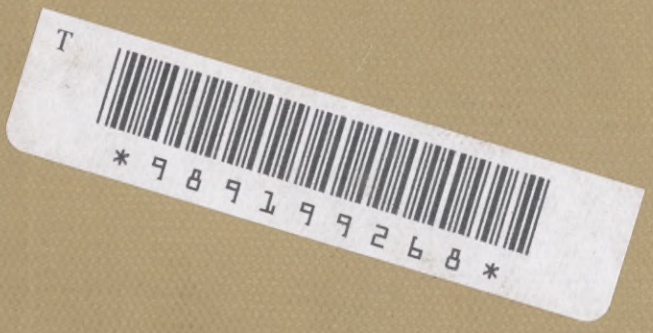

UNITED STATES REPORTS

VOLUME 187

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1902

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1903

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES,* Associate Justice.

PHILANDER CHASE KNOX, Attorney General.
JOHN KELVEY RICHARDS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

* Oliver Wendell Holmes, Associate Justice, appointed in place of Horace Gray, Associate Justice, who died September 15, 1902, took his seat December 8, 1902.

MEMORANDUM.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1902.

Thursday, December 4, 1902.

The Chief Justice announced the following order:

Ordered that the letter of resignation of the Reporter of this Court, Mr. J. C. Bancroft Davis, and the response of the Court thereto, be entered upon the minutes of the Court;

(The letter of resignation and response of the Court are printed in full in 186 U. S. Reports, pp. 487.)

And it is further ordered, that Mr. Charles Henry Butler be, and he is hereby, appointed Reporter of this Court in place of Mr. J. C. Bancroft Davis, resigned, and he is charged with the duty of reporting the decisions of the present term from its commencement.

Mr. Butler being present in Court, the oaths of office were administered to him by the clerk.

The Reporter will endeavor to report the decisions with all dispatch which is compatible with accuracy. He, however, asks indulgence for the next few months as a number of decisions had been handed down during the present term prior to the commencement of his actual attendance upon the Court, and this accumulation has necessarily delayed the issuance of this part in which only a few of the opinions appear; the other opinions, about forty in all, will be published in two parts, which are now in press and which will be issued during January and February.

With the consent of the Court, the Reporter has arranged with the publishers to issue temporary parts of volumes on the first and fifteenth of every month, which will contain all decisions rendered by the Court up to the time of going to press of each part respectively. The parts so issued will be for temporary use; new bound volumes will be furnished as soon as completed and published. By this method it is hoped to make the United States Reports the earliest and most convenient publication, as well as the only official reports, of the decisions of the Supreme Court of the United States.

JANUARY 15, 1903.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

ALLOTMENT OF JUSTICES.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1902.

OCTOBER 20, 1902.

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

For the First circuit, RUFUS W. PECKHAM, associate justice.
For the Second circuit, RUFUS W. PECKHAM, associate justice.
For the Third circuit, GEORGE SHIRAS, JR., associate justice.
For the Fourth circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth circuit, EDWARD D. WHITE, associate justice.
For the Sixth circuit, JOHN M. HARLAN, associate justice.
For the Seventh circuit, HENRY B. BROWN, associate justice.
For the Eighth circuit, DAVID J. BREWER, associate justice.
For the Ninth circuit, JOSEPH MCKENNA, associate justice.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1902.

DECEMBER 8, 1902.

ORDER: There having been an associate justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and associate justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First circuit, OLIVER WENDELL HOLMES, associate justice.
For the Second circuit, RUFUS W. PECKHAM, associate justice.
For the Third circuit, GEORGE SHIRAS, JR., associate justice.
For the Fourth circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth circuit, EDWARD D. WHITE, associate justice.
For the Sixth circuit, JOHN M. HARLAN, associate justice.
For the Seventh circuit, HENRY B. BROWN, associate justice.
For the Eighth circuit, DAVID J. BREWER, associate justice.
For the Ninth circuit, JOSEPH MCKENNA, associate justice.

For allotment made March 9, 1903, after the appointment of Mr. Justice DAY, see Vol. 188 U. S. Reports.

SUPREME COURT OF THE UNITED STATES

MONDAY JANUARY 5, 1903.

PROCEEDINGS ON THE DEATH OF MR. JUSTICE GRAY.

On the opening of the court Mr. Attorney General Knox addressed the court as follows:

May it please the court:

The bar of this court has requested me to present to you the resolutions recently adopted by it expressing its estimate of the life and character of the late Mr. Justice Gray, and its deep sense of bereavement occasioned by his death.

They are as follows:

"The bar of the Supreme Court of the United States, deploring the recent death of Horace Gray, an associate justice of the court, would put upon record a brief memorial of their esteem and admiration for his judicial achievements, as well as for his qualities as a man. Therefore, be it

"*Resolved*, That we of the bar are met together to pay tribute to the memory of an able lawyer, a scholar versed in the learning of the books, and a judge who never failed to uphold the dignity of his office. He did his work thoroughly and with scrupulous efforts to dispense exact justice.

"*Resolved*, That the labors of Mr. Justice Gray, which have been constant and arduous, are deserving of the country's gratitude. He spared nothing of health or of strength. With patience he explored the sources of the law and gathered from the past much that proved of value in its application to the needs of the present. Of sound judicial instincts, he year by year visibly grew, alike in clearness of vision and in breadth of apprehension, until in these later days his ripened powers declared him to be a fit example of the strong and truly great judge.

"*Resolved*, That we shall ever cherish a remembrance of the manly qualities of our deceased brother. Large of stature, vigor-

ous and firm in demeanor, it needed but a slight acquaintance with the real man to recognize in Mr. Justice Gray a generous, noble spirit, a pure-minded, brave, and Christian gentleman.

"*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 send to the widow and family of the late Mr. Justice Gray a copy of these resolutions as an expression of our sympathy for them in the loss that they have been called upon to sustain."

This just and temperate expression by the bar will be received, I am sure, with sentiments of full approval by the members of the court, to whom the death of Mr. Justice Gray is a personal grief, as well as by the profession and the people, to whom it is a most serious public loss.

The character and work of a judge are an open record to the world. They are impressed on judgments which survive the man, and may be imperishable. A great judge hearing contending arguments and settling their issues with convincing logic erects and leaves behind him a monument standing high in the public view. All men may know him and may estimate and speak of his labors. So men regard John Marshall, almost as if they had seen him and talked with him; and so those who did not have the privilege of intimate acquaintance with the living man might speak of Mr. Justice Gray.

He was born of the New England ancestry which has done so much to strengthen and adorn this nation—strong, self-controlled, intellectual, and aspiring. Such ancestry has produced faithful men, men of action and men of culture. Mr. Justice Gray, true to these inheritances, made early use of his advantages of environment and education. His career from his youth shows the steady advance in capacity of a man formed and trained to be a scholar, a lawyer, and a judge.

From his recognized position as a leader of the bar of his native State, he was advanced to be an associate justice and later to be chief justice of the supreme court of Massachusetts—the court which contributed the illustrious name of Shaw to the roll of distinguished American judges. In that court Mr. Justice Gray delivered many luminous opinions marked by the comprehensiveness, thoroughness, and learning which were characteristic of him, including leading ones on the law of charities, ancient grants and boundaries, contracts *ultra vires*, and the conflict of laws.

No eulogy is needed to bring before this court and bar the recol-

lections of the steadfast labors, profound learning, and ripe ability of intellect by which his judicial service to his country was here rounded out and completed. The opinions which he delivered reflect the robust vigor of his personality—the clearness of mind and firmness of will, the strength and purity of moral purpose, which were part of his nature. His unremitting industry, his high conception of duty, his accumulated erudition, his dignity of diction and of character, combined to make him a great jurist in all branches of the law. This court is required to explore the entire field of jurisprudence. Its jurisdiction is as broad as the range of human controversy, and Mr. Justice Gray has left fitting memorials of his capacity throughout its range—whether he deals with the technicalities of a statute, with constitutional or international law, with equity pleading, with admiralty, with the laws of property or of personal relations.

It is superfluous to comment particularly on his utterances for the court. The profession will not forget them. They will survive the passage of time and remain for the instruction and guidance of ourselves and of posterity.

In presenting these resolutions to your honors, on behalf of the bar I express the consciousness of loss to public life and service which Mr. Justice Gray's private life and character emphasize. The generosity and purity of his nature, the modesty and simple dignity which adorn worth, the courtesy of the gentleman—these qualities also marked his career and endeared him to those who were privileged to know him intimately.

I have the honor to move that the resolutions be entered upon the records of the court.

The Chief Justice responded:

It is difficult to express our sense of the loss the court has sustained in the departure of this eminent judge and dear brother.

The results of the labors of the court are announced from the bench, but the burden of its labors can be known only to those who participate in them. They only can know the value of aid in the discharge and alleviation of that burden. They only can know the closeness of the ties which bind the company of faithful workers together.

Speaking from that standpoint, it may be truthfully said of Mr. Justice Gray as he himself, when chief justice of Massachusetts, said in commemoration of one of his colleagues, that "every year

of association with him brought a greater reliance upon his counsel and a closer friendship."

And, portraying on that occasion the lineaments of another, he drew a striking likeness of himself as we knew him in our common consultations. This is the portrait:

"His minute and accurate observation of the facts, his thoughtful comparison of the arguments, his careful weighing and scrutiny of precedents, his nice appreciation of legal distinctions, his grasp of fundamental principles, his strength in presenting his own suggestions, and his candor in considering those of his associates—guided throughout by a love of justice, and tempered by common sense—made his presence a peculiar safeguard. In arriving at results that would affect the rights of his fellow-men no detail was so small as to be neglected, no field of investigation too wide to be explored. Very cautious in forming his conclusions, he was correspondingly tenacious of them when formed. He always wished the opinions of the court to be placed upon such grounds as, not going beyond what the decision of each case required, should afford a firm foothold in determining future controversies."

The description also measurably indicates the character of his judicial utterances.

It was observed of the judgments of Lord Cottenham, that he who read them felt that they "fixed the law on the matter in hand upon a defined basis for future years." The same impression is produced by many of the judgments of Mr. Justice Gray, while other judgments are confined, with keen precision, to the bare disposition of the particular case.

All excellent, his opinions in leading cases—and he made cases leading when he thought the occasion demanded—constitute permanent contributions to jurisprudence and imperishable monuments to his memory. They do not simply lay down rules for guidance. They are treasuries of doctrine and precedent. And in the time to come it will be found:

> "Hither, as to a fountain,
> Other suns repair, and in their urns
> Draw golden light."

Mr. Justice Gray was preceded as the head of the supreme judicial court of Massachusetts by Lemuel Shaw; he was preceded on this bench by Joseph Story and Benjamin Robbins Curtis. Eulogy can rise no higher than the expression of the conviction that he will be ranked with them without appreciable interval.

For nearly forty years he was given grace to execute justice and to maintain truth, with the dignity and power befitting his great office, and he arrived at the resting place with unclouded mind and ready for the change. His lips are dumb, but the devouring Past cannot destroy the works which follow him.

The resolutions and accompanying remarks will be entered upon the records of the court.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1902.

AMBROSINI *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 14. Argued December 4, 1901.—Decided October 20, 1902.

Sections 6 and 7 of the War Revenue Act of 1898, 30 Stat. 448, c. 448, provided for certain stamp taxes on bonds, and other instruments enumerated in Schedule A of the act, but section 17 of the same act exempted "all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power."

The "dramshop act" of Illinois and the Revised Code of Chicago provided for the giving of bonds by all applicants to whom licenses were granted to sell liquor in the city of Chicago. Ambrosini gave two such bonds as required by the state statute but failed to affix thereto United States revenue stamps, and was indicted for an offence under the War Revenue Act, tried, found guilty and sentenced to pay a fine after a motion to quash the indictment had been overruled. *Held* error and that the indictment should have been quashed.

The General Assembly of Illinois in enacting the dramshop act legislated "against the evils arising from the sale of intoxicating liquors" not by prohibiting, but by regulating, the traffic, and such legislation was in exercise of the police power which is reserved to the States free from any Federal restriction material in this action.

Such legislation (and ordinances of the city of Chicago) required bonds to be given by applicants as prerequisites to the issue of licenses permitting sales, and the granting of the license was a strictly governmental function

Statement of the Case.

and the giving of the bonds was a part of the same transaction, and to tax either would be to impair the efficiency of state and municipal action; this case, therefore, falls within the general principle that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government, and viewed in the light of this principle the bonds in question were exempted by section 17 of the War Revenue Act.

THIS was a writ of error brought to reverse a judgment of the District Court imposing a fine on a finding of guilty of an offence under section seven of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," 30 Stat. 448, c. 448, otherwise known as the War Revenue Act of 1898. The indictment contained two counts. The first charged that defendant on August 30, 1898, executed a certain bond in the penal sum of $3000 to the People of the State of Illinois without affixing to the bond a fifty-cent revenue stamp, alleged to be required by said act of Congress. The second count charged that defendant on August 30, 1898, executed a certain bond to the city of Chicago in the penal sum of $500 without affixing thereto a fifty-cent revenue stamp, alleged to be required by the act. The bonds were set forth *in extenso*. A motion to quash the indictment was made and overruled, and, a jury being waived, the cause was submitted to the court for trial, defendant found guilty, and sentenced to pay a fine. The opinion is reported 105 Fed. Rep. 239.

Sections 6, 7 and 17 of the act are as follows:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures

against the same, respectively, or otherwise specified or set forth in the said schedule. . . .

"SEC. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

"Sec. 17. That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this act such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity: *Provided further*, That stock and bonds issued by coöperative building and loan associations whose capital stock does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

Schedule A contained this provision: "Bond: For indemnifying any person or persons, firm, or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

The bonds, to which it was alleged the stamps should have been affixed, were bonds required by the laws of Illinois to be given as a condition of the issue of licenses to keep dram shops

or sell intoxicating liquors in the State of Illinois and in the city of Chicago.

Sections one, two and five of an act of the general assembly of the State of Illinois, entitled "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors," read:

"§ 1. That a dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

"§ 2. Whoever, not having a license to keep a dram-shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than twenty dollars ($20) nor more than one hundred dollars ($100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court."

"§ 5. No person shall be licensed to keep a dram-shop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town or village, unless he shall first give bond in the penal sum of $3000, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant." 2 Starr & Curtis, Anno. Stat. Ill. (2d ed.) 1586, c. 43.

Statement of the Case.

By article five, chapter 24, of the statutes of Illinois concerning cities, it was provided:

"§ 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers . . .

"*Fourth.* To fix the amount, terms and manner of issuing and revoking licenses. . . .

"*Forty-sixth.* To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: . . . *Provided, further*, That in granting licenses, such corporate authorities shall comply with whatever general law of the State may be in force relative to the granting of licenses."

". . . *Ninety-sixth.* To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: . . ." 1 Starr & Curtis (2d ed.), 689, c. 24.

The Revised Code of Chicago of 1897, provided: "The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dram shops within the city of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. Each applicant shall execute to the city of Chicago a bond, with at least two sureties, to be approved by the city clerk or city collector, in the sum of five hundred dollars, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed, on Sundays, all doors opening out upon any street from the bar or room where such dram shop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed." 1 Rev. Code, 1897, p. 253, c. XXXIX, art. I.

The ordinance contained many other specific regulations of the traffic, and provided that licenses might be revoked by the mayor for violation of "any provision of any ordinance of the city council relating to intoxicating liquors, or any condition of the bond aforesaid."

The conditions of the bond in the sum of $3000 to the People of the State of Illinois were substantially in the words of the statute. The conditions of the bond in the sum of $500 to the city of Chicago were somewhat more stringent than the language of the municipal code.

Mr. T. A. Moran and *Mr. Levy Mayer* for plaintiff.

Mr. Assistant Attorney General Beck for defendants in error.

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

By the dramshop act the general assembly of Illinois legislated, as was stated in the title of the act, "against the evils arising from the sale of intoxicating liquors," not by prohibiting the traffic altogether, but by regulating it in protection of the public. The act concerning cities authorized municipal action subject to the general law.

The legislation was enacted in the exercise of the police power for the safety, welfare and health of the community, and it is conceded that that power is a power reserved by the States, free from Federal restriction in any particular material here.

The act and the ordinance required these bonds to be given as prerequisites to the issue of licenses permitting the sale. The licenses could not be issued without compliance with this condition precedent. The statute expressly provided that no license should be granted unless the applicant "shall first give bond in the penal sum of $3000," and the ordinance, that "no application for a license shall be considered until such bond shall have been filed."

The bonds were obviously intended to secure the proper enforcement of the laws in respect of the sale of intoxicating liq-

uors; the prompt payment of fines and penalties; a remedy for injuries in person, property or means of support; and the protection of the public in divers other enumerated particulars. The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assume the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of city, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health and the safety of the community in compelling strict observance of the law, and remedying injurious results.

The general principle is that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. Nelson, J., *Collector* v. *Day*, 11 Wall. 113.

Viewed in the light of that general principle, we think it clear that Congress, lest the broad language of Schedule A, "and all other bonds of any description," might literally cover bonds such as those in question, and in avoidance of controversy in that regard, exempted them by section 17, wherein it was declared that it was intended "to exempt from stamp taxes imposed by this act, such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity." True, this language was used in a proviso, and the

enacting clause exempted bonds "issued by the officers of any State, county, town, municipal corporation or other corporation exercising the taxing power;" but as the bonds were required by the State and the city and were issued for the benefit of the public and not for the benefit of the individuals who executed them, it appears to us that they came fairly within the meaning of the clause, assuming that they were covered by Schedule A. The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of opinion that they were, and that they were exempted as no more taxable than the licenses. Either they were exempt, apart from the proviso, because, in the sense of the statute, issued by the State and city, or the proviso so far qualified the language of the enacting clause as to exempt them in exempting the State and city in respect of the exercise of strictly governmental functions.

We conclude, therefore, that they were not taxable within the statute. *United States* v. *Owens*, 100 Fed. Rep. 70; *Stirneman* v. *Smith*, 100 Fed. Rep. 600; *Warwick* v. *Bettman*, 102 Fed. Rep. 127; *S. C.*, 108 Fed. Rep. 46; *People* v. *City*, 31 C. L. N. 247.

Judgment reversed and cause remanded with a direction to quash the indictment.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision.

SCHWARTZ *v.* DUSS.

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

No. 38. Argued April 22, 23, 1902.—Decided October 27, 1902.

In an action brought for the distribution of the property and assets of the Harmony Society on the ground that it had ceased to exist and that its assets should revert to the heirs of the original contributors some of whom were ancestors of the plaintiffs in error (complainants below),

and that the defendants now in control of the property should be enjoined from transferring the same to a corporation or otherwise dealing with the same, the bill contained allegations of fraud and conspiracy on the part of the defendants. The ancestors of the complainants had long since retired from the society and signed releases. The effect of several agreements between the members and founders of the society was involved in the action; it had been held by the master, whose conclusions of law and fact were approved by the Circuit Court and the judgment thereon affirmed by the Circuit Court of Appeals, that none of the plaintiffs had such a proprietary right or interest in the property and assets of the Harmony Society as entitled them upon the dissolution of the society to any part of, or share therein, as prayed for in the bill, and also that the society had not been dissolved by the common consent of the members or by an abandonment of the purposes for which it was formed.

In affirming this judgment dismissing the bill, it is stated: "The Harmony Society, the history whereof has been recited and its principles characterized and defined by the Supreme Court of Pennsylvania and by this Court" (*Schriber* v. *Rapp*, 5 Watts, 351; *Baker* v. *Nachtrieb*, 19 How. 126; *Speidel* v. *Henrici*, 120 U. S. 377), was founded by George Rapp, and its members "were associated and combined by the common belief that the government of the patriarchal age, united to the community of property, adopted in the days of the Apostles, would conduce to promote their temporal and eternal happiness."

The relations of the society, precepts of government, personal and property rights, were provided for by several written contracts executed in 1805, and thereafter. By one of these agreements some of the members who contributed property to the society renounced individual ownership, but by the same agreement George Rapp and his associates promised to refund to any members retiring the value of the property so brought in, and if any members who had brought nothing into the community retired, they should, provided they departed openly and orderly, receive a donation of money to be determined by George Rapp and associates.

By a subsequent agreement made in 1836, it was provided that each individual was to be considered as having finally and irrevocably parted with all his former contributions, and on withdrawing should not be entitled to demand an account thereof as a matter of right, but it should be left altogether to the discretion of the superintendent to decide whether any, and if any, what, allowance should be made to such member or his representatives as a donation.

The membership of the society having greatly diminished, many of the members retired leaving only the defendant in this action and a few others, who had determined to transfer the property to a corporation, when complainants filed a bill claiming that the society was dissolved and that the assets were held by the remaining members and officers in trust and should be distributed between former members and their descendants including complainants:

Held that the facts did not show that there was any dissolution of the

society; that the relations of the members and the society were fixed by contract; that the plaintiffs could not have other rights than their ancestors had; that no trust was created by the agreement of 1836, and under its terms when the plaintiffs' ancestors (who had not contributed any property) died or withdrew from the society their rights were fixed by the terms of that agreement; the members who died left no rights to their representatives, and had no rights which they could transmit to the plaintiffs.

The Supreme Court of Pennsylvania has decided in other cases involving these contracts that they were not offensive to the public policy of Pennsylvania.

The master, the Circuit Court and the Circuit Court of Appeals, having found that the society had not been dissolved, either by consent of its members or by the abandonment of the purposes for which it was founded, this court will not, on account of such concurrence and under the rules of the court, review the disputed facts involved in that finding.

THIS suit was brought for the distribution of the property and assets of the Harmony Society, which the bill alleged had ceased to exist. The bill also prayed for an injunction against John S. Duss to restrain him from in anywise dealing with the property of the society, and also for a receiver. The bill was exceedingly voluminous. It stated the origin and principles and plan of government of the society; that many industries were started and conducted by it, including a savings bank; the town of Economy, Pennsylvania, founded by it; and that its acquisitions, including 3000 acres of land in the city of Pittsburg, amounted, in 1890, to upwards of $4,000,000; and "all of said possessions up to and until the grievances hereafter complained of, were scrupulously used for the benefit of all its members and for the advancement, benefit and continuation of the society;" that until those grievances the society, "from the period of its inception until a recent date, adhered rigidly to its plan of government and became illustrious and highly respected by reason of its sincere advocacy of the equality of man, its espousal of the highest principles of Christianity, and its honesty and benevolent administration of all public functions, whether in the management of its internal affairs or in its many transactions with the citizens of Western Pennsylvania."

The bill also averred that the society "but once in a period

of ninety years suffered from serious internal disorder," which arose from the induction into the society of one Count De Leon, his artifices and subsequent secession. That in 1890 there "began a second conspiracy, the results of which overturned and destroyed the entire government of the society, wasted nearly its entire wealth, depleted its membership to a few aged and infirm women, and placed the management of the society and the control of its remaining assets in the hands of one man and certain associates and confederates, within and without the ranks of the society."

That the acting and directing mind of the conspiracy was John S. Duss, and he obtained his power as follows: In 1847 a plan of regulation and government of the society was adopted, by which its internal affairs were managed by a "board of elders," composed of nine members, and its external affairs were managed by a "board of trustees," composed of two members. Romulus L. Baker and Jacob Henrici were chosen the first board of trustees. Baker died in 1868, and Henrici and Jonathan Lenz became the board of trustees; the latter was succeeded upon his death in 1890 by Ernest Woelful; Woelful also died in 1890 and Duss became his successor. Henrici died in 1892, and one Samuel Sieber was appointed, and on his retirement from the society Gottlieb Riethmueller, a relative of Duss, was elected trustee. At the time of the filing of the bill Duss and Riethmueller were trustees.

The bill detailed the acts and purposes of Duss at great length. It is, however, enough to say that the bill alleged that he became senior trustee and a member of the board of elders, and conceived the purpose of wrecking and dismembering the society, and attempted to execute such purpose. That the condition of the society gave him opportunity; that he caused the expulsion of at least one member, and induced or paid others to withdraw. That the increase in the society could only be through the admission of new members, and he directed that no new members be elected under any circumstances whatever, and as a result thereof the said Duss and Susie, his wife, were the last members admitted in the four years preceding the filing of the bill.

That he entered into certain arrangements with one Henry Hice and John Reeves, of the town of Beaver, Pennsylvania, by which he used $1,000,000 of the society's money without the knowledge or consent of its members "to pay off the alleged indebtedness of the Economy Savings Bank, of which said Hice and Reeves were the principal officers," though at the time he knew that the bank was wholly insolvent by reason of the overdrafts made by said Hice and Reeves, and although he knew that they had caused a loss to the society of over $2,000,000, "as officers and stockholders in said bank, and officers and stockholders in the Beaver Falls Cutlery Works and File Works, the debtors of said bank;" that he had not sued to recover back the money, but, on the contrary, had abetted them in obtaining further assets of the society.

That in pursuance of his scheme to defraud the society and to pay the indebtedness of the Economy Savings Bank, and for paying off claims upon which the society was only partly liable, if at all, he and his co-trustee Henrici executed a mortgage for the sum of $400,000 upon the real estate of the society, but that Henrici at the time of its execution "was in *articulo mortis*, and wholly beyond any power of comprehension of his act." And on the — day of June, 1893, he caused to be executed another mortgage, without the knowledge or consent of the members, for $100,000, bearing interest at six per cent, upon the land described in the former mortgage, to raise a fund "wherewith to secretly secure and induce removal of those members most likely to inquire into the validity or propriety of his conduct as trustee."

It was averred that the society had certain dividend paying stocks which Duss, in pursuance of his scheme, disposed of without the knowledge of any member of the society, except possibly his wife, and Gottlieb Riethmueller. The names of ten persons were stated, who, it was alleged, Duss, "by representation, coercion and the payment of large sums of money," were induced within two years preceding the commencement of the suit to withdraw from the society, and that he was endeavoring to compel remaining members "to depart by means of intimidation and oppression."

That the membership of the society was reduced to eight persons, none of whom were aware of the actions of Duss, or were consulted by him.

"That on the 12th day of April, 1894, the said Duss, without any authority from the members of the Harmony Society, and in the utmost disregard to his trust, secretly entered into an agreement with said Hice, Reeves and one James Dickson, whereby he, the said Duss, agreed to convey the town of Economy, the surrounding properties and certain other lands of the Harmony Society, situate in Allegheny County, to the Union Company, an alleged corporation created under the laws of the State of Pennsylvania. And your orators allege that a conveyance has been made by said Duss for the lands as aforesaid, and that the same was made without the knowledge of your orators or any members of the said society, excepting possibly Susie C., wife of said Duss, and Gottlieb Riethmueller. That by the said pretended conveyance and sale of the home of the Harmony Society and its other properties, the said Duss has attempted to wholly terminate the existence of said society, not only as to the government thereof by the board of elders and by the members, but also as to the ownership of any property. That the said Union Company, in addition to said Duss and Riethmueller, is composed of said Hice and Reeves, debtors of the said Harmony Society, as hereinbefore stated, and one James Dickson, the private bookkeeper and confidential agent of said Duss, whose interest in said corporation was acquired by gift from said Duss.

"That your orators are advised that it was not competent for the said trustees to convey said properties to the said Union Company, but such transfer was a breach of trust and wholly invalid."

It was further averred that the principle of equality had been departed from. That Duss and his family enjoyed every luxury, while the aged and infirm members were obliged "to be content with the bare necessaries of life, awarded with grudging, stinting hands."

And it was finally averred—

"That recently said Harmony Society has become dissolved

as aforesaid; that all of its purposes and practices established as aforesaid by the founder of said society and by the ancestors of your orators have been abandoned; that the pursuit of agriculture no longer exists in said society; that its chief assets, consisting of bonds, stocks and other securities, and the town of Economy, with its buildings and the adjacent lands of said society, consisting of some 3000 acres, and which constituted the basis of organization and business of said society, have been sold and conveyed away by the said Duss as aforesaid in fraud, however, of the rights of your orators and their co-tenants, and that by reason of the facts hereinbefore set forth your orators and the said last members, except the said Duss and wife, are now tenants in common of all said lands and tenements, and entitled to partition thereof in proportion to their respective interests.

"That for some time past the members of said Harmony Society have been retiring therefrom and have received the amount of their interest in said association in the land or money, or both, the land being set apart in severalty to them, and have released all of their rights and interests in said association in consideration for such payment or conveyance to them, and that by said retirement and withdrawal the membership of said association has been reduced to the persons hereinbefore named members; that by common consent this association has ceased to exist as an association, and that if the property thereof has ever been impressed with a trust (which your orators deny, as being contrary to public policy and void in law or equity), such trust has wholly ceased, and the assets of such dissolved association have reverted to the donors thereof, among whom were the ancestors and intestates of your orators as hereinbefore fully set forth."

Duss, Hice, Reeves and the Union Company answered separately. The other defendants joined in an answer. By agreement of the parties the case was referred to a master, with "authority to hear and take all the testimony, and to find all the issues of law and facts, and to report the testimony and such findings to the court, and if the report of such master shall suggest a decree that the plaintiffs or any of them are en-

titled to an account against the defendants or any of them, and the same be confirmed by the court, then the case shall be referred again to the master, to state such an account and report thereon to the court."

Under the orders of the court the master considered the following questions:

"First. Have the plaintiffs, or any of them, such a proprietary right or interest in the property and assets of the Harmony Society as entitled them upon the dissolution of the society to any part of or share in such property or assets or as entitles them to the account prayed for in the bill?

"Second. Has the Harmony Society been dissolved by the common consent of the members or by an abandonment of the purposes for which it was formed?"

On both propositions the master reported adversely to the claim of the petitioners, and recommended a decree dismissing the bill. His conclusions of fact and law were approved and accepted by the Circuit Court, and a decree entered dismissing the bill. The decree was affirmed by the Circuit Court of Appeals. The case was then brought here by certiorari on petition of the plaintiffs in the Circuit Court. Other facts will be stated in the opinion.

Mr. George Shiras, 3d, and *Mr. Shoyer, Jr.*, for petitioners.

Mr. D. T. Watson for respondents. *Mr. Johns McCleave* was with him on the brief.

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

Two questions were submitted to the master: (1) Have the plaintiffs such a proprietary right or interest as would entitle them upon the dissolution of the society to share all its property or assets, or which entitles them to an accounting? (2) Has the society been dissolved by consent or by an abandonment of the purposes for which it was formed? A negative answer to either of the propositions determines the controversy against

petitioners, and both were so answered by the master and by the Circuit Court and the Circuit Court of Appeals. The case, therefore, seems not to be as broad or as complex as presented in the argument of counsel. The case is certainly clear from any disputes of fact, and we may dismiss from consideration the accusations against Duss, not only as to his motives in joining the society, but also as to his motives and acts as a member and officer of it. We are concerned alone with the legal aspect and consequences of his acts and those of his associates. They, however, pertain more particularly to the second proposition.

This is not the first time that the Harmony Society has been before the courts. Its history has been recited and its principles characterized and defined, not only by the Supreme Court of Pennsylvania, but by this court. *Schriber* v. *Rapp*, 5 Watts, 351; *Baker et al.* v. *Nachtrieb*, 19 How. 126; *Speidel* v. *Henrici*, 120 U. S. 377.

The society was formed by one George Rapp, who, with his son and others, came from the Kingdom of Wurtemberg to the United States in 1803 or 1804, and settled at Harmony, in Butler County, Pennsylvania. In 1814 the society moved to Posey County, Indiana, and later removed to Economy, Pennsylvania, its present abode, in 1825. Its members "were associated and combined by the common belief that the government of the patriarchal age, united to the community of property, adopted in the days of the Apostles, would conduce to promote their temporal and eternal happiness." 19 How. 126.

Their relations, principles of government, personal and property rights were provided for by written contracts executed respectively in 1805, 1821, 1827, 1836, 1847, 1890 and 1892. The present discussion is concerned with the first four.

By article 1 of the contract of 1805 each subscriber to that contract delivered up, renounced and remitted all of his or her property of every kind, "as a free gift or donation, for the benefit and use of the community," and bound himself, his heirs and descendants, "to make free renunciation thereof, and to leave the same at the disposal of the superintendents of the community," as if the subscriber "never had nor possessed it."

In article 2 they pledged obedience and submission to the society, and promised "to promote the good and interest of the community," and to that they pledged their children and families. But recognizing a possible weakness and inability to "stand to it in the community," they promised (article 3) never to demand any reward for themselves or children for "labor or services," and declared whatever they should do would be "as a voluntary service for our brethren." In consideration of this renunciation of property and dedication of labor and services, George Rapp and his associates promised to supply the subscribers to the contract with all the necessaries of life, not only in their "healthful days, but when they should become sick or unfit for labor." And if after a "short or long period" a member should die or otherwise depart from the community, "being the father or mother of a family," such family should "not be left widows and orphans but partakers of the same rights and maintenance."

Article 5 was as follows:

"And if the case should happen, as above stated, that one or more of the subscribers, after a short or long period, should break their promise, and could or would not submit to the laws and regulations of the church or community, and for that or any other cause would leave Harmony, George Rapp and his associates promise to refund him or them the value of his or their property, brought in without interest, in one, two or three annual installments, as the sum may be, large or small; and if one or more of them were poor and brought nothing into the community, they shall, provided they depart openly and orderly, receive a donation of money, according to his or their conduct while a member, or as he or their circumstances and necessities may require, which George Rapp and associates shall determine at his or their departure."

The society became the owner of about 7000 acres of land at Harmony, which on May 6, 1815, was conveyed by Frederick Rapp, as attorney in fact, to Abraham Ziegler for $100,000. That year, or in 1814, the society removed to Indiana. There a second agreement was entered into January 20, 1821. This agreement expressed, as that of 1805, the submission of the sub-

scribers to the society, the dedication of their service and labor, and contained the same promises of support.

The master found that "in 1825 the society removed from Indiana to Beaver County, Pennsylvania, where they purchased and settled upon a tract of land containing about 3000 acres, now known as 'Economy,' where they have since remained, and which has since become very valuable, and on which they have erected many buildings, including dwellings and factories of various kinds, and made many valuable improvements."

In 1827 another agreement was entered into, the preamble of which was as follows:

"Whereas by the favor of Divine Providence an association or community has been formed by George Rapp and many others upon the basis of Christian fellowship, the principles of which being faithfully derived from the sacred Scriptures, include the government of the patriarchal age, united to the community of property adopted in the days of the apostles, and wherein the single object sought is to approximate, so far as human imperfection will allow, to the fulfillment of the will of God by the exercise of those affections and the practice of those virtues which are essential to the happiness of man in time and throughout eternity.

"And whereas it is necessary to the good order and well being of said associations that the condition of membership should be clearly understood, and that the rights and privileges and duties of every individual therein should be so defined as to prevent mistake or disappointment on the one hand and contention or disagreement on the other."

This agreement was an amplification of that of 1805. Article 5 of the latter became article 6. This agreement was signed by 522 members of the association, and afterwards, and until February 14, 1836, was signed by 144 additional members. In 1832, dissensions having arisen, a large number of the members withdrew under the leadership of one Count De Leon. They received $110,000, and granted a release unto George Rapp and his associates of all of their right and title in any of the property "belonging to the society of George Rapp and his associates."

In 1836 another agreement was entered into revoking and annulling the sixth article of the agreement of 1827—fifth article of the agreement of 1805. The agreement recited the sixth article—

"And whereas the provisions of the said sixth article, though assented to at the time, manifestly depart from the great principle of a community of goods and may tend to foster and perpetuate a feeling of inequality at variance with the true spirit and objects of the association;

"And whereas the principle of restoration of property, besides its pernicious tendency, is one which cannot now be enforced with uniformity and fairness, inasmuch as the members of the association in the year 1816, under a solemn conviction of the truth of what is above recited, did destroy all record and memorial of the respective contributions up to that time;

"And whereas continued happiness and prosperity of the association, a more intimate knowledge of each other, have removed from the minds of all members the least apprehension of injustice and bad faith:

"Now, therefore, be it known by these presents that the undersigned, with a view to carry out fully the great principles of our union, and in consideration of the benefits to be derived therefrom, do hereby solemnly enter into covenants, and agree with each other as follows:

"1st. The said sixth article is entirely annulled and made void, as if it had never existed; all others remain in full force as heretofore.

"2d. All the property of the society, real, personal and mixed, in law or equity, and howsoever contributed or acquired, shall be deemed now and forever joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money or labor; and the same rule shall apply to all future contributions whatever they may be.

"3d. Should any individual withdraw from the society, or depart this life, neither he in the one case nor his representatives in the other shall be entitled to demand an account of said

contributions, whether in land, goods, money or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and if any what, allowance shall be made to such member or his representatives as a donation."

The agreement was signed by all who were then members, and subsequently by thirty-three others.

Prior to his death, in 1834, Frederick Rapp, a member of the society, had been its business agent, and transacted its external affairs. After his death the members of the society (July 5, 1834) executed a power of attorney to George Rapp, constituting him such general agent, with power to appoint agents and substitutes under him. On the same day he appointed Romulus L. Baker and Jacob Henrici his subsfitutes. This power of attorney was signed by 402 members, and recited the death of Frederick Rapp, and the consequent necessity for the appointment of a new agent, so that the temporal affairs of the society would continue to be managed in a mode which had proved convenient and satisfactory, constituted George Rapp such agent with power of substitution, invested him with all necessary powers, including the receipt and the execution of conveyances of real and personal property. George Rapp disclaimed any greater interest in the then resources or future earnings of the society than other members.

George Rapp was the founder of the society, and continued to be its head or superintendent, and to rule and govern it until his death in 1847. After his death another agreement was executed (August 12, 1847). It was signed by 280 members. The agreement recited the death of Rapp, and expressed the necessity "to the good order and well being of the association that some plan should be agreed upon to regulate its future affairs, promote its general welfare and preserve and maintain it upon its original basis;" it also announced to all immediately concerned that the surviving and remaining members of the Harmony Society, each covenanted with all the others thereof, and with those who should thereafter become members, "to solemnly recognize, reëstablish and continue the articles of our

association (the sixth section excepted), entered into at Economy on the 9th day of March, A. D. 1827."

This agreement created a board of elders of nine members to conduct the internal affairs of the society, and a board of trustees of two members to conduct its external affairs. The trustees disclaimed any greater personal interest in the property of the society than other members.

These agreements, the master found, "are the agreements and documents under which, or some of which, the plaintiffs claim the right to share in the property and assets of the society as heirs of former members." And as to the relations of the plaintiffs to the society the master found as follows:

"1st. That none of the plaintiffs were ever members of the society.

"2d. That all of those members of the society through whom Christian Schwartz claims as their heir, signed the agreements of 1836 and 1874, and continued members until their death.

"3d. That Antony Koterba claims as heir of his father, Joseph Koterba, and his half-brother, Andreas Koterba; that Joseph Koterba joined in the organization of the society, and also signed the agreement of 1827, and afterwards, in 1827, withdrew from the society; and that Andreas Koterba signed the agreements of 1827, 1836 and 1847, and died a member of the society.

"4th. That the grandparents of David Strohaker, viz., Christian Strohaker and wife, and Matthias Rief and wife, joined the society in 1805, and all remained members until their death—all dying between 1820 and 1825, except Mrs. Rief, who died between 1830 and 1836. That his father, Christopher Strohaker, signed the agreement of 1827, and withdrew from the society in 1827. That his aunt, Catharina Strohaker, signed the agreements of 1827, 1836 and 1847, and continued a member of the society until her death.

"5th. That Lawrence Scheel and Jacob Scheel, ancestors of Allen and G. L. Shale, joined the society in 1805; that Lawrence withdrew in 1824 or 1826; that Jacob Scheel signed the agreement in 1827 and died a member, about 1837.

"6th. That none of the parties through whom the plaintiffs claim contributed any money or property to the society."

He divided the persons from whom the plaintiffs claim as follows:

"First. Those withdrawn from the society before the execution of the agreement of 1836.

"Second. Those dying in the society before that time.

"Third. Those who died members of the society after having joined in the agreements of 1836 and 1847."

Manifestly the plaintiffs cannot have other rights than their ancestors, and the rights of the latter depend upon the agreements they signed. The agreements we have recited. The signers of them certainly strove to express their meaning clearly, and, whenever occasion arose, declared their understanding, aims and purposes, and always substantially in the same way.

The cardinal principle of the society was self-abnegation. It was manifested not only by submission to a religious head, but by a community instead of individual ownership of property, and the dedication of their labor to the society. The possibility of some member or members not being able to "stand to it," to use the expressive phrase of the agreements, was contemplated, and provision was made for that event. But a very significant difference was made between a performance of service and the contribution of property. For the former it was covenanted by the members no reward should be demanded for themselves or their children or those belonging to them. As to the latter, George Rapp and his associates promised to refund the value of the property brought in without interest, in one, two or three annual installments, as the same might be large or small. It was, however, provided, as to those who "were poor and brought nothing to the community," that they should receive, if they departed openly and orderly, "a donation in money, according to his or their conduct while a member, or as his or their circumstances might require," as "George Rapp and his associates shall determine" (agreement of 1805); as "in the judgment of the superintendents of the association" (agreement of 1827).

Those provisions apply to those who withdrew from the society prior to 1836—the first class into which the master divided the plaintiffs, and need not much comment. None of the persons who so withdrew contributed property to the association. We are not informed by the record whether their conduct when in the society or whether their manner of withdrawing from it, entitled them to the consideration that the articles of agreement permitted as an indulgence to withdrawing members. If they could have exacted anything as a matter of right it would now be presumed that it had been demanded and the demand satisfied.

There was another class, the faithful and abiding members, but even these, the master found, contributed no property, and the decision of their rights becomes as easy as the decision of the right of those who "could not stand to it in the community" and withdrew. They promised, as we have seen, to endeavor by the labor of their hands "to promote the good and interest of the community," and to hold their "children and families to do the same." And for compensation they received instruction in church and school. They received assurance of maintenance "in healthful days" and days which might not be such, and assurance when death should come to them, that their families would be taken care of. It may be presumed that as the members were faithful to their covenants the society was faithful to its covenants, and there were no undischarged obligations or rights for distant relatives of deceased members to assert or claim against the community or its property. This seems to be conceded by counsel for petitioners, and we are brought to the consideration of the third class into which the master divided the persons from whom some of the petitioners claim to derive, those who died members of the society after having joined in the agreements of 1836 and 1847.

Counsel for petitioners say in their brief: "The article of 1836 is the only material article bearing upon the property rights of the plaintiffs, while the articles of 1805, 1821, 1827 and 1847 are material in considering the character of the trust, the purposes and principles of the society."

In other words, as we understand counsel by the propositions

they have submitted and the arguments employed to support them, by the articles executed prior to October 31, 1836, those who joined the society made "a free gift and donation of all their property" to George Rapp and his associates, "*for the use and benefit of the community*," upon the condition, however, to have the property returned to them if they should withdraw from the society. But that "by the articles of October 31, 1836, all the members of the society agreed with each other to surrender this right of property restitution which each possessed, and to convey the same to all the members in equal shares." In other words, the gifts before 1836 were to the community; after 1836 to "all the members in equal shares." This difference in result in 1836 and afterwards was effected, it is claimed, by the following provision of the agreement of 1836:

"All the property of the society, real, personal and mixed, in law or equity and howsoever constituted or acquired, shall be deemed, now and forever, joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in lands, goods, money or labor, and the same rule shall apply to all future contributions, whatever they may be."

To the articles of 1836, it is also contended, that the society as such was not a party, but nevertheless the property became impressed with a trust for the use of the society, as such, "by those who then (1836) represented the ownership of this joint and indivisible stock," and as each new member came in "he became an owner of an equal share of the property, subject to the trust." And it is further contended that the members of 1836 and those who came in afterwards became *donors* of the property, and when the society or the trust failed from any cause the "corpus of the trust property" reverted to them "by way of resulting trust, . . . not to the surviving members as donees, or beneficiaries of the trust." In other words, the members became at once *donees* of each other and *donors* to the society, and the descendants of members who had not and might not bring a dollar to the society excluded from any interest in the reversion of its great properties the descendants of those

from whom those properties came. And this through the doctrine of resulting trusts, whose fundamental principle is to recognize an equity only in them from whom the consideration has proceeded. And this, too, would result from granting the contentions of petitioners—a society whose chief purpose was to establish community of property would come back to the assertion and fact of individual ownership, and whose hope was self-sacrifice and self-abasement would encourage self-interest and self-assertion. Members could go into the society or go out of it, take nothing to it, serve it ever so little, and become ultimate sharers of its property. They might die in the society, or, having withdrawn, die out of it, and will or convey their titles or rights to others. No such right was ever conceived to exist and no such right was intended to be created. This is demonstrated by the quotations which we have made from the articles of agreement. The permanence of the community was provided for in the articles of 1805; it was continued in those of 1821 and 1827; and on account of the secession of Count De Leon and his followers it was asserted with emphasis in 1836. The article of that year became, and was intended to become, the complete and final consummation of community ownership —did not become and was not intended to become the commencement of individual ownership. That article was but an incident in the life and evolution of the society. It asserted constancy to the principles of the association, and annulled the sixth article of 1825—fifth article of 1805, because that article manifestly departed "from the great principle of community of goods," and it was said that "with a view to carry out the great principles" of their union "and in consideration of the benefits to be derived therefrom," they entered into this covenant:

"Should any individual withdraw from the society, or depart this life, neither he in the one case nor his representatives in the other shall be entitled to demand an account of said contributions, whether in land, goods, money or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide

whether any, and if any what, allowance shall be made to such member or his representatives as a donation."

The purpose was definite and clearly expressed. It was certainly thought to be clear enough by the men who framed it to declare and accomplish the "sacrifice of all narrow and selfish feelings to the true purposes of the association," as the articles fervidly declared. And it was provided that the member who withdrew from the society could make no demand against it "as a matter of right." The member who died left no right to his representatives. It needs no argument to show that as such members had no rights they could transmit none to the petitioners in this case.

No trust having been created by the agreement of 1836 different from that created by the other agreements, there is no necessity to consider the arguments based on the assumption of its invalidity. That agreement was the affirmation and the continuation of the prior agreements, and they were held not to be offensive to the public policy of Pennsylvania, by the Supreme Court of that State in *Schriber* v. *Rapp*, 5 Watts, 351. The trial court in that case had instructed the jury that "there is nothing in the articles of association (those of 1805, 1821 and 1827) given in evidence that renders the agreement unlawful or void; nothing in them inconsistent with constitutional rights, moral precepts, or public policy."

The Supreme Court observed that the point made against the articles as being against public policy was attended with no difficulty, and Chief Justice Gibson said for the court: "An association for the purposes expressed is prohibited neither by statute nor the common law." And it did not occur to this court in *Baker et al.* v. *Nachtrieb*, 19 How. 126, to treat them as invalid contracts. See also *Goesele* v. *Bimeler et al.*, 14 How. 589; *Speidel* v. *Henrici*, 120 U. S. 377.

An analysis of the agreements of 1847, 1890 and 1892 is not necessary. They were made to meet particular exigencies, and expressly affirmed the prior agreements, except the sixth section of that of 1827.

The master, and both the Circuit Court and the Circuit Court of Appeals, found that the society had not been dissolved, either

by the consent of its members or by the abandonment of the purposes for which it was founded. On account of this concurrence the disputed facts involved in that finding, under the rules of this court, and the circumstances of the record, we do not feel disposed to review. There is left, therefore, for consideration only the agreements of 1890 and 1892 and the changes in administration effected by them, and the conveyance of the property of the society to the Union Company. So far as those agreements affect the property rights of petitioners we have expressed an opinion of them, but their effect upon the question of the dissolution of the society, or the effect of the conveyance to the Union Company, we are not called upon to decide. In that question, we have seen, the petitioners have no concern.

Judgment affirmed.

MR. JUSTICE GRAY and MR. JUSTICE SHIRAS took no part in the decision.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE BREWER, dissenting.

Assuming the validity of the trusts, the questions appear to be, whether the condition of things has resulted in failure to carry out, and of ability to carry out the principles and purposes of the society, and the defeat of the trusts; and, if so, whether the destination of the corpus of the trust property has, thereupon, become such that complainants or some of them have a *locus standi* to ask relief in a court of equity.

The courts below held that the society still existed in law and in fact, and that this case was not one of "dealing with the assets of a defunct or dissolved association;" or in other words, that the trusts had not been defeated; and the decrees rested on this conclusion. If erroneous, the inquiry then arises, to whom does the corpus of the trust property go in the event of the defeat of the trusts.

A brief recapitulation of the facts is necessary to indicate the grounds of my inability to concur in the opinion and judgment of the court.

CHIEF JUSTICE FULLER and JUSTICE BREWER, dissenting.

In 1803, George Rapp and others located at Harmony, Butler County, Pennsylvania, removed in 1814 to Indiana, and returned in 1825 to Pennsylvania, and located at Economy, in Beaver County. They formed a society or association, which, as said by the Circuit Court of Appeals, "was organized upon the principle of community of goods and land ownership.

"The members of the said society who had brought with them from Wurtemburg, money, combined their funds and all their property in common, they lived as members of a common household and each member enjoying, alike with every other, the fruits of their common labor in equality and brotherhood. The occupation or business of the said society was agriculture, except in so far as it was necessary to manufacture shoes, clothing and other necessaries for the community. The members of the said society obeyed George Rapp as their spiritual and temporal leader and ruler. About the year 1807, the community promulgated the doctrine of celibacy as being necessary for the success of a communistic society."

Although styled "George Rapp and his associates," Rapp was, from the beginning to his death in 1847, the absolute and exclusive ruler in whom all power was vested. Members were admitted by adoption and on adoption conveyed and transferred all their property, real and personal, to "George Rapp and his associates," and after 1836, to the Harmony Society, for the use and benefit of the community.

By article 5 of a written agreement of February 5, 1805, if for any cause one or more of the subscribers should leave Harmony, "George Rapp and his associates" promised to refund the value of his or their property brought in, while those who brought nothing in might receive a donation.

The second agreement was dated January 20, 1821, and the third, March 9, 1827.

The first branch of the preamble of this agreement of 1827, read: "Whereas, By the favor of Divine Providence, an association, or community, has been formed by George Rapp and many others, upon the basis of Christian Fellowship, the principles of which being faithfully derived from the sacred Scriptures, include the government of the patriarchal age, united to

the community of property adopted in the days of the Apostles, and wherein the single object sought is to approximate, so far as human imperfection may allow, to the fulfillment of the will of God, by the exercise of those affections, and the practice of those virtues which are essential to the happiness of man in time and throughout eternity."

By the first article the subscribers gave, granted and forever conveyed "to the said George Rapp and his associates, their heirs and assigns, all our property, real, personal and mixed, whether it be lands and tenements, goods and chattels, money or debts due to us, jointly or severally, in possession or in remainder or in reversion, or in expectancy, whatsoever or wheresoever, without evasion, or qualification, or reserve, as a free gift or donation, for the benefit and use of said association or community."

Members were to be obedient to superintendents, were bound to promote the interests and welfare of the community, and were to receive support and instruction.

The sixth article (almost identical with article 5 of 1805), was as follows: "And if it should happen as above mentioned, that any of the undersigned should violate his or her agreement, and would or could not submit to the laws and regulations of the church or community, and for that or any other reason, should withdraw from the association, then the said George Rapp and his associates agree to refund to him or them the value of all such property, without interest, as he or they may have brought into the community in compliance with the first article of this agreement, and the said value to be refunded in one, two or three annual installments, as the said George Rapp and his associates shall determine. And if the person or persons so withdrawing themselves were poor, and brought nothing into the community, yet if they depart openly and regularly, they shall receive a donation in money, according to the length of their stay and to their conduct, and to such an amount as their necessities may require, in the judgment of the superintendents of the association."

The master found, among other things, as follows:

"Prior to his death in 1834, Frederick Rapp, a member of

the society, had been the business agent of the society, transacting its external business. After his death the members of the society on July 5, 1834, executed a power of attorney to George Rapp—Exhibit No. 85 in evidence—constituting him general agent of the society in all its temporal affairs, with power to appoint agents and substitutes under him. Under this power, he on the same day appointed Romulus L. Baker and Jacob Henrici his substitutes. This power of attorney was signed by four hundred and two members of the association, and with the substitution and not including the signatures, is as follows:

"'Know all men by these presents: Whereas, Frederick Rapp, of Economy, in Beaver County, State of Pennsylvania, recently deceased, was for a series of years the agent in temporal affairs of the Harmonie Society, carrying on in his own name all the external business of said society and taking to himself the titles to real estate as well as the evidence of claims arising out of the various transactions of said society;

"'And Whereas, By an instrument dated the 20th of July, 1825, under the hand and seal of said Frederick, he solemnly and irrevocably declared that all the property, real, personal and mixed, which then was or hereafter might be in his possession or enjoyment, or the title to which he then held or might hereafter hold, was and should be considered the property of the said society, in which he the said Frederick had no absolute interest whatsoever;

"'And Whereas, The lamented death of the said Frederick Rapp renders it indispensable that a new agent should be appointed by whom the temporal affairs of the society may continue to be managed in a mode which has proved convenient and satisfactory;

"'Now, Therefore, Be it known, that we the undersigned, constituting said Harmonie Society, do hereby nominate and appoint George Rapp, of Economy, in the County of Beaver, the general agent of said society in all its temporal affairs.

"'The powers intended to be conferred on the said George Rapp are hereby declared to be as follows, that is to say:

"'1. To ask for, demand and receive from each and every

bank or other incorporated company, partnership, or individual person or persons, the amount which may be due therefrom, in the way of principal, interest or dividend to the said Harmonie Society, or to Frederick Rapp, whether the same be evidenced by judgment, mortgage, bond, certificate of stock, note, bill of exchange, deposit of money, book account, verbal promise, sale or barter, loan or money, or arise in any other manner whatsoever, the check, order, receipt, acquittance or release of the said George Rapp to be as effectual as if executed by all and each of us, or as if it had been executed by the said Frederick Rapp in his lifetime.

"'2. To execute and receive all deeds and conveyances, in fee simple or otherwise, on behalf of the society, whether the title thereto stand in the name of the society or of Frederick Rapp or of George Rapp and associates. The act of the said George Rapp relative thereto to be as valid and sufficient as if executed by us or by the said Frederick Rapp in his lifetime.

"'3. To carry on, by himself or through the agents whom he is hereinafter authorized to appoint, all the dealings and traffic of said society of every description.

"'4. To constitute and appoint an agent or agents under him as he may deem advisable, imparting to such substitute or substitutes, should he think fit the whole or any portion of the authority hereby conferred on himself. He may also at his pleasure revoke such instrument of substitution whenever he may think such revocation called for by the interests of the society.

"'5. It is distinctly understood that in accepting and acting under this power the said George Rapp disclaims all personal interest other than that of a member of said society in the present resources or future earnings of the society, in conformity with the principles and terms upon which the Harmonie Society was orginally founded, as fully and effectually as was done by the late Frederick Rapp in the instrument already adverted to, dated 20th July, 1825, the terms of which instrument the said George Rapp hereby adopts for himself and repeats in every particular.

"'In witness whereof the undersigned members of the Har-

monie Society who constitute said society, have hereunto set their hands and seals at Economy, in Beaver County, this fifth day of July, in the year of our Lord, eighteen hundred and thirty-four.'

(Signatures.)

(Acknowledgment.)

"'By virtue of the authority expressed in the fourth article of the foregoing power of attorney, I do appoint and substitute in my place and stead, Romulus L. Baker and Jacob Henrici, of Economy, Beaver County, Pennsylvania, to act as general agents of the Harmonie Society aforesaid, jointly or severally in my name, and for the use of the said society, to do and perform all acts and things which as the general agent of said society, I am authorized to do. It being distinctly understood, however, that in accepting and performing the office and business of general agents of the said society, the said R. L. Baker and Jacob Henrici shall neither acquire nor claim any personal interest in the present resources or future earnings of the said society other than that of a member of the said society, agreeably to the plans and terms of association, but shall be considered as exercising the same trust mentioned in a declaration of trust signed by Frederick Rapp on the 20th day of July, 1825, and referred to in the foregoing power of attorney to George Rapp.'"

Signed, sealed and delivered by George Rapp.

October 31, 1836, the following agreement was executed by 391 members of the society and afterwards accepted and adopted by 33 others:

"Whereas, The Harmonie Society, consisting of George Rapp and many others, now established in the town of Economy, in Beaver County, Pennsylvania, did on the 9th of March, 1827, enter into certain articles of association, of which the 6th in number is as follows, viz. [here follows that article]:

"And whereas, The provisions of the said 6th article, though assented to at the time, manifestly depart from the great principle of a community of goods and may tend to foster and perpetuate a feeling of inequality at variance with the true spirit and objects of the association;

"And whereas, The principle of restoration of property, besides its pernicious tendency, is one which cannot now be enforced with uniformity and fairness, inasmuch as the members of the association in the year 1816, under a solemn conviction of the truth of what is above recited, did destroy all record and memorial of the respective contributions up to that time;

"And whereas, Continued happiness and prosperity of the association, and a more intimate knowledge of each other, have removed from the minds of all members the least apprehension of injustice and bad faith;

"Now therefore, Be it known by these presents that the undersigned, with a view to carry out fully the great principles of our union, and in consideration of the benefits to be derived therefrom, do hereby solemnly enter into covenants, and agree with each other as follows:

"1st. The said 6th article is entirely annulled and made void, as if it had never existed; all others remain in full force as heretofore.

"2d. All the property of the society, real, personal and mixed, in law or equity, and howsoever contributed or acquired shall be deemed now and forever joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money or labor; and the same rule shall apply to all future contributions whatever they may be.

"3d. Should any individual withdraw from the society, or depart this life, neither he in the one case nor his representatives in the other, shall be entitled to demand an account of said contributions, whether in land, goods, money or labor, or to claim anything from the society as a matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and if any, what allowance shall be made to such member or his representatives as a donation.

"Invoking the blessing of God on this sacrifice of all narrow and selfish feelings to the true purposes of the association and to the advancement of our own permanent prosperity and happiness, we have signed the foregoing instrument, and affixed

thereunto our respective seals, at Economy, this 31st day of October, 1836."

George Rapp, sole patriarch and ruler, died in 1847, and thereupon, in that year certain articles were subscribed by two hundred and eighty-eight persons as the "surviving and remaining members of the Harmonie Society, and constituting the same." These articles created and nominated a Board of Elders of nine members, with the power of filling vacancies, and a Board of Trustees, consisting of two members of the Board of Elders, which had power to fill vacancies in the trusteeship. Instead of a single patriarch, a dual patriarchy was substituted, and those boards alone had the power over and control of the property.

The eighth article was as follows:

"It is hereby distinctly and absolutely declared and provided that all the property, real, personal and mixed, which now or hereafter shall be held or acquired by any trustee or trustees, or person under them, is and shall be deemed the common property of said society, and each trustee now or hereafter appointed hereby disclaims all personal interest in the present resources and future earnings of the society, other than that of a member thereof, according to the articles of association hereby established and continued, and according to the present government."

From these documents it appears that prior to October 31, 1836, all contributions of property were for the use and benefit of the community on the condition that any member withdrawing was to receive back the value of his contributions.

But that by the contract of 1836, the property then held in trust was no longer held subject to reclamation on the basis of original contribution, but the whole aggregate was made a common fund in which each member was equally interested, subject to the previously existing trust for the use and benefit of the society; that the corpus of the trust property included all future contributions, accretions and accumulations; and that the then and subsequently admitted members occupied the relation of donors and the society, as a society, of donee.

The joint and indivisible stock embraced all present and fu-

ture property subject to the trusts declared in the articles of 1827, which were reaffirmed in 1836, except the sixth article. That trust was described "as a free gift or donation for the benefit and use of the said association." And by the agreement of 1847, the property was to be held and deemed the common property of said society, and each trustee disclaimed all personal interest therein "other than that of a member thereof."

If then the trusts are defeated I concur in the view that the trust property must go either to the owners or donors living, and to the heirs and legal representatives of those who are dead, by way of resulting trust; or to the surviving members of the society as joint tenants with right of survivorship, or by way of tontine.

It is true that the third clause of the agreement of 1836, provided that on withdrawal, or death, no member, or his representatives, should be entitled to an account or "to claim anything from the society as matter of right." But that clause referred to the society as a going concern, and this bill is not filed against the society, but proceeds on the ground of the termination of the trusts and the existence of a condition of things demanding the winding up of the society's affairs.

And if the system of patriarchal government has been abandoned; if for the communistic scheme, a capitalistic scheme has been substituted; if the society has become a trading community and lost all its distinctive attributes; if it is undergoing the process of liquidation; if all its property and assets have passed to a trading corporation and the power of carrying out its original principles has departed; if its membership has become practically incapable of perpetuation; it follows that the trusts have been defeated and the society ended to all intents and purposes.

Early in 1890, John S. Duss and two others, employés but not members of the society were elected to fill vacancies in the Board of Elders.

In April, 1890, certain articles were executed, the number of members being stated to be 45.

The Junior Trustee having died, John S. Duss was elected to fill the vacancy, and soon after, with his wife and children,

took possession of the official residence of the society. In 1892 the Senior Trustee died, and Duss was elected to that position, one Sieber, the town constable, who had a wife, being elected Junior Trustee. Later in that year other articles were entered into, describing the then number of members as 37.

In February, 1893, certain members of the society filed a bill for its dissolution, the winding up of its affairs and the distribution of its assets.

While the bill was pending, seventeen members received from the assets money and property to the amount of something over one hundred thousand dollars, and gave quitclaims and acknowledgments of full satisfaction of their interest or share in the property of the society. The grantors in nearly all of these instruments acknowledged in consideration of the money paid or land conveyed, that he or she does "hereby release, cancel and discharge any and all claims whatsoever, which I, my heirs, assigns or lawful representatives, may or could ever have against said society or its trustees, its property or assets, or any part thereof, I hereby declaring all such claims to be fully compensated, settled, released and discharged;" and, after reciting the various properties and assets, "I am entirely satisfied to accept as my full share and interest therein," etc.

Two of the deeds contained this paragraph: "While it may be that said society may have and be the possessor of several hundred thousand dollars worth of property after paying all debts, I am entirely satisfied to accept as my full share therein the sum of —— thousand dollars."

After these settlements began the bill was dismissed by consent.

In January, 1894, a corporation styled the Union Company was organized, under the state statute, "for the purpose of the purchase and sale of real estate, or for holding, leasing and selling real estate," its business "to be transacted in the borough of Beaver, county of Beaver, State of Pennsylvania."

On April 11, 1894, seventeen persons purporting to be all the then members of the society, executed a paper stating: "We the members of said Harmonie Society, do each hereby

express our consent with and request that John S. Duss and Gottlieb Riethmueller, the present trustees of said society, shall forthwith sell, transfer and convey to the Union Company, a corporation duly created and organized under the laws of the State of Pennsylvania, all the lands, tenements and hereditaments situated in the Allegheny and Beaver Counties, Pennsylvania, now owned and held by said trustees for the benefit of the said society, to the end that all said lands, tenements and hereditaments may be owned, held and managed by said incorporated company, and be sold and otherwise disposed of from time to time in pursuance of proper corporate action as may be determined by the directors and officers of said incorporated company.

"The capital stock of said incorporated company, however, to be owned and held by the said trustees for the benefit of the society, in accordance with, and on the terms and conditions of the articles of association of said society and the ratifications and modifications thereof, as the same now exists, to the extent of three hundred and ninety-seven thousand five hundred ($397,500) dollars, out of a total capital of four hundred thousand ($400,000) dollars."

The vast property of the society was conveyed to the Union Company, and the stock of that corporation assigned to the trustees.

Since April 11, 1894, nine of the seventeen subscribers have died, leaving eight, consisting of John S. Duss and his wife, one Gillman, 77 years of age, and unable to read or speak English; and five women of the ages of 80, 77, 58, 54, and 47, respectively.

Duss and Gillman became the sole remaining male members of the society and the women, with the exception of Mrs. Duss, were mostly old, infirm or ignorant.

No new member has been admitted since 1893. It is suggested that this was because none desired admission. This may be so, and this would explain the diminishing of over five hundred members in 1827 to two hundred and eighty-eight in 1847, and forty-five in 1890. But the result is the same. The eight remaining cannot reasonably be held to represent the great

communistic scheme which the Wurtembergers of 1803 sought to found on "the basis of Christian Fellowship, the principles of which being faithfully derived from the sacred Scriptures include the government of the patriarchal age, united to the community of property adopted in the days of the Apostles, and wherein the single object sought is to approximate, so far as human imperfection may allow, to the fulfillment of the will of God, by the exercise of those affections, and the practice of those virtues which are essential to the happiness of man in time and throughout eternity."

As the membership diminished the wealth increased, but not from contributions by new members, and operations were carried on by hired labor.

Not one of the eight contributed to the three or four millions of property accumulated. It is conceded that Duss alone is the active member. But he is not the society, nor does the society in respect of its avowed principles any longer exist.

Moreover the transactions by which seventeen members of the society, not old and infirm, but vigorous and capable, were bought out, were in themselves acts of liquidation. It is idle to say that these payments were "donations" to withdrawing members. They were purchases, in terms, and in effect. They were settlements by agreement instead of through litigation.

Finally, substantially the entire property of the society and its affairs have been turned over to a corporation created under the laws of Pennsylvania, authorized to purchase and sell land. This corporation has none of the powers confided by the articles of 1847, to the Board of Elders and the Board of Trustees. It has no power to feed, lodge, maintain and support, or to care for the spiritual welfare of members of the society or to perform any of the duties imposed upon the boards. The trustees have no distinct title to the society's property, but only the rights pertaining to the stock of the Union Company. All the industries carried on in Economy are carried on by tenants and lessees of the Union Company, and the society has ceased to possess the power to carry out the purposes for which its property was accumulated.

The affairs of the Union Company must be wound up under

the state statutes in that behalf, and proceeds derived from the lands by sale or otherwise would go to the stockholders by way of dividends. The legal effect of the transaction was the same as a sale, out and out, for cash, and it was irrevocable. And this point so arises on the record that it must be disposed of as matter of law.

The master found, as matter of law, that the society continued to exist because the surviving members had not formally declared it to be dissolved, and that the purposes and principles of the society could not be held to have been abandoned unless by the formal action of all its members. But this could only be so on the assumption that the scheme of the trust created a joint tenancy with the right of survivorship, or a system of tontine; and that a single surviving member might be the society although to the integrity of a community, numbers are essential. By the articles neither the members, nor the Board of Elders, nor the Board of Trustees, nor all together, possessed the power voluntarily to formally dissolve the association, and it is for a court of equity to adjudge whether a condition of dissolution or a condition requiring winding up is or is not created by acts done or permitted.

Such being, in my opinion, the condition here, the trust property must go, as I have said, either to the surviving members as joint tenants with right of survivorship, or by way of tontine; or to the owners or donors living, and to the heirs and legal representatives of those who are dead by way of resulting trust.

Appellees contend for the first of these propositions. Their counsel says in his brief: "It is the society, as a society, which owns this property. It is the entire body as one whole. If at any time the society did dissolve, its property would go to the persons who then were its members. No one else has any legal or equitable claim to it except those members. To them, and to them alone, it would belong, and among them it would be divided."

It is inconceivable that the creators of the trust contemplated any such result, when they sought to perpetuate Christian fellowship by the renunciation of their property.

CHIEF JUSTICE FULLER and JUSTICE BREWER, dissenting.

The present membership has shrunk to eight members, less than enough to fill the Board of Elders, and that board consists of Duss and his wife; an old man and five women, aged or ignorant. Practically Duss is the last survivor and he claims the ownership of this vast estate as such survivor. By the articles no period was fixed for the termination of the life of the society. There is no remainder over, nor provision of any kind for the disposition of the trust estate in the event of the society's extinction.

Joint tenancy with survivorship or tontine excluding all but living members and casting accumulations on the survivor, are neither of them to be presumed. They are the result of express agreement and there is none such in these documents.

On the contrary, this property was held in trust for the use and benefit of the society as a society, and not for the individual members. The trust was for the use and benefit of the society in the maintenance of its principles as declared by its constitution and laws. When the purposes of the society were abandoned, or could not be accomplished, or the society ceased to exist, the trust failed, and the property reverted by way of resulting trust to the owners, who subjected it to the trust, living, and to the heirs and legal representatives of those of them who are dead.

This conclusion does not involve the assertion of a reversion secured by the express terms of the contracts, but rests on the familiar principle of equity jurisprudence that when the trust clearly created by the documents terminated a resulting trust arose to the grantors or donors or their heirs. The distinction is thoroughly elucidated by Mr. Justice Gray in *Hopkins* v. *Grimshaw*, 165 U. S. 342. It was there said, among other things:

"But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground, adding (as if to put the matter beyond doubt) 'and for no other purpose whatever.' The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground and the society was dissolved. . . .

"In the case at bar, the trust created by the deed having

been terminated, according to its express provisions, by the land ceasing to be used as a burial ground, and the dissolution and extinction of the society for whose benefit the grant was made, there arises, by a familiar principle of equity jurisprudence, a resulting trust to the grantor and his heirs, whether his conveyance was by way of gift, or for valuable consideration."

The titles held by the trustees in this case were held for the benefit and use of the society in the maintenance of its principles. When the purposes of the trusts failed the property reverted, not because of special provision to that effect, but because that was the result of the termination of the trusts.

Complainants, or some of them, are the heirs and next of kin of members who signed the articles of 1836 and 1847, and who died in fellowship. The service of one of these families is said to aggregate three hundred years of unrequited toil. They are entitled to invoke the aid of the court in the winding up of this concern, and these decrees ought to be reversed.

I am authorized to state that MR. JUSTICE BREWER concurs in this dissent.

ROBINSON & CO. *v.* BELT.

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

No. 46. Argued May 2, 1902.—Decided October 27, 1902.

The question whether a general assignment for the benefit of creditors is rendered invalid by reason of a provision that the "preferred creditors shall accept their dividends in full satisfaction and discharge of their respective claims" is one determinable by the local law of the jurisdiction from which the question arises.

Statement of the Case.

Under the Act of Congress of May 2, 1890, the laws of Arkansas respecting assignments for the benefit of creditors, as well as the statute of frauds, are extended and put in force in the Indian Territory. In adopting these laws the courts of the Indian Territory are bound to respect the decisions of the Supreme Court of Arkansas interpreting them.

Under the laws of Arkansas, thus made applicable to the Indian Territory, a stipulation for a release in a general assignment, which is made only as a condition of preference, does not invalidate the instrument.

Other objections were made in the assignments of error, but as they did not appear to have been raised in either of the courts below, it was held that they could not be raised in this court.

While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors shall be called directly to their attention, and that their action shall not be reversed for errors which counsel in this court have first evolved from the record.

This was a writ of error to a judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the Court of Appeals of the Indian Territory, which latter court affirmed the judgment of the United States court for the Northern District of such Territory, sustaining an interplea by one King to recover the value of certain property attached and sold by Robinson & Co., which had been conveyed to King as assignee by a deed of assignment made by his co-defendant Belt.

The facts of the case are substantially as follows: One John C. Belt, a resident of Arkansas, who was engaged in business in the Indian Territory, on December 29, 1891, made an assignment for the benefit of his creditors to King as assignee.

On the following day "J. M. Robinson & Co.," plaintiffs in error, brought suit against Belt in the United States court in that Territory, sued out an attachment and levied upon the property assigned. Belt failed to plead, and judgment by default was taken against him, and the attachment sustained.

On May 31, 1892, defendant in error King filed an interplea,

setting out his deed of assignment, and claiming the property as his, by virtue of such deed. After so doing, he entered into a stipulation with other attaching creditors, of whom there were a large number, whereby it was agreed that this interplea should be considered as filed in every suit, and virtually that the result of the interpleader proceedings in the suit of J. M. Robinson & Co. should control all other suits. The property was, after its attachment, sold under order of court, pursuant to statutes governing such proceedings, and at such sale realized the sum of $7900.

A demurrer to the interplea was filed and sustained by the court, from which order King sued out a writ of error from the United States Court of Appeals. He gave no supersedeas bond, however, and the fund was by order of the court distributed *pro rata* to the attaching creditors according to their priorities. The Court of Appeals reversed the judgment on the demurrer, 63 Fed. Rep. 90, and on September 19, 1895, Robinson & Co. filed their answer to the interplea, denying that King was owner by virtue of the deed of assignment, and alleged the same to be fraudulent and void; denied that King filed a complete inventory; denied that certain personal property described in the deed of assignment was the property of the wife of Belt, and admitted that the property described in the deed was seized under the attachment.

The trial on the interplea was had before a jury and resulted in a verdict in favor of the interpleader, which found the attached property to be the property of King as assignee. A judgment was thereupon entered in his favor, which was subsequently affirmed, first, by the Court of Appeals for the Indian Territory, and then by the Circuit Court of Appeals for the Eighth Circuit. 100 Fed. Rep. 718. Whereupon a writ of error was sued out by Robinson & Co. from this court.

Mr. David Goldsmith for plaintiffs in error.

No appearance for defendants in error.

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

This is a contest between certain attaching creditors of John C. Belt, and one King, his voluntary assignee for the benefit of creditors.

The record is in an unsatisfactory condition. It is impossible to tell whether the plaintiffs are a corporation or a partnership, and if the latter, who constitute the firm, or against what individuals the judgment of the court was rendered. Although the only right of the plaintiffs to contest the assignment of Belt to King arises from the levy of an attachment upon the assigned property, neither the writ of attachment nor the return of the marshal of the levy thereunder appears in the record or testimony. Nor does the record contain a copy of the complaint in which these proceedings were probably averred. The only pleadings before us are the interplea of King, filed in the action, (which appears to have been brought against Belt alone,) setting up the assignment, and the answer of the plaintiffs thereto, denying the ownership of King and averring the fraudulent character of the assignment. But as the interplea of King alleges that on December 31, 1891, and just after he had completed an inventory of the property so assigned, plaintiffs caused a writ of attachment to be levied upon a portion of the property, we may treat this as a sufficient admission of plaintiffs' title to justify us in passing upon the question of the validity of the assignment upon which the case largely depends.

1. This assignment is attacked by the plaintiffs chiefly upon the ground that it contains a provision that the preferred creditors shall accept their dividends "in full satisfaction and discharge of their respective claims," "and execute and deliver to said John C. Belt a legal release therefor." This provision has been the subject of discussion in England and in most of the States, and in a large number of cases has been held to avoid the assignment, upon the ground that the debtor has no right to compel his creditors to accept his terms or lose their preference. In England a clause of a somewhat similar nature was held to be void under the statute of Elizabeth as an attempt to hinder, delay or defeat creditors, *Spencer* v. *Slater*, L. R. 4 Q. B. D. 13, though the applicability of that case to this particular provision admits of some doubt.

The fact that it enables the debtor to extort a settlement by playing upon the fears or apprehensions of his creditors is thought by the courts of many of the States to be sufficient to justify them in setting aside the assignment; and where such provision has been sustained it has usually been in deference to authority rather than upon conviction of its propriety or wisdom. The question was discussed at considerable length by Mr. Justice Story in *Halsey* v. *Whitney*, 4 Mason, 206, 227, and the validity of the clause sustained largely in deference to the case of *King* v. *Watson*, 3 Price, 6, where, as he states, the very exception was taken by counsel and the assignment held good by the Court of Exchequer. *King* v. *Watson*, however, has but a remote bearing, and seems to have been *pro tanto* overruled by the case of *Spencer* v. *Slater*, above cited. Mr. Justice Story finally remarks that if the question were entirely new and many estates had not passed upon the faith of such assignments, the strong inclination of his mind would be against their validity. "As it is," said he, "I yield without reluctance to what seems the tone of authority in favor of them." Somewhat similar doubt is expressed by Mr. Chief Justice Taney in *White* v. *Winn*, a memorandum of which is found in 8 Gill. 499. The question was also incidentally considered by this court in *Security Trust Co.* v. *Dodd*, 173 U. S. 624, 633, but the case went off upon another point.

This court has never directly passed upon the validity of this provision, but wherever it has been called in question it has been treated as determinable by the local law of the State from which the question arose. Thus, in *Brashear* v. *West*, 7 Pet. 608, the clause was upheld solely upon the ground that the courts of Pennsylvania had sustained its validity. The assignment in that case was in trust to pay and discharge the debts due from the assignor, first, to certain preferred creditors, and afterward to creditors generally, provided that no creditor should be entitled to receive a dividend, who should not within ninety days execute a full and complete release of all claims and demands upon the assignor. Mr. Chief Justice Marshall, after summarizing the arguments for and against the validity of this provision, did not commit the court to the expression of

an opinion, but held that "the construction which the courts of that State (Pennsylvania) have put on the Pennsylvania statute of frauds must be received in the courts of the United States," and decided the case upon the authority of *Lippincott* v. *Barker*, 2 Binney, 174, in which this question arose, and was decided after an elaborate argument in favor of the deed. He also remarked that the question had been decided the same way in *Pearpoint* v. *Graham*, 4 Wash. 232. In that case Mr. Justice Washington thought that an assignment in trust for the benefit of such creditors as should release their debts was founded upon a good and valuable consideration, and was valid, the only inquiry being whether it was *bona fide*. The assignment was supported in favor of such of the creditors as executed a release of their demands within sixty days after the date of the instrument, that being the time limit provided for such acceptance. Neither in *Lippincott* v. *Baker* nor in *Pearpoint* v. *Graham* were there any preferred creditors, but the assignments were in trust for all the creditors who should within sixty days in one case and four months in the other execute a release of their demands. In several subsequent cases the rule laid down in *Brashear* v. *West* has been adopted, and the principle fully established that the construction and effect of a state statute, regulating assignments for the benefit of creditors, is one upon which the decisions of the highest courts of the State are a controlling authority in the Federal courts. They are treated as establishing a rule of property applicable within their several jurisdictions. *Sumner* v. *Hicks*, 2 Black, 532; *Jaffray* v. *McGehee*, 107 U. S. 361; *Peters* v. *Bain*, 133 U. S. 670, 686; *Randolph* v. *Quidnick Co.*, 135 U. S. 457; *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 235; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622, 627.

The same rule has been held to be applicable to decisions of state courts construing the statute of frauds. *Allen* v. *Massey*, 17 Wall. 351; *Lloyd* v. *Fulton*, 91 U. S. 479, 485.

Whatever might be our own views with regard to the validity of a release by creditors as a condition of preference under an assignment, the question is one which, upon the authorities

above cited, must be held to be determinable by the state law as interpreted by the Supreme Court of such State.

While the case under consideration arose in the Indian Territory, the law applicable thereto is determined by the laws of Arkansas, which were adopted and extended over the Indian Territory by the act of Congress approved May 2, 1890, 26 Stat. 94, sec. 31, which declares that certain general laws of Arkansas, "which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended and put in force in the Indian Territory," among which laws are enumerated assignments for the benefit of creditors and the statute of frauds. In adopting this law with respect to assignments, the courts of the Indian Territory are also bound to respect the decisions of the Supreme Court of Arkansas interpreting that law.

In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus in *Pennock* v. *Dialogue*, 2 Pet. 1, it was said by Mr. Justice Story (p. 18): "It is doubtless true, as has been suggested at the bar, that where English statutes, such for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20): "The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt, that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke." In *Cathcart* v. *Robinson*, 5 Pet. 264, Mr. Chief Justice Marshall said (p. 280): "By adopting them (British statutes) they become our own as entirely as if they had been enacted by the legislature of the State. The received construction in England at the time they are admitted to operate in

this country, indeed to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority." See also *Kirkpatrick* v. *Gibson's Executors*, 2 Brock. 388. The same rule has been applied in the state courts in the construction of statutes adopted from other States. *Commonwealth* v. *Hartnett*, 3 Gray, 450; *Tyler* v. *Tyler*, 19 Illinois, 151; *Bloodgood* v. *Grasey*, 31 Alabama, 575; *Marqueze* v. *Caldwell*, 48 Mississippi, 23; *State* v. *Robey*, 8 Nevada, 312; *The Devonshire*, 8 Sawyer, 209.

As the Arkansas statutes concerning assignments for the benefit of creditors and the statute of frauds were extended and put in force in the Indian Territory by the act of Congress above cited, it becomes material to consider the decisions of the Supreme Court of that State with reference to the validity of the provision of an assignment exacting a release by creditors of all their demands against the assignor as a condition of preference. The subject was first examined in *Clayton* v. *Johnson*, 36 Arkansas, 406, 424, in which an assignment for the benefit of creditors without preferences was held to be valid, notwithstanding a proviso that no creditor provided for should participate in the assets "unless he accepts the same in full of his claim." The question is most elaborately considered in that case, and a distinction taken between a conveyance of the whole and the conveyance of a part only of the debtor's property upon condition of releasing the residue. The latter was thought to be fraudulent and pernicious in its tendencies. In *McReynolds* v. *Dedman*, 47 Arkansas, 347, it was held that, although an assignor might make preferences and exact releases from creditors who assented to the assignment, if he reserved to himself, to the exclusion of non-assenting creditors, the surplus that remained, the deed was fraudulent upon its face. The difficulty with that assignment was that, in case the creditors refused to execute the releases, the residue, instead of being devoted to the payment of the assignor's creditors, was to revert to the assignor himself. This case is wholly consistent with that of *Clayton* v. *Johnson*. In the

subsequent case, however, of *Collier* v. *Davis*, 47 Arkansas, 367, *Clayton* v. *Johnson* was formally overruled, and an assignment which provided that no creditor should participate unless he should accept his share in full satisfaction of his claim, and gave no direction for the application of the surplus after satisfying assenting creditors, was held void upon its face. It may be noted that the personnel of the court had changed since *Clayton* v. *Johnson* was decided. In the subsequent case of *Wolf* v. *Gray*, 53 Arkansas, 75, decided a few weeks before the act of Congress of 1890, notwithstanding the former overruling of *Clayton* v. *Johnson* in *Collier* v. *Davis*, it is said that its authority upon the stipulation for a release was not impaired, except as modified by the cases before cited. It follows, said the court, that "the law is established here, in accord with much authority elsewhere, that a stipulation for a release in a general assignment, which is made only as a condition of preference, does not invalidate the instrument." The assignment in that case preferred one creditor and provided for payment to all other creditors who should execute releases of the residue of their debts. This case was followed by *King* v. *Hargadine-McKittrick Dry Goods Co.*, 60 Arkansas, 1, where the very assignment in question in this case was held to be valid, notwithstanding the provision for a release by creditors as a condition of preference. Without determining the validity of such a provision at common law, we are of opinion that the courts of the Indian Territory did not err in applying the settled construction of the law of Arkansas to the assignment in this case, and in holding the provision for a release of creditors to be valid.

2. Plaintiffs also seek to impeach the assignment upon the ground that there was no evidence of its acceptance by any of the creditors, or their assent thereto; and the position is taken that, while the creditors may be presumed to accept an assignment made for their benefit, such acceptance will not be presumed, where the assignment is subject to the condition that the creditors consent to a release and discharge of their claims against the estate. Error is also charged in the rendition of the judgment against persons who were not parties to

the immediate case, but who had stipulated other cases into this case for a like judgment; and also in the fact that a personal judgment rendered against the plaintiffs in error for the value of the goods in controversy was not contemplated or allowed by the statute under which the proceedings were had.

It is a sufficient answer to these objections to say that neither of them appears to have been called to the attention of the courts below. They do not seem to have been raised at the time the judgment was entered. It does not appear that any assignments of error were filed in the Court of Appeals for the Indian Territory, but the opinion states that plaintiffs relied upon four objections to the assignment as showing upon its face that it was fraudulent in law. No objection seems to have been raised in that court to the form of the judgment. In the assignments of error in the United States Court of Appeals for the Eighth Circuit no such question is raised and none alluded to in the opinion. Such objections could not be raised for the first time in this court. *Insurance Co.* v. *Mordecai*, 22 How. 111, 117; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Wheeler* v. *Sedgwick*, 94 U. S. 1; *Wilson* v. *McNamee*, 102 U. S. 572; *Edwards* v. *Elliott*, 21 Wall. 532; *Clark* v. *Fredericks*, 105 U. S. 4.

While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*.

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice Shiras and Mr. Justice White concurred in the result.

TURPIN *v.* LEMON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 35. Argued March 17, 1902.—Decided November 3, 1902.

The statutes of West Virginia in regard to the sale of land for unpaid taxes require certain proceedings to be taken by the sheriff, but do not require the sheriff to show in his return that he has complied with these requirements; the statutes also make the deed given by the sheriff *prima facie* evidence that the material facts therein recited are true. *Held* that the effect of these statutes is to change the burden of proof which rested at common law upon the purchaser at a tax sale to show the regularity of all proceedings prior to the deed and to cast it upon the party who contests the sale.

Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court; while it has been held that notice must be given to the owner at some stage of proceedings for condemnation or imposition of special taxes, it has also been held that laws for assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary (Mr. Justice Field's definition of "due process of law" in *Hager* v. *Reclamation District*, 111 U. S. 701, followed), and the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the state laws requires notice to the taxpayers and is in conformity with natural justice.

A plaintiff is bound to show that he has personally suffered an injury by the application of a law before he can institute a bill for relief to test its constitutionality.

This was an appeal from a decree of the Circuit Court for the District of West Virginia sustaining a demurrer to, and dismissing, a bill filed for the purpose of impeaching a tax sale and deed of certain lands, and of obtaining a judicial declaration that the defendants, who were purchasers under such tax deed, took no title to or interest in such lands.

The facts set forth in the bill were substantially as follows: On April 30, 1874, Turpin, a citizen of the State of Pennsylvania, purchased from the executors of one Smith C. Hill 225 acres of land in the county of Ritchie, West Virginia, and re-

ceived a deed therefor. In the year 1879, 100 acres of this land were sold for delinquent taxes for prior years, by which the quantity owned by Turpin was diminished to 125 acres, which were assessed to him for taxes for the years 1883 and 1884. Being absent from the State for several years, in poor health and unfit for business, he paid no attention to the land, which was returned delinquent for the non-payment of these taxes, and was sold by the sheriff of Ritchie County for such taxes on January 12, 1886. Having failed to redeem the land within the year allowed by law from the time of the sale, on February 3, 1887, some weeks after the expiration of the year, a deed was made by the clerk of the county court of Ritchie County to the defendants.

Nothing was done and no effort was made to pay these taxes until about February 21, 1899, when Turpin met the defendant, John B. Lemon, and tendered him the sum of one hundred and seventy-six dollars and fifty cents, to cover the amount of the taxes paid by the defendants in the purchase of the land, and all taxes paid by them subsequently, as well as the cost of all surveys, etc., which amount he now offers to pay into court; but Lemon refused to receive the money, and has since cut large quantities of timber and removed the same from the land.

Whereupon he filed this bill, which really raises but a single question, and that is, whether the laws of the State of West Virginia, enacted with reference to the sale of delinquent lands for taxes, are contrary to the Constitution of the United States, or constitute due process of law within the Fourteenth Amendment. Other questions were raised in the bill, but in his petition for an appeal to this court the appellant rests his case upon the single question of the constitutionality of these laws.

Mr. C. D. Merrick for appellant.

Mr. John G. McCluer for appellees.

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

The general charge is made by the appellant in his assign-

ments of error that the tax sale complained of in the bill, as well as the statutes of West Virginia, are obnoxious to the Fourteenth Amendment of the Constitution in failing to provide due process of law or the equal protection of the laws.

The particular errors which are alleged in the bill to invalidate the sale in question are—

That it nowhere appeared in the return of the sale made by the sheriff for these taxes, either (1) that the land had been certified to him as delinquent by the auditor of the State as required by law, or (2) that he published or posted the notice of the sale as required by law, or (3) that said sale was made at a time at which he would be authorized by law to make such sale, or (4) that such sale was at a place, to wit, at the front door of the courthouse, at which the sheriff was authorized to make it, or (5) that such sale was made at public auction, or (6) that such land was sold to a person or persons who would take the least number of acres and pay the taxes thereon, or (7) that such sale was made in accordance with the provisions of the law of the State.

In making sales of land for unpaid taxes the procedure indicated by the above exceptions is undoubtedly required by the statute, the provisions of which are so numerous that they do not require citation. It will be observed, however, that there is no allegation in the bill that such requirements were not actually followed, but simply that the return of the sale failed to set forth a compliance with them. It is true the bill avers that the statements in the tax deed of a compliance with the law, "*as the record evidence shows*, were without foundation in fact." This, however, is but a restatement of the proposition theretofore stated more particularly, that the return did not show that the successive steps laid down by the statute were followed. That the pleader did not intend thereby to charge that the statutory procedure was not actually pursued is evident from the plaintiff's brief, that, "while the proceeding may have been conducted under this statute, yet the system provided is arbitrary and uncertain in its character," etc. As the statute does not require the sheriff to show in his return of sale that he has complied with these requirements, or any of them, or even to

state in general terms that the sale was made in accordance with the statutes, the plaintiff fails to show that he has suffered any actual injury, or that the forms of law were not literally observed.

The act of 1882, ch. 130, secs. 12 and 13, specially provides a form of return of the sale as follows:

"12. The sheriff or collector who made the sale, shall forthwith make out a list of sales so made, with a caption thereto in form or effect as follows: 'List of real estate sold in the county of——— in the month (or months, as the case may be), of———eighteen——, for the non-payment of the taxes charged thereon, in the said county, for the year (or years, as the case may be), eighteen———.' Underneath shall be the several columns mentioned in the tenth section of this chapter, with a like caption to each column.

"13. There shall be appended to such list an affidavit in form or effect as follows: 'I, A— B ——, sheriff (or collector or deputy for C— D—, sheriff or collector), of the county of———, do swear that the above list contains a true account of all the real estate within my county which has been sold by me during the present year, for the non-payment of taxes thereon for the year——, and that I am not directly or indirectly interested in the purchase of any of said real estate. So help me God.' Which oath shall be subscribed and taken before some person authorized to administer oaths."

By section 15 of the same chapter "the owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for a debt, may redeem the same by paying to the purchaser, his heirs or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the tenth section of this chapter, and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on said purchase money, and taxes, at the rate of twelve per centum per annum from the time the same may have been so paid." No attempt was made by the plaintiff to comply with this statute.

By section 19 of the same chapter it is provided that after the expiration of the year the purchaser may obtain from the

clerk of the county court of the county in which said sale was made a deed of conveyance for the land; and by section 25, when the purchaser shall have obtained a deed thereof, "and caused the same to be admitted to record, . . . such right, title and interest in and to said real estate, as was vested in the person or persons charged with the taxes thereon for which it was sold, . . . shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter." This same section further declares in a subsequent clause that "no irregularity, error or mistake in the delinquent list or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the plat, description, or report thereof made by the surveyor or other person, shall, after the deed is made, invalidate or affect the sale or deed."

The substance of this legislation, then, is this: that a certain procedure is prescribed for the sheriff in making sales of land for unpaid taxes; but it is not required that he incorporate the various steps of such procedure in his report of sales—merely that he shall swear that the list of lands to which his affidavit is appended contains a true account of all the real estate within the county sold by him during the current year for the nonpayment of taxes, and that he is not directly or indirectly interested in the purchase of any such real estate. A year is then allowed for redemption, after the expiration of which, a deed of the land is executed to the purchaser at the sheriff's sale by

the clerk of the county court, which deed, the statute provides, shall not be invalidated by reason of any irregularity in the proceedings under which the land was sold, unless such irregularities appear upon the face of such proceedings of record in the office of the clerk, and be such as to materially prejudice and mislead the owner.

Counsel for the plaintiff criticises this legislation, and particularly section 25, upon the ground that it does not provide for any record of the successive steps of procedure in advertising and selling lands for the non-payment of taxes, and yet declares that the title to the land shall be vested in the purchaser, notwithstanding any irregularity, unless such irregularity appears upon the face of the proceedings. The inference is that there is no irregularity which can vitiate the sale. This is not entirely accurate. It is true that the statute prescribes a general form of return by the sheriff, which does not set forth in detail the proceedings prior to and at the sale; but that there are irregularities which appear of record, and therefore that the exception in the curative statute is not without force, is evident from the case of *McCallister* v. *Cottrille*, 24 W. Va. 173, in which it was held to be the official duty of the clerk of the county court to note in his office the day on which the sheriff returned his list of the sales of lands sold for delinquent taxes, and if he fails to make such note, or his office shows that such list was not returned and filed for more than ten days after the completion of such sales, this, in either case, is such an omission and irregularity as to materially prejudice the rights of the owner of lands sold at such sale, and therefore vitiates any deed made to the purchaser by the clerk. The court went further in this case, and held that parol evidence could not be introduced to affect the validity or invalidity of a tax deed. So, too, in *Carrell* v. *Mitchell*, 37 W. Va. 130, 136, it was said the fact that land was advertised and sold as delinquent under a description in the advertisement, locating it in a different district from that in which the land was situated, was such an irregularity as would void the deed made in pursuance of such sale. In *Hays* v. *Heatherly*, 36 W. Va. 613, the title obtained by a purchaser was held to be defective for the reason that the affidavit

did not comply with the form contained in the statute. In that case the deed had not been obtained; but in *Phillips* v. *Minear*, 40 W. Va. 58, the same defect was held to be fatal after the deed was obtained and after the curative section (25) had taken effect. See also *Jackson* v. *Kittle*, 34 W. Va. 207; *Baxter* v. *Wade*, 39 W. Va. 281.

That it is competent for the legislature to provide by curative statutes that irregularities in the sales of lands shall not prejudice the purchaser after a certain time has elapsed, and a deed has been given, is entirely clear, although as observed by Judge Cooley in his work upon Taxation, chapter 10, such defective proceedings cannot be cured where there is a lack of jurisdiction to take them. "Curative laws may heal irregularities in action, but they cannot cure want of authority to act at all," and that "whatever the legislature could not have authorized originally it cannot confirm." It may not be altogether easy in a particular case to determine whether the defect be jurisdictional or not, but certainly irregularities in the personal conduct of the officer making the sale would not be so regarded; and it is at least exceedingly doubtful whether the failure to preserve the auditor's list of delinquent lands or the evidence of the publication and posting of the statutory notices would vitiate a deed made by the clerk, after a lapse of twelve years.

But, even if parol or other evidence were competent to impeach this sale, none such was offered, and it may well be doubted whether due process of law, within the meaning of the Fourteenth Amendment, requires a punctilious conformity with the statutory procedure preceding and accompanying the sale. Whether all the steps required by law were actually taken in a particular case, and whether the failure to take such steps would invalidate the sale, would seem to be a matter for the state courts, rather than for this court, to decide, and it would appear that the Fourteenth Amendment would be satisfied by showing that the usual course prescribed by the state laws required notice to the taxpayer and was in conformity with natural justice. Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold

that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. *Spencer* v. *Merchant*, 125 U. S. 345; *Huling* v. *Kaw Valley Railway*, 130 U. S. 559; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Paulsen* v. *Portland*, 149 U. S. 30. But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. Due process of law was well defined by Mr. Justice Field in *Hagar* v. *Reclamation District*, 111 U. S. 701, in the following words: "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

It was said in *Witherspoon* v. *Duncan*, 4 Wall. 210, that the States, as a general rule, had the right to determine the manner of levying and collecting taxes upon private property, and could declare a tract of land chargeable with taxes, irrespective of its ownership, or in whose name it was assessed or advertised, and that an erroneous assessment did not vitiate the sale. In *McMillen* v. *Anderson*, 95 U. S. 37, it was held that due process of law did not require that a person should have an opportunity to be present when the tax was assessed against him, or that the tax should be collected by suit; and in *Kelley* v. *Pittsburgh*, 104 U. S. 78, that the general system of procedure for the levy and collection of taxes, established in this country, is, within the meaning of the Constitution, due process of law. In *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S.

232, 239, it was held that the process of taxation did not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. "It involves no violation of due process of law, when it is executed in accordance to customary forms and established usages, or in subordination to the principles which underlie them."

The main objection to section 25, above quoted, seems to be that it makes the deed conclusive evidence of the regularity of all proceedings not appearing of record, and hence that it is obnoxious to the ruling of this court in *Marx* v. *Hanthorn*, 148 U. S. 172, in which we held that as the legislature could not deprive one of his property by making his adversary's claim to it conclusive of its own validity, it could not make a tax deed conclusive evidence of the holder's title to land.

But conceding this to be so, there is another section proper to be considered in this connection, and that is section 29, which reads as follows:

"29. In all cases in which a question shall arise as to any such sale or deed, or the effect thereof, such deed shall be *prima facie* evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs and assigns, . . . that the person named in the deed as clerk of the county court was such, that the sheriff or other officer who made the sale was such sheriff or officer as stated in such deed, *that the material facts therein recited are true*, and that such estate as is mentioned in the twenty-fifth section of this chapter vested in the grantee in the deed."

Assuming the common law rule to be, as stated by the elementary writers upon taxation, that the purchaser at a tax sale is bound to take upon himself the burden of showing the regularity of all proceedings prior thereto, it is entirely clear that statutes declaring the tax deed to be *prima facie* evidence, not only of regularity in the sale, but of all prior proceedings, and of title in the purchaser, are valid, since the only effect of such statutes is to change the burden of proof which rested at common law upon the purchaser and cast it upon the party who contests the sale. Indeed, the validity of these acts was

expressly affirmed by this court in *Pillow* v. *Roberts*, 13 How. 472, 476, and *Williams* v. *Kirtland*, 13 Wall. 306.

Even if the provisions of section 25, making irregularities of a sale immaterial, were invalid, it would still result that under section 29 the facts recited in the deed would be presumed to be true, and the burden be thrown upon the landowner of disproving them. This burden the plaintiff has not assumed, but he is content to rely, and stake his whole case, upon the fact that the return of the sheriff did not show a compliance with the procedure marked out by the statute. Even if it were admitted that due process of law required the observance of all the steps prescribed by this statute, it does not demand that they shall be made matter of record, much less that they shall be made matter of a particular record, such for instance as the return of the sheriff of the sale of the lands. Under the Fourteenth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice; but it is not bound to provide that the particular steps of a procedure for the collection of such taxes shall be proven by written evidence; and it may properly impose upon the taxpayer the burden of showing that in a particular case the statutory method was not observed. The fact that the return of the sheriff does not recite the various steps of the procedure when the statute does not contemplate that it shall do so, is no evidence whatever that they were not followed to the letter. If the plaintiff had alleged that in the proceedings for the sale of these lands the sheriff had failed to comply with the law, and the defendant had pleaded that by the curative section (25), irregularities not appearing of record would not vitiate the deed, the constitutionality of that section would properly be raised; but the plaintiff in this case was content to put his bill upon the ground that the record, namely, the sheriff's return of sale, did not set forth that the procedure prescribed by statute, preceding and accompanying the sale, had been followed. This is an effort to test the constitutionality of the law without showing that the plaintiff had been injured by its application, and in this particular the case falls within our ruling in *Tyler* v. *Judges of Registration*, 179

U. S. 405, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic. For aught that appears, the proceedings may have been perfectly regular, and his bill rests solely upon the proposition that there may have been irregularities in the sheriff's sale, and that, if there were, the statute validating the deed, notwithstanding such irregularities, is unconstitutional, and deprives him of his property without due process of law. This proposition contains its own answer.

The exact case then made by the bill is this: The plaintiff seeks to avoid a sale made twelve years before by an allegation that the record, namely, the sheriff's return of the sale, does not show a compliance with the statute in certain particulars, without also averring that in fact there was a failure to perform some step required by law. To hold a sale invalid upon these allegations might result in upsetting every sale for taxes made in West Virginia for the past twenty years.

We are of the opinion that no case is made by the bill, that the judgment of the Circuit Court is correct, and it is therefore

Affirmed.

BAKER *v.* BALDWIN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 4. Submitted October 14, 1902.—Decided November 3, 1902.

The Supreme Court of Michigan affirmed a decree compelling the release of a mortgage, payment whereof had been tendered in silver dollars coined after 1878 and refused on the ground that the legal tender provisions of the act of Congress of February 28, 1878, were unconstitutional. As such decision was not against the validity of the statute but sustained its validity, and as the jurisdiction of this court over the judgments and decrees of state courts in suits involving the validity of statutes of the Uni-

ted States can only be exercised under section 709 of the Revised Statutes when the decision is against their validity, the writ of error was dismissed.

THE case is stated in the opinion of the court.

Mr. Albert B. Hall and *Mr. Fred A. Baker, in propria persona*, for plaintiff in error.

Mr. Timothy E. Tarsney for defendant in error.

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

This was a bill filed by Stephen Baldwin in the Circuit Court for the county of Oakland, Michigan, against Fred A. Baker, to compel the release of a mortgage given to secure payment of a promissory note for three hundred and thirty dollars, dated January 12, 1894, and payable in three years thereafter.

Baldwin had purchased the land subject to the mortgage, which had been assigned to Baker, and tendered the amount due thereon in silver dollars coined after 1878. This tender Baker declined to accept on the ground that the legal tender provisions of the act of Congress of February 28, 1878, entitled "An act to authorize the coinage of the standard silver dollar, and to restore its legal-tender character," 20 Stat. 25, c. 20, were unconstitutional, and refused to discharge the mortgage as demanded by Baldwin.

The Circuit Court for Oakland County entered a decree in accordance with the prayer of the bill, and Baker carried the cause by appeal to the Supreme Court of Michigan, which affirmed the decree. *Baldwin* v. *Baker*, 121 Michigan, 259. This writ of error was then allowed.

The Supreme Court of Michigan said: "The sole question presented is whether the act in question, making the silver dollar of 412.5 grains troy of standard silver a full legal tender for all debts and dues, public and private, is constitutional;" and held that it was. That decision is assigned for error but it was not a decision against the validity of the statute, and on the contrary sustained its validity.

Statement of the Case.

As our jurisdiction over the judgments and decrees of state courts in suits in which the validity of statutes of the United States is drawn in question can only be exercised, under section 709 of the Revised Statutes, when the decision is against their validity the writ of error cannot be maintained. *Missouri* v. *Andriano*, 138 U. S. 496; *Rae* v. *Homestead Loan and Guaranty Company*, 176 U. S. 121.

Writ of error dismissed.

KANSAS CITY SUBURBAN BELT RAILWAY COMPANY *v.* HERMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 321. Submitted October 20, 1902.—Decided November 3, 1902.

While an action commenced in a state court against two defendants, one of whom is a resident and the other a non-resident, may be removed to the Circuit Court of the United States by the non-resident defendant if it can be shown that the cause of action is separable and the resident defendant is joined fraudulently for the purpose of preventing the removal of the cause to the Federal court, such removal cannot be had if it does not appear that the resident defendant, is fraudulently joined for such purpose.

This rule will be adhered to even if on the trial of the action the lower court holds that no evidence was given by the plaintiff tending to show liability of the resident defendant, and a second application for removal from the state to the Federal court has been made and denied after a trial, and the trial court has sustained a demurrer to the evidence as to the resident defendant, and where it appears that the ruling was on the merits and *in invitum*.

Powers v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, distinguished, and *Whitcomb* v. *Smithson*, 175 U. S. 635, followed.

Where a fraudulent joinder of defendants is averred by the party petitioning for removal and is specifically denied, the petitioner has the affirmative of the issue.

This was an action brought by Andrew Herman, a minor, by his next friend, in the Court of Common Pleas of Wyandotte County, Kansas, September 18, 1897, against the Union

Terminal Railway Company, a corporation of Kansas, and the Kansas City Suburban Belt Railway Company, a corporation of Missouri, to recover damages for injuries inflicted through their joint or concurrent negligence.

The Belt Railway Company, October 18, 1897, filed a verified petition and bond for removal in proper form on the ground of a separable controversy; which petition alleged the controversy between plaintiff and petitioner to be distinct and separable from that between plaintiff and the Union Terminal Railway Company, on these grounds:

"1. Defendant, The Union Terminal Railway Company, owns, repairs and maintains the railroad mentioned in plaintiff's petition. Your petitioner has no interest therein, except that it has leased same and pays certain yearly rental for the use of said tracks. All of the locomotives, engines and cars running over said railroad are the property of your petitioner, or subject to its control. Defendant Terminal Company has no control over the operation of trains and has no employés in train service. Defendant The Union Terminal Railway Company is responsible for the condition of the track and your petitioner, and none other, for the acts and doings of all persons operating trains.

"2. The plaintiff herein has declared upon two distinct causes of action: First: for maintaining a defective switch; and second: for negligent operation of a train of cars, the first of which, if true, is negligence chargeable against defendant The Union Terminal Railway Company, and the second, if true, is negligence chargeable against your petitioner.

"3. The train of cars mentioned in the petition was operated by your petitioner as averred. All of the parties in charge thereof were in your petitioner's employ and none other.

"4. By reason of the foregoing your petitioner says that whatever cause of action plaintiff has for negligent operation of said railroad train lies against your petitioner exclusively."

The application for removal was heard February 5, 1898, and upon argument denied. The Belt Company thereupon filed a transcript of the record in the Circuit Court of the United States for the District of Kansas, and plaintiff made a

motion to remand, which was sustained by the Circuit Court, and the cause remanded to the state court "on the —— day of May, 1898." Each of the two railroad companies defendant then filed its separate demurrer, May 28, 1898, assigning as causes, misjoinder of parties; and that plaintiff had not stated a cause of action or facts sufficient to constitute a cause of action against it. These demurrers were severally overruled, and the defendants severally answered. The cause came on for trial October 18, 1898, and on October 20, at the close of the evidence for plaintiff, each company filed its separate demurrer to the evidence on the ground that the same was not sufficient to establish a cause of action against it. The court sustained the demurrer of the Terminal Company, the Kansas corporation, and entered judgment in its favor, to which ruling of the court plaintiff at the time excepted; and the court overruled the demurrer of the Belt Company, the Missouri corporation, to which ruling the Belt Company excepted. Thereupon the Belt Company filed a second verified petition for removal, which, after rehearsing the prior proceedings, thus continued:

"And the defendant further says that no evidence was offered or introduced by plaintiff or attempt made to show a cause of action against said Union Terminal Railway Company; that said Union Terminal Railway Company was joined with this defendant fraudulently and for the sole purpose of preventing a removal of this cause to the Circuit Court of the United States, and with no purpose or intent of attempting to show any cause of action against it.

"This defendant now here shows to the court that there is a separable controversy and that the plaintiff's cause of action exists against the defendant alone and in nowise against the said defendant, The Union Terminal Railway Company. That no cause of action ever existed against the defendant, The Union Terminal Railway Company, as plaintiff at all times well knew."

In response to this petition plaintiff filed without objection an affidavit, which stated, among other things, that it was not true "that plaintiff joined the Union Terminal Railway Com-

pany as defendant therein fraudulently or for the purpose of giving this court jurisdiction of the petitioner, but on the contrary, plaintiff avers that said action was brought in good faith against both defendants as joint tort feasors, and that plaintiff believed in good faith that he has a joint cause of action against both defendants, and had subpœnas issued for witnesses to prove directly the responsibilities of the Union Terminal Railway Company for the injuries sustained by plaintiff, but that on account of the removal of a witness from the State, plaintiff was at the last moment unable to obtain certain testimony, which, if introduced, would have tended to prove the joint liability of said defendants. That plaintiff has excepted to the ruling of the court sustaining a demurrer to the evidence on the part of the Union Terminal Railway Company in the trial of this case, for the purpose of preserving his rights in this action against both of said defendants jointly." And it was further stated that counsel had relied on the production, on notice which had been given, of "writings showing the relations existing between the two defendant companies in the operation and maintenance of their lines of railroad where the injuries were received," and on an agreement with counsel for both of the defendants to admit the facts as to the relations between said companies, which, when it was too late to adduce other testimony, was not fulfilled.

The application for removal was overruled, and the Belt Company excepted, but took no bill of exceptions embodying the evidence to which the demurrers had been directed. The trial then proceeded, and resulted in a disagreement of the jury.

Plaintiff subsequently filed an amended petition reducing the damages claimed to less than $2000, and the cause was again tried, and resulted in a verdict and judgment in favor of plaintiff for $1500. The cause was carried to the Kansas Court of Appeals and the judgment affirmed, and thence to the Supreme Court of Kansas with like result. *Kansas City Suburban Belt Railway Company* v. *Herman et al.*, 68 Pac. Rep. 46.

A writ of error from this court was then allowed by the Chief Justice of Kansas, and citation issued to and acknowledged

on behalf of Herman, and the Union Terminal Railway Company. The case was submitted on motions to dismiss or affirm.

Mr. Gardiner Lathrop, Mr. Thomas R. Marrow and *Mr. Samuel W. Moore* for plaintiff in error. *Mr. John W. Fox* was with them on the brief.

Mr. Silas Porter for defendant in error. *Mr. W. B. Sutton* was with him on the brief.

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

The question is whether the state court erred in denying the second application for removal, and in view of our previous rulings in respect of such applications we think there was color for the motion to dismiss. And reference to two recent decisions of this court will indicate the reasons for our conclusion that the motion to affirm must be sustained.

In *Powers* v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, the railroad company filed its petition for removal on the grounds of separable controversy, and that its co-defendants were fraudulently and improperly joined in order to defeat the company's right of removal. The transcript of the record of the state court was filed in the Circuit Court of the United States, and a motion to remand was sustained for want of separable controversy. Thereafter, when the case was called for trial in the state court, plaintiff discontinued his action against the co-defendants, and the company filed a second petition for removal, which was denied. The company then again filed a transcript of the record of the proceedings in the Circuit Court, and plaintiff again moved to remand, and the Circuit Court, being of opinion that plaintiff had fraudulently joined the co-defendants in order to defeat the removal and was estopped to deny that the second petition for removal was filed in time, denied the motion to remand. 65 Fed. Rep. 129. Final judgment was afterwards rendered in the company's favor, and a

writ of error was sued out from this court on the sole ground that the cause had not been properly removed into the Circuit Court. The judgment was affirmed, and it was held that "when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time." But we did not pass upon the questions of fraudulent joinder and estoppel because the application was seasonably made, and stated sufficient ground for removal apart from fraud.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, the action had been brought by Smithson, in a Minnesota court, against the Chicago Great Western Railway Company and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railroad Company, to recover for personal injuries inflicted, while he was serving the Chicago company as a locomotive fireman, in the collision of the locomotive on which he was at work, and another locomotive operated by Whitcomb and Morris as receivers. The Chicago company answered the complaint and the receivers filed a petition for the removal of the cause into the Circuit Court of the United States for Minnesota, alleging diverse citizenship; that they were officers of the United States court; that the controversy was separable, and that the railway company was fraudulently made a party to prevent removal. Plaintiff answered the petition and asserted that the company was made party defendant in good faith, and not for that purpose. An order of removal was entered and the cause sent to the Circuit Court, which and thereafter remanded it to the state court. Trial was had, and after the testimony was closed counsel for the Chicago company moved that the jury be instructed to return a verdict in behalf of that defendant, which motion was granted. The receivers then presented a petition for removal, but the court denied the application, and exception was taken. The court thereupon instructed the jury to return a verdict in favor of the Chicago company, which was done, and the cause went to the jury, which returned a verdict against

the receivers and assessed plaintiff's damages. Judgment was entered on the verdict, and subsequently affirmed by the Supreme Court of Minnesota on appeal, and a writ of error was sued out from this court. Motions to dismiss or affirm were submitted, and we held that there was color for the motion to dismiss, and affirmed the judgment. We there said: "The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the Circuit Court. This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*."

It was pointed out that the ruling of the trial court "was a ruling on the merits and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." We held also that the judgment of the Circuit Court in remanding the cause, when removed on the first application, covered the question of fact as to good faith in the joinder, and added that "assuming, without deciding, that that contention could have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it."

It will be perceived that: In *Powers* v. *Railway Company*, two applications for removal were made; they were severally denied; and the record was filed in the Circuit Court of the

United States in each instance. Remand was granted on the first removal and denied as to the second. Plaintiff voluntarily discontinued his action against the company's co-defendants before trial, thereby leaving the case pending between citizens of different States, and no necessity to dispose of the issue as to fraudulent joinder arose.

In *Smithson* v. *Whitcomb* two applications for removal were made and they were severally denied, but the record was filed in the Circuit Court of the United States only on denial of the first application, and the case was only once remanded. Plaintiff did not discontinue his action against either of the defendants and went to trial against both, and the trial court directed a verdict in favor of one of them. The ruling was on the merits and *in invitum*.

In the case at bar, two applications for removal were made, and they were severally denied, but the record was filed in the Circuit Court of the United States only on the denial of the first application, and the case was only once remanded. Plaintiff did not discontinue as to either of the defendants and went to trial against both, and the trial court sustained in favor of one of them a demurrer to the evidence. Here again the ruling was on the merits and *in invitum*.

The first petition in terms raised no issue of fraudulent joinder, but the second petition did. Was that issue seasonably raised, and, if so, ought the case to have been removed? The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after plaintiff had introduced his evidence, notwithstanding the averments in the first petition.

But apart from this, the averments of fraud were specifically denied, and, so far as this record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case. *Plymouth Mining Company* v. *Amador Canal Company*, 118 U. S. 264, 270.

Doubtless the general rule is that issues of fact raised on petitions for removal should be tried in the Circuit Court of the United States, but petitioner did not file the record in the Circuit Court, and as the issue was correctly disposed of, it would

be absurd to send the case back to be removed for the purpose of being remanded, and we are obliged to deal with the record as it is. Nor was the evidence introduced on plaintiff's behalf, and demurred to, made part of the record, and the bare fact that the trial court held it insufficient to justify a verdict against the Terminal Company was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown that plaintiff had reasonable ground for a *bona fide* belief in the liability of both defendants. In these circumstances, the case comes within *Smithson* v. *Whitcomb*, and the judgment must be

Affirmed.

DREYER *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 37. Argued and submitted April 18, 1902.—Decided, November 10, 1902.

Dreyer was convicted in a state court of Illinois for having failed to turn over, as required by statute, to his successor in office, certain revenues, bonds, funds, warrants and personal property, that came into his hands as Treasurer of a Board of Public Park Commissioners. The judgment of conviction was affirmed by the Supreme Court of Illinois, and the accused was sentenced to the penitentiary.

By a statute of Illinois it was provided: "When the jury retire to consider of their verdict, in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted) unless by leave of court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court." In this case the statute was not complied with, but objection on that ground was first made on a motion for new trial.

The accused in this case was sentenced to the penitentiary, and the warden was commanded to confine him in safe and secure custody, from and after the delivery thereof, "until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of impris-

onment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced." The sentence was based upon a statute of Illinois, approved April 21, 1899, and known as the Indeterminate Sentence Act. By that statute it was provided: "Whenever it shall be made to appear to the satisfaction of the State Board of Pardons from the warden's report or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty and that his final release will not be incompatible with the welfare of society, the State Board of Pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of, his conviction, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner in the nature of a release or commutation of his sentence, to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order. It is hereby made the duty of the clerk of the Board of Pardons to send written notice of the fact to the warden of the penitentiary of the proper district whenever any prisoner on parole is finally released by said board." Laws of Ill. 1899, p. 142. *Held:*

(1) That the ruling that the objection as to non-compliance with the statute requiring the jury to be placed in charge of a sworn officer, was not made in time and was to be deemed as waived, presented no question of a Federal nature, but was an adjudication simply of a question of criminal and local law, and did not impair the constitutional guaranty that no State shall deprive any person of liberty without due process of law.

(2) The objection that the act of 1899 conferred upon executive or ministerial officers powers of a judicial nature, did not present any question under the due-process clause of the Fourteenth Amendment. Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty.

(3) If the jury in a criminal cause be discharged by the court because of their being unable to agree upon a verdict, the accused, if tried a second time, cannot be said to have been put twice in jeopardy of life or limb, whether regard be had to the Fifth or the Fourteenth Amendment.

Statement of the Case.

By an indictment returned in the Criminal Court of Cook County, Illinois, on the 4th day of February, 1899, the plaintiff in error Dreyer was charged with the offence of having failed to turn over to his successor in office, as treasurer of the West Chicago Park Commissioners, revenues, bonds, funds, warrants and personal property that came to his hands as such treasurer, of the value of $316,013.40 — said Commissioners constituting a Board of Public Park Commissioners appointed by the Governor and confirmed by the Senate of Illinois, and as such having the supervision of the public parks and boulevards in the town of West Chicago and authority under the law to collect and disburse moneys, bonds, etc., for their maintenance.

The indictment was based on section 215 of the Criminal Code of Illinois, which is as follows:

"If any state, county, town, municipal or other officer or person, who now is or hereafter may be authorized by law to collect, receive, safely keep or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes, warrants or dues, or other funds or securities belonging to the State, or any county, township, incorporated city, town or village, or any state institution, or any canal, turnpike, railroad, school or college fund, or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes or belonging to any insurance or other company or person, required or authorized by law to be placed in the keeping of any such officer or person, shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one *nor more than ten years: Provided*, Such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made: *And provided*, That no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to one hundred dollars, or if it appear that such failure or refusal is occasioned by unavoidable loss or accident. Every person con-

victed under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this State." Hurd's Revised Statutes, 1901, p. 630, § 215.

A trial was commenced on the 29th day of August, 1899, and a jury was empaneled and evidence heard. The jury not having agreed upon a verdict were discharged.

A second trial was begun on the 19th day of February, 1900. The defendant filed a plea of once in jeopardy, which in substance averred that it was not true, as recited in the order of court at the previous trial, that the jury were unable to agree upon a verdict; also, that the discharge of the jury was without the defendant's assent, was against his objections made at the time, and was without any moral or physical necessity justifying such a course on the part of the trial court.

On motion of the State, the plea of former jeopardy was stricken from the files, the defendant at the time excepting to the action of the court.

There was a second trial which resulted in the defendant being found "guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment," the jury stating in the verdict that the amount not paid over was $316,000, and imposing the punishment of confinement in the penitentiary.

The defendant upon written grounds filed moved for a new trial, and also moved in arrest of judgment. Both motions were overruled, and it was ordered and adjudged that the defendant be sentenced to the penitentiary "for the crime of failure to pay over money to his successor in office, whereof he stands convicted."

The judgment of the trial court having been affirmed by the Supreme Court of Illinois, the case is here upon writ of error allowed by the Chief Justice of that court.

Mr. Alfred S. Austrian for plaintiff in error. *Mr. T. A. Moran* and *Mr. Levy Mayer* were with him on the brief.

Mr. H. J. Hamlin, attorney general of the State of Illinois,

Mr. Charles S. Deneen and *Mr. A. C. Barnes* for defendants in error.

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

It is contended that the judgment of the Supreme Court of Illinois, affirming the judgment in the present case of the Criminal Court of Cook County, in that State, denied to the plaintiff in error certain rights secured to him by the Constitution of the United States, particularly by the clause of the Fourteenth Amendment forbidding a State to deprive any person of liberty without due process of law.

The defendant insists that three questions, involving rights secured by the Constitution of the United States, are presented by the assignments of error.

1. The first of those questions, as stated by his counsel, relates to the alleged "omission to swear the baliffs in the manner prescribed by the common law and the statutes of the State of Illinois before the jury retired to consider of their verdict." This point will be first examined.

The Criminal Code of Illinois provides: "When the jury retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court: *Provided*, In cases of misdemeanor only, if the prosecutor for the people and the person on trial by himself or counsel, shall agree, which agreement shall be entered upon the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the

lawful verdict of such jury." Hurd's Rev. Stat. Ill. 1901, p. 660, § 435.

Referring to this section the Supreme Court, in the present case, said that it was reversible error in a trial for a felony to allow the jury to retire for the purpose of considering their verdict without being placed in charge of a sworn officer as required by the statute—citing *McIntyre* v. *People*, 38 Illinois, 514, 518; *Lewis* v. *People*, 44 Illinois, 452, 454; *Sanders* v. *People*, 124 Illinois, 218, and *Farley* v. *People*, 138 Illinois, 97. In *Lewis* v. *People*, just cited, the court observed that the provisions of the above section "show the great care and solicitude of the General Assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned, and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement. The jury should be entirely free from all outside influences from the time they are empaneled until they return, their verdict and it is accepted and they discharged; and the legislature have determined that the provisions of this statute are necessary to accomplish the object. It is a provision easily complied with, and one member of the court, at least, has never in practice seen it dispensed with, except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power short of its repeal, to dispense with this requirement."

But the court further said: "The point of controversy in the present case is not, however, whether it is reversible error to fail to comply with the statute, but whether the question is properly raised upon this record. No objection or exception was taken by the defendant, at the time of the retirement of the jury, that the officers in charge of it were not sworn, but the question was raised by him for the first time on his motion for new trial, one of the grounds of that motion being 'that when the jury retired to consider of their verdict in said case no constable or other officer was sworn or affirmed to attend the jury, in manner and form as provided by the statute of the State of Illinois.' . . . Affidavits made by the bailiffs them-

selves, and by an assistant of the prosecuting attorney, who participated in the trial, tend to prove that the oath administered was in the statutory form; but these affidavits also show that the only oath administered to them was on the 21st day of February, immediately after the empaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out until February 28th, so that even by the proof made on behalf of the people the only oath taken by the bailiffs was some six days prior to their retirement with the jury, and prior to the introduction of evidence and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the statute that 'when the jury shall retire to consider of their verdict,' etc., 'a constable or other officer shall be sworn,' etc. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel and instructions of the court—six or seven days prior to the retirement of the jury to consider of their verdict—would be little less than farcical."

It was, however, held, that under the principles established by former decisions in Illinois, the requirement of the statute could be waived by the accused, and that his failure to object at the time that the officer having charge of the jury was not sworn when the jury retired was equivalent to a waiver of compliance with its provisions. And it was adjudged "that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable, or other officer, sworn to attend it, as prescribed by statute, is not properly raised by the record [of this case] and therefore [is] not available as error in this court."

It thus appears that while the state court expressly recognized the rights of the accused under the statute it adjudged that he had not properly raised on the record the question raised for the first time on motion for a new trial as to noncompliance with its provisions. But manifestly this decision presents no question of a Federal nature. A ruling to the effect that the accused shall be deemed to have waived compliance with the statute if the record does not show that he

objected at the time to the action of the court, was an adjudication simply of a question of criminal practice and local law, was not in derogation of the substantial right recognized by the statute, and did not impair the constitutional guaranty that no State shall deprive any person of liberty without due process of law. We cannot perceive that such a decision by the highest court of the State brings the case upon this point within the Fourteenth Amendment, even if it should be assumed that the due process of law prescribed by that Amendment required that a jury in a felony case should be placed in charge of an officer especially sworn at the time to attend and keep them together until they returned their verdict or were discharged.

We adjudge that in holding that the record did not sufficiently present for consideration the question now raised, the state court, even if it erred in its decision, did not infringe any right secured to the defendant by the Constitution of the United States.

2. Another question which counsel for the defendant contends is raised by the assignments of error relates to the final judgment of the Criminal Court of Cook County. It was adjudged by the trial court that the defendant be taken to the penitentiary of the State, at Joliet, and delivered to its warden or keeper, who was required and commanded to "confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, *until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.*"

The judgment was in conformity with a statute of Illinois approved April 21, 1899, entitled "An act to revise the law in relation to the sentence and commitment of prisoners convicted of crime, and providing for a system of parole," etc. The statute is sometimes referred to as the Indeterminate Sentence Act of Illinois, and as its validity under the Constitution of the United States is assailed its provisions must be examined.

That statute provides that every male person over twenty years of age, and every female person over eighteen years of

age, convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnapping, shall be sentenced to the penitentiary, the court imposing the sentence to fix its limit or duration, the term of such imprisonment not to be less than one year, nor exceeding the maximum term provided by law for the crime of which the prisoner was convicted, making allowance for good time, as provided by law. § 1.

It was made the duty of each board of penitentiary commissioners to adopt such rules concerning prisoners committed to their custody as would prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. To that end it provided that whenever any prisoner was received into the penitentiary the warden should cause to be entered in a register the date of his admission, the name, nativity, nationality, with such other facts as could be ascertained, of parentage, education, occupation and early social influences as seemed to indicate the constitutional and acquired defects and tendencies of the prisoner, and, based upon these, an estimate of his then present condition, and the best probable plan of treatment. And the physician of the penitentiary was required to carefully examine each prisoner when received and enter in a register the name, nationality or race, the weight, stature and family history of each prisoner, also a statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, and the measurement of the chest and abdomen, and any existing disease or deformity, or other disability, acquired or inherited. Upon the warden's register was to be entered from time to time minutes of observed improvement or deterioration of character, and notes as to the method and treatment employed; also all alterations affecting the standing or situation of the prisoner, and any subsequent facts or personal history brought officially to his knowledge bearing upon the question of the parole or final release of the prisoner; and it was the duty of the warden, or, in his absence, the deputy warden, of each penitentiary to attend each meeting of the Board of Pardons held at the penitentiary of which he was warden, for the purpose of examining prisoners as to

their fitness for parole. He shall advise with that Board concerning each case, and furnish it with his opinion, in writing, as to the fitness of each prisoner for parole whose case the board considered. And it was made the duty of every public officer to whom inquiry was addressed by the clerk of the Board of Pardons, concerning any prisoner, to give the board all information possessed or accessible to him, which might throw light upon the question of the fitness of the prisoner to receive the benefits of parole. § 2.

It was made the duty of the judge before whom any prisoner was convicted, and also the State's Attorney, of the county in which he was convicted, to furnish the board of penitentiary commissioners an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the committal of the crime of which he was convicted, relative to his habits, associates, disposition and reputation, and any other facts and circumstances tending to throw any light upon the question as to whether such prisoner was capable of again becoming a law-abiding citizen. § 3.

Other sections of the statute are as follows:

"4. The said Board of Pardons shall have power to establish rules and regulations under which prisoners in the penitentiary may be allowed to go upon parole outside of the penitentiary building and enclosure: *Provided*, That no prisoner shall be released from either penitentiary on parole until the State Board of Pardons or the warden of said penitentiary shall have made arrangements, or shall have satisfactory evidence that arrangements have been made, for his honorable and useful employment while upon parole in some suitable occupation, and also for a proper and suitable home, free from criminal influences, and without expense to the State: *And, provided further*, That all prisoners temporarily so released upon parole shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary from which they were paroled, and shall, during the said time, be considered as remaining under conviction for the crime of which they were

convicted and sentenced and subject at any time to be taken back within the enclosure of said penitentiary; and full power to enforce such rules and regulations and to retake and reimprison any inmate so upon parole is hereby conferred upon the warden of said penitentiary, whose order or writ, certified by the clerk of said penitentiary, with the seal of the institution attached, and directed to all sheriffs, coroners, constables, police officers, or to any particular person named in said order or writ, shall be sufficient warrant for the officer or other person named therein to authorize said officer or person to arrest and deliver to the warden of said penitentiary the body of the conditionally released or paroled prisoner named in said writ, and it is hereby made the duty of all sheriffs, coroners, constables, police officers or other persons named therein to execute said order or writ the same as other criminal process. In case any prisoner so conditionally released or paroled shall flee beyond the limit of the State, he may be returned pursuant to the provisions of the law of this State relating to fugitives from justice. It shall be the duty of the warden, immediately upon the return of any conditionally released or paroled prisoner, to make report of the same to the State Board of Pardons, giving the reasons for the return of said paroled prisoner: *Provided, further*, That the State Board of Pardons may, in its discretion, permit any prisoner to temporarily and conditionally depart from such penitentiary on parole and go to some county in the State named and there remain within the limits of the county, and not to depart from the same without written authority from said board, for such length of time as the board may determine, and upon the further condition that such prisoner shall, during the time of his parole, be and continuously remain a law abiding citizen, of industrious and temperate habits, and report to the sheriff of the county on the first day of each month giving a particular account of his conduct during the month and it shall be the duty of such sheriff to investigate such report and ascertain what has been the habits and conduct of such prisoner during the time covered by such report, and to transmit such report upon blanks furnished him by the warden of the penitentiary, to said warden within five days after the receipt of

such prisoner's report, adding to such report the sheriff's statement as to the truth of the report so made to him by the prisoner. It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner, and in no case divulge such fact to any person or persons so long as said prisoner obeys the terms and conditions of his parole.

"5. Upon the granting of a parole to any prisoner the warden shall provide him with suitable clothing, ten dollars in money, which may be paid him in installments at the discretion of the warden, and shall procure transportation for him to his place of employment or to the county seat of the county to which he is paroled.

"6. It shall be the duty of the warden to keep in communication, as far as possible, with all prisoners who are on parole from the penitentiary of which he is the warden, also with their employers, and when, in his opinion, any prisoner who has served not less than six months of his parole acceptably has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the warden shall make a certificate to that effect to the State Board of Pardons; and whenever it shall be made to appear to the satisfaction of the State Board of Pardons, from the warden's report or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty and that his final release will not be incompatible with the welfare of society, *the State Board of Pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of, his conviction, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner in the nature of a release or commutation of his sentence, to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order.* It is hereby made the duty of the clerk of the Board of Pardons to

send written notice of the fact to the warden of the penitentiary of the proper district whenever any prisoner on parole is finally released by said board." Laws of Ill. 1899, p. 142.

In this connection we are referred to article 3 of the constitution of Illinois, dividing the powers of government into three distinct departments—legislative, executive, judicial—and providing that "no person, or collection of persons, being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted;" to section 1 of article 6 of the same constitution, providing that "the judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, county courts, justices of the peace, police magistrates and such courts as may be created by law in and for cities and incorporated towns;" and to section 13 of article 5, providing that the pardoning power shall be in the Governor of the State.

If we do not misapprehend the position of counsel, it is that the Indeterminate Sentence Act of 1899 is inconsistent with the above provisions of the state constitution, in that it confers judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invests them with the pardoning power committed by the constitution to the Governor of the State.

We will not stop to consider whether the statute is in conflict with the provisions of the state constitution to which reference is here made. We may, however, in passing observe that a similar statute, previously enacted, was upheld by the Supreme Court of Illinois. *George* v. *The People*, 167 Illinois, 447. It is only necessary now to say that even if the statute in question were obnoxious to the objection now urged by plaintiff in error, it would not follow that this court would review a judgment of the highest court of the State which expressly or by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department, with powers that are judicial and authorizing them to exercise the pardoning power which alone belongs to the Governor of the State, presents no question under the Constitution of the

United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. "When we speak," said Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution." Story's Const. (5th ed.) 393. Again: "Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." Story's Const. (5th ed.) 395.

The objection that the act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due-process clause of the Fourteenth Amendment.

3. The remaining contention of the defendant is that, under the circumstances disclosed by the record, the second trial of the case placed him twice in jeopardy, and therefore the judgment should be reversed.

Under date of September 1, 1899, the following order was made of record in the case: "This day come the said People,

by Charles S. Deneen, State's Attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and also come the jurors of the jury aforesaid; and the aforesaid jury hearing the arguments of counsel and instructions of the court, retire in charge of sworn officers to consider of their verdict." And under date of September 2d, this order appears: "This day come the said People, by Charles S. Deneen, State's Attorney, and the defendant, as well in his own proper person as by his counsel, also comes. And also come the jurors of the jury aforesaid, being now returned into court, and, *being unable to agree upon a verdict, are thereupon by order of this court discharged from further consideration of this cause.*"

It seems to be undisputed that the case was submitted to the jury at four o'clock in the afternoon and that the jury having retired to consider of their verdict were kept together until nine o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case.

The contention is that, notwithstanding the recital in the record that the jury were discharged by the court because they were unable to agree upon a verdict, such discharge was without moral or physical necessity and operated as an acquittal of the defendant.

Upon the face of the question under examination the inquiry might arise whether the due process of law required by the Fourteenth Amendment protects one accused of crime from being put twice in jeopardy of life or limb. In other words, is the right not to be put twice in jeopardy of life or limb forbidden by the Fourteenth Amendment; or, so far as the Constitution of the United States is concerned, is it forbidden only by the Fifth Amendment which prior to the adoption of the Fourteenth Amendment had been held as restricting only the powers of the National Government and its agencies?

We pass this important question without any consideration of it upon its merits, and content ourselves with referring to the decision of this court in *United States* v. *Perez*, 9 Wheat. 579. That was a capital case—in which without the consent of the prisoner or of the attorney of the United States, the jury

being unable to agree were discharged by the court from giving any verdict—this court, speaking by Mr. Justice Story, said: "We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." If the due process of law required by the Fourteenth Amendment embraces the guarantee that no person shall be put twice in jeopardy of life or limb—upon which question we need not now express an opinion—what was said in *United States* v. *Perez* is applicable to this case upon the present writ of error and is adverse to the contention of the accused that he was put twice in jeopardy.

The principles settled in *United States* v. *Perez*, we may remark, were reaffirmed in *Ex parte Lange*, 18 Wall. 163, 175; *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263; *Thompson* v. *United States*, 155 U. S. 271, 274.

Syllabus.

The conclusion is, that the judgment of the Supreme Court of Illinois did not deny to the plaintiff in error any right secured by the Constitution of the United States, and is therefore

Affirmed.

IOWA *v.* ROOD.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 9. Argued October 14, 15, 1902.—Decided November 17, 1902.

Where the title claimed by the State of Iowa to land formerly the bed of a lake rested solely upon the proposition that the State became vested, upon its admission into the Union, with sovereignty over the beds of all lakes within its borders, and upon the act of the General Government in meandering such lakes and excluding from its survey of public lands all such as lay beneath their waters, and the Supreme Court of the State has decided adversely to the State and in favor of one who claimed under the act of Congress of September 28, 1850, known as the swamp land act, there is no question involving the validity of any treaty or statute of the United States or the constitutionality of any state statute or authority which gives this court jurisdiction.

Neither article III of the treaty with France ceding Louisiana, article IV, section 3, of the Constitution of the United States, nor the act of Congress of 1846, admitting the State of Iowa into the Union on an equality with the original States, has even a remote bearing upon the question of title of the State of Iowa to the land beneath its lakes.

The mere fact that the plaintiff in error asserts title under a clause of the Constitution or an act of Congress, or that such act or a patent of the United States appears in the chain of title, does not constitute such a right, title or immunity as to give the Federal courts jurisdiction, unless there is either a plausible foundation for such claim, or the title involves the construction of the act or the determination of the rights of the party under it.

The action of the government surveyors in segregating and setting apart the lakes in question by meander lines from the public lands and the approval of such survey by the Commissioner of the General Land Office was not an adjudication by the Government of the United States by its duly authorized officers and agents, that the lake so segregated and set

Statement of the Case.

apart was the property of the State of Iowa and not a part of the public domain. It was beyond the powers of a government surveyor to determine the title to such lands, or to adjudicate anything whatever upon the subject.

THIS was a controversy over about 800 acres of land lying in the bed of what is known as Owl Lake, in Humboldt County, Iowa. The original plaintiffs, the appellees in this case, claimed under the act of Congress of September 28, 1850, commonly known as the swamp land grant. Defendants' position was that the lands were unsurveyed lands belonging to the national government, subject to entry under the homestead and preëmption laws, under which they had made entry. The State of Iowa intervened and claimed to own the land in virtue of its right of sovereignty over the beds of all lakes meandered by the general government.

The suit was originally instituted by a petition in equity filed in the District Court of Humboldt County by Edwin O. Rood and others against George A. Wallace and others, founded upon allegations: (1) that the lands were conveyed to the State under the swamp land act of September 28, 1850, and thence by intermediate conveyances to the plaintiff; (2) that at the date of this act the lands were in fact swamp and overflowed lands, and continued to be, until Pearsons, plaintiffs' grantor, received the title, marshy and unfit for cultivation, without artificial drainage. That in 1884, Pearsons began to reclaim the land by ditches, building fences around it, and for several years used and occupied it for pasturage, and spent a large amount of money in draining, reclaiming it and making it fit for cultivation; (3) that defendants have taken possession, and built a cabin upon the land, and are interfering with the plaintiffs in their use and enjoyment of it.

Wherefore an injunction was prayed.

A demurrer to this bill was overruled and an answer filed in general denial of the petition.

Thereupon the State of Iowa filed a petition of intervention, alleging that the land in question was a part of the bed of Owl Lake, and did not constitute any part of the land which the United States government was authorized or empowered to sell.

Statement of the Case.

That the State was duly admitted into the Union in 1846, and, as a sovereign State, became the owner of all the lakes within its borders, subject to the right of the public to use the same, and that the title to the soil was in the State. That in surveying the public lands adjoining the lake the same was meandered, and the land up to the meander lines sold by the United States to different persons, and after such survey and sale the United States had no right, title or interest in any part of the lake bed, and that the same had passed to the State upon its admission to the Union.

The petition denied that the land described was within the swamp land grant, and averred that the act of the plaintiffs and their vendors in draining the said lake and drawing off the water was unlawful.

Wherefore the State prayed a decree against both plaintiffs and defendants, quieting its title to the land, and for a writ of possession removing both parties therefrom.

Defendants Wallace and others subsequently amended their answer to the effect that the lands were unsurveyed lands, subject to entry by settlers, and that defendants had entered the lands as homesteads, built houses thereon, and occupied the same as homes. That, at the date of the swamp land act, the lands were covered by water from six to fifteen feet in depth, with well-defined shores and high banks upon the south and east sides, and navigable by ordinary steamboats. That the lands were never swampy, and never came within the meaning of the grant as swamp and overflowed lands. And that whatever rights plaintiffs might have in the land were junior and inferior to those of defendants.

Plaintiffs thereupon amended their petition by averring that since the commencement of the suit the lands had been patented to the State under the swamp land act of 1850; and answered the petition of the intervenor, alleging that by the proper officer of the government the character, quality and condition of said lands were duly adjudicated in the manner provided by law, and that the title of the United States passed through certain patents mentioned in amendments to plaintiffs' petition, and finally inured to the benefit of the plain-

tiffs, and that said patents have never been set aside nor canceled.

Testimony was taken by the plaintiffs, and a decree entered dismissing the intervenor's petition, and quieting the title in this and several other cases involving the same facts, in the plaintiffs. On an appeal taken to the Supreme Court of Iowa, the judgment of the District Court was confirmed. 109 Iowa, 5. Whereupon the State sued out a writ of error from this court.

Mr. Charles Mullan, attorney general of the State of Iowa, for plaintiff in error.

Mr. R. M. Wright and *Mr. J. P. Dolliver* for defendants in error.

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

Motion is made to dismiss this case upon the ground that no Federal question is involved; or if there be such question, that there was another non-Federal question, the decision of which was sufficient to sustain the judgment, irrespective of what the decision of the Supreme Court may have been upon such Federal question.

1. From the foregoing abstract of the pleadings it will be seen that the title set up by the State rests solely upon the proposition that it became vested, upon its admission into the Union under the act of Congress of December 28, 1846, 9 Stat. 117, with sovereignty over the beds of all lakes within its borders, and by the act of the general government in meandering such lakes, and excluding from its survey of public lands all such as lay beneath their waters. This clearly does not involve the validity of any treaty or statute of the United States, or the constitutionality of any state statute or authority, so that if jurisdiction exists in this court, it must be by reason of the claim of a title, right, privilege or immunity under the Constitution, or an authority exercised under the United States, the

decision of which was against such title, right, privilege or authority.

The real question then is whether the sovereignty of the State over the beds of its inland lakes rests upon some statute or provision of the Constitution, or upon general principles of the common law which long antedated the Constitution, and had their origin in rights conceded to the Crown centuries before the severance of our relations with the mother country. If the latter, then the State must look to the decisions of this court, recognizing and defining such rights and determining how far they are inherited, first, by the United States as the successor of the Crown, and second, by the several States upon their admission into the Union. This would not involve a construction of the Constitution, nor of any title derived thereunder, but a determination of the title of the Crown to lands beneath the beds of inland lakes and of the respective rights of the States and the general government as successors thereto.

In support of our jurisdiction the State relies (1) upon art. III of the treaty with France for the cession of Louisiana, 8 Stat. 200, which merely provides that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States;" (2) the provision of the Constitution, art. IV, sec. 3, which merely declares, with certain immaterial qualifications, that "new States may be admitted by the Congress into this Union;" and (3) upon the act of Congress of 1846, admitting the State of Iowa into the Union, with the provision that it should be admitted on an equal footing with the original States in all respects whatsoever.

None of these provisions was questioned by the Supreme Court of Iowa in its opinion, but neither of them has even a remote bearing upon the question of the title of the State to the land beneath its lakes. Indeed, the argument now made by the Attorney General, that the title of the State depends upon the construction given to this act of Congress, is quite inconsistent with his first assignment of error upon the merits,

which charges the court with error "in not holding that the beds of all the meandered lakes and streams in the State of Iowa belong to said State in trust for the public by virtue of its sovereignty, and that this right *does not depend upon any act of Congress or any grant from the United States.*" In other words, the State is put in the dilemma of insisting, for the purpose of sustaining the jurisdiction of this court, that the title of the State is dependent upon the proper construction of these three instruments, and, for the purpose of sustaining its case upon the merits, denying that the title depends upon either of them. This is an attempt to blow hot and cold upon the same question.

The mere fact that the plaintiff in error asserts title under a clause of the Constitution, or an act of Congress, is not in itself sufficient, unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336.

It is equally clear that the mere fact that an act of Congress or a patent of the United States appears in a chain of title does not constitute such a right, title or immunity as gives the Federal court jurisdiction, unless such title involves the construction of the act or the determination of the rights of the party under it. *De Lamar's Nevada G. M. Co.* v. *Nesbitt*, 177 U. S. 523.

The case of the *City of New Orleans* v. *Armas*, 9 Pet. 224, is directly in point. Plaintiffs claimed a parcel of land in the city of New Orleans by incomplete title from the Spanish government, which was, however, confirmed under the laws of the United States and a patent issued therefor. The city claimed the land as a part of a quay dedicated to the city in the original plan of the town, and therefore not grantable by the king. The state court gave judgment for the plaintiffs, which was affirmed by the Supreme Court, and the city sued out a writ of error. The court held, through Chief Justice Marshall, that to

sustain its jurisdiction it must be shown that the title set up by the city was protected by the treaty ceding Louisiana to the United States (the treaty involved in this case), or by some act of Congress applicable to that title. It was held that the third article of the treaty, above quoted, did not embrace the case, and that the act of Congress admitting Louisiana into the Union, which is identical in language with the act admitting Iowa, could not be construed to give appellate jurisdiction to this court over all questions of title between citizens of Louisiana; that the case involved no principle upon which this court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States, and that "it would also comprehend all controversies concerning titles in any of the new States, since they are admitted into the Union by laws expressed in similar language." The writ of error was dismissed. This case is conclusive against the existence of a Federal question in the case under consideration.

2. We are also asked to sustain the jurisdiction of this court upon the ground that the action of the government surveyors in segregating and setting apart the lake in question by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, was an adjudication by the government of the United States, by its duly authorized officers and agents, that the lake so segregated and set apart was the property of the State of Iowa and not a part of the public domain.

We do not so interpret the action of these officers. They undoubtedly did survey the lands adjoining this lake and meander the lake itself, but they determined nothing as to the title of the land beneath its waters—a determination which would have been wholly beyond their powers; but simply omitted those lands from the survey, and left their title to be subsequently determined either by state or Congressional action. It was obviously beyond the powers of a government surveyor, or of the Land Office, to determine the title to these lands, or to adjudicate anything whatever upon the subject.

Had the decision of the Supreme Court been adverse to the

plaintiffs, who claimed title under the swamp land act, it is possible that a writ of error might have lain from this court, but we have frequently held that to sustain such writ, the decision must be adverse to a right claimed under an act of Congress, or to the exercise of an authority granted by the United States. *Baker* v. *Baldwin*, decided this term, *ante*, p. 61.

The writ of error must be

Dismissed.

AMERICAN SCHOOL OF MAGNETIC HEALING *v.* McANNULTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 27. Argued October 15, 19, 1902.—Decided November 17, 1902.

On demurrer all the material facts averred in a bill of complaint are admitted including averments describing complainant's business and stating that it is founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the healing, curing, benefiting and remedying thereof, and that the human race does possess the innate power through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and they (complainants) discard and eliminate from their treatment what is commonly known as Christian Science, and they are confined to practical scientific treatment emanating from the source aforesaid." The foregoing allegations are not conclusions of law but statements of fact.

Such an allegation having been made in a bill of complaint the business referred to cannot on demurrer be properly pronounced such a fraud within the statutes of the United States as will justify a postmaster withholding matter sent to complainants through the mail in answer to advertisements on an order issued by the Postmaster General under sections 3929 and 4041 of the Revised Statutes of the United States, and section 4 of an act approved March 2, 1875, 28 Stat. 963, 964; but in overruling the demurrer, this court does not mean to preclude the defendant from showing on the trial, if he can, that the business of the complainants, as in fact conducted, amounts to a violation of such statutes.

The statutes referred to were not intended to cover any case which the Postmaster General might regard as based on false opinions, but only cases of actual fraud, in fact, in regard to which opinions formed no basis.

Conceding for the purposes of this case that Congress has full and absolute

Statement of the Case.

jurisdiction over the mails, still where the Postmaster General, in a case not covered by the acts of Congress, has assumed to act under the authority granted by the said statutes and made an order withholding mail and interfering with carrying on the business above described, even if such order be made after a hearing, the matter is subject to be reviewed by the courts; and while the conduct of the post office is a part of the administrative department of the Government, that fact does not always oust the courts of jurisdiction to grant relief to a party aggrieved by any action, by the head, or one of the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act.

Where the action of such an officer is unauthorized he thereby violates the property rights of the person whose letters are withheld.

In this case it not appearing that the complainants have violated any law they have the legal right under the general acts of Congress relating to the mails to have their letters delivered at the post office as directed, and as those letters contain checks, drafts, money orders and money itself, all of which became their property as soon as deposited in the various post offices for transmission by mail, if the same are not delivered to them they will sustain irreparable injury, and there being no adequate remedy at law, they are entitled to equitable relief and an injunction preventing the local postmaster withholding their mail under the order so issued by the Postmaster General.

THIS is an appeal under section 5 of the Circuit Court of Appeals act of 1891, to review directly the decree of the Circuit Court of the United States for the Western District of Missouri, dismissing the bill of complainants (appellants) on the merits. The bill, as amended by leave of the court, averred in substance that the complainants are, the one a business corporation incorporated under the laws of and doing business in the State of Missouri, and the other a resident and citizen of the State of Missouri; that the defendant was at the time of the filing of the bill and at the times therein stated postmaster in charge of the United States post office in the city of Nevada, State of Missouri, and a resident and a citizen of that State; that as such postmaster he has the exclusive management of the post office in the city of Nevada, and of the receipt and distribution of mail received at that city through the United States mails.

It was further averred that The American School of Magnetic Healing is located and has its chief office and place of business at the city of Nevada, and the complainant Kelly was at the time of the filing of the bill and at all the dates and times

mentioned therein secretary, treasurer and general manager of the corporation. In November, 1897, he located at Nevada and engaged in the business of healing diseases and ailments of the human family and the business of teaching the science of healing of human ills, and that in April, 1898, he procured the incorporation of the business under the laws of the State of Missouri, under the name of The American School of Magnetic Healing, and among the stockholders of the company the complainant Kelly was one; that large buildings were erected for such business and large amounts expended in advertising the same. The bill further averred as follows:

"That in and about their business they carried on and conducted, not only the treating of people afflicted with ills at their establishment at said city, but also engaged in the business of teaching and educating others in the practical science of healing, and that a large amount of their business consists of treatment by letter and advice to people throughout the United States and foreign countries, and in the treatment under said circumstances they have built up a large and extensive business in the way of receipts of such treatment received through the United States mail, by letter, registered package and otherwise, in the nature of checks, drafts and United States moneys; that said business has grown to such an extent that, immediately and for a long time prior, to the grievances hereinafter complained of the receipts through the United States mails, in the manner aforesaid, for the treatment of persons throughout the United States and foreign countries, have reached and averaged about from one thousand dollars to sixteen hundred dollars per day.

"And your orators state that said business is a legal and legitimate business, conducted according to business and legal methods, and is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof.

"And that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to,

and complainants discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and complainants are confined to practical scientific treatment emanating from the source aforesaid.

"That for a long time previous, and prior to, the grievances hereinafter mentioned, said corporation has been sending out a large amount of advertising matter through the United States post office at said city of Nevada, and that all of its receipts, by checks, drafts or money orders aforesaid, have been received by and delivered to them through the United States post office at the city of Nevada, of which the respondent herein has exclusive charge as postmaster aforesaid, and had, during the time aforesaid, been receiving a large number of letters addressed to said institution and to its office, regarding its treatment and manner of treatment, and business letters pertaining to, and inquiring into, the manner of treatment.

"That all such mail, letters and communications are generally addressed and directed to the American School of Magnetic Healing at said city, and that in many cases said letters are and may be addressed to said J. H. Kelly, secretary or treasurer or manager, or to J. H. Kelly, individually, or to Prof. J. H. Kelly, or to J. H. Kelly or Prof. J. H. Kelly, secretary, treasurer or manager of the American School of Magnetic Healing.

"That said Kelly is also receiving and for a long time past has been receiving letters addressed to him individually upon social matters from friends and acquaintances and concerning business not pertaining to or connected with the business hereinafter stated.

"That prior to the grievances hereinafter mentioned said institute was receiving in the way of letters addressed to it or to its officers in the manner aforesaid an average of about the sum of 3000 letters per day, and ever since the happening of the grievances hereinafter mentioned there have been accumulating in said post office letters belonging to your orator, addressed in the manner before stated, probably to the total number of 25,000 letters.

"That all of said letters, as your orators are informed and believe, are duly stamped and ready for delivery to them but

for the action of the postmaster and postal department hereinafter mentioned."

It was then averred that persons who were prompted by assumed competitive interference with their business complained to the United States Post Office Department at Washington that complainants were not engaged in legitimate business, and therefore, on May 15, 1890, the Post Office Department made the following order:

"POST OFFICE DEPARTMENT,
"WASHINGTON, D. C., May 15, 1900.

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, president; J. H. Kelly, secretary, and J. H. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes approved September 19, 1900.'

"Now, therefore, by authority vested in him by said act and by the act of Congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States, approved March 2, 1895,' the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'fraudulent' plainly written or stamped upon the outside of such letters or

matter. Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the dead letter office, with the word 'fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

"CH. EMORY SMITH,
"*Postmaster General.*

"To the Postmaster, Nevada, Missouri."

Since such order the defendant has refused to deliver any mail whatever to the complainants, and there had, when the bill was filed, as complainants aver on information and belief, accumulated at the post office at Nevada letters addressed to them containing checks, drafts, money orders or money to an aggregate of at least $10,000 in value; that these checks, drafts, etc., came from various customers and clients throughout the United States and foreign countries, who had all been treated and for whom the complainants had performed services under contracts with such parties, and that the sums were so sent in the respective letters in payment for services performed and rendered to the senders respectively, all of the senders being willing and at all times having been willing that their letters containing the remittances should be turned over to the complainants, they making no objection or complaint thereto.

The complainants further averred that they had been informed by the defendant that on Monday, the 28th day of May, then coming, he intended to stamp on each and every one of the letters addressed to the complainants, under any of the designations theretofore mentioned in the bill, the word "fraudulent" across the face of each letter, without opening it and without knowing what such letter contained or the nature or character of the contents, and that the defendant would then return the letter to the sender thereof in all cases where from the outside of the letter or envelope he was able to determine from whom the same was received, and as to all other letters addressed to the complainants, where he was unable to

determining from the outside from whom the letters were sent, the defendant would stamp with the word "fraudulent" and send to the dead letter office of the United States Post Office Department all such letters, and the defendant stated that he would refuse to deliver any further mail or letters to the complainants or either of them that might be received at his said post office addressed to them or either of them.

Complainants then averred that if the respondent were permitted to do these things and to return the letters, and refused in the future to deliver or allow complainants to receive any letters or mail matter at the post office at Nevada, it would work irreparable injury, loss and damage to the complainants, and would result in eventually embarrassing, crippling, breaking up and destroying complainants' legitimate business, and that the complainants had no other legal or adequate remedy by which they could prevent the committing of the acts and grievances complained of than by writ of injunction.

The bill then averred that the action of the defendant was based upon the order of the Postmaster General, above set forth, who assumed to act under sections 3929 and 4041 of the Revised Statutes of the United States, and section 4 of an act approved March 2, 1895. 28 Stat. 963, 964.

Section 3929 of the Revised Statutes is set forth in the margin.[1]

Section 4041 is of the same purport as section 3929, except-

[1] SEC. 3929. The Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift-enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post offices at which registered letters arrive directed to any such person, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word "fraudulent" plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

ing that instead of providing for the retention of registered letters, it forbids the payment by any postmaster to the person or company described of any postal money orders drawn to his or its order or to his or its favor or to any agent of any such person or company, and it provides for the return to the remitters of the sums of money named in those money orders. Section 4 of the act (chap. 191, Laws of 1895, 28 Stat. *supra*) amended section 3929 of the Revised Statutes so as to provide for the retention of all letters instead of merely registered letters as in the original section.

Before the issuing of the written order by the Postmaster General prohibiting the delivery of mail matter to the complainants and pursuant to notice from the Postmaster General, the complainants went before that official at Washington and had a hearing before him, and gave their reasons why what is termed a "fraud order" should not be issued, and that the Postmaster General, after hearing evidence such as in his judgment was contemplated by the sections of the statutes above mentioned, issued the order above referred to, and thereupon the defendant has refused to permit the delivery of the mail, and assigns as his only reason for so doing that it would be in violation of the order of the Postmaster General founded upon the provisions of the statute already set forth.

The bill then averred that the statutes have no application whatever to the conduct or carrying on of complainants' business, which is a legitimate one, and that no fraud, deceit, deception or misrepresentation of any kind has ever been practised by them, and that their customers or clients do not claim or assert that the complainants have in any manner practised any fraud, deceit or misrepresentation at any time in procuring the business from them or in curing their ills or diseases. Complainants further averred that the provisions of the statutes above mentioned are in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, in that they undertake to deprive persons of their property and property rights without due process of law, and if the statutes were enforced they would place in the power of the postmaster and the Post Office Department of the United States the sole

Counsel for Appellants.

and exclusive right to pass upon the rights of the complainants, as between themselves and other parties with whom they deal and transact business through the mails, without a hearing, and that the provisions of the statute are void for the reason that they provide for no tribunal, court or authority to hear or determine any violation of the statute or claimed violation of the statutes, but place the same absolutely in the power and control of the postmasters and the Post Office Department, and that the statutes vest an arbitrary discretion in the postmasters and the Post Office Department or the Postmaster General to determine as he may see fit, whether right or wrong, the question as to who shall or who shall not have and receive mail from the United States Post Office Department, and who shall and who shall not use the United States mails, and vests in the department or the Postmaster General, if enforced, the power to interdict and absolutely prohibit the carrying on of all commercial and business transactions of the country done through the mailing system, if they see fit so to do, and make the postmasters and the Post Office Department the sole judges in their own case.

The complainants then asked for an injunction to restrain the postmaster from carrying out the order of the Postmaster General, and that a decree might be entered perpetually enjoining the defendant as prayed for.

The defendant demurred to the complainants' amended bill, (1) on the ground that the complainants had not stated any such case as entitled them to any relief; (2) because the complainants had not stated any ground for equitable relief against the defendant, and had not shown any reason why an injunction should be granted.

The court sustained the demurrer, and the complainants declining to plead futher, it was decreed by the court that the amended bill of the complainants was insufficient in law and equity, and it was thereupon dismissed at complainants' cost.

Mr. James H. Harkless for appellants. *Mr. John O'Grady* and *Mr. Charles S. Crysler* were with him on the brief.

Opinion of the Court.

Mr. Solictor General Richards and *Mr. Special Attorney Robert A. Howard* for appellee.

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

The bill of the complainants as amended raises some grave questions of constitutional law which, in the view the court takes of the case, it is unnecessary to decide. We may assume, without deciding or expressing any opinion thereon, the constitutionality in all particulars of the statutes above referred to, and therefore the questions arising in the case will be limited, (1) to the inquiry as to whether the action of the Postmaster General under the circumstances set forth in the complainants' bill is justified by the statutes; and (2) if not, whether the complainants have any remedy in the courts.

First. As the case arises on demurrer, all material facts averred in the bill are of course admitted. It is, therefore, admitted that the business of the complainants is founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment emanating from the source aforesaid."

These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants who are conducting the business upon the basis stated thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations or promises. Can such a business be properly pronounced a fraud within the statutes of the United States?

There can be no doubt that the influence of the mind upon

the physical condition of the body is very powerful, and that a hopeful mental state goes far in many cases, not only to alleviate, but even to aid very largely in the cure of an illness from which the body may suffer. And it is said that nature may itself, frequently if not generally, heal the ills of the body without recourse to medicine, and that it cannot be doubted that in numerous cases nature when left to itself does succeed in curing many bodily ills. How far these claims are borne out by actual experience may be matter of opinion. Just exactly to what extent the mental condition affects the body, no one can accurately and definitely say. One person may believe it of far greater efficacy than another, but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater than even a vast majority of intelligent people might be willing to admit or believe. Even intelligent people may and indeed do differ among themselves as to the extent of this mental effect. Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them towards the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud or a false pretense or promise within the meaning of these statutes? How can any one lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not

believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. The bill in this case avers that those who have business with complainants are satisfied with their method of treatment and are entirely willing that the money they sent should be delivered to the complainants. In other words, they seem to have faith in the efficacy of the complainants' treatment and in their ability to heal as claimed by them. If they fail, the answer might be that all human means of treatment are also liable to fail, and will necessarily fail when the appointed time arrives. There is no claim that the treatment by the complainants will always succeed.

Suppose a person should assert that, by the use of electricity alone, he could treat diseases as efficaciously and successfully as the same have heretofore been treated by " regular " physicians. Would these statutes justify the Postmaster General, upon evidence satisfactory to him, to adjudge such claim to be without foundation and then to pronounce the person so claiming, to be guilty of procuring, by false or fraudulent pretenses, the moneys of people sending him money through the mails, and then to prohibit the delivery of any letters to him? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a Postmaster General, and was it intended that he might decide the claim to be a fraud and enjoin the delivery of letters through the mail addressed to the person practising such treatment of disease? As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.

Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.

Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practised it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practised precisely upon the lines set forth by its originator, is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded against under these statutes and liable at the discretion of the Postmaster General, upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses and their letters stamped as fraudulent and the money contained therein as payment for their professional services sent back to the writers of the letters? And, turning the question around, can physicians of what is called the "old school" be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. And so, it is said, do people recover who are treated under this mental theory. By reason of it? That cannot be averred as matter of fact. Many think they do. Others are of the contrary opinion. Is the Postmaster General to decide the question under these statutes?

Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes.

That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts, which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not as matter of law cover the facts herein.

Second. Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed

and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. *Burfenning* v. *Chicago &c., Railway Company*, 163 U. S. 321; *Johnson* v. *Drew*, 171 U. S. 93, 99; *Gardner* v. *Bonestell*, 180 U. S. 362.

While the analogy between the above cited cases and the one now before us is not perfect, yet even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers.

Thus in the *Burfenning* case, *supra*, a tract of land had been reserved from homestead and preëmption, and had been included within the limits of an incorporated town, notwithstanding which the Land Department had decided that the land was open to entry and had granted a patent under the statute

relating to homesteads. The court said that "When by act of Congress a tract of land has been reserved from homestead and preëmption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster

General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld.

In our view of these statutes the complainants had the legal right under the general acts of Congress relating to the mails to have their letters delivered at the post office as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders and money itself, all of which were their property as soon as they were deposited in the various post offices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful. In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster General's order being the result of a mistaken view of the law could not operate as a defence to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case, as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was

within the statute, yet such decision being a legal error does not bind the courts.

Without deciding, therefore, or expressing any opinion upon the various constitutional objections set out in the bill of complainants, but simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have the power to grant relief against, we are constrained to reverse the judgment of the Circuit Court, with instructions to overrule the defendant's demurrer to the amended bill, with leave to answer, and to grant a temporary injunction as applied for by complainants, and to take such further proceedings as may be proper and not inconsistent with this opinion. In overruling the demurrer we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants as in fact conducted amounts to a violation of the statutes as herein construed.

Judgment reversed.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, believing the judgment should be affirmed, dissented from the foregoing opinion.

ROMIG *v.* GILLETT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 52. Argued October 20, 21, 1902.— Decided November 17, 1902.

Under §§ 3950, 3951 and 3955 of the statutes of Oklahoma where a judgment of foreclosure and sale of land in Oklahoma Territory is based upon service of the summons by publication, the facts tending to show the exercise of due diligence in attempting to serve the defendant within the Territory must be disclosed in the affidavit on which the order for service by publication is based.

But where a publication has been made, approved by the court and a decree entered thereon, and the mortgagee put in possession thereunder, the mortgage not having been paid, and the mortgagee has improved the

Statement of the Case.

property, § 4498 of the statutes of Oklahoma will protect the mortgagee in possession, and equitable principles must control the measure of relief to which the defendant is entitled, and while she will be given the right to appear, plead and make such defence as under the facts and principles of equity she is entitled to, the possession of the mortgagee will not be disturbed in advance of such defence.

A mortgagee who enters into possession, not forcibly but peacefully and under the authority of a foreclosure proceeding cannot be dispossessed by the mortgagor or one claiming under him, so long as the mortgage remains unpaid (following *Bryan* v. *Brasius*, 162 U. S. 414).

On February 2, 1895, Don A. Gillett made and delivered to John Romig a note for seven hundred dollars, secured by a mortgage on eighty acres in Garfield County, Oklahoma. On February 6, 1895, the mortgagor sold and conveyed the real estate to Myrtle Gillett. On March 11, 1896, the mortgagee Romig commenced an action of foreclosure in the District Court of the county against Don A. Gillett and Myrtle Gillett. In the petition Myrtle Gillett was alleged to have some interest in the real estate, but junior and subsequent to plaintiff's mortgage. A summons was issued and returned not served, the sheriff certifying that the defendants were not found in Garfield County. On June 2 plaintiff filed an affidavit for publication, which affidavit disclosed fully the nature of the action and the relief sought, and added:

"Affiant further says that he is unable and that the plaintiff is unable by using due diligence to obtain service of summons on the said defendants within the Territory of Oklahoma.

"Affiant further states that on the — day of March, 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, 'Defendants not found in my county.'

"Affiant further states upon information and belief that the said defendants Don A. Gillett and Myrtle Gillett are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants Don A. Gillett and Myrtle Gillett within the said Territory of Oklahoma, and that said plaintiff wishes to obtain service upon said defendants by publication; and further affiant sayeth not."

Statement of the Case.

Publication was made and proof thereof filed as required by the statutes. On December 18, 1896, a judgment of foreclosure was entered against both defendants and a sale of the real estate ordered. An order of sale was issued on January 20, 1897. A sale was made to the plaintiff and confirmed by the court March 1, 1897, and an order entered directing the sheriff to execute a deed to the purchaser and put him in possession. A deed was accordingly made and the plaintiff put in possession on March 9, 1897. Thereafter Daniel W. Harding purchased the property from the plaintiff Romig, received a deed therefor and entered into possession on March 10, 1897. He improved the property, which up to that time was unimproved prairie land, by the erection of three residences and other permanent structures of the value of $2000, paid taxes to the amount of $200, and has ever since resided thereon.

On May 11, 1898, Myrtle Gillett filed a motion to set aside the judgment, and all proceedings had thereunder, on the ground that the court had never acquired any jurisdiction; that she was at all times during the pendency of the action a resident of the Territory of Oklahoma, living in an adjoining county and within twenty miles of the mortgaged real estate, and that she had no knowledge of the institution or prosecution of the cause until long after the sale of the land by the sheriff. Upon the hearing of this motion the court entered an order setting aside the judgment and all subsequent proceedings, and directing that she be put in immediate possession of the premises. This order and judgment of the trial court was affirmed by the Supreme Court of the Territory on June 30, 1900, (10 Oklahoma, 186), whereupon the case was brought here on appeal.

The statutes of Oklahoma of 1893, which were in force at the time of these proceedings, required that actions for the foreclosure of a mortgage be brought in the county in which the real estate is situated. Section 3950 authorized service by publication in such cases "where any or all of the defendants reside out of the Territory, or where the plaintiff with due diligence is unable to make service of summons upon such defendant

or defendants within the Territory." Sections 3951, 3955 and 4498 read as follows:

"SEC. 3951. Before service can be made by publication, an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication."

"SEC. 3955. A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defence; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section."

"SEC. 4498. In all cases any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or equity, . . . or being in quiet possession of and holding the same by deed, . . . from and under any person claiming title as aforesaid, . . . or being in quiet possession of, and holding the same under sale on execution or order of sale against any person claiming title as aforesaid, . . . or any person in quiet possession of any land claiming title thereto, and holding the same under a sale and conveyance made . . . in pursuance of any order of court or decree in chancery where lands are or have been directed to be sold and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his, her or their part, shall not be evicted

or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands until said occupying claimant his, her or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected."

Mr. A. A. Hoehling, Jr., for appellants. *Mr. Charles S. Wilson* was with him on the brief.

Mr. William M. Springer for appellee. *Mr. George P. Rush* was with him on the brief.

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

The Supreme Court of Oklahoma was of opinion that the affidavit for service by publication was wholly insufficient in that it alleged the non-residence of defendants simply upon information and belief and not positively; that being so insufficient the defendant Myrtle Gillett was not brought into court, and the judgment and all subsequent proceedings were as to her absolutely void. On the other hand, it is contended by the appellants that a separate ground for service by publication is "where the plaintiff with due diligence is unable to make service of summons . . . within the Territory;" that the affidavit for publication stated positively such inability; that therefore it was strictly within the statute, and authorized the publication of notice; that the publication was duly made, the defendants were thereby brought into court and the judgment and all subsequent proceedings were regular and valid. It may well be doubted whether this contention of appellants can be sustained, at least in cases like this of direct and not collateral attack, even if the inability to obtain personal service by the exercise of due diligence is a distinctive ground for service by publication. It would seem that the facts tending to

show such diligence should be disclosed and that an affidavit merely alleging inability was one of a conclusion of law and not of facts. *McDonald* v. *Cooper*, 32 Fed. Rep. 745; *Carleton* v. *Carleton*, 85 N. Y. 313; *McCracken* v. *Flanagan*, 127 N. Y. 493; *Ricketson* v. *Richardson*, 26 California, 149; *Braly* v. *Seaman*, 30 California, 610; *Kahn* v. *Matthai*, 115 California, 689; *Little* v. *Chambers*, 27 Iowa, 522; *Thompson* v. *Shiawassee Circuit Judge*, 54 Michigan, 236; *Alderson* v. *Marshall*, 7 Montana, 288. Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in cases of this kind by section 3934 a summons can be issued to and served in any county of the Territory.

But while the affidavit for publication may have been insufficient, we are unable to concur with the Supreme Court of Oklahoma in its conclusions. A publication of notice was in fact made, and a publication based upon an affidavit which, however defective it may have been, was intended to be in compliance with the statute. It was approved by the court, which upon it rendered a decree of foreclosure, which was executed by the proper officers in the proper way. By virtue of the proceedings the mortgagee was put into possession—a possession which he transferred to the appellant Harding. Under those circumstances what right has the appellee, a grantee from the mortgagor? The foreclosure was a proceeding in equity, although its various steps were prescribed by statute. Equitable principles must control the measure of relief. Even if the publication had been founded upon an affidavit perfect in form and the decree and all proceedings had been in strict conformity to the statute, yet by section 3955 the defendant would be let in to defend upon compliance with certain conditions.

Assuming that that section is not fully applicable because of the defect in the affidavit, yet the appellee comes into a court of equity seeking relief against the foreclosure of a mortgage. In such a case there are almost always certain conditions of relief. If the mortgage be valid the rights of the mortgagee and those claiming under him are to be protected. Generally such rights are protected by requiring payment of the mortgage debt

and granting a right of redemption. It is true that this right of redemption is a favored right. *Russell* v. *Southard*, 12 How. 139; *Villa* v. *Rodriguez*, 12 Wall. 323; *Bigler* v. *Waller*, 14 Wall. 297; *Noyes* v. *Hall*, 97 U. S. 34; *Shillaber* v. *Robinson*, 97 U. S. 68. But it is only a right of redemption which in this case and under the facts disclosed the appellee is entitled to. She does not pretend in her affidavit that the mortgage was invalid, or that it had been paid. She claims by a deed subsequent to the mortgage, and simply insists that she has not had her day in court, and therefore her rights, which, so far as appears, are only the rights of redemption, have not been cut off. Harding, as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee. *Bryan* v. *Brasius*, 162 U. S. 415. As shown by the opinion in that case and cases cited therein a mortgagee who enters into possession, not forcibly but peacefully and under the authority of a foreclosure proceeding, cannot be dispossessed by the mortgagor, or one claiming under him, so long as the mortgage remains unpaid.

Under section 4498 the appellant Harding has all the rights of an occupying claimant, for he was "in quiet possession . . . claiming title . . . and holding . . . under a sale and conveyance made . . . in pursuance of . . . a decree in chancery where lands . . . have been directed to be sold and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion." Of course, this section applies to proceedings which are defective, for if not defective, by section 3955 a purchaser in good faith has title and cannot be evicted upon any terms.

The decree of the Supreme Court of Oklahoma will be reversed and the case remanded to that court, with instructions to set aside the order of the trial court, and to direct the entry of one which, without disturbing the possession of Harding, will give to the appellee the right to appear, plead and make such defense as under the facts of the case and the principles of equity she is entitled to.

Decree reversed.

Syllabus.

BIRD *v.* UNITED STATES.

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

No. 306. Argued October 14, 1902.—Decided November 17, 1902.

Bird was twice tried and found guilty of the crime of murder and sentenced to death by the District Court of the United States for the District of Alaska; while an appeal from the first trial was pending in this court, which resulted in reversal, 180 U. S. 356, Congress passed the act of March 31, 1899, to "define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district," which went into effect July 1, 1899; on June 6, 1900, Congress passed another act for Alaska "making further provision for a civil government in Alaska and for other purposes." On the second trial plaintiff in error contended that these acts deprived the trial court of jurisdiction and that the act of March 17, 1884, establishing the District Court for Alaska was entirely repealed and superseded by the act of June 6, 1900, and the District Court for Alaska to which the indictment was returned was thereby abolished; motions to strike from the docket and in arrest of judgment were denied:

(1) *Held*, that this was not error as the acts of March 3, 1899, and June 6, 1900, together constituted a part of the scheme for the government of Alaska, and it is manifest from the provision in section 219 of the act of March 3, 1899, that "nothing therein contained shall apply to or affect in any way any proceeding or indictment now found or pending, or that may be found for any offence committed before the passage of this act." That Congress did not intend by the act of June 6, 1900, to affect the prosecution of prior offences.

The tribunal provided for by the act of June 6, 1900, whether newly created or an existing one continued, has jurisdiction of all criminal cases embraced by the provision of the act of March 3, 1899.

There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.

(2) Where a female witness for the prosecution is designated on the trial indictment and the list of witnesses given to the defendant on the trial by her maiden name, which was the name by which she was known at the time, although she had been married and divorced and had subsequently borne the name of another man with whom she lived, the trial court properly overruled the objections of the plaintiff in error to the testimony on the ground that the name so designated was not her name.

Counsel for Parties.

The purpose of section 1033 of the Revised Statutes of the United States requiring that in capital cases the list of witnesses be given to the defendant at least two days before the trial, is to point out the persons who may testify against him, and this is best accomplished by the name the witness bears at the time and not some name that the witness may have had at a prior time.

(3) It was not error to charge a jury, "But in determining this matter under the evidence before you, you must consider the situation of the parties at the time and all the surrounding circumstances, together with the testimony of the witness for the prosecution as well as the evidence of the defendant," on the ground that it in effect declared that even if the testimony of the witnesses for the Government were untrue, it was to be considered in delivering the verdict and because all the defendant's evidence (except his own) was withdrawn from the jury on the issue of self-defence, as it appears that the jury were also instructed that it was their duty "to consider the whole evidence and render a verdict in accordance with the facts proved upon the trial."

(4) There was no error in the following instruction: "Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong, but if the attempt was made after many months of confinement and escape comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time."

(5) The trial court rightly refused, at the defendant's request, to give the jury any instructions defining principal and accessory, or to submit to the jury to determine whether certain other persons were accomplices, as there were no facts in the case to justify it and the defendant himself testified that he had acted in self-defence.

THE case is stated in the opinion of the court.

Mr. L. T. Michener for plaintiff in error. *Mr. W. W. Dudley* and *Messrs. Malony & Cobb* were with him on the brief.

Mr. Assistant Attorney General Beck and *Mr. Charles H. Robb* for defendants in error.

Mr. Justice McKenna delivered the opinion of the court.

Homer Bird was found guilty of the crime of murder and was sentenced to death. On appeal to this court the judgment and sentence were reversed and the case remanded for a new trial. 180 U. S. 356.

A new trial was had resulting again in the conviction of Bird for murder, and a sentence of death by hanging was pronounced against him. To this judgment and sentence this writ of error is directed.

After the first trial and while the case was pending in this court, that is, on March 3, 1899, Congress passed a criminal code and code of civil procedure for Alaska, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district." It went into effect July 1, 1899.

On June 6, 1900, Congress passed another act for Alaska, entitled "An act making further provision for a civil government for Alaska, and for other purposes." 31 Stat. 321.

Plaintiff in error, contending that these acts deprived the court of jurisdiction, when the case was called for trial, moved the court to strike the cause from the docket and order him discharged: (1) because the court had no jurisdiction of the crime charged; (2) because the court had no jurisdiction of the case. The motion was denied. It was renewed again in arrest of judgment, and the grounds of it specifically alleged as follows:

"I. Because there has never been any plea entered in this court by the defendant, the only plea ever made by him being in the District Court for Alaska, established by the act of Congress of May 17, 1884, which was abolished by the act of Congress of June 6, 1900.

"II. Because the court has no jurisdiction of this cause, the indictment herein having been returned into the District Court for Alaska, established by the act of Congress of May 17, 1884,

and not into this court, and there is no law conferring upon this court jurisdiction over indictments returned into said court.

"III. Because this court has no jurisdiction of the offense charged in the indictment herein, in this: The said indictment charges an offense under section 5339 of the Revised Statutes of the United States, while this court has no jurisdiction of crimes except as defined in the criminal code for Alaska."

The motion was denied and an exception was taken. This ruling constitutes the first assignment of error.

1. The act of 1884 provided a civil government for Alaska, and by section 3 it was enacted as follows:

"That there shall be, and hereby is, established a District Court for said district, with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed for said district, who shall during his term of office reside therein and hold at least two terms of said court therein in each year, one at Sitka, beginning on the first Monday in May, and the other at Wrangel, beginning on the first Monday in November."

By section 7 it was provided:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

It was under this law that plaintiff in error was indicted and tried the first time.

The act of March 3, 1899, defined the crime of homicide, and divided it into murder in the first and second degrees, and manslaughter. The act contained a clause, it is conceded, saving the jurisdiction of the court over prior cases and crimes. And it is also conceded that the act is still in force, but it is urged that it has no bearing on the questions presented. It is contended that the act of 1884 was entirely repealed and superseded by the act of June 6, 1900, "both by express enactment and by necessary implication;" that "the District Court for Alaska created

by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created;" and it is hence asserted "that in the absence of a provision in the latter act, transferring criminal causes pending in the old court to the new, the latter had no jurisdiction of indictments returned into the old court;" that "a statute conferring upon a court 'general' jurisdiction in criminal matters, must be construed to refer to and to be limited by the code of criminal law enacted for the Territory, and does not include jurisdiction of any offence not embodied in the code."

The act of 1884, we have seen, established the District Court for Alaska "with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts." It also provided for the appointment of a district judge, a governor and other officers. It made provision, as declared in its title, for a civil government in Alaska.

The act of June 6, 1900, is entitled "An act making further provision for a civil government for Alaska, and for other purposes." It provides for a governor and other officers, and its provisions for a court are as follows:

"There is hereby established a District Court for the district, which shall be a court of general jurisdiction in civil, criminal, equity, and admiralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President.

"The court shall consist of three divisions. The judge designated to preside over division numbered one shall, during his term of office, reside at Juneau, and shall hold at least four terms of court in the district each year, two at Juneau and two at Skagway, and the judge shall, as near January first as practicable, designate the time of holding the terms during the current year.

"The judge designated to preside over division numbered two shall reside at St. Michaels during his term of office, and shall

hold at least one term of court each year at St. Michaels, in the district, beginning the third Monday in June.

"The judge designated to preside over division numbered three shall reside at Eagle City during his term of office, and shall hold at least one term of court each year at Eagle City, in the district, beginning on the first Monday in July."

Section 5, Title I, declares the jurisdiction of each division of the court to extend over the whole district, and provides for a change of venue from one division or place to another. The act further empowers the judges to appoint their own clerks, commissioners, etc.

Section 10 provides that the "judges (and other officers) provided for in this act shall be appointed by the President, by and with the advice and consent of the Senate," etc., and a salary of $5000 is provided instead of $3000, as under the old law.

Section 25 provides that "the officers properly qualified and actually discharging official duties in the district at the time of the approval of this act may continue to act in their respective official capacities until the expiration of the terms for which they were respectively appointed unless sooner removed." And it is provided in section 368, Title III, as follows:

"No person shall be deprived of any existing legal right or remedy by reason of the passage of this act, and all civil actions or proceedings commenced in the courts of the district before or within sixty days after the approval of this act may be prosecuted to final judgment under the law now in force in the district, or under this act. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

It is upon these provisions that counsel for plaintiff in error rest the contentions which we have quoted. The principal contention is that the District Court for Alaska created by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created. The contention is supported with ability, but we do not think that it is necessary to decide it on this record. That Congress did not intend by the act of June, 1900, to affect the prosecution of prior offences is manifest from the act of March 3, 1899, *supra*. 30 Stat. 1285. This act, though passed prior to the act of June, 1900, con-

stituted, with the latter act, a part of the scheme of government for Alaska. By the act of March 3, 1899, it is provided "that nothing herein contained shall apply to or in any way affect any proceeding or indictment now found or pending or that may be found for any offence committed before the passage of this act" (section 219). The act was in force at the time of the passage of the act of June, 1900. It constituted then and constitutes now the code of criminal law enacted for the Territory, and the crimes there defined constitute the criminal causes of which the District Court, by the act of June, 1900, is given "general" jurisdiction. Necessarily therefore not only the criminal causes subsequent to the act of 1899, but the criminal causes saved by it, are covered by its provisions. In other words, the tribunal provided by the act of 1900, whether it is newly created or an existing one continued, has jurisdiction of all the criminal causes embraced by the provisions of the act of March 3, 1899. And it makes no difference that the records and files "of the old court" are not made records and files "of the new court." They must be considered as made, as the means of exercising the jurisdiction conferred. It being the intent of Congress to save "any proceeding or indictment" found or pending "for any offence committed before the passage" of the act of 1899 in construing the act of 1900, "some degree of implication may be called in to aid that intent." 6 Cranch, 314. There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience.

We find nothing in the cases cited by plaintiff in error to defeat our conclusion. In *McNulty* v. *Batty et al.*, 10 How. 72, there was a transfer of sovereignty; a Territory became a State, and it was held "the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice, and providing for the revision of their judgments in this court (Supreme Court of the United States) by appeals or writs of error." All that is material in *Freeborn* v. *Smith*, 2 Wall. 160, depends upon the same consideration. In *Insurance Co.* v. *Ritchie*, 5 Wall. 541, it was decided that the act of 1833, which gave the citizens of a State

the right to sue citizens of the same State in the courts of the United States, for cause arising under the revenue laws, was repealed by a subsequent statute, and that therefore the national courts had no longer jurisdiction of such causes. In other words, it was held that, as the jurisdiction depended upon the statute, it was taken away by the repeal of the statute. *Ex parte McCardle*, 7 Wall. 506; *Assessors* v. *Osbornes*, 9 Wall. 567; *Railroad Co.* v. *Grant*, 98 U. S. 398, and *United States* v. *Tynen*, 11 Wall. 88, were to the same effect. In the latter case there was not an express repeal of the prior statute, but it was decided that the latter act effected such repeal upon the principle that if two acts are "repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." This principle plaintiff in error relies on and urges that it was recently asserted and applied in *Murphy* v. *Utter*, 186 U. S. 95. The principle is not pertinent in the view we take of the statutes.

2. One of the witnesses for the prosecution was a woman. She was designated on the indictment by the name of Naomi Strong. It was contended that Naomi Strong was not her name, and plaintiff in error objected to her testimony on the ground that her true name had not been furnished on the list of witnesses given. The objection was overruled and the ruling is assigned as error. At the request of the plaintiff in error the jury was withdrawn and the witness examined before the court as to her name, and she testified that her maiden name was Naomi Strong, but she had been married and divorced. She refused to give the name of her husband. She also testified that she had been divorced ten or twelve years, and upon her divorce she went by her maiden name. Subsequently she went by the name of Byers, when living with a man by that name, and, after meeting the plaintiff in error, she went by his name. She testified that she met the plaintiff in

error in 1893 or 1894, and left New Orleans with him the 1st of May, 1898, to join the expedition to Alaska during which the homicide was committed. She and plaintiff in error traveled as husband and wife under the name of Mr. and Mrs. Bundick.

The ruling of the court was right. Section 1033 of the Revised Statutes of the United States requires that in a capital case the list of the witnesses and jurors shall be delivered to the defendant at least two entire days before the trial. By list of the witnesses is meant a list containing the names of the witnesses, and necessarily this means the names which they then bear and which identify them. The purpose of the statute is to point out to the defendant the person who may testify against him, and that is best accomplished by the name the witness bears at the time, and not some name that such witness may have had at some prior time. The present case demonstrates the sense of this. It does not appear how long the witness had been married, and to have designated her by her married name might have conveyed no information about her. A question could be raised whether the objection to the witness was made in time. *Logan* v. *United States*, 144 U. S. 263.

3. There are errors assigned on the instructions given or refused, and for their understanding an outline of the facts is necessary.

In the spring of 1898 the plaintiff in error, Hurlin, the deceased, Charles Scheffler, R. S. Patterson and Naomi Strong organized a party to prospect in Alaska for gold. Each of the men was to contribute five hundred dollars for purchasing an outfit. Scheffler failed with his contribution, and plaintiff in error furnished something over one thousand dollars. At San Francisco, California, a small steam launch and a scow thirty-two feet long by six feet beam were bought, together with the usual supply of food, clothing, etc.

The party sailed from San Francisco and reached St. Michael, July 4. Shortly after they started up the Yukon River, reaching a point in September about six hundred miles above its mouth, and there determined to go into winter quarters, and for that purpose began the construction of a

cabin. Dissensions arose in the party, and the plaintiff in error and the rest of the party do not agree in their testimony as to who was in fault. A resolution to separate was formed, but its execution was postponed at the request of the plaintiff in error until the cabin should be finished. The cabin was finished on September 26. In the meantime there had been disagreements as to the division of supplies. The homicide occurred on the morning of the 27th of September. The witnesses for the prosecution substantially agree that the party collected for breakfast on that morning—Patterson, Hurlin and Scheffler going first, the plaintiff in error subsequently joining them, he seating himself on his bunk back of the others, and they sat as follows: Patterson on the right, Scheffler in the center and Hurlin on the left.

We may quote from the testimony of the woman. Her statement was substantially corroborated by the others; their statements only varied in some details or differences which arose from their different positions.

"Scheffler and I were talking about a trap I had set to catch some grouse, and——— . . . A.——— we were talking about it, and all at once I heard Mr. Bird's gun click—shotgun—when he broke it it clicked, of course, and I looked up and he had the gun to his shoulder, and in the meantime Mr. Scheffler looked around; I think he fired at Mr. Hurlin, and then Scheffler looked around and held up his hands and told him for God's sake not to shoot him, and I jumped up after he fired at Hurlin, and Mr. Patterson kind of jumped back of me—jumped behind me like, and I asked Bird not to shoot; he had the gun to his shoulder all the time, and I jumped and run; put my head over Patterson's shoulder and run through the boat, and just as I passed him in the boat he fired at Mr. Patterson, and Patterson jumped overboard; whether the shot struck him when he jumped overboard I don't know, and in the meantime I jumps out on the beach, and Mr. Patterson jumps overboard, and Mr. Bird comes running out, climbs over the bow of the boat with two guns in his hand—his own and Mr. Scheffler's—and heads Patterson off; the boat was in the water just kind of half on the beach

and half in the water, and so Mr. Patterson wades around on the side of the boat to get out, and Bird heads him off and tells him not to come near him, and Patterson kept begging him not to shoot him, and Bird up with his gun again and says, 'Bob, you dirty son of a bitch, you're the cause of this,' and shot at him the second time and Patterson came to the beach.

"Q. Well, compose yourself, Mrs. Strong, if you can, and go on and state what occurred there. What happened when Mr. Patterson got to the beach? A. They were all on the beach then, and he begged Bird not to shoot him.

"Q. What did he say to him? A. He held out his hands and told him for God's sake to think of his poor family.

"Q. What did Bird say? A. I don't remember any more what he did say; I think he says, 'Bob, I have thought of our families,' or something like that.

"Q. At the time he fired at Hurlin, did you see what Mr. Hurlin did? Immediately after, as far Hurlin was concerned? Immediately after the shooting of Hurlin, what followed [witness sobs]; what did he do, Mrs. Strong? A. Mr. Hurlin?

"Q. Yes. A. He never moved at all; he sat in the same position when he was shot.

"Q. Did his body change position at all? A. No; just remained that way for quite a while.

"Q. Did you see any evidence of a wound on Mr. Hurlin, anything? A. I saw where there was a hole in his head right here, the left side."

The plaintiff in error claimed to have acted in self-defense. His testimony will be given hereafter in connection with an instruction to which it is more particularly pertinent.

In view of the testimony error is based upon the following instruction given by the trial court:

"In this connection you may consider whether the gun of the defendant was placed at a point near his bed as stated by the witnesses for the prosecution, and whether the defendant took his gun from the point where it was described to have been placed by the witnesses for the prosecution, and whether, without any act on the part of the deceased or either of those

sitting near him, he maliciously from behind the backs of these men, when no attack was made against him in any way, wilfully and maliciously shot the deceased, Hurlin, in the back and side of the head, thereby taking his life; or, whether the statement of the defendant is true, that a quarrel ensued between himself and Patterson while discussing their accounts; that blows passed between them, and that after hearing the witness Naomi Strong say, 'They are getting their guns,' if he did hear any such thing and if you so find—whether he sprang down to a point near the water barrel and there seized his gun and immediately raising the same shot Hurlin while he, the said Hurlin, was in the act of attempting to draw a gun from his sleeping bag; and if all of that was true as the defendant states, whether he was under the necessity of immediately shooting and killing the said Hurlin in order to protect his own life, or if, as the situation then appeared to him, such necessity of immediately shooting Hurlin in order to save his own life existed.

"If you find from the evidence that the statements of defendant Bird in these respects are true, and that the statement of the witnesses of the prosecution are not true, and that the defendant Bird shot and killed the said Hurlin under circumstances as they then appeared to him necessary for the protection of his own life, then you should find him not guilty. But if you should further find that the statement of the defendant Bird is true as to the acts of the said Hurlin as to obtaining his own gun in the manner he described, and yet the apparent danger was not such as to make it necessary or apparently necessary for him to kill the deceased Hurlin, without giving him any warning—if you find he gave him no warning—and without calling upon him, the said Hurlin, to desist in his efforts to obtain his gun, and that the defendant under such circumstances shot and killed the deceased Hurlin, without apparent necessity therefor in order to preserve his own life, then you should find the defendant guilty of manslaughter at least.

"But in determining this matter, under the evidence before you, you must consider the situation of the parties at the time

and all the surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the evidence of the defendant."

The contention of the plaintiff in error is that the last paragraph "qualified the whole instruction and permeated it with two errors;" because it was in effect declared that even if the testimony of the witnesses for the government were untrue it was to be considered in determining the verdict; and because all of the evidence for the defendant (plaintiff in error) except his own was withdrawn from the jury in passing on the issue of self-defence. The instruction is not open to this criticism when considered in connection with other instructions. The rule as to the credibility of witnesses was given in other instructions, and did not have to accompany every ruling, and the jury were instructed that it was their duty "to consider the whole evidence and render a verdict in accordance with the facts proved upon the trial." The injunction was not limited by the paragraph complained of by plaintiff in error. That was preceded by the following:

"In considering whether the killing in this case was justifiable or excusable on the ground of self-defence, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and shortly prior thereto, and their respective situations at the time. *You should determine from the evidence in this case whether the several parties were situated at the time of the killing as described by the witness for the prosecution or described by the defendant himself.*"

The italics are ours, and manifestly the injunction was to determine from the whole evidence "the respective situations" of the "several parties." And the same injunction was expressed in the concluding paragraph of the instruction. This view makes it unnecessary to consider at length the instruction requested by plaintiff in error, the refusal of which constitutes the eighth assignment of error. It selected and gave certain testimony prominence and attempted to make it determinative of a reasonable doubt of the guilt of the plaintiff in error. If we could concede the correctness of such an instruction the re-

fusal cannot be claimed as error, if the whole case was submitted to the jury, and we think it was.

4. The seventh assignment of error is based upon the following instructions:

"Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong, but if the attempt was made after many months of confinement and escape comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time."

There was no error in the instruction. It submitted to the jury the attempt to escape as a fact to be considered, not as determinative of guilt, and *Allen* v. *United States*, 164 U. S. 492, applies, and not *Starr* v. *United States*, 164 U. S. 627. Indeed when the state of the record is considered the charge given was as favorable to the accused as the law warranted. The only testimony on the subject of flight related to an escape made by the prisoner in October following his arrest in June. This testimony was objected to not because proof of flight was *per se* inadmissible, but solely on the ground that the escape in question was too remote from the commission of the offence charged and the arrest and imprisonment of the accused to be entitled to go to the jury. The court overruled the objection on the ground that it went to the force of the evidence and not to its admissibility. When therefore the court charged the jury that an attempt to escape "made after many months of confinement" and "comparatively without danger" tended

only slightly to prove guilt, we think the instruction was not amenable to the criticism made of it. In view of the instruction which the court gave, as just stated, we think the court committed no error in not giving a more elaborate instruction on the subject of flight which was asked by the accused. Everything in the charge asked as applied to the case was embraced in the charge given.

5. The plaintiff in error requested the court to give an instruction which defined principal and accessory—expressed the legal value of the testimony of an accomplice and the necessity of its corroboration to justify a conviction, and submitted to the jury to determine whether Charles Scheffler and Naomi Strong were or were not the accomplices of plaintiff in error in the killing of Hurlin. Assuming without deciding that the instruction requested expressed the law correctly, it was nevertheless rightly refused, because there were no facts in the case to justify it. The plaintiff in error testified and claimed to have killed Hurlin in self-defence. His version of the controversy which preceded the homicide was as follows:

"I says to him, [Patterson] 'You fellows are nothing but a pack of thieves; you made ten per cent on them bills in Frisco,' and Patterson says, 'You're a liar;' I says, 'You're another,' and with that we dug into each other.

"Q. And what happened? A. He struck me and I struck him.

"Q. Where did you strike him? A. In the eye, and I knocked him off the sacks and he fell down, and with that Naomi hollers, 'Look out, Homer, they're getting their guns.' Hurlin was coming up with his gun under his sleeping bag, one end of it this way. I shot Hurlin, and Patterson ran to the bow of the boat; he had to stoop like that, and he jumped for his gun and as he did so, I shot him.

"Q. Come to this map and point out just where you were when you shot at Hurlin. A. I was in here; I jumped down here and got the gun and stood right about here; Scheffler and the woman was here.

"Q. Where was Hurlin? A. Hurlin was here, reaching for

his gun under the sleeping bags, and had it under his knee like this way.

"Q. And where was Patterson? A. He was jumping from here over against the edge like—you see the rifle was right in here. I had seen that gun there before, for Scheffler had it out and brought in and set it down there. He was going for that."

It is hardly necessary to point out that this testimony shows the woman to have been an innocent spectator of the fray, and if Scheffler had any guilty connection with what transpired it was not as the accomplice of plaintiff in error. Nor did he become an accomplice by not disclosing the homicide until some time afterward.

We find no error in the other rulings objected to nor do they require particular review.

Judgment affirmed.

JACOBI *v.* ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 341. Argued November 7, 1902.—Decided November 17, 1902.

Plaintiff in error was convicted of assault and the judgment was affirmed by the Supreme Court of Alabama; the conviction was the result of a second trial and the alleged victim who testified at the first trial was not present at the second trial; the witness was permanently absent from the State and there was no pretense of absence by procurement, but there was evidence of diligence in attempting to serve process on her.

Evidence of the former testimony of this witness was admitted against defendant's objections based on several grounds, one of which was that he had the constitutional right to be confronted by the witness, but as no reference to the Constitution of the United States was made in the objections, and the constitution of Alabama provides that in all criminal prosecutions the accused has a "right . . . to be confronted by witnesses against him"; *Held*, that the constitutional right was asserted under the state, and not the Federal Constitution.

In the state Supreme Court error was assigned to the admission of the evidence as being in violation of the Fourteenth Amendment, but as the court did not refer to that contention, and as the settled rule in Alabama in

criminal cases is that when specific grounds of objection are assigned all others are waived, the Supreme Court of the State was not called upon to revise the judgment of the lower court, and this court will not interfere with its action, although if the Supreme Court of the State had passed upon that question the jurisdiction of this court might have been maintained.

Where objection to testimony on the ground that it is in violation of the Constitution of the United States is taken in the highest court of the State for the first time, and that court declines to consider such objection because it was not raised at the trial, the judgment of the state court is conclusive, so far as the right of review by this court is concerned (following *Spies* v. *Illinois*, 123 U. S. 131).

THE case is stated in the opinion of the court.

Mr. Henry C. Lazarus for plaintiff in error. *Mr. Lionel Adams*, *Mr. J. N. Luce* and *Mr. H. Michel* were with him on the brief.

Mr. Charles G. Brown, attorney general of the State of Alabama, for defendant in error.

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

Jacobi was convicted in the City Court of Montgomery, Montgomery County, Alabama, on an indictment for criminal assault, and the judgment against him was affirmed by the Supreme Court of that State. 32 So. Rep. 158. To revise that judgment this writ of error was brought.

The conviction was the result of a second trial of the case, and the alleged victim of the assault, who had testified at the first trial, was not present at the second. But evidence of her previous testimony was admitted against defendant's objection, and it is contended that thereby defendant was deprived of rights secured by the Federal Constitution, and denied due process of law. The question for us to decide at the outset is whether such a claim was specially set up at the proper time and in the proper way.

The rule is firmly established by the decisions of the highest court of Alabama that when a witness is beyond the jurisdiction of the court, whether he has removed from the State per-

manently, or for an indefinite time, his testimony on a former trial for the same offence may be given in evidence against defendant on a subsequent trial. *Lowe* v. *State*, 86 Alabama, 47; *Perry* v. *State*, 87 Alabama, 30; *Pruitt* v. *State*, 92 Alabama, 41; *Matthews* v. *State*, 96 Alabama, 62; *Burton* v. *State*, 115 Alabama, 1.

In this case evidence was introduced before the trial judge that the witness was not in the State at the time of the trial, and that her absence was of a permanent or indefinite nature. There was no pretense of absence by procurement and there was evidence of diligence in attempting to serve process upon her. It was held that sufficient foundation for the admission of evidence of her former testimony had been laid and the Supreme Court concurred in that conclusion. Defendant objected to this preliminary proof and moved to exclude it on several grounds, one of which was "that the defendant has the constitutional right to be confronted by" the witness. These objections having been overruled, evidence was introduced of the testimony given by the absent witness on direct and cross-examination on the former trial, to which defendant objected on the ground, among others, "that the defendant, Jacobi, has the constitutional right to be confronted by the witnesses against him." The trial judge overruled defendant's objections, and each ground thereof, and admitted the evidence, and defendant duly excepted. No reference to the Constitution of the United States was made in the objections. The constitution of Alabama provided that: "In all criminal prosecutions the accused has a right . . . to be confronted by witnesses against him;" and it is plain that the constitutional right asserted was under the state constitution. *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131; *Kansas Endowment Association* v. *Kansas*, 120 U. S. 103.

After the case reached the state Supreme Court, error was assigned to the admission of the evidence as being in violation of the Fourteenth Amendment. The Supreme Court did not refer to that contention, presumably because of the settled rule in Alabama in criminal cases that when specific grounds of objection to the admission of evidence are assigned, all others

are waived, *McDaniel* v. *The State*, 97 Alabama, 14; and that the Supreme Court will not decide a question relating to the admission of evidence not made and acted on in the trial court. *Freeman* v. *Swan*, 22 Alabama, 106; *Robertson* v. *Robinson*, 65 Alabama, 610. The Supreme Court was therefore not called upon to revise the judgment of the City Court for error not committed, and we cannot interfere with its action in adhering to the usual course of its judgments. If the court, however, had passed upon the question our jurisdiction might have been maintained. *Mallett* v. *North Carolina*, 181 U. S. 589; *Dreyer* v. *Illinois*, *ante*, 71.

In *Spies* v. *Illinois*, 123 U. S. 131, where objection to the admission of a certain letter, because obtained in violation of the Constitution of the United States, was made in the Supreme Court of the State for the first time, and that court declined to consider the constitutional question supposed to be involved on the ground that it was not raised in the trial court, Mr. Chief Justice Waite said: "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned." And see *Brooks* v. *Missouri*, 124 U. S. 394; *Baldwin* v. *Kansas*, 129 U. S. 52.

The result is that the writ of error must be

Dismissed.

Syllabus.

REID *v.* COLORADO.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 269. Argued October 24, 1902.—Decided December 1, 1902.

The transportation of live stock from State to State is a branch of interstate commerce and any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union.

When the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the power of the States.

The act of Congress of May 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, does not cover the whole subject of the transportation of live stock from one State to another.

The statute of Colorado of March 21, 1885, relating to the introduction of infectious or contagious diseases among the cattle and horses of that State, relates to matters not covered by the Animal Industry Act of Congress, and is not in violation of the Constitution of the United States.

No one is given by the Constitution of the United States the *right* to introduce into a State, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States.

The Colorado statute is not inconsistent with the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; for it is applicable alike to the citizens of all the States.

The principle is universal that legislation, whether by Congress or by a State, must be taken to be valid, unless the contrary is made clearly to appear.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. John H. Denison and *Mr. William M. Springer* for plaintiff in error.

Mr. Frederic D. McKenney for defendant in error. *Mr. Charles C. Post*, attorney general of the State of Colorado, was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error was convicted in the District Court of Arapahoe County, Colorado, and sentenced to confinement for six months in the county jail for a violation of the second section of a statute enacted March 21, 1885, to prevent the introduction of infectious or contagious diseases among the cattle and horses of that State. Sessions Laws, Col. 1885, p. 335.

The judgment was affirmed by the Supreme Court of the State, and the case having been brought here, it is insisted that by the final judgment the accused has been denied a right specially claimed by him under the Constitution of the United States.

This position depends upon the inquiry whether a certain act of Congress, to be presently referred to, has the scope and effect attributed to it by the accused, and, that contention failing, whether the statute under which he was convicted is repugnant to that instrument.

After reciting that certain infectious and contagious diseases, known as the Texas or splenetic fever, Spanish itch and other diseases of a dangerous and contagious nature, were prevalent among cattle and horse stock in the States and Territories south of the 36th parallel of north latitude, and that it was essential for the protection of the cattle and horses of Colorado to prevent the introduction and spread of all such diseases within that State, the above statute provided:

"§ 1. It shall be unlawful for any person, association or corporation, to bring or drive, or cause to be brought or driven, into this State any cattle or horses having an infectious or

contagious disease, or which have been herded, or brought into contact, with any other cattle or horses laboring under such disease, at any time within ninety days prior to their importation into this State.

"§ 2. It shall be unlawful for any person, association or corporation, to bring or drive, or cause to be brought or driven, into this State, between the first day of April and the first day of November, any cattle or horses from a State, Territory or county south of the 36th parallel of north latitude, unless said cattle or horses have been held at some place north of the said parallel of latitude for a period of at least ninety days prior to their importation into this State, or unless the person, association or corporation, owning or having charge of such cattle or horses, shall procure from the State Veterinary Sanitary Board a certificate, or bill of health, to the effect that said cattle or horses are free from all infectious or contagious diseases and have not been exposed, at any time within ninety days prior thereto, to any of said diseases. The expense of any inspection connected herewith to be paid by the owner or owners of such cattle or horses.

"§ 3. Any person violating the provision of this act shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than five hundred dollars ($500), nor more than five thousand dollars ($5000), or by imprisonment in the county jail for a term of not less than six months, and not exceeding three years, or by both such fine and imprisonment.

"§ 4. If any person, association or corporation shall bring, or cause to be brought, into this State, any cattle or horses, in violation of the provisions of sections one or two of this act, or shall, by false representation, procure a certificate of health, as provided for in section two of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by or from said cattle or horses; judgment for damages in any such case, together with the costs of action, shall be a lien upon all such cattle and horses, and a writ of attachment may issue in the first instance without the giving of a bond, and the court rendering such judgment may order the sale of said cattle or horses, or so many thereof as

may be necessary to satisfy said judgments and costs. Such sale shall be conducted as other sales under execution." Session Laws, Col. 1885, p. 335.

There was no proof in the case that the particular cattle in question had any dangerous, infectious or contagious disease. But it did appear that after being kept a long while in Lubbock and Cochran Counties, Texas, south of the 36th parallel of north latitude, these cattle were shipped on the 20th day of June, 1901, to Denver, Colorado, on their way to their ultimate destination in Wyoming, without being first inspected as required by the statute of the former State. The provisions of the Colorado statute were ignored altogether as invalid legislation. Being asked by one of the witnesses whether he had or not allowed the State Board of Sanitary Inspection to inspect the cattle, or whether or not he had procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that the cattle were free from all infectious or contagious diseases, the defendant said: "That the State Board of Sanitary Inspection, through one of their inspectors, had inspected the cattle against his will and desire, but that he had not obtained from the board any certificate or bill of health whatsoever. But he said that he immediately theretofore had had the cattle inspected by a duly authorized inspector of the Bureau of Animal Industry of the United States, at Hereford, in the State of Texas, and had obtained a certificate from him to the effect that the same were free from any infectious or contagious disease; that the reason he could not get a certificate or bill of health from the State Board of Colorado was because he would not pay the expense of such inspection, and because he had opposed such inspection as unnecessary and without any warrant in law."

When refusing his assent to the State inspection Reid showed to the State authorities what he called a "United States certificate."

The certificate was signed by "Arthur C. Hart, Ass't Inspector, Bureau of Animal Industry." That officer certified that he had carefully inspected the cattle in question at Hereford, Texas, and found them "free from Texas or splenetic fever in-

fection (*Boophilus bovis*), or any other infectious or contagious disease," and that "no Texas fever infection is known to exist where they have been kept or on the trail over which they have passed." Below the signature of the Assistant Inspector was the following unsigned printed memorandum: "Animals which have been inspected and certified by an inspector of the U. S. Bureau of Animal Industry, and are free from disease, have the right to go into any State and be sold for any purpose, without further inspection or the exaction of fees."

The above, together with certain published regulations prepared and issued by the Bureau of Animal Industry, was all the evidence in the case.

The defendant asked the court to instruct the jury:

That it was unnecessary for the defendant to procure from the Colorado Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle were free from infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto, to any of said diseases, for the reason that the cattle had previously been inspected, "according to the statute of the United States in such case made and provided, and according to the rules and regulations pursuant to said statute, promulgated by the Department of Agriculture, by a duly authorized inspector of the Bureau of Animal Industry of the United States, stationed at Hereford, in the State of Texas, and had been duly certified by such United States inspector to be free from any infectious or contagious disease; and for the further reason that he, the said defendant, then and there exhibited and showed to the said State inspector of Colorado the said inspection certificate of the United States to said cattle;" and,

That the Colorado statute, approved March 21, 1885, and under which defendant was prosecuted, was repugnant to the provision of the Constitution of the United States giving Congress power to regulate commerce among the States, as well as to the provision declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and was null and void, as imposing unnecessary and unlawful burdens and restrictions upon interstate commerce.

The court refused to so instruct the jury, but instructed them that if they believed from the evidence, beyond a reasonable doubt, that the defendant did, on or about the 20th day of June, 1901, that is, between the first day of April and the first day of November of that year, "unlawfully bring or drive or cause to be brought or driven into the State of Colorado, and into the county of Arapahoe, the cattle as mentioned in the information or any part thereof, from certain counties south of the 36th parallel, north latitude, and that said cattle had not been held theretofore at some place north of said parallel of latitude, for a period of at least ninety days prior to the importation of said cattle into said State of Colorado, and that the said defendant had not procured from the State Veterinary Sanitary Board of Colorado a certificate or bill of health, to the effect that said cattle were free from infectious or contagious diseases, and to the effect that the same had not been exposed at any time within ninety days prior thereto to any of said diseases, and that then and there the said defendant did refuse and decline to procure or permit any one for him to procure such certificate or bill of health, and did refuse and decline to pay or allow, or suffer or permit any one for him to pay the expense of any inspection so as by the act prescribed, then and in that event it is your duty to find the defendant guilty as charged in this information."

The contention here of the defendant is substantially that the subject of the transportation of cattle from one State to another has been so far covered by the act of Congress known as the Animal Industry Act of May 29, 1884, 23 Stat. 31, c. 60, that, after its passage, no enactment by the State upon the same subject was permissible; and that even in the absence of legislation by Congress the Colorado statute is invalid, in that, by its natural or necessary operation, it unreasonably obstructs that freedom of commerce among the States which the Constitution established. These questions are recognized by the court as of great importance and have received its most careful consideration.

Taking up the first branch of the defendant's contention, let us look at the controlling provisions of the above act of Con-

gress and ascertain whether that statute has the scope and effect claimed for it.

The statute is entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals."

By the first section the Commissioner of Agriculture is directed to organize in his Department a Bureau of Animal Industry, to appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be "to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country." § 1.

By the second section the Commissioner is authorized to appoint two competent agents, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner, "to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and communicable diseases." § 2.

The third section makes it "the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to coöperate in the execution and enforcement of this act." And "whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist,

or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State or other properly constituted authorities signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another." § 3.

In order "to promote the exportation of live stock from the United States," the Commissioner was directed to "make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require;" § 4; and that "to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia," the Secretary of the Treasury was authorized to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary. § 5.

By another section of the act all railroad companies within the United States, or the owners or masters of any steam or sailing vessel or other vessel or boat, were forbidden to receive for transportation or transport from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, "any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall

any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, *knowing* them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, *knowing* them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto." § 6.

Other provisions of the act are as follows:

"§ 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"§ 8. That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be brought into or shall break out in the District of Columbia, it shall be the duty of the Commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; and for this purpose the said Commissioners are

hereby empowered to order and require that any premises, farm, or farms where such disease exists, or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and carcasses; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the Commissioner of Agriculture whatever they may do in pursuance of the provisions of this section.

"§ 9. That it shall be the duty of the several United States district attorneys to prosecute all violations of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any District or Circuit Court of the United States or territorial court holden within the district in which the violation of this act has been committed." 23 Stat. 31, c. 60.

It may be here stated that by the act of February 9, 1889, the Department of Agriculture was made one of the Executive Departments of the Government, and placed under the supervision and control of a Secretary of Agriculture, 25 Stat. 659, c. 122; and that by the act of July 14, 1890, the Secretary was vested with all the authority which by the above act of May 29, 1884, was conferred upon the Commissioner of Agriculture, 26 Stat. 282, 288, c. 707.

It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all

local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628, 631; *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 626; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States.

But the difficulty with the defendant's case is that Congress has not by any statute covered the whole subject of the transportation of live stock among the several States, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the States of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases.

An examination of the Animal Industry Act will make this entirely clear. Three distinct subjects are embraced by that act. One is the ascertainment through the Agricultural Department of the condition of the domestic animals of the United States, the causes of contagious, infectious or communicable diseases affecting them, the best methods for treating, transporting and caring for animals, the means to be adopted for the suppression and extirpation of such diseases, particularly that of contagious pleuro-pneumonia, and to collect such information on those subjects as will be valuable to the agricultural and commercial interests of the country. Congress did not assume to declare that "the rules and regulations" which that Department might adopt as necessary "for the speedy and effectual suppression and extirpation of said diseases" should have in themselves, or apart from the action of a State, any binding force upon the States. They were to be certified to the executive authority of each State, and the coöperation of such authorities in executing the act of Congress invited. If the authorities of any State

adopted the plans and methods devised by the Department, or if the State authorities adopted measures of their own which the Department approved, then the money appropriated by Congress could be used in conducting the required investigations and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one State or Territory into another. Congress did not intend to override the power of the States to care for the safety of the property of their peoples by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the Department with authority to go into a State and without its assent take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing and which endangered the health of domestic animals. Nor did Congress give the Department authority by its officers or agents to inspect cattle within the limits of a State and give a certificate that should be of superior authority in that or other States, or which should entitle the owner to carry his cattle into or through another State without reference to the reasonable and valid regulations which the latter State may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243. The certificate given to the defendant by Assistant Inspector Hart of the Bureau of Animal Industry was in itself without legal weight in Colorado. As said in *Missouri, Kansas & Texas Railway Company* v. *Haber*, above cited: "While the States were invited to coöperate with the General Government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and un-

impaired by the act of Congress." Hence, it was decided in that case that the Animal Industry Act did not stand in the way of the State of Kansas enacting a statute declaring that any person driving, shipping or transporting, or causing to be shipped, driven or transported into or through that State, any cattle liable or capable of communicating Texas or splenetic fever to domestic cattle should be liable to the person injured thereby for all damages sustained by reason of the communication of said disease or fever, to be recovered in a civil action. We there held that the Kansas statute did nothing more than establish a rule of civil liability, in that State, affected no regulation of interstate commerce that Congress had prescribed or authorized, and impaired no right secured by the National Constitution.

Another subject embraced by the act of Congress related to the exportation from ports of the United States to ports in foreign countries of live stock affected with contagious, infectious or communicable diseases, especially pleuro-pneumonia; and in relation to that matter the Secretary of the Treasury was authorized to take such steps and adopt such measures not inconsistent with the act of Congress, as he deemed necessary. As the present case is not one of the exportation of live stock to a foreign country, it is unnecessary to consider what power, if any, remained with the States, after the passage of the Animal Industry Act, to suppress or extirpate diseases that in fact affected live stock, which it was the purpose of the owners to export.

Still another subject covered by the act is the driving on foot or transporting from one State or Territory into another State or Territory, or from any State into the District of Columbia, or from the District into any State, of any live stock *known* to be affected with any contagious, infectious or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one State to another. The owner of such stock, when bringing them into another State, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the State into which

they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious or communicable diseases. The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an offence against the United States for any one *knowingly* to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District into any State, live stock affected with infectious or communicable disease. The Animal Industry Act did not make it an offence against the United States to send from one State into another live stock which the shipper did not know were diseased. The offence charged upon the defendant in the State court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latidude for at least the time required prior to their being brought into Colorado, and without having procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle—in fact—were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the State enactment or under the charge made.

Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress. The latter question we now proceed to examine.

Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural

and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268. Another is, that a State may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Railroad Company* v. *Husen*, 95 U. S. 465, 472. Again, the acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 625, 626, and authorities cited.

Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given by that instrument the *right* to introduce into a State, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States.

Is the statute of Colorado liable to the objection just stated? Can the courts hold that upon its face it unreasonably obstructs the exercise of the general right secured by the Constitution to ship or send recognized articles of commerce from one State to another without interference by local authority? Those questions must be answered in the negative. The Colorado statute, in effect, declares that live stock coming, between the dates and from the territory specified, are, ordinarily, in such condition that their presence in the State may be dangerous to its domestic animals; and hence the requirement that before being brought or sent into the State they shall either be kept at some place north of the 36th parallel of north latitude for at least ninety days prior to their importation into the State, *or* the owner must procure from the State Veterinary Sanitary Board

a certificate or bill of health that the cattle are free from all infectious or contagious diseases, and have not been exposed to any of said diseases at any time within ninety days prior thereto. As there is no evidence in the case as to the practical operation of this regulation upon shippers of cattle, as it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost, the court cannot assume arbitrarily that the State acted wholly without authority or that it unduly burdened the exercise of the privilege of engaging in interstate commerce. The accused seems to have been content to rest his defence upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the State to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the State enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.

As, therefore, the statute does not forbid the introduction into the State of *all* live stock coming from the defined territory—that diseased as well as that not diseased—but only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the State under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.

One other objection to the Colorado statute must be noticed, namely, that it is inconsistent with the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. This position is untenable. The statute is equally applicable to citizens of all the States. No discrimination is shown. No privileges are granted to citizens of Colorado that are denied

Counsel for Parties.

to citizens of other States. *Kimmish* v. *Ball*, 129 U. S. 217, 222.

The principle is universal that legislation, whether by Congress or by a State, must be taken to be valid, unless the contrary is made clearly to appear; and as the contrary does not so appear, the statute of Colorado is to be taken as a constitutional exercise of the power of the State.

Perceiving no error in the judgment to the prejudice of the plaintiff under the Constitution of the United States, the judgment is

Affirmed.

Mr. Justice Brewer dissented from the opinion and judgment of the court.

REID *v.* JONES.

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

No. 147. Argued October 24, 1902.—Decided December 1, 1902.

One convicted in a State court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United States, must ordinarily first take his case to the highest court of the State, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error.

The case is stated in the opinion of the court.

Mr. John H. Denison and *Mr. William M. Springer* for appellant.

Mr. Frederic D. McKenney for appellee. *Mr. Charles C. Post*, attorney general of the State of Colorado, was with him on the brief.

Mr. Justice Harlan delivered the opinion of the court.

After the appellant Reid had been convicted and sentenced, as shown in the case just decided, he was arrested upon a mittimus sued out by the State. He immediately obtained a writ of *habeas corpus* from the Circuit Court of the United States for the District of Colorado. But that court, upon hearing, remanded the prisoner to the custody of the State authorities, and dismissed his application to be discharged. He thereupon prayed and was allowed an appeal to this court.

The merits of this case have been fully considered in case No. 269, *Reid* v. *Colorado*, *ante*, 137. But if this had not been, we should dismiss the present appeal; for, one convicted in a State court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United States, must ordinarily first take his case to the highest court of the State, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State. *Ex parte Royall*, 117 U. S. 241, 251; *New York* v. *Eno*, 155 U. S. 89; *Minnesota* v. *Brundage*, 180 U. S. 499, 502, and authorities cited.

The judgment is

Affirmed.

HOME FOR INCURABLES *v.* CITY OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 86. Argued and submitted November 12, 1902—Decided December 1, 1902.

If the jurisdiction of the Supreme Court of the United States is invoked on the ground that the judgment of the State court has denied a right, title, privilege or immunity secured by the Constitution of the United States, it should appear that such right, title, privilege or immunity was specially set up or claimed in the State court.

This court cannot acquire jurisdiction to review the final judgment of the highest court of the State by reason of a certificate of the Chief Justice of the State court, not made while the case was before it or under its control, stating that the party seeking the intervention of this court raised Federal questions before the State court. While it has been said in some cases that such a certificate is entitled to great respect, and in other cases that its office is to make that more certain and specific which is too general and indefinite in the record, the certificate is insufficient in itself to give jurisdiction or to authorize this court to determine Federal questions that do not appear in any form from the record to have been brought to the attention of the State court.

THE plaintiff in error, the Home for Incurables, filed its petition in the Supreme Court for the city and county of New York, alleging that at the date of the confirmation of a certain assessment for a sewer in East 184th Street from Vanderbilt Avenue west to Washington Avenue, etc., it was the owner of certain lots affected thereby in ward number one, block number 3064, the twenty-fourth ward of the city of New York;

That on the 22d of January, 1900, that assessment was confirmed by operation of law and the title thereof duly entered, with date of entry and of confirmation, in the record of titles of assessments confirmed, whereby such assessment became a lien upon such lots; and,

That the assessment, together with an interest certificate certified by the Comptroller of the city of New York to the Board of Assessors, was irregular, excessive and voidable, for reasons set forth in the petition.

The petition alleged among other things that "so much of the act of the Legislature of the State of New York, known as section 868 of the New York City Consolidation Act of 1882, as purports to authorize and direct the making of such interest certificate and the assessment of the amount thereof herein, is in violation of the Constitution of the State of New York in that said portion of said act authorizes the taking of private property without just compensation, and said portion of said act purports to authorize an unlawful exercise of the power of taxation."

The petitioner prayed that the assessment be vacated or reduced, and that the lien or liens created thereby or by any subsequent proceeding be cancelled and discharged or reduced so far as the same affected the above lots.

The case was heard upon the stipulation of facts in the Supreme Court and the relief asked by the petitioner was denied. Upon appeal to the Appellate Division of the Supreme Court the action of the court of original jurisdiction was confirmed. The case was then carried to the Court of Appeals of the State, and the judgment of the lower court was affirmed.

Upon writ of error to this court, it has been assigned for error that the judgment of the state court was in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States; also, that the judgment deprived the Home of the equal protection of the law and of its property without due process of law.

The record contains a certificate by the Chief Judge of the Court of Appeals of New York to the effect that in this proceeding the Home for Incurables claimed in the courts of the State that "the imposition of all or a part of the assessment on its land as set forth in the record herein was in violation of the statutes and Constitution of the State of New York and of the provisions of the Fourteenth Amendment of the Constitution of the United States, and constituted a taking of property without due process of law; that the respondent in this proceeding contended that the said assessment was neither in whole nor in part in violation of the statutes and Constitution of the State of New York or of the Constitution of the United States, and also

that the said Home for Incurables had no remedy by petition to correct any errors in the said assessment; that this court decided that the said Home for Incurables did have a remedy by petition in the manner and form of the proceeding adopted by it to correct any errors in the said assessment, but that the assessment complained of was valid and without error as to each and every part thereof."

Mr. John M. Perry for plaintiff in error.

Mr. George L. Sterling for defendant in error. *Mr. George L. Rives* and *Mr. Theodore Connoly* were with him on the brief.

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

The plaintiff insists here that the State court, by its final judgment, refused to recognize certain rights belonging to it under the Constitution of the United States. But it does not appear on the face of the record that he set up or claimed any such right until the case reached this court. In *Parmelee* v. *Lawrence*, 11 Wall. 36, 38, this court—following the previous cases of *Lawler* v. *Walker*, 14 How. 149, 152, and *Railroad Company* v. *Rock*, 4 Wall. 177—said it was essential to our jurisdiction in reëxamining the judgment of the State court that the alleged conflict between the State law and the Constitution of the United States "appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court," or "it must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it." Later cases in this court have expressed the additional thought that if the highest court of the State assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in it-

self to sustain the judgment, independently of any question of Federal right.

In the case before us, the Home for Incurables has not brought upon the record the fact that it asserted, in the State court, any Federal right whatever. It is entirely consistent with the record that the Home did not, at any time pending the case in the State court, set up or claim any such right. If our jurisdiction is invoked on the ground that the judgment of the State court has denied a right, title, privilege or immunity secured by the Constitution of the United States, it is essential, under existing statutes, that such right, title, privilege or immunity shall have been specially set up or claimed in the State court. Rev. Stat. § 709; *Armstrong* v. *Treasurer of Athens Co.*, 16 Pet. 281, 285; *Railroad Company* v. *Rock*, 4 Wall. 177, 180; *Powell* v. *Brunswick Co.*, 150 U. S. 433, 439; *Roby* v. *Colehour*, 146 U. S. 153, 159; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648, 654; *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175, 177.

It is true that the transcript contains the certificate of the Chief Judge of the Court of Appeals of New York, not appearing to have been by order of that court while the case was before it or under its control, which states that the Home did make in that court, the Federal questions now pressed upon our consideration. But that certificate is not properly a part of the record. While we have said in some cases that such a certificate is entitled to great respect, and, in other cases, that its office is to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give us jurisdiction, or to authorize us to determine Federal questions that do not appear, in any form, from the record, to have been brought to the attention of the State court. *Powell* v. *Brunswick Co.*, 150 U. S. 433, 439; *Newport Light Co.* v. *Newport*, 151 U. S. 527, 537; *Yazoo & Mississippi Railroad Co.* v. *Adams*, 180 U. S. 41, 47; *Felix* v. *Scharnweber*, 125 U. S. 54, 59.

Having no jurisdiction to reëxamine the judgment below, the writ of error must be

Dismissed.

Counsel for Parties.

RAUB *v.* CARPENTER.

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

No. 64. Argued November 3, 4, 1902—Decided December 1, 1902.

At a special term for orphans' court business the Supreme Court of the District of Columbia admitted a will and codicil to probate, to which the plaintiffs in error (caveators below) filed their caveat; issues as to mental capacity, fraud, coercion and undue influence were framed for trial by jury; on the trial a witness, who was a physician and a relative of deceased, after testifying in regard to certain facts as to health, actions of deceased, cause of death and results of an autopsy, was asked, "Doctor, have you formed any opinion from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, *and from all you know about him yourself*, what his condition of mind was?" The trial court sustained the objection taken by the caveators to the words in italics on the ground that no sufficient basis had been laid for that portion of the evidence, and that the facts relied upon in this particular should be first adduced. *Held*, that the exclusion was not error.

After the decree caveators moved to vacate on the ground that one of the jurors was incompetent *propter delictum* for service, but the trial court denied the motion, the record stating that the court was of the opinion that at the trial there was no evidence of mental incompetency, fraud or undue influence. *Held*, that the verdict and judgment were not absolutely void, and that it was within the discretion of the trial court to grant or deny the motion, and as no other verdict could have been rendered consistently with the facts, the presence of the juror objected to could not have operated to the prejudice of the plaintiffs in error, and as there was nothing to show that injustice was done to them, the trial court did not abuse its discretion.

Wassum v. *Feeney*, 121 Massachusetts, 93, cited in *Kohl* v. *Lehlback*, 160 U. S. 293, 301, followed and *Garrett* v. *Weinberg*, 54 S. C. 127, distinguished.

THE case is stated in the opinion of the court.

Mr. Charles Poe and *Mr. Victor H. Wallace* for plaintiffs in error.

Mr. Joseph A. Burkhart and *Mr. J. J. Darlington* for defendant in error.

Opinion of the Court.

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

This is a writ of error to a judgment of the Court of Appeals of the District of Columbia, affirming certain orders of the Supreme Court of the District, holding a special term for orphans' court business, admitting a will and codicil to probate and granting letters testamentary thereon; and denying a motion to vacate that decree.

Plaintiffs in error filed a caveat to the probate and record of the writings purporting to be the will and codicil, and issues, addressed to both, as to mental capacity, fraud or coercion, and undue influence, were framed for trial by jury.

Trial was had, and on the conclusion of the evidence the court, at the request of the caveatees, instructed the jury that there was no evidence tending to show fraud, undue influence or coercion, and that on these issues the jury should render its verdict for the caveatees. To which the caveators made no objection, and preserved no exception. Three instructions in respect of the mental capacity of the deceased to make a valid will or codicil were given on behalf of the caveators as requested by them.

The jury returned a verdict June 15, 1900, in favor of the caveatees. No motion for a new trial was made within four days as required by rule 53 of the court, or prior to June 26, when the court entered an order and decree admitting the will and codicil to probate, and granting letters testamentary thereon, from which an appeal was taken to the Court of Appeals.

Several exceptions were preserved to the rulings of the court in the progress of the trial, which were disposed of by the Court of Appeals satisfactorily as we think. But one of them has been pressed on our attention.

Dr. George B. Heinecke, a practicing physician in Washington, and a grandnephew of deceased, testified that he had known deceased ever since he could recollect, and was accustomed to seeing him frequently; that he had seen him when recovering from attacks of epilepsy subsequently to the execution of the will and codicil; "that testator had stated to him that he was

a sufferer from urethal calculus; that on the 13th of March, 1896, he had seen the testator have a fainting spell;" "that he had on one occasion seen testator laughing to himself; that on or about the 13th of February, 1899, during the blizzard, the testator acted peculiarly about the snow in his yard; did not know how it got in there, all of it, and went out there and tried to get it removed;" and witness stated the result of the autopsy and the cause of death. He was then asked the following question: "Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, *and from all you know about him yourself*, what his condition of mind was?"

To that portion of the question which called for an opinion from the witness from "all that you know about him yourself," the caveatees objected on the ground that no sufficient basis had been laid for that portion of the question, and that the facts relied upon in this particular should be first adduced. The court sustained the objection and caveators preserved an exception.

We agree with the Court of Appeals that the trial court did not err in holding that portion of the question objectionable, and, if so, the question as framed could not properly have been allowed to be propounded, though caveators were left free to put it with the objectionable words omitted. Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the existence of facts for which there was no foundation in the evidence.

So far as the conduct of the trial was concerned we find no reversible error.

On July 16, 1900, twenty days after the decree was entered, caveators moved that that decree be vacated on the ground that one of the jurors was disqualified for service on the jury by the fact that he was under the age of twenty-one years, and by the fact that he had several times been convicted of the crime of petty larceny in the police court of the District. The motion

was supported by transcripts from the records of the police court, and by affidavits, sustaining both disqualifications, the affidavits also showing that at the beginning of the trial term of the court at which they had been summoned, the jurors had all been examined on their *voir dire* by the presiding justice as to their qualifications to serve on the jury; that the juror now charged to be disqualified had then and there falsely answered that he was over the age of twenty-one years, and had never been convicted of crime; that one of the counsel for the caveators was present in court at the time of such examination; and that the falsehood of the statements of the juror in question was not known to the caveators or their counsel until after the entry of the order now sought to be vacated. The motion to vacate was denied, the record stating "the court further being of opinion that at the trial there was no evidence of mental incompetency, fraud, or undue influence."

From this order the caveators took their second appeal.

Viewed as an ordinary motion for a new trial, the motion was not seasonably made under the rules, nor is it contended that the judgment came within the Maryland act of 1787, ch. 9, sec. 6, 2 Kilty; *Spalding* v. *Crawford*, 3 App. D. C. 361, as having been obtained by fraud, deceit, surprise or irregularity in the sense of that statute. But it rests on the power of the court to set aside a judgment at the term at which it is rendered under circumstances calling for the exercise of its discretion in that regard, or on the assumption that the trial and verdict were absolutely void because of the incompetency of the juror.

By section 872 of the Revised Statutes relating to the District of Columbia, as amended by the act of March 1, 1889, 25 Stat. 749, it is provided: "No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, and a good and lawful man, who has never been convicted of a felony or misdemeanor involving moral turpitude."

Treating the application as open to consideration by reason of the discovery of the existence of the alleged objection after

verdict and judgment, but as amounting to no more than a motion for new trial made in apt time, it was within the discretion of the trial court to grant or deny it, and the Court of Appeals held that the order denying it was not appealable. But the court also held that the discretion of the trial court was properly exercised; that there was not only no evidence in support of the charges of "fraud, undue influence, circumvention, or coercion," which was conceded, but that "the charge of mental unsoundness is wholly unsustained and without any support whatever in the testimony;" and that the trial court would have been fully justified in peremptorily directing a verdict on this issue as well as on the others, as that court in the order appealed from intimated it would have done if requested. In short, the two courts agreed that the facts were with the caveatees, and, unless clearly erroneous, which does not appear, we should accept their finding. *Towson* v. *Moore*, 173 U. S. 17, 25.

And as the verdict was the only verdict that could be rendered consistently with the facts, the presence of this juror in the box could not have operated to the prejudice of plaintiffs in error.

In *Wassum* v. *Feeney*, 121 Massachusetts, 93, the rule that "when a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict," was applied, and it was held that "a verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and empaneled, though the losing party did not known of the infancy until after the verdict." And Mr. Justice Gray, then Chief Justice of Massachusetts, delivering the opinion, cited, among other cases, *Hill* v. *Yates*, 12 East, 229, where the son of a juryman unlawfully served in his father's place, and pointed out that Lord Ellenborough there "said that he had mentioned the case to all the judges, and they were all of opinion that it was a matter within their discretion to grant or refuse a new trial on such a ground; that if no injustice had been done, they would not interfere in this mode."

Wassum v. *Feeney* was cited with approval and quoted from in *Kohl* v. *Lehlback*, 160 U. S. 293, 301, as in accordance with the great weight of authority. This case involved the disquali-

fication of alienage, but did not require the determination of the question, "whether, where the defendant is without fault and may have been prejudiced, a new trial may not be granted on such a ground," though it was referred to.

Garrett v. *Weinberg*, 54 S. C. 127, is relied on by plaintiffs in error as ruling in a civil case that a new trial should be granted when a disqualified juror sat, the parties or their attorneys not knowing of the disqualification until after verdict. But that was a case of a motion for new trial made in the ordinary way, and the juror was held disqualified under the express provisions of the constitution of the State, which in that respect were held to be mandatory, so that the jury was not a "constitutional jury," but the court did not intimate that the incompetency rendered the verdict and judgment void, and, on the contrary, treated ignorance of the fact until after trial as material.

In *Kohl* v. *Lehlback*, we held that "the disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if, voluntarily, or through negligence, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it." *Hollingsworth* v. *Duane*, Wall. C. C. 147, was referred to, where the court placed alienage, infancy, infamy, and affinity, in the same category. See *Goad* v. *State*, 106 Tennessee, 175; *State* v. *Powers*, 10 Oregon, 145; where disqualification *propter delictum* was held not to be in itself fatal after verdict.

No reason is perceived why this particular objection could not be waived by the parties, and even where a party by reason of excusable want of knowledge might be entitled to claim that he had not waived it, that would go to the merits on application for new trial, and not to the want of power. The verdict and judgment not being absolutely void, it is unnecessary to pursue the subject further, as there is nothing to show that injustice was done to caveators, and the trial court did not abuse its discretion in the premises.

Judgment affirmed.

METCALF *v.* BARKER.

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

No. 57. Argued October 30, 1902.—Decided December 1, 1902.

The question in this case was whether under section 67*f* of the bankruptcy act of 1898 where a final decree recovered within four months of the petition, but which was based on a judgment creditors' bill in equity filed long prior thereto, the creditor had a lien on the assets involved in the action which was superior to the title of the trustee in bankruptcy, or whether (as was held by the District Court) section 67*f* prevented the complainant from acquiring any benefit from the lien, or the fund attached except through the trustee in bankruptcy *pro rata* with other creditors. *Held*, that while the lien created by a judgment creditors' bill is contingent in the sense that it may possibly be defeated by the event of the suit, it is in itself, and so long as it exists, a charge, a specific lien, on the assets, not subject to being divested save by payment of the judgment sought to be collected, and a judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the bankruptcy statute which is plainly confined to judgments creating liens.

When therefore a judgment creditor files his bill in equity long prior to the bankruptcy of the defendant, thereby obtaining a lien on specific assets, and diligently prosecutes it to a final judgment, he acquires a lien on the property of the bankrupts which is superior to the title of the trustee, and a District Court of the United States does not have jurisdiction to make an order in bankruptcy proceedings against the defendants enjoining him from enforcing such lien.

See also *Pickens* v. *Roy*, decided this term, p. 177, *post*.

THE certificate in this case is as follows:

"This matter came before this court upon a petition of Metcalf Brothers & Co. to superintend and revise in matter of law certain proceedings of the District Court of the United States for the Southern District of New York, wherein an order was made by said District Court enjoining the petitioners, Metcalf Brothers & Co., from taking any further proceedings under any judgment obtained by them in the Supreme Court of the State of New York in a judgment creditors' action wherein certain transfers made by the bankrupts had been set aside as to them

as fraudulent and void, and wherein receivers of the property of the bankrupts appointed by the said Supreme Court had been directed to pay to them the amount of their judgments at law upon which their said judgment creditors' action was founded.

"For its proper decision of the matter this court desires the instruction of the Supreme Court upon the questions of law hereinafter stated, and hereby certifies the same to the Supreme Court of the United States for that purpose."

"*Statement of Facts.*

"On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were copartners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being copartnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the Supreme Court of the State of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all their tangible personal property, consisting of clothing material and stock in trade. This also was copartnership property, and, with the book accounts, comprised all their property except a piece of real estate owned by Israel Lesser individually and a ground lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilianthal.

"After making these transfers and after the levy by the sheriff under the executions issued upon the confessed judgments and on the same day, by a fraud upon the court, in a collusive action in the Supreme Court of New York to dissolve the partnership, they procured the appointment of a receiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

"Various creditors of the bankrupts immediately commenced

actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed-judgment creditors, and in an action brought in the Supreme Court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

"On the 22d day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the Supreme Court of the State of New York against the Lessers for $930.21 and $2547.80 respectively, upon which executions were issued and returned unsatisfied.

"On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action in the Supreme Court of the State of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the copartnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

"This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment to the receivers) were to be administered by the receivers for the benefit of all the creditors of the copartnerhip equally, including Metcalf Brothers & Co., while the real estate transferred

became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22d and 29th, 1896.

"All parties except the receivers appealed from this judgment to the appellate division of the Supreme Court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers. It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands, and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgments in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

"This decision was embodied in an instrument made the 30th day of December, 1898, entitled an 'order,' but which, after reciting the necessary facts, 'ordered and adjudged' that the judgment of the trial term be modified as stated, and also 'ordered and adjudged' that the transfers in question, except the transfer of the real estate, were fraudulent and void as to Metcalf Brothers & Co.; that the receivers be, and they were thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the Supreme Court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was transmitted to the clerk of the Supreme Court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

"On the 12th day of May, 1899, Lesser Brothers filed in the District Court of the United States for the Southern District of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and

on the 7th day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

"From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the Court of Appeals of the State of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the amount of their judgments, and that those creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

"The decision of the Court of Appeals was made on the 6th of February, 1900. The remittitur from that court to the Supreme Court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the District Court of the United States for the Southern District of New York an order, entitled in the bankruptcy proceeding, requiring Metcalf Brothers & Co. to show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon any one but their attorneys in their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause and filed a written objection that the District Court was without jurisdiction, power, or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject matter of the

proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that they had not been brought into court on any process or been given any notice of the order to show cause except that their attorneys in their creditors' action had received a copy thereof, and especially that no statute conferred upon the District Court jurisdiction, power, or authority to issue any writ of injunction in the premises.

"Their objection was overruled, and after an argument of the merits of the application the injunction was continued.

"Subsequently Metcalf Brothers & Co. presented a petition to this court to superintend and revise in matter of law the said proceedings of the District Court.

"*Questions Certified.*

"Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

"1. Had the District Court of the United States for the Southern District of New York jurisdiction to make the injunction order in question?

"2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

"3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

"4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

"5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by

any of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?"

Mr. Nelson S. Spencer for petitioners.

Mr. Otto T. Hess and *Mr. McCready Sykes* for respondent.

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

Metcalf Brothers & Company, judgment creditors of Lesser Brothers, commenced their creditors' suit in the Supreme Court of New York, December 17, 1896. The case came to trial December 17, 1897, and decree was rendered April 6, 1898. 22 Misc. Rep. 664. On appeal the appellate division affirmed the judgment of the trial court in part, and reversed it in part, and directed the payment by the receivers to Metcalf Brothers & Company of the amount of their judgments out of the money in the receivers' hands. 35 App. Div. 596. This decree or judgment was embodied in an order dated December 30, 1898, but the clerk of the Supreme Court appears not to have entered it until January 31, 1899. The decision of the Court of Appeals, 161 N. Y. 587, was made February 6, 1900, and the remittitur was received and filed in the court below March 12, 1900.

The bankruptcy law was approved July 1, 1898. May 12, 1899, Lesser Brothers filed their petition in bankruptcy and were adjudicated bankrupts, and Barker was appointed trustee June 7, 1899. March 8, 1900, the bankrupts' trustee procured from the District Court an order entitled in the bankruptcy proceedings requiring Metcalf Brothers & Company to show cause on March 13 why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action, and so enjoining them in the interim, which injunction, after argument on the merits, was continued. No question arises here in respect of real estate, and on the case stated in the certificate the property affected was equitable assets. There had been tangible personal property,

subject to levy and sale under execution, but this had been previously sold by an order of the Supreme Court of New York and the proceeds were held by receivers.

The general rule is that the filing of a judgment creditors' bill and service of process creates a lien in equity on the judgment debtor's equitable assets. *Miller* v. *Sherry*, 2 Wall. 237; *Freedman's Savings & Trust Company* v. *Earle*, 110 U. S. 710. And such is the rule in New York. *Storm* v. *Waddell*, 2 Sandf. Ch. 494; *Lynch* v. *Johnson*, 48 N. Y. 27; *First National Bank* v. *Shuler*, 153 N. Y. 163. This was conceded by the District Court, but the court held that the lien so created was "contingent upon the recovery of a valid judgment, and liable to be defeated by anything that defeats the judgment, or the right of the complainants to appropriate the fund;" that "such a contingent or equitable lien, it is evident, cannot be superior to the judgment on which it depends to make it effectual, but must stand or fall with the judgment itself;" and that "section 67*f*, therefore, in declaring that a judgment recovered within four months 'shall be deemed null and void,' etc., necessarily prevents the complainants from acquiring any benefit from the lien, or the fund attached, except through the trustee in bankruptcy *pro rata* with other creditors," it being also held that, although the judgment at special term was rendered more than four months before the filing of the petition, yet that the judgment of the appellate division, as affirmed by the Court of Appeals, was within the four months. 100 Fed. Rep. 433.

Assuming that the judgment at special term is to be disregarded, and that the judgment of the appellate division was entered within the four months, it will be perceived that if the views of the District Court were correct, the third question propounded should be answered in the negative, while if incorrect, that question should be answered in the affirmative.

Doubtless the lien created by a judgment creditors' bill is contingent in the sense that it might possibly be defeated by the event of the suit, but in itself, and so long as it exists, it is a charge, a specific lien, on the assets, not subject to being divested save by payment of the judgment sought to be collected.

Opinion of the Court.

The subject was fully discussed and the effect of bankruptcy proceedings considered by Vice Chancellor Sandford in *Storm* v. *Waddell*, 2 Sandf. Ch. 494, which has been so repeatedly recognized with approval as to have become a leading case.

As Mr. Justice Swayne remarked in *Miller* v. *Sherry*, the commencement of the suit amounts to an equitable levy, 2 Wall. 249; or, in the language of Mr. Justice Matthews, in *Freedman's Savings & Trust Company* v. *Earle*, "It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority. The filing of the bill, in cases of equitable execution, is the beginning of executing it." 110 U. S. 717. And the right to payment out of the fund so vested cannot be affected by a subsequent transfer by the debtor, *McDermutt* v. *Strong*, 4 Johns. Ch. 687, or taken away by a subsequent discharge in bankruptcy. *Hill* v. *Harding*, 130 U. S. 699; *Doe* v. *Childress*, 21 Wall. 642; *Eyster* v. *Gaff*, 91 U. S. 521; *Peck* v. *Jenness*, 7 How. 612.

Kittredge v. *Warren*, 14 N. H. 509, was relied on as to the effect of attachments on mesne process in New Hampshire in *Peck* v. *Jenness*. And it may be remarked that Chief Justice Parker's vigorous discussion in that case of the point that the attachment lien was not contingent on a subsequent judgment is *a fortiori* applicable in cases where the prior establishment of the creditor's claim is the foundation of the creditor's suit.

Granting that possession of the power "to establish uniform laws on the subject of bankruptcies" enables Congress to displace these well-settled principles and to divest rights so acquired, we do not think that Congress has attempted to do so.

Section 67*f* provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien

shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid preëxisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial.

Moreover other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four months.

By section 63*a*, fixed liabilities evidenced by judgments absolutely owing at the time of the filing of the petition, or founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of application for discharge, may be proved and allowed, while under section 17 judgments in actions of fraud are not released by a discharge, and other parts of the act would be wholly unnecessary if section 67*f* must be taken literally.

Many of the District Courts have reached and announced a similar conclusion: *In re Blair*, 108 Fed. Rep. 529; *In re Beaver Coal Company*, 110 Fed. Rep. 630; *In re Kavanaugh*, 99 Fed. Rep. 928; *In re Pease*, 4 Amer. Bank. Rep. 547; as have also the Supreme Court of Rhode Island and the Chancery Court of New Jersey in well-considered decisions. *Doyle* v. *Heath*, 22 R. I. 213; *Taylor* v. *Taylor*, 59 N. J. Eq. 86. And see *Wakeman* v. *Throckmorton*, 51 Atl. Rep. 554.

As under section 70*a*, *e*, and section 67*e*, the trustee is vested with the bankrupt's title as of the date of the adjudication, and

subrogated to the rights of creditors, the foregoing considerations require an affirmative answer to the third question, but in answering the first question some further observations must be made. This creditors' action was commenced December 17, 1896, more than eighteen months before the passage of the bankruptcy act, and was prosecuted with exemplary diligence to final and complete success in the judgment of the Court of Appeals. At this point the bankruptcy court intervened and on summary proceedings enjoined Metcalf Brothers & Company from receiving the fruits of their victory. The state courts had jurisdiction over the parties and the subject matter, and possession of the property. And it is well settled that where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control.

In *Peck* v. *Jenness*, 7 How. 612, the District Court had decided that the lien of an attachment issued out of a court of New Hampshire was defeasible and invalid as against an assignee in bankruptcy. But this court held that this was not so, and that the District Court had no supervisory power over the state courts, and Mr. Justice Grier said: "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. . . . The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The rule indicated was applied under the act of 1841 in *Clarke* v. *Rist*, 3

McLean, 494; under the act of 1867, by Mr. Justice Miller in *Johnson* v. *Bishop*, Woolworth, 324, and by Mr. Justice Nelson, in *Sedgwick* v. *Menck*, 21 Fed. Cases, 984, and under the act of 1898, among other cases, by the Circuit Court of Appeals for the Fourth Circuit in *Frazier* v. *Southern Loan and Trust Company*, 99 Fed. Rep. 707, and *Pickens* v. *Dent*, 106 Fed. Rep. 653.[1]

White v. *Schloerb*, 178 U. S. 542, proceeded on the familiar doctrine that property in the custody of a court of the United States cannot be taken out of that custody by any process from a state court, and the jurisdiction of the District Court sitting in bankruptcy by summary proceedings to maintain such custody was upheld. Mr. Justice Gray, speaking for the court, said: "By section 720 of the Revised Statutes, 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Among the powers specifically conferred upon the court of bankruptcy by section 2 of the bankrupt act of 1898 are to '(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act.' 30 Stat. 546. And by clause 3 of the Twelfth General Order in Bankruptcy applications to the court of bankruptcy 'for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.' 172 U. S. 657. Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody."

This cautious utterance—and courts must be cautious when dealing with a conflict of jurisdiction—sustains as far as it goes

---

[1] Affirmed by this court *sub nomine Pickens* v. *Roy*, p. 177, *post*.

Counsel for Appellant.

the converse of the proposition when presented by a different state of facts.

We are of opinion that the jurisdiction of the District Court to make the injunction order in question cannot be maintained. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18, 26.

The first question will be answered in the negative, and the third question in the affirmative, and it is unnecessary to answer the other questions.

Certificate accordingly.

PICKENS *v.* ROY.

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

No. 78. Submitted November 10, 1902.—Decided December 1, 1902.

Where a judgment creditor filed a bill in a state court to set aside a conveyance made by a person, who during the pendency of the action and years after its commencement is adjudged a bankrupt, and to apply the proceeds of the property affected towards the payment of the debt, the state court acquires such complete jurisdiction and control over the bankrupt and his property that jurisdiction is not divested by proceedings in bankruptcy, and it is the duty of the state court to proceed to final decree notwithstanding the adjudication in bankruptcy, under the rule that the court which first acquires rightful jurisdiction over the subject matter should not be interfered with; and the District Court of the United States in which the bankruptcy proceedings are pending has no jurisdiction to restrain the complainants in the state court from executing their decree obtained in that court.

Nor does the mere fact that the complainant in such an action in a state court proved up her judgment as a preferred debt in bankruptcy "without waiving her preference," operate to deprive the State court of jurisdiction or amount to a consent to the exercise of jurisdiction by the District Court to restrain her from executing the judgment.

See also *Metcalf Brothers & Co.* v. *Barker*, decided this term, p. 165, *ante*.

THE case is stated in the opinion of the court.

Mr. John W. Davis for appellant. *Messrs. Davis & Davis* were with him on the brief.

Mr. Edwin Maxwell for appellees. *Mr. J. Hop. Woods*, was with him on the brief.

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

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit affirming the decree of the District Court for the District of West Virginia dissolving an injunction and dismissing a bill filed in that court by Dever Pickens against Susan C. Dent and others. 106 Fed. Rep. 653.

The facts necessary to be considered in disposing of the case were stated by the Circuit Court of Appeals in substance as follows: January 24, 1889, Susan C. Dent (afterwards Susan C. Dent Roy) exhibited her bill in the Circuit Court of Barbour County, West Virginia, against Dever Pickens and others, to set aside as fraudulent a certain deed made by Pickens to trustees, bearing date January 14, 1889, and assailing as fraudulent certain indebtedness thereby secured. At the succeeding September rules an amended bill was filed alleging that complainant Dent (Roy) on July 23, 1889, recovered a judgment at law against Pickens for the sum of $10,000, with interest and costs. Complainant prayed that the real estate mentioned in the bill as the property of Pickens, and described in the trust deed, might be sold, and the proceeds applied to the payment of her judgment and in satisfaction of the liens existing on the land. The judgment was subsequently reversed, and a retrial resulted on February 27, 1892, in a judgment for $9000, with interest and costs, and a second amended bill was filed so alleging.

The Circuit Court of Appeals did not deem it essential to give a history of the many years of "hard fought and well contested litigation," which followed, but stated that the case was pending and undisposed of by the Circuit Court of Barbour County, October 30, 1899, when Pickens was adjudicated a bankrupt by the District Court of the United States for the District of West Virginia on a petition filed October 27. After the adjudication, and on November 2, 1899, Pickens filed an answer in the chancery cause, in which he set up the proceed-

ings in bankruptcy, asked that all further action in the state court might be suspended until the District Court had disposed of those proceedings, and contended that all his estate, rights and interests of every kind and description, had passed from the control of the Circuit Court of Barbour County and into the jurisdiction of the District Court. On November 18, 1899, a trustee in bankruptcy was appointed for Pickens' estate, who in February, 1900, presented to the Circuit Court of Barbour County his petition in the chancery cause, asking that he be made a party, that his petition stand as an answer, and that the Circuit Court proceed to the enforcement of the liens against the bankrupt's estate; and, thereafter, on February 23, 1900, that court rendered a decree by which, among other things, it was ordered that the deed of trust referred to in the bill be set aside as fraudulent and that a special commissioner and receiver therein named should rent the land described until a certain day and then sell the same, the proceeds thereof to be applied to the payment of the debts due by Pickens. November 20, 1899, complainant Dent (Roy), "without waiving her preference," tendered her proof of debt before the referee in bankruptcy, it being the judgment in question, which was allowed as a preferred claim against the bankrupt's estate.

The receiver and commissioner appointed in the chancery court was proceeding to execute the decree therein when Pickens filed his bill in the District Court March 31, 1900, against Dent (Roy) and others, rehearsing the facts relating to the suit and to the proceedings in bankruptcy, charging that the trustee was not authorized to intervene in the chancery cause, and asserting that the state court on the filing of Pickens' answer setting up his adjudication should have taken no further action, and that, therefore, the decree appointing the commissioner and receiver to rent and sell the real estate was without authority of law and void.

The prayer was that defendants be restrained from all further proceedings in the suit so pending in the Circuit Court of Barbour County until the termination of the bankruptcy proceedings; that the receiver and commissioner be enjoined from executing the decree during their pendency; and that the pos-

session and control of the property be turned over to the trustee to be administered under the direction of the court in bankruptcy.

A preliminary injunction was granted by the district judge, which was dissolved July 26, 1900, and Pickens' bill dismissed with costs. From that decree this appeal was taken.

Such being the state of facts, the Circuit Court of Appeals held that the District Court had no jurisdiction of the suit, even if it had been brought in the name of the trustee, who could not have sued defendants below in that court in respect of the bankrupt's property, unless by consent, while the bankrupt himself had no standing in that court after adjudication, *Bardes* v. *Hawarden Bank*, 178 U. S. 524; and further, that as the Circuit Court of Barbour County had at the time of the adjudication, and had had for years, complete jurisdiction and control over the bankrupt and his property, that jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject matter should not be interfered with. *Frazier* v. *Southern Loan and Trust Company*, 99 Fed. Rep. 707. And Goff, J., speaking for the court, said: "The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject matter of such controversy."

The court also ruled that the mere fact that complainant Dent (Roy) proved up her judgment as a preferred debt in bankruptcy, when, and as she did, did not operate to deprive the state court of jurisdiction, nor amount to a consent to the exercise of jurisdiction by the District Court as invoked.

We are of opinion that the Circuit Court of Appeals was right in its rulings. The case in the one aspect came within *Bardes* v. *Hawarden Bank*, and in the other within the rule applied. *Metcalf* v. *Barker*, *ante*, p. 165.

Decree affirmed.

GRIN *v.* SHINE.

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

No. 303. Submitted November 3, 1902.—Decided December 1, 1902.

Extradition treaties should be faithfully observed and interpreted with a view to fulfilling our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused. Technical noncompliance with formalities of criminal procedure should not be allowed to stand in the way of the discharge of the international obligations of this Government.

1. Section 5270 of the Revised Statutes is satisfied if the commissioner before whom the warrant requires the person arrested to appear has been specifically authorized to act in extradition proceedings on the same day the warrant is issued, and the oath to the complaint need not necessarily be taken before a commissioner specially authorized to act in extradition proceedings; but the judge issuing the warrant may act upon a complaint sworn to before a United States commissioner authorized generally to take affidavits.
2. The District Judge may make the warrant returnable directly before a commissioner who upon the same day is specially designated to act in extradition proceedings. It need not necessarily be made before himself.
3. Under a statute punishing embezzlement of property which has come under the control or care of the defendant by *virtue of his employment* as clerk, agent, or servant, it is sufficient to allege that the defendant while so employed embezzled money entrusted to, and received by, him in his capacity as clerk, etc.

A complaint in extradition need not set forth the crime with the particularity of an indictment. It is sufficient if it fairly apprises the party of the crime with which he is charged.

4. A complaint is not defective because it does not use the word "fraudulently" in referring to the defendant's action in embezzling the money entrusted to him. The word "embezzle" implies a fraudulent intent; the addition of the word "fraudulently" would be mere surplusage.
5. An order made by an officer in Russia, purporting to act as an examining magistrate, and reciting the fact of defendant's flight and ordering him to be brought before an examining magistrate, which is evidently designed to secure the apprehension of the accused and his production before an examining magistrate, although not in the form of a warrant of arrest as used in this country, is a sufficient compliance with the provision of the treaty which requires an authenticated copy of the warrant of arrest

or of some other equivalent judicial document issued by a judge or magistrate of the demanding government. Furthermore, Congress not having required by section 5270 the production of a warrant of arrest by the foreign magistrate, has waived that requirement of the treaty.

6. The sufficiency of evidence properly certified under section 5 of the act of August 3, 1882, 22 Stat. 216, to establish the criminality of the accused for the purposes of extradition, cannot be reviewed upon *habeas corpus* (following *In re Oteiza*, 136 U. S. 330).
7. Where depositions and other documents in the record are certified by the proper officer, as required by the act of August 3, except that the certificate says that the papers "are properly and legally authenticated so as to entitle them to be received and admitted *as evidence* for similar purposes by the tribunals of Russia," the language being a literal conformation to the statute, adding only the words italicized, the introduction of those words does not invalidate the certificate.
8. Under section 5270 the complaint may be made by any person acting under authority of the demanding government having knowledge of the facts. The accused, however, can only be surrended upon the requisition made by the foreign government through the diplomatic agent or superior consular officer, and this may be made entirely independently of the proceeding before the magistrate, and the certificate of the Secretary of State that such demand has been made does not have to be produced before the warrant can be issued.
9. Where a cheque is delivered to a clerk with instructions to draw money from the bank, take it to the railway, and forward it to another city, he obtains possession of both the cheque and the money honestly and with the consent of his principal, and if he subsequently converts the money to his use, it is *prima facie* a case of embezzlement and not of larceny, within the definitions of both crimes under the laws of California, and while there might be a question for a jury in a Russian court to pass on, it is sufficient in proceedings here if a *prima facie* case of embezzlement is made out.

This was an appeal from a judgment of the Circuit Court for the Northern District of California, dismissing a writ of *habeas corpus* sued out by Grin, and remanding him to the custody of the defendant, marshal for the Northern District of California, who held him under a mittimus issued by a commissioner in certain proceedings under a treaty with the Emperor of Russia for the extradition of criminals, proclaimed June 5, 1893. 28 Stat. 1071.

These proceedings were begun by a complaint of Paul Kosakevitch, Russian consul at the city of San Francisco, stating in substance that on March 6, 1901, Grin, a Cossack of the Don

and a Russian subject, in the employment of the firm of E. L. Zeefo & Co., doing business in the city of Rostov, on the river Don, in the Empire of Russia, embezzled the sum of 25,000 roubles, "entrusted to and received by" him in his capacity as "clerk" of such firm, and that he had subsequently absconded and taken refuge in San Francisco; that he had been indicted in Russia for the embezzlement of the money, and that a mandate had been issued by the Department of State in Washington directing the necessary proceedings to be had in pursuance of the laws of the United States, in order that the evidence of this criminality might be heard and considered. The complaint was sworn to before George E. Morse, United States commissioner, with the usual power to take affidavits, but not specially authorized by any court of the United States to take proceedings in extradition; that upon such complaint the judge of the District Court for the Northern District of California issued a warrant of arrest, and directed that petitioner, when arrested, should be brought before E. H. Heacock, Esquire, United States commissioner, for examination and further proceedings; that, at the time such warrant was issued, Heacock was not authorized to take jurisdiction of extradition proceedings, and that the evidence before him failed to show that the petitioner had committed the crime of embezzlement.

Several other defects in the extradition proceedings are set forth in the petition, and so far as they are deemed material appear hereafter in the opinion.

Upon a hearing upon this petition the Circuit Court made an order remanding the petitioner to the custody of the marshal, and an appeal was thereupon taken to this court. *In re Grin*, 112 Fed. Rep. 790.

Mr. George D. Collins for appellant.

Mr. Richard Bayne and *Mr. H. G. Platt* for the Russian government.

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

We shall only notice such alleged defects in the extradition proceedings as are pressed upon our attention in the briefs of counsel. While these defects are of a technical character, they are certainly entitled to respectful and deliberate consideration. Good faith toward foreign powers, with which we have entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defences as others accused of crime within our own jurisdiction.

We are not prepared, however, to yield our assent to the suggestion that treaties of extradition are invasions of the right of political habitation within our territory, or that every intendment in proceedings to carry out these treaties shall be in favor of the party accused. Such treaties are rather exceptions to the general right of political asylum, and an extension of our immigration laws prohibiting the introduction of persons convicted of crimes, 18 Stat. 477, by providing for their deportation and return to their own country, even before conviction, when their surrender is demanded in the interests of public justice. There is such a general acknowledgment of the necessity of such treaties that of late, and since the facilities for the escape of criminals have so greatly increased, most civilized powers have entered into conventions for the mutual surrender of persons charged with the most serious non-political crimes. These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to

do, viz., submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged.

1. The first assignment of error is that the commissioner had no jurisdiction over the case, inasmuch as at the time the warrant of arrest was issued he had not been authorized to act in extradition proceedings by any of the courts of the United States under Rev. Stat. sec. 5270, which reads as follows:

"SEC. 5270. Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or conven-

tion; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Under this section it is plain, first, that the commissioner must be specially authorized to act in extradition cases; second, that a complaint must be made under oath charging the crime; third, that a warrant must issue for the apprehension of the person; fourth, that he must be brought before such justice, judge or commissioner to the end that the evidence of criminality may be heard and considered; fifth, that the commissioner shall certify the evidence to the Secretary of State, that a warrant may issue for the surrender. There is certainly no requirement here that the commissioner shall be authorized to act before he assumes to act, and in this case there is no evidence that he assumed to act until after October 17, 1901, when he was specially appointed for that purpose. The day upon which the petitioner was brought before the commissioner, Heacock, does not appear, but his commitment is dated November 19, 1901. The warrant upon which he was arrested was issued October 17, the day upon which the commissioner was specially authorized to act.

It is true that a warrant of arrest can only issue under sec. 5270 upon a complaint made under oath; but there is no requirement that the oath shall be taken before a commissioner authorized to act in extradition proceedings, or even before the judge or commissioner, who issues the warrant of arrest. While we are bound to give the person accused the benefit of every statutory provision, we are not bound to import words into the statute which are not found there, or to say that the judge issuing the warrant may not receive an oath taken before a commissioner authorized generally to take affidavits. There is no evidence that Mr. Morse, who took this complaint, was not a United States commissioner appointed under the act of May 28, 1896, 29 Stat. 140, 184, and the fact that he signs his name as such, and that he was recognized as such by the Circuit Court in this proceeding, is sufficient evidence of his authority. It is true the district judge, who issued this warrant of arrest, might himself have administered the oath, but he was equally at liberty

to act upon a complaint sworn to before a United States commissioner.

2. Nor did the district judge, who issued the warrant, exceed his powers in making it returnable before a commissioner, who upon the same day was specially designated to act in extradition proceedings. It is true that the statute provides, sec. 5270, that the person before whom the complaint is made may "issue his warrant for the apprehension of the person so charged, that he may be brought before *such* justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered;" but the practice in this as in other proceedings of a criminal or *quasi* criminal nature has been to make the warrant returnable before the magistrate issuing the warrant, or some other magistrate competent to take jurisdiction of the proceedings. In the case of *Henrich*, 5 Blatchf. 414, the complaint was made before Commissioner White, was laid before Mr. Justice Nelson of this court, who issued his warrant returnable before himself *or* Commissioner White. No objection was made to the proceedings for this reason, though the case was vigorously contested upon other grounds, notably because the warrant was executed without the limits of the district, and within the State of Wisconsin. The fact that the point was not made in the case certainly indicates that it was not considered by counsel to be even a plausible ground for quashing the proceedings.

The commissioner is in fact an adjunct of the court, possessing independent, though subordinate, judicial powers of his own. If the district judge, acting under sec. 5270, had made the warrant returnable before himself, there could be no doubt of its legality; and in such case, upon the return of the warrant with the prisoner in custody, he might refer the case to the commissioner to examine the witnesses, hear the case, and report his conclusions to the court for its approval. If he could do that, we see no objection to his referring the case directly to the commissioner by making the warrant returnable before him, inasmuch as the latter possesses the same power with respect to the extradition of criminals as the district judge himself. It may be said that technically the warrant should be made re-

turnable before the magistrate issuing it, but where it is made returnable before another officer, having the same power and jurisdiction to act, we do not think it is fairly open to criticism.

This practice is by no means unknown under the criminal laws of the several States. Thus in *Commonwealth* v. *O'Connell*, 8 Gray, 464, it was held that a mere grant of "exclusive jurisdiction" to a police court over certain offences, did not exclude the authority of justices of the peace to receive complaints and issue warrants returnable before that court. To the same effect are *Commonwealth* v. *Pindar*, 11 Metc. 539; *Commonwealth* v. *Roark*, 8 Cush. 210; *Commonwealth* v. *Wolcott*, 110 Massachusetts, 67; *Hendee* v. *Taylor*, 29 Connecticut, 448.

No objection seems to have been taken to the proceedings before the commissioner upon the ground that he did not issue the warrant, and as he was fully vested with authority to act in extradition cases we do not think the fact that the judge, for the convenient dispatch of business, made his warrant returnable before such commissioner can be made available upon a writ of *habeas corpus*.

3. The eighth assignment of error turns upon the sufficiency of the charge of embezzlement. The first article of the extradition treaty with Russia of June 5, 1893, 28 Stat. 1071, after providing for the mutual surrender of fugitive criminals from one country to another, declares that "this shall only be done 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 or her apprehension and commitment for trial if the crime or offence had been there committed." We do not deem it necessary to inquire whether the words "evidence of criminality" include a definition of the crime charged or to determine by what law the elements of the crime of embezzlement are fixed. Moore on Extradition, sec. 344. As the petitioner has sought to apply the definition of embezzlement given in the law of California as likely to be most favorable to himself, and the prosecution has assented to this view, we assume for the purposes of this case that this is the definition contemplated by the treaty.

Section 508 of the Penal Code of California is as follows:

"Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

Objection is made to the complaint upon the ground that there is no allegation that the money embezzled came into his control or care "by virtue of his employment" as such clerk, the allegation being that Grin was employed as clerk; that while so employed the money was entrusted to and received by him "in his capacity as clerk," as aforesaid. Whatever might be the force of an objection to an indictment that it does not set out in the exact language of the statute the fact that the money came into his possession by virtue of his employment, we think that the complaint in this particular is clearly sufficient. It is a general principle of criminal law that the complaint need not set forth the crime with the particularity of an indictment, and that it is sufficient, if it fairly apprises the party of the crime of which he is charged. If there be any distinction at all between an allegation that money came into the possession of a person by virtue of his employment as clerk, and in his capacity as clerk, it is too shadowy to be made a matter of exception to the complaint.

4. Equally unfounded is it that the complaint is defective because it does not use the word "fraudulently," the allegation being "that the accused wrongfully, unlawfully and feloniously appropriated said money." As the word "embezzled" itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word "fraudulent" would not enlarge or restrict its signification. Indeed, it is impossible for a person to embezzle the money of another without committing a fraud upon him. The definition of the word "embezzlement" is given by Bouvier as "the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another." In *City* v. *Randall*, 54 California, 408, a complaint that defendant did "wilfully, unlawfully, and feloniously embezzle and convert" certain securities to his

own use, was held to be a sufficient compliance with sec. 1426 of the Penal Code, requiring the offence charged to be set forth "with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offence complained of, and to answer the complaint." The complaint in this case differs from that only in the substitution of the word "wrongfully" for the word "wilfully," and we think it is clearly sufficient. As the word "embezzle" implies a fraudulent intent, the addition of the word "fraudulently" is mere surplusage. *Reeves* v. *State*, 95 Alabama, 31; *United States* v. *Lancaster*, 2 McLean, 431; *State* v. *Wolff*, 34 La. Ann. 1153; *State* v. *Trolson*, 21 Nevada, 419; *State* v. *Combs*, 47 Kansas, 136. We express no opinion as to whether it would be necessary in an indictment.

5. It is further insisted that the treaty requires an authenticated copy of the warrant of arrest or of some other equivalent judicial document, issued by a judge or magistrate of the foreign government duly authorized so to do, and that there is no such process in the record as a warrant of arrest or its equivalent. It is true that art. VI of the treaty provides that "when the person whose surrender is asked shall be merely charged with the commission of an extraditable crime or offence, the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document issued by a judge or a magistrate duly authorized to do so." But it can hardly be expected of us that we should become conversant with the criminal laws of Russia, or with the forms of warrants of arrest used for the apprehension of criminals. The clause is satisfied by the production of an equivalent document. On examination of the record we find a certified copy of an order by one purporting to act as an examining magistrate, and reciting that "having investigated the preliminary examination concerning the accusation of the Cossack, Simeon Grin," and that "as he is hiding under a false name, and, as is seen from his letters, is looking out for means to prevent his arrest and the finding out of his address by the authorities, his temporal place of residence being known at present," pursuant to art. 389 of the Criminal

Code of Procedure, "he is ordered to be brought to the city of Rostov on the Don, in order to be placed at the disposition of the examining magistrate of the Taganrog Circuit Court." This order purports not only to be signed, but sealed by the examining magistrate Okladnykh, and while it is not in the form of a warrant of arrest as used in this country, it is evidently designed to secure the apprehension of the accused, and his production before an examining magistrate. This seems to us a sufficient compliance with the treaty. If not a warrant of arrest it is an equivalent judicial document, issued by a judge or magistrate authorized to do so.

But there is another consideration in this connection which should not be overlooked. While the treaty contemplates the production of a copy of a warrant of arrest or other equivalent document, issued by a magistrate of the Russian Empire, it is within the power of Congress to dispense with this requirement, and we think it has done so by Rev. Stat. sec. 5270, hereinbefore cited. The treaty is undoubtedly obligatory upon both powers, and, if Congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian government and of further negotiations. But notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro* v. *De Uriarte*, 16 Fed. Rep. 93. This appears to have been the object of sec. 5270, which is applicable to all foreign governments with which we have treaties of extradition. The requirements of that section, as already observed, are simply a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty or convention, a certificate by the magistrate of such evidence and his conclusions thereon, to the Secretary of State. As no mention is here made of a warrant of arrest, or other equivalent document, issued by a foreign magistrate, we do not see the necessity of its production. This is one of the requirements of

the treaty which Congress has intentionally waived. Moore on Extradition, sec. 70.

6. Again, it is alleged that although the complaint sets forth that criminal proceedings have been instituted in Russia, and that Grin had been therein "indicted" for embezzlement, no indictment has ever been found, and that no other evidence of criminality can be received. It is obvious that the word "indictment," as it appears in this complaint, was used in the general sense of charged or accused by legal proceedings, and not in the technical sense of an indictment as here understood. An indictment is a technical word peculiar to Anglo-Saxon jurisprudence, and implies the finding of a grand jury. To give it the construction contended for would require us to know what an indictment was under the laws of Russia and to inspect it, at least so far as to ascertain the charge for which the conviction of the accused is sought. No indictment was necessary to be produced under this complaint, the proceeding being governed by section 5 of the act of August 3, 1882, 22 Stat. 216:

"That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, (secs. 5270 and 5271,) such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

The sufficiency of such evidence to establish the criminality of the accused for the purposes of extradition cannot be reviewed upon *habeas corpus*. *In re Luis Oteiza*, 136 U. S. 330.

7. It is further insisted that the depositions and other docu-

ments which appear in the record have not been properly and legally authenticated. The certificate of the ambassador in that connection is that these papers "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia." As this is a literal conformation to the above statute, adding only the words, "as evidence," it is difficult to see in what respect it is deficient. If we were to hold that a certificate in the language of the statute were insufficient, the certifying officer would be at once embarked upon a sea of speculation as to the proper form of such certificate, and would be utterly without a guide in endeavoring to ascertain what the requirements of the law were in that particular. All that was decided in the case of *Luis Oteiza*, 136 U. S. 330, in this connection was that depositions and other papers authenticated and certified as required by the act, were not admissible on the part of the accused. The introduction of the words "as evidence" does not vitiate the certificate. We find it difficult to conceive any other purpose for which such depositions could be used except as evidence of criminality.

8. No evidence was required that the Russian consul had authority to make the complaint. All that is required by sec. 5270 is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government based upon depositions in his possession, although under the first article of the treaty the accused can only be *surrendered* upon a "requisition" of the foreign government, and by art. VI such requisition must be made by the "diplomatic agent of the demanding government," and in case of his absence from the seat of government, by the "superior consular officer." It is true that art. VII of the treaty provides that it "shall be lawful for any competent judicial authority of the United States, upon production of a certificate issued by the Secretary of State, stating that request has been made by the Imperial Government of Russia for the provisional arrest of a person convicted or accused of the commission therein

of a crime or offence extraditable under this convention, and upon complaint, duly made, that such crime or offence has been so committed, to issue his warrant for the apprehension of such person;" and in this case it appears by the certificate of the Acting Secretary of State that application was made in due form by the chargé d'affaires of Russia accredited to this government, for the arrest of Grin, alleged to be a fugitive from the justice of Russia. This, however, was entirely independent of the proceedings before the magistrate, which might have been instituted by any person making a complaint under oath and acting by the permission or authority of the Russian government. While art. VII undoubtedly contemplates a prior certificate of the Secretary of State, the language of the article is merely permissive, and does not compel the production of such certificate before the warrant can be issued.

It might readily happen that the foreign representative might have no knowledge of the facts necessary to be embodied in a complaint, and have no documentary evidence then at hand to prove them. In such case if a complaint could not be made by a private person, having knowledge of the facts, the surrender might easily be defeated by the flight of the accused.

It was formerly held that a requisition from the demanding government was necessary to be produced before the commissioner could act, *In re Herris*, 32 Fed. Rep. 583, but the opinion in this case was reversed by Mr. Justice Brewer on appeal to the Circuit Court, who held that no preliminary requisition was necessary, as extradition could not be consummated without action by the executive in the last instance, and that the authority of the foreign government to act need not appear in the complaint, if it were made to appear in the examination before the commissioner, or elsewhere in the proceedings. Bearing in mind the frequent necessity for immediate action in case the whereabouts of the accused is ascertained, the delay necessary to procure a preliminary requisition might often result in the defeat of justice.

In *Kaine's* case, 14 How. 103, 129, this court was nearly equally divided upon the question whether a preliminary mandate from the executive was necessary. So long as Mr. Jus-

tice Nelson, who thought such mandate necessary, remained upon the bench his opinion was followed in the Second Circuit, *In re Henrich*, 5 Blatch. 414; *In re Farez*, 7 Blatch. 34, 45; but since that time a different view has been taken of the question. *In re Macdonnell*, 11 Blatch. 79; *In re Thomas*, 12 Blatch. 370. Judge Lowell's opinion accorded with the later, and, as we think, the sounder view, *In re Kelley*, 2 Lowell, 339. See also *Benson* v. *McMahon*, 127 U. S. 457.

9. It is again objected that the facts set forth in the record show that defendant, if guilty at all, is guilty of larceny and not of embezzlement, and that as the laws of California make a clear distinction between embezzlement and larceny, he cannot be held for one crime upon proof of his guilt of the other. The charge set forth in the complaint is that Zeefo, one of the members of the firm of E. L. Zeefo & Co., entrusted and delivered a cheque for the money to Grin, who subsequently received the money from the bank to take it to the Vladikavkaz Railway Company, by which it was to be taken to Novorosseesk, and upon the same day absconded. Upon these facts it is insisted that the defendant had nothing more than the bare custody, as distinguished from the possession of the money, and therefore could not and did not embezzle it, but stole it.

By section 503 of the Penal Code of California "embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted," and by section 508, "every clerk, agent, or servant of any person who fraudulently appropriates to his own use . . . any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." As Grin was clerk of the firm, and as the money was delivered to him in his capacity as clerk for a special purpose, it certainly came into his control or care. We do not care to inquire into the soundness of the distinction made in some of the older cases between the custody and possession of property, because under the section above quoted nothing more is necessary to constitute embezzlement than that the party charged should have the control or care of the money.

The cases in California upon this subject are decisive. Thus,

in *Ex parte Hedley*, 31 California, 108, where the agent of an express company, authorized to draw telegraphic cheques on his principal for money to be used in the principal's business, but not to draw individual cheques, drew certain cheques as agent for money to be used in his private business, and the principal paid the money to the drawee, it was held to amount to a receipt of the money of the principal by the agent "in the course of his employment." It was further held that, in order to convict one of embezzling money of his principal, it was necessary to establish four propositions: First, that the accused was an agent; second, that he received money belonging to his principal; third, that he received it in the course of his employment; fourth, that he converted it to his own use with intent to steal the same. In *People* v. *Tomlinson*, 102 California, 19, a recent case upon the same subject, the law of California was summed up as follows: "Where one honestly receives the possession of goods upon a trust, and after receiving them fraudulently converts them to his own use, it is a case of embezzlement. . . . But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession and not with the title, the offence is larceny."

These cases are strictly in line with that of *Moore* v. *United States*, 160 U. S. 268, in which we held that "embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking."

The cases relied upon by the petitioner are of the latter description. Thus in *People* v. *Abbott*, 53 California, 284, defendant was instructed by a bank to purchase silver for its account; and, to provide him with funds, the bank certified and delivered him a cheque drawn by him on the bank. He did not purchase the silver, but used the cheque for his own purposes. It was held that, if he took the custody of the certified cheque with

the intention of stealing it, he was guilty of larceny. The question was treated as one for the jury. In *People* v. *Raschke*, 73 California, 378, it was held that if one, through false representations, obtains the possession of personal property with the consent of the owner, but without a change of the general title, he is guilty of larceny, upon subsequently converting the same to his own use, if he had the felonious intent to steal the property at the time the possession was obtained. The authority of these cases is not questioned. In the case under consideration, a cheque was delivered to the petitioner with instructions to draw the money from the bank, take it to the railway station, to be forwarded to another city. The facts show that he obtained possession of both the cheque and the money, honestly, and with the consent of his principal, and subsequently converted it to his own use. *Prima facie*, at least, this makes a case of embezzlement, and if there were in fact an original intent to steal, that is a question for a jury in a Russian court to pass upon. It is sufficient for the purposes of this proceeding that a *prima facie* case of embezzlement is made out.

This disposes of all the questions made in the brief, and the judgment of the Circuit Court is

Affirmed.

KNIGHTS TEMPLARS' AND MASONS' LIFE INDEMNITY COMPANY *v.* JARMAN.

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

No. 48. Argued October 17, 1902.—Decided December 8, 1902.

1. That section of the Revised Statutes of Missouri declaring that in all suits upon policies of life insurance it shall be no defence that the insured committed suicide, applies not only to cases where the insured takes his own life voluntarily and in full possession of his mental faculties, but to all cases of self-destruction by the insured, whether sane or insane, unless he contemplated suicide at the time he made his application for the policy.

Statement of the Case.

The fact that this court has held that a clause avoiding a policy in case the insured should die by his own hand applied only where the insured intentionally took his own life while sane, does not estop the court from giving a different construction to a statute embodying an important question of public policy.

2. While under the decisions of the Supreme Court of Missouri it must be held that the above statute was repealed by the act of 1887, authorizing the incorporation of insurance companies on the assessment plan, as to policies thereafter issued, this statute of 1887 was prospective in its operation, and with respect to policies issued anterior to the date of that act, the rights of the parties are to be determined by the suicide statute.

It was further held that a law passed in 1897, specially applying the suicide statute to insurance companies doing business upon the assessment plan, was constitutional, and applied to this policy, inasmuch as the insured did not die until 1898.

3. The promise of the company to pay the plaintiff the sum of $5000 and all the money paid on the policy in assessments, was not impaired by subsequent amendments to the constitution, inasmuch as these amendments operated only upon policies thereafter issued.

This was a writ of certiorari to review a judgment of the Circuit Court of Appeals affirming a judgment of the Circuit Court for the Western District of Missouri, overruling the defence of suicide to an action upon a policy of life insurance, and awarding plaintiff judgment for the amount of the policy and assessments thereon.

An agreed statement of facts shows defendant to be an Illinois corporation, organized "for the purpose of furnishing life indemnity or pecuniary benefits to widows," etc.; and that on October 19, 1885, it issued to John P. Jarman, plaintiff's husband, and a citizen of Missouri, a policy of insurance or certificate of membership, subject to the constitution and by-laws of the company and certain conditions in the policy, one of which provided for its avoidance in case of self-destruction, "whether voluntary or involuntary, sane or insane." The seventh stipulation was that "John P. Jarman, while insane to such an extent as to be incapable of understanding the nature or consequences of his act, took his own life, and came to his death on the 12th day of September, 1898, by a gunshot wound, inflicted by himself. It is not contended, however, by plaintiff that such self-destruction was the result of accident." The further material facts are set forth in the opinion.

Opinion of the Court.

Defendant having refused to pay the amount of the policy on account of the suicide of the insured, Rosa B. Jarman, his widow and beneficiary, brought an action January 19, 1899, in the Circuit Court of Grundy County to recover the amount of the policy, $5000, and assessments, which action was subsequently removed to the Circuit Court of the United States for the Western District of Missouri, upon the ground of diversity of citizenship. The case was submitted to the court without the intervention of a jury, and resulted in a judgment in favor of the plaintiff in the sum of $6006.30, which was affirmed by the Circuit Court of Appeals. Whereupon petitioner sued out a writ of certiorari from this court.

Mr. Hervey Bryan Hicks and *Mr. S. S. Gregory* for petitioner.

Mr. Frederick H. Bacon for respondent. *Mr. E. M. Harber* and *Mr. A. G. Knight* were with him on the brief.

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

This case turns principally upon the applicability to the policy in question of sec. 5982 of the Revised Statutes of Missouri of 1879, afterwards sec. 5855, Rev. Stat. 1889, (hereinafter termed the suicide statute,) which was in force in 1885, when this policy was written. The section is as follows:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this State, it shall be no defence that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

1. The first defence in order of time is that Jarman did not commit suicide within the meaning of this act, since the stipulated fact was that he shot himself while insane to such an extent as to be incapable of understanding the nature or conse-

quences of his act. The position of the company in this connection is that the enactment above quoted, that "it shall be no defence that the insured committed suicide," relates only to cases where the insured takes his own life voluntarily, while sane, and in full possession of his mental faculties; and hence, the provision of the policy, that "in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane *or insane*, . . . this policy shall become null and void," applies, and exonerates the company from all liability beyond that provided in the policy, "that in the case of the suicide of the holder of this policy, then this company will pay to his widow and heirs or devisees such an amount of his policy as the member shall have paid to this company on the policy in assessments on the same without interest."

This contention is founded upon the ruling of this court in *Life Insurance Co.* v. *Terry*, 15 Wall. 580, and cognate cases, to the effect that a similar provision avoiding a policy in case the insured should "die by his own hand" applied only where the insured intentionally takes his own life, while in possession of his ordinary reasoning faculties, and does not apply when he is unable to understand the moral character, the general nature, consequences and effects of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist.

But we are of opinion that the word "suicide" is not used in this statute in its technical and legal sense of self-destruction by a sane person, but according to its popular meaning of death by one's own hand, irrespective of the mental condition of the person committing the act. The result of the construction urged by the defendant would be that, if a perfectly sane man voluntarily and from anger, pride or jealousy, or a mere desire to escape from the ills of life, puts an end to his life, and thereby becomes guilty of the crime of self-murder, and of a fraud upon the insurance company, the company would still be responsible, unless it could be shown that the insured contemplated suicide at the time he made his application for the policy; while, if he committed the same act while *insane*, and therefore irresponsible, the statute would not apply, and the company would not

be liable under the terms of the policy, which provided that it should become void "in case of the self-destruction of the holder, . . . whether voluntary or involuntary, sane or *insane*." In the one case, as we held in *Ritter* v. *Mutual Life Insurance Co.*, 169 U. S. 139, that is, of self-destruction by a sane man, not only would the policy be void, whether there were a provision to that effect or not, but even a contract that it should be valid under such circumstances was thought to be against public policy and subversive of sound morality, (p. 154;) while in the other case of a suicide by an insane person, the insured is guilty of no wrong to the company, if he be incapable of understanding the moral consequences of his own act, and there is no reason in law or morals why the company should not pay. It is impossible to suppose that the legislature could have contemplated such a contingency, and a construction that would lead to this result should be deemed inadmissible, unless the language of the statute were too plain to be misunderstood.

The statute was manifestly intended to apply to all cases of self-destruction or suicide, unless the same were contemplated at the time application was made for the policy, and the fact that we may have given a different construction to the same words when used in a policy of insurance does not militate against this theory. The same words may require a different construction when used in different documents, as, for instance, in a contract, and a statute; and identity of words is not decisive of identity of meaning where they are used in different connections and for different purposes. In a contract, the technical rights of the parties only are involved—in a statute, an important question of public policy. If this statute were read alone and disembarrassed by the construction given to these words in policies of insurance, not a doubt would arise as to its application to all cases of self-destruction; and when we examine the theory of the defendant, and find that it leads to the conclusion that the company would be liable if the insured had committed a fraud upon it, and would not be liable if he had taken his life, though guilty of no fraud, the theory must be rejected without hesitation. The construction we have given to the words "committed suicide" in this act is fortified by

reference to sec. 6570, Rev. Stat. Missouri, 1889, referring to the construction of statutes, which provides that "words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Undoubtedly the word suicide in its usual sense includes all cases of self-destruction.

2. We are next brought to the consideration of the applicability of the suicide statute, sec. 5982, to policies of this company issued at this time. This act, upon its face, applies to all insurance companies "doing business in this State," and to all policies issued by such companies after the date of the act. It undoubtedly governs the rights of the parties in this case, except so far as the same may have been modified by an act passed in 1887, authorizing the incorporation of insurance companies on the assessment plan. Sec. 10 of this act, Laws, 1887, pp. 199, 204, is now known as sec. 5869 of the Revised Statutes of Missouri of 1889, and provides that corporations "doing business under this article" shall make certain annual statements, which, as well as other requirements, are also made applicable to foreign companies, with the following proviso: "*Provided, always*, That nothing herein contained shall subject any corporation *doing business under this article* to any other provisions or requirements of the general insurance laws of this State, except as distinctly herein set forth." It appears that the defendant in this case, which is a citizen of Illinois, elected to take advantage of this law, and on June 18, 1888, received from the insurance department of the State authority to do business thereunder upon the assessment plan. As to policies issued upon the assessment plan subsequent to this date and prior to 1897, the Supreme Court of Missouri held that the suicide statute, above quoted, does not apply. *Haynie* v. *Knights Templars &c. Co.*, 139 Missouri, 416. To the same effect are *Hanford* v. *Massachusetts Benefit Association*, 122 Missouri, 50; *Jacobs* v. *Omaha Life Association*, 142 Missouri, 49, and *Aloe* v. *Mutual Reserve Association*, 49 S. W. Rep. 553. It is true the authority of these cases was somewhat shaken by the recent case of *Aloe* v. *Fidelity Mutual Life Association*, 55 S. W. Rep. 993, which

did not involve the repeal of the suicide statute, but of another statute, providing that no misrepresentation should be deemed material, unless the matter misrepresented should have contributed to the death of the insured. The case, however, turned, as did the cases above cited, upon the scope of the proviso of sec. 5869, and a persuasive opinion was delivered by Judge Valliant in favor of the theory that the proviso was intended to relate only to the organization of the corporations, and the extent to which they should be subject to the supervision of the Department of Insurance, and under the superintendent's control. This opinion was delivered in the first department of the Supreme Court, and, there being a dissent, the cause was transferred to the court *in banc*, wherein a majority of the court apparently differed from the views expressed by Judge Valliant, and reaffirmed the cases above cited. These cases, including the *Haynie* case, must therefore be regarded as representing the views of the Supreme Court that the suicide statute was actually repealed by the act of 1887 as to policies thereafter issued, and that view is, of course, binding upon this court.

But we are of the opinion that this statute was intended to be prospective in its operation, and that the rights of the defendant as an assessment company under the act of 1887, began in June, 1888, with its certificate of authority to do business under that act, and with respect to policies anterior to that date the rights of the parties are to be determined by the suicide statute, sec. 5855, Rev. Stat. 1889. It must be borne in mind that the repealing act of 1887, now known as sec. 5869, Rev. Stat. 1889, was not passed as an independent statute, but as section 10 of a new statute of fourteen sections, entitled "An act to provide for the incorporation and regulation of associations, societies or companies doing a life or casualty insurance business on the assessment plan." The prior sections define what shall be deemed a contract of insurance upon the assessment plan, how the corporations are formed, what the policies should specify, giving general details with regard to the management of the business, and then providing, in section 10, for annual statements made by "every corporation doing business under this act," with the provision that "nothing herein contained

shall subject any corporation doing business under this act to any provisions or requirements of the general insurance laws of this State, except as distinctly herein set forth." This whole act, slightly amended in language, was carried into the Revised Statutes of 1889 as chapter 89, article III. It seems to us quite clear that the declaration of the proviso that corporations "doing business under this act" shall not be subject to the general insurance laws of the State, applies only to corporations which took out a certificate of authority from the insurance department to do business on the assessment plan, and to policies thereafter issued by such companies, notwithstanding the fact that such companies may have issued policies under the general insurance laws of the State prior to the act of 1887. The words "doing business" evidently refer to issuing policies and not to paying them. A man does business when he contracts obligations—he ceases to do business when he discharges them.

This is not only the natural construction of the act, but to hold that the proviso applies to policies antecedently issued might open it to the imputation of impairing the obligation of contracts previously entered into between these companies and their insured, since these policies amounted to a special agreement on the part of the companies that they would be liable in case of suicide—an agreement upon which the insured and his beneficiary were entitled to rely. The provision of the suicide statute, that it shall be no defence that the insured committed suicide, and that any stipulation in the policy to the contrary shall be void, must be considered as imposing a condition upon every policy thereafter issued, notwithstanding any stipulation in the policy to the contrary. It must be treated as an independent and binding obligation, and as overriding and nullifying any stipulation of the parties. As Mr. Justice Gray observed in *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226: "The statute . . . is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter."

But we do not find it necessary to express an opinion whether, if the act of 1887 were plainly applicable upon its face to antecedent policies, it would be objectionable as impairing the obli-

gation of contracts, entered into between the insurance company and insured, inasmuch as we are clearly of opinion that it should not be held to apply to such unless its language imperatively demand it. *City Railway Co.* v. *Citizens' R. R. Co.*, 166 U. S. 557, 565.

Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred. Endlich on Statutes, sec. 178. This rule was applied by this court in *Granada County Supervisors* v. *Brogden*, 112 U. S. 261; *Presser* v. *Illinois*, 116 U. S. 252, 269, and *Hooper* v. *California*, 155 U. S. 648, 657.

We do not wish to be understood, however, as expressing an opinion upon the constitutionality of the act of 1887, if it were applied to prior policies, but simply as holding that, in view of the language of the act, and the doubtfulness of its constitutionality as applied to prior policies, it should only be given effect in cases of policies thereafter issued.

But there is another argument in this connection which ought not to be overlooked, and which is, in our opinion, decisive that the suicide statute is applicable to this policy. In 1897 a law was passed by the legislature of Missouri, specially applying the suicide statute to insurance companies doing business upon the assessment plan. This was done by an amendment to sec. 5869, which will hereafter be considered. Two objections to the applicability of this statute are deserving of consideration. First, that it is in conflict with art. IV, sec. 28, of the constitution of Missouri, declaring that "no bill . . . shall contain more than one subject, which shall be clearly expressed in its title;" and also art. IV, sec. 25, that "no law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

The act was entitled "An act to repeal section 5869 of article 3 of chapter 89 of the Revised Statutes of Missouri of 1889, entitled 'Insurance companies on the assessment plan,' and to enact a new section in lieu thereof, to be known and designated

as section 5869" of the same chapter, "relating to statement of affairs of assessment insurance companies and misrepresentations made in securing a policy of insurance, and defence thereon, for such misrepresentations," and as first introduced contained the section as herein printed in the margin.[1] Subsequently the bill was amended by inserting between the word "sections" and the figures "5912" the figures "5855," (the suicide statute). This was not strictly germane to the other sections cited, which related to the purposes set forth in the title to the act, and it is argued that the legislature exceeded its constitutional powers in inserting these figures.

In the absence of an express adjudication of the Supreme Court of the State upon this question, we are forced to rely upon other decisions concerning the construction given to this provision of the state constitution. In *State* v. *Miller*, 45 Missouri, 495, it was held that the object of this provision was to prevent logrolling, and surprise and fraud on members; and in *State ex rel. Wolfe* v. *Bronson*, 115 Missouri, 271, 276, it is said that "these and other cases show that this section of the constitution is to be reasonably and liberally construed and applied, due regard being to its object and purpose. It was designed to prevent the insertion of disconnected matters in the same bill. The section asserts only two propositions. The first is that no bill shall contain more than one subject, and the second is that this single subject must be clearly expressed in the title. If all

[1] SEC. 5869. Every corporation doing business under this article, shall annually, on or before the first day of February, return to the superintendent of the insurance department, in such manner and form as he shall prescribe, a statement of its affairs for the year ending on the preceding 31st day of December, and the said superintendent, in person or by deputy, shall have the power of visitation of and examination into the affairs of any such corporation, which are conferred upon him in the case of life insurance companies by the laws of this State; and all such foreign companies are hereby declared to be subject to, and required to conform to the provisions of sections 5912, 5849 and 5850 of the Revised Statutes of Missouri of 1889, and governed and controlled by all the provisions in said sections contained: *Provided, always*, That nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this State, except as distinctly herein set forth and provided.

the provisions of the bill have a natural relation and connection, then the subject is single, and this too though the bill contains many provisions. As to the second proposition, namely that the single subject must be clearly expressed in the title, it is sufficient to say that the legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the subject matter covered by the act; mere matters of detail need not be stated in the title." And in *State* v. *Heege*, 135 Missouri, 112, 118, it is said: "A mere reference to the section to be amended, without other description of the subject matter of the amendatory law, is, under the rulings of this court, a sufficient title to an act which deals exclusively with the subject of the section amended." It was also said in *State* v. *County Court*, 128 Missouri, 427, 440: "The practice of legislation by reference to sections of the authorized version of the statutes (without other description of the subject of the amending act) has been followed quite generally in this State on the faith of early rulings of the Supreme Court approving such methods of lawmaking. So much has been done, and so many rights have been acquired, on the basis of those rulings, that we hold that the question of their correctness ought not to be reopened at this day. We adhere to them and follow them as an expression of the settled law of Missouri."

As the new act was simply an amendment of section 5869 these two last cases would seem to be decisive of the opinion of the Supreme Court upon the statute in question, upon which its decision is of course obligatory upon this court.

Section 5869 of the Revised Statutes of 1889 deals with four questions relating to the law of insurance by companies doing business on the assessment plan. First, providing for an annual statement; second, a visitation and examination into the affairs of the corporation; third, a general statement that foreign companies are subject to certain provisions; and, fourth, a recital as to what, among the general insurance laws of the State, shall be applicable to these companies.

While, as already stated, the Supreme Court has not decided as to the constitutional power of the legislature to incorporate the suicide statute into this amended section 5869, the decisions

above cited, that a mere reference to the section amended is sufficient to sustain the validity of the law, would seem to cover the case, and for this reason the suicide statute, though not strictly germane to the other sections mentioned, is germane to the business of insurance on the assessment plan. Bearing in mind that the suicide statute was originally repealed, as to these policies, by section 5869, as enacted in 1887, it would seem that an amendment introduced into the same section restoring its application to these same policies would not be unconstitutional.

A second objection to the application of this statute is that if the petitioner be right in his contention that, by the repeal of the suicide statute, the contract between the assured and the company relieving the latter from liability in case of suicide, became effective, the legislature could not thereafter, by reënacting the statute or attempting to subject assessment companies to its provisions, impair the contract subsisting between the assured and this petitioner.

The answer to this argument is not difficult. No new contract was made and no new rights were vested between the act of 1887, repealing the suicide statute, and the act of 1897 restoring it. All that the latter act purported to do was to reinstate the parties in their original rights prior to the act of 1887, which rights had not been affected by anything done during the ten years between the two acts. Upon defendant's theory, if the act of 1887 had been in existence but a single day the same result would have followed.

Our conclusion, then, is that the court below was correct in holding that the suicide statute, as originally applied to this policy, had not been repealed at the death of Jarman in 1898, when the cause of action arose.

3. It is also assigned as error in this case that the court permitted a recovery, not only of the amount of the policy, but of all the money paid by assured in assessments upon such policy.

The promise of the company was to pay the plaintiff "the sum of $5000, and *all the money paid on the policy in assessments*, subject to the limitation as to the amount of such pay-

ment as is provided in sec. 1 of art. VII of the constitution on the back of this policy, which section reads as follows:

"SEC. 1. Upon due notice and satisfactory proof of the death of a member of this company, the board of directors shall within sixty (60) days pay the widow, children or heirs of the deceased member, (and in the order named unless otherwise ordered by the member during his lifetime or in his will), the amount set forth in the deceased member's policy of membership: Provided that a policy of membership for $5000 shall be good for all the money in the death fund arising from one assessment; provided, it shall not exceed $5000 and *all the money paid on the policy in assessments;* and a certificate for $4000 shall be good for four-fifths of all the money in the death fund arising from one assessment, provided it shall not exceed $4000 and all the money paid on the policy in assessments; and so on in the same proportion as to all certificates."

The assessments paid upon the policy amounted to $811.83, and the right of the plaintiff to recover this amount in addition to the principal sum of $5000 would be beyond question, were it not for certain changes thereafter made in the constitution, which it is insisted were binding upon the plaintiff under the following clause, found in the application of Jarman for membership: "I further agree, if accepted, to abide by the constitution, rules and regulations of the company, as they now are, or may be constitutionally changed hereafter."

The application further stated that the application was made a part of the policy by reference thereto.

In virtue of the privilege thus given to amend its constitution the company, on January 8, 1889, amended art. IV, sec. 3, of the constitution so as to read as follows:

"SEC. 3. Policies of membership may be issued upon a basis of benefits ranging in amounts to $5000, and all the money paid in assessments upon the policy *for the first five years.*"

The proviso of art. VII, sec. 1, was also amended at the same time to correspond with the above amendment and to read as follows:

"*Provided,* That a policy of membership for $5000 shall be good for all the money in the death fund arising from one

assessment; provided, that it shall not exceed $5000 and all the money paid on the policy in assessments *for the first five years.*"

On February 20, 1894, this section was again amended by striking out the proviso altogether.

It seems that these sections thus changed from an agreement to repay all assessments upon policies to an agreement to pay all assessments for the first five years, was found or deemed to be, too liberal; and in January, 1898, the company made an important additional amendment by striking out entirely the proviso for the repayment of assessments, under which it now claims to be relieved altogether from paying more than the principal sum of the policy. The article as finally amended reads as follows:

"SEC. 3. Policies of membership may be issued upon a basis of benefits ranging in amounts to $5000, but no member shall hold more than one policy at the same time, except one additional policy on the term plan," etc.

In view of the fact that both of these amendments imply a prospective operation upon policies which *may be issued,* it would seem to be unnecessary to consider the question discussed with much detail in briefs of counsel, whether the amendments were intended to operate upon policies already issued. In our opinion it is clear that they were not, and conceding the proposition that Jarman had agreed to abide by the constitution, rules and regulations of the company, as they then were, or might be constitutionally changed thereafter, this agreement could have no operation upon changes which, upon their face, indicated that they applied only to policies thereafter to be issued. To cover this case he should have promised to abide by amendments thereafter made, though they were intended to apply only to future policies.

The judgment of the court below awarding the plaintiff the full amount agreed upon in the policy, without damages, is accordingly

Affirmed.

MR. JUSTICE HARLAN took no part in the decision of this case.

SECURITY TRUST COMPANY *v.* BLACK RIVER NATIONAL BANK.

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

No. 39. Argued April 21, 22, 1902.—Decided December 1, 1902.

Under the statutes of the State of Minnesota and the decisions of the courts of that State construing and applying them, a creditor cannot maintain a suit in the courts of that State for a debt against a decedent after the expiration of the period limited by the order of the probate court in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account and a final decree of distribution.

Although it is a well settled principle that a foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the State limit the right to establish such demands to a proceeding in the probate courts of the State, it is also equally well settled that the courts of the United States in enforcing such claims are administering the laws of the State of the domicile and are bound by the same rules that govern the local tribunals; and if a foreign creditor of a Minnesota decedent delays proceedings in the Federal court until after the time to present claims fixed by the order of the probate court has expired and the final distribution of the estate has been effected, he cannot use the Federal courts to devolve a new responsibility upon the administrator and interfere with the rights of other parties, creditors or distributees, which have become vested under the regular and orderly administration of the estate under the laws of the State.

Although under the state statutes the probate court may, before final settlement and upon good cause shown, extend the time for presentation of claims, this court is not called upon to determine in a case where no application for such extension was made before final settlement whether a Federal court might or might not, on good cause shown, extend such time. It is obvious and always has been held that the United States Circuit Court cannot in the trial of an action at law exercise the powers of a court of equity.

In January, 1897, the Black River National Bank of Lowville brought an action in the Circuit Court of the United States for the District of Minnesota against the Security Trust Com-

pany of St. Paul, as administrator of the estate of Sumner W. Matteson, deceased. The complaint alleged that the plaintiff was a corporation duly organized under the national banking laws of the United States, having its place of business at Lowville, Lewis County, and State of New York; that the defendant was a corporation created by the laws of the State of Minnesota, having its place of business at the city of St. Paul and State of Minnesota, and had been duly appointed administrator of the estate of Sumner W. Matteson, deceased, by the proper probate court of Ramsey County, Minnesota, on or about the 3d day of September, 1895; that the said Matteson had been during his lifetime a resident and citizen of the State of Minnesota.

For a cause of action the complaint averred that on the 27th day of February, 1894, the said Matteson had executed his two promissory notes, wherein for value received he promised to pay to the order of James H. Easton and Company, at the First National Bank of Decorah, Iowa, the sum of twenty-five hundred dollars, four months after date, with interest thereon at the rate of eight per cent per annum from date until paid; that thereafter, on March 22, 1894, and before the maturity of said notes, the said James H. Easton and Company, for value received, sold and assigned the same to the plaintiff; that said James H. Easton and Company was a copartnership doing business at Decorah, and that all the members thereof were residents and citizens of the State of Iowa; that no part of said notes has ever been paid except the interest thereon to the 24th day of November, 1894.

The complaint further alleged that the defendant, as administrator of the estate of Sumner W. Matteson, had in its hand and under its control property, money and effects which belonged in his lifetime to said Matteson, more than sufficient to pay the amount due the plaintiff; that the estate of said Matteson was in process of settlement in the probate court of Ramsey County, State of Minnesota, and had not been fully and finally settled and probated, and that said administrator had never been discharged and was still the administrator of the estate of said Matteson, deceased; and plaintiff demanded judg-

ment against the defendant in the sum of five thousand dollars and interest thereon from the 24th day of November, 1894.

On February 12, 1897, the defendant appeared and answered, admitting those allegations of the complaint which alleged the making and transfer of said notes, and that the same remained unpaid in the hands of the plaintiff, but denying that the defendant had in its hands as administrator of said Matteson any money or property applicable to the payment of said notes. The answer also alleged that the estate of said Matteson had been fully settled, probated and administered upon and discharged from the probate court long prior to the commencement of plaintiff's action, and that the defendant had long before the commencement of this action turned over all property, money and effects of said estate remaining in its hands, to the persons entitled thereto, and that defendant long before the commencement of this action had been discharged as such administrator, and was not when said action was brought and is not now administrator of the estate of said decedent.

On March 20, 1897, the plaintiff filed a reply, traversing the allegations of the answer. Thereafter and on the 18th day of January, 1899, a stipulation of facts and waiver of jury trial were filed. In the stipulation of facts it appeared that the estate of Matteson had been settled, administered upon and discharged from the probate court prior to the commencement of plaintiff's action in the Circuit Court of the United States.

On April 17, 1899, the cause came on to be heard, on the pleadings and stipulation of facts, and judgment was entered in favor of the plaintiff in the sum of $6782.89, to be paid and enforced out of the property and effects of the intestate, Sumner W. Matteson, deceased; and it was ordered further that this judgment be duly certified by this court to the probate court of Ramsey County as a claim duly approved, established and allowed against the estate of Sumner W. Matteson, deceased.

Subsequently the cause was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where on October 17, 1900, the judgment of the Circuit Court was affirmed, on authority of the case of the *Security Trust Company, as Administrator of Sumner W. Matteson, deceased*, v. *William H.*

Dent, as Receiver of the First National Bank of Decorah, reported in 104 Fed. Rep. 380.

Whereupon a writ of certiorari was prayed for and allowed, and the cause was brought to this court.

Mr. Edmund S. Durment for petitioner. *Mr. Albert R. Moore* was with him on the brief.

Mr. Edward C. Stringer for respondent. *Mr. McNeil V. Seymour* was with him on the brief.

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

This was a suit brought in January, 1897, in the Circuit Court of the United States for the District of Minnesota, by the Black River National Bank of Lowville, incorporated under the national banking laws of the United States, and doing business in the county of Lewis and State of New York, against the Security Trust Company of St. Paul, Minnesota, as administrator of the estate of Sumner W. Matteson, deceased, seeking to recover the sum of five thousand dollars and interest thereon, due on certain promissory notes made by said Matteson in his lifetime, and which were alleged to be the property of the said national bank.

No defence was interposed as respected the execution of the notes or the ownership of the same by the bank. It was admitted that the Security Trust Company had been, on September 3, 1895, duly appointed by the probate court of Ramsey County, Minnesota, administrator of the estate of said Matteson. The defendant, however, alleged, in its answer that, as the action was not brought until after the time limited by the order of the probate court for the filing, examination and allowance of claims against Matteson's estate, nor until after the examination and allowance of the administrator's final account, under the laws of the State of Minnesota, the official existence of the defendant company as administrator had ceased, and therefore no action could be maintained against it, and also

that the right to a judgment on the notes in suit was, by the laws of Minnesota, forever barred, although they were owned by a non-resident of the State, and a recovery was sought in a Federal court.

Two inquiries are presented to us—first, whether, by virtue of the state statutes, the estate of Matteson had been so fully settled and administered, before the present action was brought, as to operate as a discharge of the administration, and as a bar to a right of the plaintiff to recover against the estate in the state courts; and, second, if the first question must be affimatively answered, whether, not withstanding such a condition of the statutory law of the State, an action can be successfully maintained by a citizen of another State in the Circuit Court of the United States on a cause of action not barred by the general statute of limitations of the State.

It is scarcely necessary to say that, as respects the first of these inquiries, we must find an answer in the provisions of the constitution and statutes of Minnesota as interpreted and construed by the Supreme Court of that State.

The state constitution and statutory provisions bearing upon the question involved are the following:

"Constitution, art. VI, sec. 7. There shall be established in each organized county in the State a probate court, which shall be a court of record, and be held at such times and places as may be prescribed by law. . . . A probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this constitution."

General Statutes, 1894:

"Sec. 4523. The probate court at the time of granting letters testamentary or of administration shall make an order allowing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate.

"Sec. 4524. The probate court may, upon good cause shown by the executor or admininistrator, extend the time for the settlement of the estate not exceeding one year at a time, unless in the judgment of the court a longer time be necessary."

"Sec. 4527. When there is not sufficient personal estate in

the hands of the executor or administrator to pay all the debts and legacies and the allowance to the widow and minor children, the probate court may, on petition of the executor or administrator, order the sale of the real estate or so much thereof as may be necessary to pay the same."

Section 4471 provides that real estate shall descend subject to the debts of the intestate.

"SEC. 4638. Every executor or administrator shall render his account of his administration within the time allowed him for the settlement of the estate and at such other time as he is required by the court, until the estate is wholly settled.

"SEC. 4639. When the estate is fully administered, the executor or administrator shall petition the probate court for an order fixing a time and place in which it will examine, settle and allow the final account of the executor or administrator, and for the assignment of the residue of the estate to the persons entitled thereto by law. The final account shall be filed in the probate court at the time of filing said petition.

"SEC. 4640. Upon the filing of said petition the court shall make an order fixing a time and place for hearing the same. Said order shall be published according to law.

"SEC. 4641. On hearing such petition, the probate court shall examine every executor and administrator upon oath as to the truth and correctness of his account before the same is allowed; but such examination may be omitted when no objection is made to the allowance of the account and there is no reason to doubt the justness and correctness thereof; and the heirs, legatees and devisees may be examined on oath upon any matter relating to the account of any executor or administrator whenever the correctness thereof is called in question. If from such examination the account is found just and correct the probate court shall allow and settle the same, and upon satisfactory evidence shall determine the rights of the persons to the residue of said estate and unless partition is asked for and directed as hereinafter provided, make a decree accordingly, assigning said residue to the persons thereto entitled by law.

"SEC. 4642. In such decree the court shall name the persons and the proportion or parts to which each is entitled, and if

real estate, give a description as near as may be of the land to which each is entitled; and such persons may demand and recover their respective shares from the executor or administrator, or any other person having the same; and a certified copy of any decree of distribution of real estate may be recorded in the office of the register of deeds in every county in this State in which are situated any of the lands described in such decree; and such register of deeds shall enter in his reception book the name of the deceased as grantor, and the names of the heirs, legatees or devisees, as grantees, and shall make in such reception book so many separate grantor and grantee entries for such decree as there are persons taking real estate in such county under said decree."

"SEC. 4509. At the time of granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order; said order shall fix the time or times and place in which the court will examine and adjust claims and demands of all persons against deceased. No claim or demand shall be received after expiration of the time so limited, unless for good cause shown the court may in its discretion receive, hear and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given, as provided in the next section, and before final settlement, and the allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate; . . .

"SEC. 4510. The order prescribed in section one hundred and two shall be published according to law, and shall be notice to all creditors and persons interested.

"SEC. 4511. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought

by the executor or administrator. All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim."

"SEC. 4514. No action at law for the recovery of money only shall be brought in any of the courts of this State against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court except as provided in this code. No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent: *Provided*, That this provision shall not be construed as affecting any lien existing at the date of such death: *Provided, further*, That said provision shall not be construed as affecting the right of a creditor to recover from the next of kin, legatee or devisee to the extent of assets received. This provision shall be applicable to the estate of persons who died prior as well as to those who may die after adoption of this code."

"SEC. 4517. Upon the allowance or disallowance of any claim the court shall make its order allowing or disallowing the same. The order shall contain the date of allowance and the amount allowed, the amount disallowed, and be attached to the claim with the offsets if any."

"SEC. 4522. In case of appeal from the allowance or disallowance of any claim in whole or in part, the District Court shall certify to the probate court the decision or judgment rendered therein."

Section 4665 provides for an appeal to the District Court.

Section 4668 provides for serving notice of appeal.

Section 4672 provides that the District Court shall try the case as if originally commenced in that court.

Section 4673 provides that pleadings shall be made up as in civil actions, and the issues of fact tried as in other actions.

Section 4676. In case of a reversal or modification of the order appealed from the District Court makes such order as the probate court should have made, and certifies its judgment to the probate court.

"SEC. 4730. The probate court may, at any time, correct, modify or amend its records to conform with the facts in the same manner as a District Court."

State ex rel. Lindekugel v. *Probate Court of Sibley County*, 33 Minnesota, 94, 96, was an application to the District Court for a writ of prohibition to the probate court, the latter court having granted a petition to set aside a sale of real estate confirmed by the probate court, and it was held by the Supreme Court of the State that there was no jurisdiction in the probate court, saying:

"The want of jurisdiction in this case is still further emphasized by the fact that the administration has been closed by the allowance of the administrator's accounts and his discharge, and there is no attempt to reopen it. So long as it remains closed the probate court has no more jurisdiction over the estate, or the property belonging to it, or which once belonged to it, than if there never had been any administration and there was no attempt to institute one. The jurisdiction of the court has been fully exhausted, and it can do nothing further unless it is restored in the manner pointed out in the statute."

In *State ex rel. Dana* v. *Probate Court of Ramsey County*, 40 Minnesota, 296, 299, where, upon an application for the final settlement of his accounts by the administrator of an estate and for a final discharge, the probate court made an order allowing the account and discharging the administrator, such order was held by the Supreme Court to be a final order discharging the administration of the estate, and that, as a final decree discharging the administration, it operated to discharge the lien of creditors upon real estate which might have been previously sold to pay debts. The opinion of the court was thus expressed:

"The object of the application on the part of the acting administrator was to submit his final account and close the administration. The order made was evidently so intended, and must be

construed as a final order discharging the administration of the estate. The parties had their remedy by appeal, but the order could not be attacked collaterally or treated as void, so as to warrant subsequent proceedings to reach the real estate, as if the administration was still in progress and the estate still unsettled.

"The omission of the land from the inventory, and the subsequent discovery of the real estate of the deceased which was not reduced to assets by the administrator or distributed to the heirs, do not operate to revive the administration and open the judgment, or warrant further proceedings. The land descended to the heirs, subject to the claims of administration upon it. The effect of a decree assigning the real estate to the heirs is simply to discharge it from the administration, and, of course, the final discharge of the administration must discharge the lien of the creditors."

In *Schmidt* v. *Stark*, 61 Minnesota, 91, 92, it was held that where the estate of a deceased person has been fully administered, and a decree of distribution has been made, assigning the residue of the estate in the hands of the personal representative to the parties entitled thereto, the jurisdiction of the probate court is ended; and, if the personal representative does not deliver the property to the distributees, they may bring an action against him in the District Court. It was said, per Mitchell, J.:

"The probate code neither authorizes nor provides for an assignment of any part of the estate of a deceased person until after the estate is fully administered. It contemplates but one decree of distribution, by which the entire residue of the estate shall be assigned to those entitled to it, specifying the proportion or part to which each is entitled. Gen. Stats. 1894, secs. 4639–4642. Read in the light of the statute and of the admissions of the answer, we think the complaint would fairly admit of being construed as alleging that all this had been duly done, and that the proportion of the estate assigned to plaintiff was an undivided fifth. If this was the state of facts, the jurisdiction of the probate court over the property had ended. The effect of a decree of distribution is to transfer the title to the personalty and the right of possession of the realty from the

personal representative to the distributees, devisees or heirs. The property then ceases to be the estate of the deceased person, and becomes the individual property of the distributees, with the full right of control and possession, and with the right of action for it against the personal representative if he does not deliver it to them. If such an action is necessary, resort must be had to some other forum, for the probate court has no further jurisdiction. *Hurley* v. *Hamilton*, 37 Minn. 160."

State ex rel. Matteson v. *Probate Court of Ramsey County*, 87 N. W. Rep. 783, is the last expression of the Supreme Court of Minnesota on this subject to which we have been referred. The syllabus, prepared by the court, is as follows:

"1. The probate code of this State makes no provision for the formal discharge of an administrator, but the necessary legal effect of an order of the probate court allowing the final account of the administrator and its final decree of distribution, assigning the whole of the estate to the heirs and distributees, is to remove the estate of the deceased from the jurisdiction of the court, and to render the office of administrator, which depends upon such jurisdiction, *functus officio.*

"2. After the estate has been so settled and assigned, and while the final decree of distribution remains unreversed and unmodified, the probate court has no jurisdiction to entertain a petition to issue a citation to the administrator requiring him to further account for the property belonging to the estate which is in his possession, or came into his possession."

The facts and law of the case were then stated in the opinion of the court:

"Sumner W. Matteson, a resident of the county of Ramsey, having real and personal property therein, died intestate on July 22, 1895. The Security Trust Company was duly appointed by the probate court of such county, on September 3, 1895, administrator of his estate, and it duly qualified as such, and duly filed in such court an inventory of such estate. The probate court, on the same day, by its order, which was duly published, limited the time for presenting claims against the estate to six months from the date of the order. All claims

against the estate presented to the court within the time limited and allowed by the court were paid by the administrator in the due course of administration. Thereafter, and on March 31, 1896, the administrator filed with the court its petition, representing that it had fully administered the estate, paid all the debts against the estate allowed by the court, and the expenses of administration, and asking for the allowance of its final account, and the distribution of the residue of the estate to the persons entitled thereto. Such proceedings were thereafter duly had upon the petition, that the court, on April 27, 1896, allowed the final account of the administrator, and made and entered its decree of distribution of the residue of the estate, describing it, and thereby assigned the property therein described and all other estate of the intestate in the State of Minnesota to his heirs and distributees, naming them, and determining the share of each. Afterwards, and on November 21, 1896, the Security Trust Company filed with the probate court its petition, representing that in drafting such final decree certain clerical errors were made, stating them, whereby certain parcels of real estate were erroneously described therein, and other parcels omitted therefrom, and praying that the decree be amended so as to correct the errors. The court made its order so correcting the decree. Neither the order allowing the administrator's account nor the final decree of distribution has ever been opened or set aside. On December 15, next following, all the heirs and distributees named in the decree transferred and conveyed to the Matteson estate, incorporated, all the property so assigned to them by the final decree. But the Security Trust Company still has in its possession and now holds certain stocks as collateral security under a pledge made to it by the intestate for the payment of a debt owed by him to it at the time of his death. The value of the stocks exceeds the amount of the debt which they secured. No order has ever been made by the probate court in terms discharging the administrator. The Black River National Bank, a non-resident creditor of the intestate, on January 4, 1897, made application to the probate court for leave to file its claim against his estate, and have it allowed, and paid out of

the assets of the estate. This was denied by the court for the reason that the administration of the estate had been closed, and the court had no further jurisdiction in the premises. Afterwards the bank and another non-resident creditor each brought an action on their respective claims, which had never been presented to the probate court, against the Trust Company, as administrator, in the Circuit Court of the United States for the District of Minnesota. Such proceedings were had therein that judgment, on April 17, 1899, was rendered in favor of the plaintiff in each case for the full amount claimed against the administrator. The court directed the judgments to be certified to the probate court as claims duly established against the estate of the intestate, and it was done, but the administrator refused to take any steps for the payment of either of the judgments. Thereupon the relator herein presented to the probate court a petition asking it to issue a citation to the trust company, as such administrator, requiring it to file an account of any property in its possession belonging to such estate, and to report what disposition had been made of the property inventoried as belonging thereto, and to pay so much of the judgments as could be paid from such property. The court refused to entertain the petition, or to make any order in the premises, for the sole reason that it had no jurisdiction to take other or further steps in the administration of the estate. The relator then sued out of the District Court for the county of Ramsey an alternative writ of mandamus based upon the facts here stated, which was directed to the probate court and the judge thereof. The answer of the respondents was an admission of such facts, and upon them the District Court awarded judgment denying a peremptory writ of mandamus, and discharging the alternative writ. The relator appealed from the judgment to this court.

"The question presented by these facts for our consideration relates solely to the legal effect of the final decree of distribution, assigning the residue of the estate of the decedent to the heirs and distributees, made by the probate court after the settlement and allowance of the final account of the administrator. Stated concretely, the question is: Did the jurisdiction of the

probate court over the estate in question cease, and the office of the administrator become *functus officio*, by force of the order of the court allowing the administrator's final account, and its final decree of distribution assigning the residue of the estate? We answer the question in the affirmative. The jurisdiction of the probate court in Minnesota is not conferred by the common law, nor by any statute of the State, but by our constitution, and is limited to 'jurisdiction over the estates of deceased persons and persons under guardianship.' Const. art. 6, sec. 7. It follows that in cases where a court of probate acquires jurisdiction over the estate of a particular decedent such jurisdiction is ended, and the office of administrator, which depends upon such jurisdiction, becomes *functus officio* whenever such estate passes by operation of law from its final control. No argument can make this obvious proposition clearer, for it is self-evident that, if the jurisdiction is limited to the estate of such deceased person, and the sole basis of such jurisdiction, the estate passes from its control, and the right to the possession and control thereof vests by operation of law in the heirs and distributees, it has no longer any jurisdiction in the premises. It is true that our probate code contains no provision for the formal discharge of an administrator, but the necessary theory and effect of its provisions as to the settlement of his account and the final decree of distribution, as interpreted by the repeated decisions of this court, are to divest the probate court of further jurisdiction when such final decree is made, and to render the office of administrator *functus officio*, unless such decree is set aside on motion, or reversed on appeal. A clear illustration of this proposition is found in the decision of this court in the case of *Hurley* v. *Hamilton*, 37 Minnesota, 160, holding that the probate court had no jurisdiction to entertain proceedings for the partition of the real estate of a decedent among the heirs and devisees after the administration was closed, and the land assigned to them in common by a final decree of distribution, for the reason that, when such decree was entered, the property passed out of the control of the court, and it had no further jurisdiction."

The court then proceeded to cite and approve previous de-

cisions, and particularly the language of Mitchell, J., in the case of *Schmidt* v. *Stark*, 61 Minnesota, 91, hereinbefore quoted. Other observations were made by the court pertinent to the case before us, as follows:

"It is, however, urged by counsel for the relator that the removal of the property, that is, the estate, from the jurisdiction of the probate court in nowise affects the continuance in office of the administrator of an estate. To hold otherwise, it is claimed, would be a divesting of the probate court of all authority to execute its decree of distribution, leaving the administrator in possession of the estate, and the heirs and distributees remediless. It necessarily follows from the concession of counsel, although not intended by him, that the office of administrator becomes *functus officio* when the estate is removed, as a result of the decree of distribution, from the jurisdiction of the court, for the office of administrator springs out of and depends for its continued existence upon the jurisdiction of the court over the estate. As well might it be claimed that the branch of a tree can live and put forth its leaves and blossoms after its roots are dead, as to claim that the office of administrator can survive the jurisdiction of the court over the estate of which administration was granted. It is not necessary for the probate court, if it could do so, to retain jurisdiction to enforce its final decree of distribution. The remedy of the distributees in case their respective shares of the residue of the estate are withheld from them by the administrator is an action in the District Court against him or against him and his bondsmen. *Schmidt* v. *Stark*, 61 Minnesota, 91; Gray, Probate Law, secs. 48, 628.

"It is further urged on behalf of the relator that neither the probate court nor the administrator considered that the allowance of the final account and the entry of the decree of distribution ended the jurisdiction of the court, for it afterwards, on the petition of the administrator, amended such decree. It is immaterial what they considered, for the view of either as to the effect of the decree could not change its legal result. The decree was corrected, not in the exercise of any jurisdiction over the estate, but by virtue of the power of the court to amend its records to conform with the facts; that is to make the records

speak truly as to the past official acts of the court. Gen. Stat. 1894, sec. 4730.

"Lastly, it is urged by the relator that the administrator still has certain stocks in its possession belonging to the estate, and that it may also have after-discovered personal property of the intestate which it has not disclosed to any one. There is no basis for this assumption in the admitted facts, except that the trust company holds certain stocks as collateral to secure its individual debt against the intestate. But, were it otherwise, the fact still remains that all such stocks and after-discovered property, if any, passed by the decree to the heirs and distributees, for it assigns to them, not only the property therein specifically described, but also all other estate of the deceased in the State of Minnesota. It follows that the probate court rightly declined to issue the citation."

Some criticism is made, in the brief of the defendant in error, of the decision of the Supreme Court of Minnesota in this case; that the issue was feigned and an imposition upon the Supreme Court, and that the purpose of the decision was to forestall the decision of this court.

If, indeed, the judgment of the Supreme Court in that case were relied on as adjudging a case which had already passed into judgment in the Circuit Court of the United States we might readily agree, as urged by the defendant in error, that the decision of the Supreme Court of Minnesota "should receive little, if any, weight, by this court in the consideration of this case." But that decision is cited and relied on by the plaintiff in error, not as an adjudication of the facts in controversy here, but as an interpretation of the statutes of the State. Cases may be found where a decision made by a state Supreme Court, even in exposition of state statutes, *after* the institution of litigation in a Federal court, wherein this court has refused to follow such a decision, if in it the state court has departed from its previous decisions, which were in force and relied upon by the Federal suitor. *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Carroll County* v. *Smith*, 111 U. S. 556.

Here, however, the Supreme Court of Minnesota, in its last opinion, did not depart from or modify its previous decisions

on the subject. On the contrary, it based its reasoning and conclusions upon its frequent previous decisions.

Nor are we permitted on the record in that case to impute to the parties therein an attempt to mislead the court or to improperly invoke its jurisdiction. The case seems to have gone before the probate court, the District Court and the Supreme Court, in the usual course of procedure, and the decision finally rendered by the Supreme Court must be received by us as a valid exposition of the law.

The conclusion to which we are brought, by an examination of the statutes of the State of Minnesota and of the decisions of the courts of that State in construing and applying them, is, that had a suit against an administrator of an estate been brought in the courts of that State, after the expiration of the period limited by the order of the probate court, in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account, and a final decree of distribution, such suit could not have been maintained.

We are now to consider whether such a suit can be successfully maintained in a Federal court by a non-resident owner of a claim against the estate of a decedent.

Some general principles have become so well settled as to require only to be stated. One of these is that a foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the State relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the probate courts of the State. *Union Bank of Tennessee* v. *Jolly's Adm'rs*, 18 How. 503; *Lawrence* v. *Nelson*, 143 U. S. 215; *Byers* v. *McAuley*, 149 U. S. 608.

Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the State of the domicile, and are bound by the same rules that govern the local tribunals. *Aspden* v. *Nixon*, 4 How. 467, 498.

"The Circuit Courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different States, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens." *Walker* v. *Walker's Ex'r*, 9 Wall. 743, 754.

In *Yonley* v. *Lavender*, 21 Wall. 276, it was decided that while a non-resident creditor may get a judgment in a Federal court against a resident administrator, and come in on the estate according to the law of the State for such payment as that law, marshalling the rights of creditors, awards to creditors of his class, yet he cannot, because he has obtained a judgment in a Federal court, issue execution and take precedence of other creditors who have no right to sue in the Federal courts, and if he do issue execution and sell lands, the sale is void.

The reasoning of this case is worthy of quotation:

"The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits, and we see no ground on which the validity of the sale in question can be sustained. To sustain it would be in effect to nullify the administration laws of the State by giving to creditors out of the State greater privileges in the distribution of estates than creditors in the State enjoy. It is easy to see, if the non-resident creditor, by suing in the Federal courts of Arkansas, acquires a right to subject the assets of the estate to seizure and sale for the satisfaction of his debt, which he could not do by suing in the state court, that the whole estate, in case there were foreign creditors, might be swept away. Such a result would place the judgments of the Federal court on a higher grade than the judgments of the state court, necessarily produce conflict, and render the State powerless in a matter over which she has confessedly full control. Besides this it would give to the contract of a foreign creditor made in Arkansas a wider scope than a similar contract made in the same State by the same debtor with a home creditor. The home creditor would have to await the due course of administration for the payment of his debt, while the foreign creditor could, as soon as he got his judgment, seize and sell the estate of his

debtor to satisfy it, and this, too, when the laws of the State in force when both contracts were made provided another mode for the compulsory payment of the debt. Such a difference is manifestly unjust and cannot be supported. . . . The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights. . . . It is possible, though not probable, that state legislation on the subject of the estates of decedents might be purposely framed so as to discriminate injuriously against the creditor living outside of the State; but if this should unfortunately ever happen the courts of the United States would find a way, in a proper case, to arrest the discrimination, and to enforce equality of privileges among all classes of claimants, even if the estate were seized by operation of law and entrusted to a particular jurisdiction."

In *Morgan* v. *Hamlet*, 113 U. S. 449, it was held that the statute of Arkansas, that "all demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred," begins, on the granting of letters of administration, to run against persons under age out of the State.

The doctrine of the case of *Yonley* v. *Lavender*, 21 Wall. 276, was approved in *Byers* v. *McAuley*, 149 U. S. 608, 615, wherein it was held that the administration laws of a State are not merely rules of practice for the courts, but laws limiting the rights of parties, to be observed by the Federal courts in the enforcement of individual rights.

In *Pulliam* v. *Pulliam*, 10 Fed. Rep. 53, 78, the distinction between ordinary statutes of limitation and statutes of administration of the estates of decedents limiting the time within which creditors must prove their claims, is pointed out in the respect that the latter are rules of property as well as statutes of limitation, and it was said by Hammond, J., after citing *Union Bank* v. *Jolly's Adm'rs*, 18 How. 503, 504; *Payne* v. *Hook*, 7 Wall. 425, 430, and other cases:

"These cases, like many others, are only intended to protect the judicial power of the United States from encroachment by

preserving to it the remedies and forms of proceeding which are granted with it, and not at all to set it above the legislative control of the States in matters pertaining to their jurisdiction. The cases cited from the Supreme Court do not, in my judgment, establish or in the least authorize the doctrine that state statutes, prescribing the time within which the creditor of a decedent must present or sue upon his claim in order to entitle him to share in the assets, and having the effect these do, are not binding on this court."

In *Dodd* v. *Ghiselin*, 27 Fed. Rep. 405, involving the administration of a decedent's estate, it was contended that non-resident minors had a right to have the laws of the State of Missouri regulating the matter disregarded in the Federal court, but it was held otherwise, per Brewer, J.: That the law of the State providing for the settlement of a deceased person's estate is binding upon the Federal as well as upon the state courts.

In *Miner* v. *Aylesworth*, 18 Fed. Rep. 199, it was held by the Circuit Court of the United States for the District of Rhode Island, as against non-resident complainants, that, under the Rhode Island statute, no suit can be commenced against an administrator, as such, after three years from the time he gave public notice of his appointment. *Bauserman* v. *Blunt*, 147 U. S. 647, 652.

Applying these principles to the present case, it would seem clear that the defendant in error, as a citizen of the State of New York, and having a legal claim against the estate of S. W. Matteson, deceased, had a right to elect to proceed to establish it by bringing a suit in the Circuit Court of the United States; and if he had brought his action against an existing administrator, the administration of the estate not having been closed under the statutory proceedings, and obtained a judgment, undoubtedly such a judgment, when presented to the probate court within the time fixed by its order, must have been received by that court as a claim against the unadministered estate.

But can it be said that, if the foreign creditor delays proceedings in the Federal court until after the time fixed by the

order of the probate court for the presentment of claims had expired and after the final distribution of the estate had been effected, and after the final account of the administrator had been allowed and his office had become *functus officio*, and after all claims of local creditors had thus been precluded, he can use the Federal process to devolve a new responsibility upon the person who had acted as administrator, and to interfere with the rights of other parties, creditors or distributees, which had become vested under the regular and orderly administration of the estate under the laws of the State?

It is the policy of the State of Minnesota, like that of many of the States, to prescribe a shorter term of limitations to claims against the estates of decedents than claims against living persons. Can that policy be defeated by a ruling of the Federal courts that the provisions of the State in that regard do not apply to parties bringing suit in those courts? In that event, the very mischief pointed out and deprecated in *Yonley* v. *Lavender* would ensue, that "The rights of those interested in the estate who are citizens of the State where the administration is conducted are materially changed, and the limitation which governs them does not apply to the fortunate creditor who happens to be a citizen of another State." The answer given to such a proposition by this court in the case just cited was: "This cannot be so. The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights."

Let us now examine the reasoning employed by the Circuit Court of Appeals in reaching its conclusion in the present case. Having correctly held that, so far as the administration law of the State of Minnesota attempts to compel citizens of other States to establish demands against the estates of decedents only by a proceeding in the probate court of the State, it is ineffectual to accomplish that object, the court proceeded to say:

"It is said, however, that although the statute in question may be ineffectual to compel non-resident creditors to submit their demands to the appropriate probate court for allowance,

yet, as a statute of limitations, it should be given effect to prevent the establishment of a demand in the Federal court of the State after such lapse of time that it cannot be established in the probate court. The vice of this argument, as applied to the case in hand, consists in the fact that the legislature of the State of Minnesota has not undertaken to bar any claim against a decedent's estate, absolutely, until after the lapse of eighteen months from the date of the order fixing the period of allowance, and in the case at bar that period had not expired when the action was commenced, to wit, on January 22, 1897. It is true that section 4509, when conferring the discretionary power to allow claims within eighteen months, imposes the limitation that they shall be allowed 'before final settlement,' and it is also true that the final account of Matteson's administrator had been submitted to and approved by the probate court before this action was commenced. But it must be borne in mind that the administration law, section 4523, confers upon the probate court the power to determine when the final settlement of an estate shall be made, and to allow as much as one year and six months for that purpose. We think that the Federal court must be conceded the same power, as respects the claim of a non-resident creditor, to allow it within eighteen months, which is conferred upon the probate courts of the State; and we are furthermore of opinion that the right of a non-resident creditor to sue for the establishment of his demand in the Federal court cannot be made to depend on the length of time that the probate court happens to allow for making a final settlement. If the Federal court gives effect to laws limiting the period for establishing claims in the probate courts of the State, which differ essentially from the general statute of limitations, it should only be required to apply the absolute bar arising from lapse of time which the legislature has erected. There is much reason, perhaps, for saying that citizens of other States ought not to be allowed to maintain an action in the Federal court against a local administrator or executor after the expiration of a period when, by the express command of the legislature, no such action can be maintained in the local courts, provided the period fixed by the legislature is reasonable; but

the right of a non-resident creditor to bring his action in the national courts ought not to be conditioned or made to depend upon the time that a local court chances to approve a final settlement, when the time of such approval rests in its discretion, and is largely a matter of convenience. For these reasons, we conclude that the case in hand, the same having been brought within less than eighteen months after the order fixing the period for the allowance of claims was made, was lawfully entertained by the trial court.

"Another claim which is interposed by the administrator as a defence to this action is that the approval of its final account and the order of distribution made thereon by the probate court on April 27, 1896, closed the administration, and operated, without more, as a discharge of the administrator, so that there was in point of fact no administrator when the suit at bar was instituted. This view evidently was not entertained by the probate court by which the administrator was appointed, since the record discloses that that court, as late as November 21, 1896, entertained a petition on the part of the administrator, and at its instance made an order, founded thereon, by which the decree of April 27, 1896, was amended and corrected in important respects. It is manifest that the probate court acted upon the theory that it had not lost jurisdiction over the administrator, that it was still subject to its orders as to all matters pertaining to the estate, and would remain so until it had fully executed its decree and was formally discharged as administrator by an order made to that effect. And this assumption, on which the probate court appears to have acted, in our opinion was entirely correct. The order of distribution that was made on April 27, 1896, required certain acts to be done and performed by the trust company in its capacity as administrator, and until they had been done and performed, and the court had approved of the administrator's acts in that behalf, it was clearly subject to the orders of the probate court, and its functions as administrator had not ceased. The view contended for by the administrator is entirely untenable, since it would deny to the probate courts of the State the right to enforce such orders relative to the distribution of estates as they may see fit to

make, leaving administrators, when final settlements are approved, in full possession of all the property then in their hands, and at liberty to deal with it as they please until they are called to account by some other tribunal than that from which they originally derived their authority. We are satisfied, therefore, that under the laws of the State of Minnesota the approval of a final settlement, and an order of distribution made thereon, does not operate forthwith to discharge the administrator, but that its effect is to give the distributees a right to the possession of the property that has been assigned to them and a right to invoke the power of the probate court, as against the administrator, to compel obedience to its orders."

The validity of this reasoning depends, of course, upon the correctness of the construction put by the learned court on the state statutes; and, we as we have seen, in the cases cited, the Supreme Court of the State has placed an altogether different meaning on those statutes. They hold that the probate code of the State makes no provision for the formal discharge of an administrator, but the necessary legal effect of an order of the probate court, allowing the final account of the administrator and its final decree of distribution, assigning the whole of the estate to the heirs and distributees, is to remove the estate of the deceased from the jurisdiction of the court, and to render the office of administrator, which depends upon such jurisdiction, *functus officio;* and that, after the estate has been so settled and assigned, and while the final decree of distribution remains unreversed and unmodified, the probate court has no jurisdiction to entertain a petition to issue a citation to the administrator requiring him to further account for the property belonging to the estate, which is in his possession, or came into his possession.

Adopting, then, the construction put upon the administration laws of Minnesota, by the Supreme Court of the State, we have only to consider the force of certain other suggestions of the court below, which are, in some measure, independent of those already considered.

It is argued, in the opinion of the Circuit Court of Appeals, that, because section 4523 confers upon the probate court the

power to determine when the final settlement of an estate shall be made, and to allow as much as one year and six months for that purpose, the Federal court must be conceded the same power as respects the claim of a non-resident creditor, to allow it within the eighteen months, which is conferred upon the probate courts of the State. This suggestion is manifestly based on a misconception of the language and legal purport of section 4523. That language is as follows: "The probate court at the time of granting letters testamentary or of administration shall make an order allowing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate."

So that, expressly the time for the settlement of the estate must be fixed by the probate court at the time when the letters of administration are granted, and it is provided, by the following section, that "the probate court may, upon good cause shown by the executor or administrator, extend the time for the settlement of the estate not exceeding one year at a time, unless in the judgment of the court a longer time be necessary."

These sections have nothing to do with the limitation prescribed for the proof or presentation of the claims of creditors, which is found in section 4509. Moreover, in the present case, the court having fixed the period of six months within which the estate should be settled, the administrator, accordingly, having no good cause to show to the contrary, filed his final account of the settlement of the estate within the time so limited, and the account was allowed and the final decree of distribution made before the institution of the present suit.

Section 4509 provides that, at the time of the granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order, and that no claim or demand shall be received after the expiration of the time so limited, unless, for good cause shown, the court may, in its discretion, receive, hear and allow such claim upon notice to the executor or administrator.

But it should be observed that such power to extend the time limit must be exercised, on good cause shown, "before final settlement," and, in the present case, no such good cause was shown, either to the probate court or to the Circuit Court of the United States, before final settlement. It is evident that the discretion to extend the time for proof of claims was to be appealed to for some good reason, that is, reason showing why the claim was not made or the suit brought before the expiration of the time fixed in the original order.

The Circuit Court of Appeals admits that "there is much reason for saying that citizens of other States ought not to be allowed to maintain an action in the Federal court against a local executor or administrator after the expiration of a period when, by the express command of the legislature, no such action can be maintained in the local courts, provided the period fixed by the legislature is reasonable, but the right of a non-resident creditor to bring his action in the national courts ought not to be conditioned or made to depend upon the time that a local court chances to approve a final settlement when the time of such approval rests in its discretion and is largely a matter of convenience." But the legislation of Minnesota does not make the limit within which claims must be made against the estates of decedents to depend on the exercise of discretionary power by the courts. It does provide that the probate court shall fix a time within which claims must be presented, to wit, not less than six nor more than eighteen months. Between those limits of six and eighteen months the probate court may have power of discretionary action on good cause shown. But having once exercised that power, as in the present case, by fixing the term of probation at six months, any extension of that term could only be had, upon good cause shown, "before final settlement."

We are not called upon, by the facts of the present case, to determine whether a Federal court might or might not, on good cause shown, extend the time in which a claim might be asserted against a decedent's estate beyond the term previously fixed by the probate court. But it is sufficient to say that, in the present case, no application was made to the Federal court to exercise such a power, either before or after the limitation prescribed

under the state statute had expired. All that was before the Circuit Court of the United States was an action at law upon a cause of action against a decedent's estate, which, under the laws of the State of Minnesota, could not be maintained in the courts of that State, because barred by the operation of the laws of the State regulating the administration of the estates of deceased persons. Moreover, it is obvious, and it has always been held, that the Circuit Court cannot, in the trial of an action at law, exercise the power of a court of equity. An application to the Federal court to decree an extension of time beyond the period previously prescribed by the probate court would have to be made by a bill in equity, showing good cause. *Scott* v. *Armstrong*, 146 U. S. 499.

Following our previous and repeated decisions, that the courts of the United States, when exercising jurisdiction over executors and administrators of the estates of decedents within a State, are administering the laws of that State, and are bound by the same rules which govern the local tribunals, we conclude, in the present case, that

The judgment of the Circuit Court of Appeals must be reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to that court, with directions to enter judgment in conformity with the opinion of this court.

SECURITY TRUST COMPANY *v.* DENT.

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

No. 42. Argued April 21, 22, 1902.—Decided December 1, 1902.

Where a case is originally brought to this court by writ of error, but it appears that the proper course was to have brought the final judgment of the Circuit Court of Appeals for review by writ of certiorari, this court under the powers given by the judiciary act of March 3, 1891, may allow a writ of certiorari and direct that the copy of the record heretofore filed under the writ of error be taken and deemed as a sufficient return to the certiorari.

The facts and questions of law involved in this case are similar to those decided in the case of *Security Trust Company* v. *Black River National Bank*, p. 211, *ante*.

THE case is stated in the opinion of the court.

Mr. Edmund S. Durment for petitioner. *Mr. Albert R. Moore* was with him on the brief.

Mr. Edward C. Stringer for respondent. *Mr. McNeil V. Seymour* was with him on the brief.

MR. JUSTICE SHIRAS stated the facts and delivered the opinion of the court.

This was an action brought in January, 1897, in the Circuit Court of the United States for the District of Minnesota, by William H. Dent, as receiver of the First National Bank of Decorah, Iowa, against the Security Trust Company of St. Paul, Minnesota, as administrator of the estate of Sumner W. Matteson, deceased, to recover the sum of $13,535.06, being the amount of principal and interest of certain promissory notes made by said Matteson in his lifetime, and which were the property of the said national bank. The execution and ownership of the notes were not denied, nor that the Security Trust Company had been, on September 3, 1895, duly appointed by the probate court of Ramsey County, Minnesota, administrator of the estate of said Matteson.

The defendant, however, alleged in its answer that the action was not brought until after the expiration of the time limited by the order of the probate court for the filing, examination and allowance of claims against Matteson's estate, nor until after the examination and allowance of the administrator's final account, whereby, under the laws of the State of Minnesota, the official existence of the defendant company as administrator had ceased, and that therefore no action could be maintained against it; and also that the right to a judgment on the notes in suit was, by the laws of Minnesota, forever barred, notwithstanding they were owned by a non-resident of the State, and that recovery was sought in a Federal court.

Syllabus.

The plaintiff obtained a judgment in the Circuit Court, and that judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit. The case is reported in 104 Fed. Rep. 380. The cause was then brought here by a writ of error. We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the Circuit Court of Appeals here for review. However, under the powers possessed by us under the judiciary act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari.

The questions presented are similar to those just decided in the case of *Security Trust Company* v. *Black River National Bank*, tried in the same court, and where the parties were represented by the same counsel which appear in this one.

Accordingly, for the reasons given in the opinion in that case,

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to enter judgment in accordance with the opinion of this court.

MACFARLAND *v.* BROWN.

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

No. 331. Argued November 5, 1902.—Decided December 1, 1902.

A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, followed.

When, therefore, the Court of Appeals of the District of Columbia reverses an order of the Supreme Court of the District in proceedings for the con-

demnation of land under the act of Congress of March 3, 1899, 30 Stat. 1381, and remands the case to the lower court for further proceedings as directed by the statute, the decree of the Court of Appeals is not such a final judgment as is reviewable in this court and an appeal therefrom will be dismissed.

See also *Macfarland* v. *Byrnes* decided this term, p. 246, *post.*

UNDER the act of Congress entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," approved March 3, 1899, 30 Stat. 1381, the Commissioners of the District of Columbia were by the terms of section 5 of said act "authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet." The provisions of said section 5 are as follows:

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Under the authority thereby conferred a petition was filed by the Commissioners of the District of Columbia in the Su-

Statement of the Case.

preme Court of the District of Columbia, sitting as a District Court, upon the 31st day of May, 1899, being No. 555 on the District Court docket, praying that the court direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by said act of Congress and by chapter XI of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands might be obtained and secured for the aforesaid extension and widening of Sherman avenue.

Upon this petition the said court on the 16th day of September, 1899, passed an order requiring interested parties to appear in said court on or before the 2d day of October, 1899, and show cause why the prayer of said petition should not be granted, and why the proceedings directed in said act of Congress should not be taken. Pursuant to such order, the jury were summoned and empaneled by the marshal, and upon the 7th day of February, 1900, were sworn according to law, and thereafter the said jury proceeded according to the provisions of chapter XI of the Revised Statutes of the United States relating to the District of Columbia, and having been upon the premises, in accordance with said statute, on the 1st day of May, A. D. 1900, made out their written verdict, which was signed by a majority of the said jurors. Upon the 9th day of May, 1900, the same was filed in the said court under the act of March 3, 1899.

Thereafter, on the 3d day of July, 1901, the trial court passed an order *nisi* confirming said verdict, and requiring all parties to appear and show cause on or before July 22 why such verdict should not be finally confirmed by the court. Upon July 22, 1901, the appellees, in response to said order, filed their exceptions to said verdict.

The court, having heard arguments upon the said exceptions,

on October 2, 1901, passed an order overruling the said exceptions and finally ratifying and confirming in all respects the said verdict.

Thereupon the appellees appealed the case to the Court of Appeals. The Court of Appeals reversed the trial court, from which decision the commissioners of the District of Columbia have appealed to this court.

Mr. Andrew B. Duvall and *Mr. Arthur H. O'Connor* for appellants. *Mr. Edward H. Thomas* was with them on the brief.

Mr. Samuel Maddox for appellees.

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

Whether those provisions of section 263 of the Revised Statutes of the District of Columbia which provide for a second jury are applicable to this proceeding under the act of March 3, 1899; whether, if entitled to a second jury, the appellees waived such right by filing, in the Supreme Court of the District, exceptions to the verdict and award of the first jury and by appealing from the order of that court, overruling their exceptions and affirming said verdict and award, to the Court of Appeals of the District; and whether it was the duty of the commissioners, and not the duty of the parties claiming to have been dissatisfied with the verdict, to demand a second jury, if a right to such jury exists, are important questions, and we can well understand why those who are entrusted with the administration of the law are anxious to have them speedily and finally determined.

But we are of opinion that the case is not before us in a condition to make it our duty to deal with those questions. The decree of the Court of Appeals, reversing the order of the Supreme Court, and remanding the cause to that court, "that proceedings may be taken and a jury of twelve ordered as directed by the statute," is not a final decree from which an appeal will lie to this court.

Opinion of the Court.

It is contended by the learned counsel of the appellants that the case is within the rulings of this court in *Phillips* v. *Negley*, 117 U. S. 665, and in *Humphries* v. *District of Columbia*, 174 U. S. 190. It is true that in the first of those cases this court entertained a writ of error to the Supreme Court of the District and reversed its judgment. But, in disposing of the question raised whether the judgment of the court below was or was not a final judgment, this court said:

"Interpreting the judgment of the general term by the opinion of the learned judge, who spoke for the court, *Phillips* v. *Negley*, 2 Mackey, 263, we must infer that it was intended to dismiss the appeal for want of jurisdiction to entertain it, on the ground that the order of the special term, vacating its own judgment, rendered at a previous term, was not only within the power of that court, but was so purely discretionary that it was not reviewable in an appellate court. The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the Supreme Court of the District at special term is one not only within the discretion of that court, but that, as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and, therefore, not reviewable on writ of error. If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its propriety; for, if it had power to make it, and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judgments at the same term at which they were rendered, and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this court to enter-

tain the present writ of error, therefore, necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself.

"The legal proposition involved in the judgment complained of, and necessary to maintain it, is, that the Supreme Court of this District at special term has the same discretionary power over its judgments, rendered at a previous term of the court, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments, when such proceedings are taken during the term at which they were rendered; and that this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error."

The court proceeded to consider the question at length, and having determined that the Supreme Court of the District had no discretionary power to set aside judgments obtained at a previous term where no proceeding for that purpose had been taken at that term, held that the court had acted without jurisdiction, and that its judgment was void and reviewable on error.

The distinction between that case and the present one is, therefore, seen in the fact that, in the one, the Supreme Court of the District acted without jurisdiction, and in the other the Court of Appeals was in the regular exercise of its appellate power in reversing the judgment of the Supreme Court of the District and awarding further proceedings. Such action in the present case may have been erroneous, but if so we cannot correct it until brought before us by an appeal from a final judgment. The further proceedings may possibly reach such a result that neither party will desire an appeal.

In *Hume* v. *Bowie*, 148 U. S. 245, where this court dismissed a writ of error to the Supreme Court of the District of Columbia upon the ground that the judgment brought here by the writ was not a final judgment, the case of *Phillips* v. *Negley*

was considered, and the distinction between a judgment ordering a new trial when the court has jurisdiction to make such an order, and a judgment where such jurisdiction does not exist, was pointed out by the Chief Justice, and it was held that, in the former case, where jurisdiction existed, a judgment setting aside the judgment of the trial court, and awarding a new trial, is not a final judgment reviewable on error, and in the latter case, where jurisdiction had ceased to exist, by reason of lapse of time, a judgment awarding a new trial is without jurisdiction, would be an order in a new proceeding, and, in that view, final and reviewable.

The other case relied on, *Humphries* v. *District of Columbia*, was a case where, in the Supreme Court of the District, a verdict had been signed by all twelve of the jurors, but one of them was disabled by illness from being present in court when the verdict was delivered. Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the Court of Appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the defendant, against whom judgment had been entered, filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the Court of Appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term. This view of the nature of the verdict was not approved by this court, which held that the defect or irregularity in the rendering of the verdict was mere matter of error, and not one which affected the jurisdiction.

In the present case no attack is made on the jurisdiction of either the Supreme Court of the District or of the Court of Appeals. That the decree of the latter court was not meant to be final is shown by its language, which does not definitely adjudge the whole subject matter, but anticipates further action of the Supreme Court. The litigation of the parties on the

merits of the case has not been terminated. "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

We do not overlook the fact that this statement of the law was made in a case where the appeal was taken directly from the decree of the trial court; but we think the principle on which the rule rests is applicable where the appeal is from the decree of an intermediate appellate court.

We are unwilling to make any departure from the rule that demands finality in a decree to render it subject to review on appeal. It would be very unfortunate if mere errors in the administration of statutes, of this character, not going to their validity, or to the jurisdiction of the courts below, could be brought here, from time to time, in advance of a final disposition of the controversy.

The appeal is

Dismissed.

MACFARLAND *v.* BYRNES.

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

No. 332. Argued November 5, 1902.—Decided December 1, 1902.

A decree of the Court of Appeals of the District of Columbia reversing an order of the Supreme Court of the District and remanding the cause to the lower court with directions to vacate the part appealed from and to take further proceedings according to law, is neither in form nor intention a final decree and is not reviewable in this court on appeal.

See also *Macfarland* v. *Brown*, decided this term, p. 239, *ante*.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. Andrew B. Duvall and *Mr. Arthur H. O'Connor* for appellants. *Mr. E. H. Thomas* was with them on the brief.

Mr. Leo Simmons for appellees.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, reversing a decree of the Supreme Court of the District; and there is a motion to dismiss the appeal for the alleged reason that the decree appealed from was not final, but contemplated further proceedings in the Supreme Court.

The following paragraph from the opinion of the Court of Appeals sufficiently discloses the nature of its decree:

"There is, however, a third consideration, which we cannot ignore in the disposition of this case. By the act of Congress of June 6, 1900, already mentioned, it was provided that, if for any reason the assessment for benefits should be declared void, the commissioners should make application to the court for a reassessment. This evidently has no reference to the invalidity consequent upon judicial decision of the unconstitutionality of the act of Congress of March 3, 1899, for there could then, of course, be no lawful reassessment, since the foundation for the whole proceeding would fail. The holding of this court that the act of March 3, 1899, was unconstitutional did not, therefore, avail to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. And when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of legislative authority all reason for reassessment under the act of 1900 vanished. Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be restored to them, that of summoning a second jury of assessment under chapter 11 of the Revised Statutes of the United States for the District of Columbia, under which these proceedings were instituted and

have been prosecuted, if they now desire to avail themselves of that right. They may prefer to forego that right; and they may prefer no longer to contest the justice and propriety of the assessments. If they so elect, the court will, of course, enter the proper order or decree in the cause. If, on the other hand, they elect further to contest the matter according to law, they should have the opportunity to do so. This court, therefore, should not now direct any final order or decree to be entered by the court below in the premises.

"The order appealed from, and only so far as appealed from, will be reversed; and the cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate such part of said order, and for such further proceedings in the cause according to law as may be right and just."

It thus plainly appears that the decree appealed from was neither in form nor intention a final one. Accordingly, and for the reasons given in the case of the *Commissioners* v. *Jesse Brown and Rosa Wallach*, recently decided, and where a similar question was considered, the motion to dismiss must be sustained.

Appeal dismissed.

MENCKE *v.* CARGO OF JAVA SUGAR.

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

No. 90. Argued November 13, 1902.—Decided December 1, 1902.

Where the charter party of a vessel bound with a cargo of sugar from Java, to a port in the United States provides that the vessel should discharge at New York, Boston, Philadelphia or Baltimore "or so near the port of discharge as she may safely get and deliver the same, always afloat, in a customary place, and manner, in such dock, as directed by charterers, agreeably to bills of lading," and also provides "all goods to be brought to and taken from alongside of the ship always afloat at said charterers' risk and expense, who may direct the same at the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver

Counsel for Parties.

the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding," and the vessel has three steel masts built up solidly from the bottom to the top and so riveted there is no way of taking them down and the mainmast requires one hundred and forty-five feet of clear space to pass under any obstruction, which is more than the height at dead low water of the Brooklyn Bridge over the East River, charterers have no right to order the vessel to discharge at a dock above the Brooklyn Bridge; and if the vessel discharges by lighterage from the most convenient place below the bridge, the charterers must pay the expense of lighterage from the vessel to the dock. Under the above conditions it is not a just exercise of the right given to the charterers by the charter party to select a dock in getting to which the vessel could not always be afloat or to which she could not safely get. Under such circumstances the vessel is not obliged to sail around Long Island and thus reach the dock above the bridge by coming through Long Island Sound and Hell Gate.

THIS action was begun by the filing on May 27, 1899, of a libel in the United States District Court for the Eastern District of New York, by Anton Mencke, the master of the British ship Benlarig, against a cargo of sugar that had just been delivered from the vessel, to recover an unpaid balance of freight due for conveying the sugar from Java to New York. The receivers of the cargo, the claimants in the action, had deducted from the freight the cost of lightering the cargo from the dock where it had been discharged to the claimants' refinery, which was above the Brooklyn Bridge. The ship had been ordered by the claimants to proceed directly to the refinery, but was unable to do so because the height of her masts was such that she could not pass under the bridge.

The District Court, per Judge Thomas, entered a decree in favor of the libellant January 18, 1900. 99 Fed. Rep. 298. The claimants appealed to the United States Circuit Court of Appeals for the Second Circuit, and that court on April 16, 1901, reversed the decree of the District Court, and remanded the cause with directions to dismiss the libel. 108 Fed. Rep. 89.

On May 13, 1901, a writ of certiorari was granted, and the cause was brought to this court. 181 U. S. 620.

Mr. J. Parker Kirlin for petitioner. *Mr. Charles R. Hickox* was with him on the brief.

Mr. Wilhelmus Mynderse for respondents.

Mr. Justice Shiras delivered the opinion of the court.

Concerning the facts of the case there is no controversy.

The ship Benlarig was chartered under a charter party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielcken, merchants of Batavia.

The vessel duly loaded a full cargo of sugar at Java, and then proceeded to Barbadoes. There she received orders to proceed directly to New York. This she did, arriving on or about April 14, 1899. Before or about the time of the arrival of the Benlarig at the port of New York the cargo of sugar was sold and transferred, with the accompanying bills of lading, by the owners and consignees thereof, to Arbuckle Brothers, sugar refiners. The agents of the vessel gave notice to Arbuckle Brothers, on April 15, of the arrival of the vessel, and asked for orders for a discharging berth, mentioning that the vessel's mast, being in one piece, would not admit of her going under the Brooklyn Bridge. Arbuckle Brothers ordered the vessel to discharge at their refinery at the foot of Pearl street above the bridge. Subsequently it was agreed that the cargo should be discharged at the West Central Pier, Atlantic Dock, below the bridge, into lighters provided by Arbuckle Brothers, without prejudice to the rights of either party in respect to the payment of the cost of lighterage. This cost amounted to $1466.12, which was paid by Arbuckle Brothers and deducted by them from the freight; and this suit is to recover the balance of the freight so deducted.

The clear height of the highest span of the Brooklyn Bridge above mean high water is one hundred and thirty-five feet. At dead low water there were not more than one hundred and forty feet in the clear at the highest point.

The Benlarig has three steel masts, built up solid from the bottom to the top, and constructed of cylindrical steel plates, riveted together with internal angle iron braces. There was no way of taking any part of the masts down. The mainmast was one hundred and thirty-nine feet ten inches above the deck;

the foremast one hundred and thirty-six feet eight inches above the deck; and the mizzenmast was one hundred and twenty-nine feet above the deck; and the deck was from seven to eight feet above the loadline of the vessel. The ship, therefore, required one hundred and forty-five feet of clear space in order to pass underneath the bridge. This was more than five feet in the clear of the highest point of the bridge when the tide was at the lowest point of the ebb. An additional margin of several feet would have to be allowed for safe passageway; and at the lowest water the Benlarig could not pass under the bridge without cutting off some eight to ten feet of her steel masts.

The charter party provided that the Benlarig should load at Java and should proceed to Barbadoes, "thence to Queenstown or Falmouth, (as directed by charterers or their agents,) for orders to discharge, always afloat, either at a safe port in the United Kingdom or on the continent of Europe between Havre and Hamburg (both included), Rouen excepted, or at option of charterers to order vessel from Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get and deliver the same, always afloat, in a customary place and manner, in such dock, as directed by charterers, agreeably to bills of lading." Section 4 of the charter party further provided that "All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same at the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding."

Four bills of lading were issued at the ports of loading, reciting the "shipment of the sugar, and containing the identical conditions that the sugar was to be delivered in the like order and condition at the port of discharge as per charter party dated London, 1st July, 1898, (the dangers of the sea excepted,) unto Messrs. Winter & Smillie as agents, or to their assigns, he or they paying freight for the said sugar as per charter party.

General average, if any, to be settled according to York-Antwerp rules, 1890. All other conditions and exceptions, negligence and Harter Act clauses included, as per charter party above referred to, with average accustomed."

The positions of the respective parties may be briefly stated thus:

The libellant's contention is that, under clause 1 of the charter party, the right of the charterers or their assigns to select the dock for the discharge of cargo was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo, and one to which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled or dismantled; and that, under clause 4 of the charter party, any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants contend that the discharging berth to which the Benlarig was ordered was safe for vessels of her class, and a customary place of discharge; and she should have proceeded there, or should have delivered her cargo there otherwise at her own expense; and that the lighterage clause of the charter party does not relieve the owners of the ship from their obligation to proceed to a designated dock above the bridge, and to there deliver the cargo.

Another suggestion made on behalf of the claimants, namely, that the Benlarig, though unable to pass under the bridge, might have reached the Arbuckle dock by sailing around Long Island, and then through the Sound and Hell Gate to Brooklyn, should be first disposed of. It is, perhaps, sufficient to say that no such allegation appears in the claimants' answer. Nor did the claimants' assignments of error to the judgment of the District Court raise any such question. Neither did the claimants, during the negotiations, make any such suggestion. Moreover, the District Court and the Circuit Court of Appeals agreed in the statement that "all shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course, and it may therefore be concluded that such alternative was contrary to the expectations and under-

standing of all parties to this contract, or of any other contract for the carriage of sugar from Java."

The question that remains is, upon which of the parties the expense of the lighterage should fall. The answer, we think, must be found in a proper construction of the contract between them.

It cannot be fairly claimed under the evidence that the expense that would have been occasioned to the owners of the vessel, if they had removed or taken down the mast, would have been trifling or inconsiderable. There was some evidence that, in a few instances, the topmasts of vessels had been taken down in order to permit them to pass under the bridge, and that the expense in each case was small. But those were cases of vessels with wooden masts, so constructed as to permit the topmast to be lowered. The Benlarig's masts were wholly of steel, and the testimony of her master was that if it became absolutely necessary to make the vessel pass beneath some obstruction lower than the top of the masts, the masts would either have to be cut or removed wholly out of the ship. What cost would have been caused by cutting or removing the steel mast does not appear. But the courts below concurred in regarding the mutilation or destruction of the ship's masts as a serious affair.

In such a condition of affairs we think that resort to lighterage was natural and reasonable and within the obvious and fair import of the terms of the charter party. The clause, which is claimed to give the charterers or their assigns the right to appoint the dock in which to discharge cargo contains conditions that the port must be safe, and that the vessel must discharge always afloat, either at a safe port or so near the port of discharge as she can safely get. It would not be a just exercise of the right to select a dock in getting to which the vessel could not always be afloat or to which she could not safely get. A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass; nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts.

Any doubt that might be felt as to this construction of the clause will be relieved by the express language of section 4: "All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding." Here, again, is recognized the right of the ship to be "always afloat." The anchorage directed must be the "most convenient;" which must mean convenient as well for the ship as for the consignees; and, finally, if lighterage is necessary, either to reach the port or to deliver the cargo, the expense thereof is chargeable to the receivers of the goods, regardless of any local port customs.

We do not feel constrained to go into an extended consideration of the authorities cited in the briefs of counsel, but shall refer to two or three cases which, in some of their features, seem to be applicable.

The case of *The Alhambra*, L. R. 6 P. Div. 68, was where the charter party provided that the vessel should go "to a safe port in the United Kingdom, . . . or as near thereunto as she could safely get, and always lay and discharge afloat . . . lighterage, if any, always at the risk and expense of the cargo."

The charterers gave orders to the vessel to proceed to Lowestoft and there discharge the cargo. The average high water in that harbor was about sixteen feet, and average low water about eleven feet. The master objected to discharging in Lowestoft harbor, notwithstanding that the purchasers of the cargo gave him notice that they were prepared at their own expense to lighter the vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft harbor, if necessary, should her draught of water so require. The vessel went to Harwich as the nearest safe port and there discharged the cargo. The owners of the cargo brought suit for breach of contract, and offered evidence to show that it was the custom of vessels which were too deep to enter the port of Lowestoft to discharge

a portion of their cargo in the roads outside, and that it could be done with reasonable safety. The cargo owners recovered a judgment, but the Court of Appeals reversed, that court holding that Lowestoft was not a safe port for the vessel within the meaning of the charter party, and that the custom shown by the charterers was inadmissible.

This case was cited with approval by this court in *The Gazelle*, 128 U. S. 474, where the charter party provided that the vessel should proceed from Baltimore "to a safe, direct, Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get, and always lay and discharge afloat."

The charterers tendered to the master for signature bills of lading, ordering the vessel to the port of Aalborg, in Denmark, as the port of discharge, "to be landed at Aalborg, or as near thereto as the vessel can safely get." The master refused to sign the bills of lading for the reason that Aalborg was not a safe port. Aalborg is situated in Denmark on the Limiford Inlet, about seventeen miles from its mouth. Owing to a bar at the mouth of the Inlet, there was a depth of water of only ten or eleven feet. The draft of the Gazelle loaded was about sixteen feet. The only place of anchorage for a vessel that cannot cross the bar is off the mouth of the Inlet, where vessels were accustomed to discharge into lighters. Thereafter the master filed a libel for demurrage in the District Court of the United States for the District of Maryland, whose judgment, sustaining the libel and dismissing the cross-libel of the charterers, was affirmed by the Circuit Court. This court said, through Mr. Justice Gray:

"By the express terms of the charter-party, the charterers were bound to order the vessel 'to a safe, direct, Norwegian or Danish port, or as near thereto as she can safely get and always lay and discharge afloat.' The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. *Dahl* v. *Nelson*, 6 App. Cas. 38; *The Alhambra*, L. R. 6 P. Div. 68. The charterers insisted upon ordering her to the port of Aalborg. The Circuit Court

has found that Aalborg is in a fiord or inlet having a bar across its mouth, which it was impossible for the Gazelle to pass, either in ballast or with cargo; and that the only anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge."

The charterers offered evidence to show that by the custom of trade between Baltimore and the Atlantic ports and the ports of Norway and Denmark, Aalborg was recognized as being, and understood to be, a safe, direct port of Denmark, within the meaning of the charter party. In respect to which this court said: "Evidence of a custom to consider as safe a particular port, which in fact is not reasonably safe, would directly contradict the charter-party, and would therefore be incompetent as matter of law."

In *In re an Arbitration between Goodbody & Co. and Balfour, Williamson & Co.*, 4 Com. Cas. 119, the facts were that a cargo of wheat per the ship Vanduara had been sold in a contract containing the clause "shipped . . . per Vanduara . . . sailed or about to sail as per bill or bills of lading dated, etc., . . . to any safe port in the United Kingdom of Great Britain, or to Havre or to Dunkirk or to Antwerp, calling at Queenstown, Falmouth, or Plymouth, for orders, as per charter party. Vessel to discharge afloat." The vendees declined to take the papers on the ground that by the bills of lading the cargo was stated to have been shipped upon the Vanduara "to discharge at a safe port in the United Kingdom, Manchester excepted," and that such bills of lading did not comply with the contract for delivery in any safe port in the United Kingdom. It was found in the special case stated for the decision of the court that "the Vanduara when loaded with the said cargo would have been unable to go up the Manchester Ship Canal to the Manchester Docks, because the heads of her lower main and mizzenmasts would have been higher than the limit fixed by the canal company's regulations for passing under the Runcorn Bridge."

The vendors argued that the addition to the bills of lading of the words, "Manchester excepted," was immaterial, inasmuch as Manchester, in any event, was not a "safe port" in the sense

of the bills of lading, as the ship could not reach it without cutting off or taking down her masts; and of that opinion were the Divisional Court and the Court of Appeal, 5 Com. Cas. 59, A. L. Smith, L. J., in the latter court saying, "it is abundantly proved that Manchester taken by itself was not a safe port for this vessel, because it was found as a fact . . . that it would have been necessary to dismantle the ship to enable her to get under Runcorn Bridge, which is the first bridge vessels going up the canal to Manchester have to pass." Collins, L. J., was of the same opinion. And Vaughn Williams, L. J., said: "On the findings of the last award it is perfectly plain that in a commercial sense the port of Manchester does not extend beyond Runcorn Bridge. It is not disputed that Manchester in that sense was not a safe port for the Vanduara to go to."

This case is pertinent as holding that an overhead bridge which prevents access to the place designated for the discharge quite as effectively renders it unsafe for the ship as a sandbar or other obstacle under the water.

The view of the Circuit Court of Appeals, that the construction put upon the charter party by the District Court was within its letter but not within its spirit, because "an application to novel circumstances of clauses intended for a different set of circumstances," we cannot accept. We are unable to see anything in the undisputed facts of the case that warrants any other construction of the language employed than that suggested by its ordinary meaning.

The decree of the Court of Appeals is reversed, and the decree of the District Court is affirmed with interest thereon from the time of its entry.

NORTHERN CENTRAL RAILWAY COMPANY *v.* MARYLAND.

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

No. 43. Argued October 16, 1902.—Decided December 1, 1902.

1. When a Maryland corporation, chartered in 1827, and possessing certain immunities from taxation, which under the then constitution might have been irrepealable, becomes merged with other corporations in an entirely new corporation possessing new rights and franchises created after the adoption of the constitution of 1850, under which the legislature has power to alter and repeal charters of, and laws creating, corporations, the right of exemption, if it ever passed to the new corporation, is subject to the right of repeal, and hence is not protected from repeal by the contract clause of the Federal Constitution.
2. An act of the legislature compromising litigation between the State and such new corporation arising from the claim of the latter that it was exempt from taxation under the immunities at one time possessed by one of its constituent corporations, and fixing a rate of taxation to be paid annually thereafter by the new corporation, cannot be regarded as a legislative contract granting an irrepealable right forbidden by the then existing constitution of the State. If, therefore, the legislature subsequently passes another act fixing a higher rate of taxation, and the highest court of the State decides that such act repeals the former act and subjects the corporation to the higher rate of taxation, the later act is not bad as impairing the obligation of contracts within the purview of the Constitution of the United States as the compromise, when made, was subject to the right to repeal, reserved by the constitution of the State at that time.

THE Baltimore and Susquehanna Railroad Company was chartered by an act of the legislature of Maryland in 1827, with authority to construct a railroad from the city of Baltimore to the Susquehanna River. The charter contained a provision declaring that the "shares of the capital stock of the company should be deemed and considered personal estate, and should be exempt from the imposition of any tax or burden." It was conceded by both parties in the discussion at bar that the effect of this provision, as interpreted by the settled adjudications of the State of Maryland, was to forever exempt the company and

its property from taxation. It was also conceded that at the time this act was passed there was no provision in the constitution of the State of Maryland restricting the legislative power to exempt, and that no reservation of the power to repeal, alter or amend was found in the constitution of the State, or expressed or implied in the charter in question. In 1854 an act was passed by the Maryland legislature, designated as chapter 250 of the laws of that year. The title of this act was as follows:

"An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company."

The companies referred to in this title other than the Baltimore and Susquehanna Railroad were corporations owing their existence to charters granted by the legislature of Pennsylvania, and which were operating railroads in that State connecting with the Baltimore and Susquehanna. The effect of the consolidation was to create one corporation owning and operating one line of railroad from and across the State of Maryland into and across the State of Pennsylvania. The act of 1854 authorizing the consolidation, the title of which has just been stated, by its first section empowered the stockholders of the Baltimore and Susquehanna Railroad, upon their acceptance of the act, "to unite and consolidate their company or corporation with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company and the Susquehanna Railroad Company in the State of Pennsylvania, so as to form and constitute one company or corporation, to be called the Northern Central Railway Company, on such terms and conditions, and conformably to such agreements and regulations as the said several companies shall respectively determine and adopt, subject nevertheless to the following general provisions: First, that all existing contracts, engagements and liabilities of the said Baltimore and Susquehanna Railroad Company shall continue to bind said company and its property as fully as before the consolidation herein above authorized, or that the said existing contracts, engagements and liabilities shall be duly adopted and

assumed by the consolidated company except as herein expressly altered or rescinded; second, that all laws heretofore made in reference to the said Baltimore and Susquehanna Railroad Company and not repealed or modified by the legislature of Maryland, and all ordinances relating to said company heretofore made and not repealed by the mayor and city council of Baltimore, shall be binding and operative upon the said consolidated company, so far as its property or its operations may be within the jurisdiction of the State of Maryland or the city of Baltimore respectively, and so far as the laws or ordinances may be applicable to, and consistent with the new organization of the said consolidated company; third, that the consolidated company shall have power from time to time to establish its capital stock at an amount not exceeding eight millions of dollars, the same to be represented by such number of shares as the said consolidated company may determine, and that the said consolidated company shall have power to issue their bonds convertible into stock on such terms as the company may prescribe, and to secure the same by one or more mortgages, for any such amounts as they may find necessary for paying off any existing debt or engagement of the company."

After providing for a board of directors and officers of the new or consolidated company, the act proceeded to say: "That the company shall make and use a common seal, and possess all the corporate powers and privileges, and be subject to all the duties and obligations not inconsistent with this act, and its general intent, which are expressed in the charter heretofore granted to the said Baltimore and Susquehanna Railroad Company, and its supplements: *Provided*, That this clause shall not be construed to deprive the parties to the said consolidated company of the right or authority to make such provisions and regulations, notwithstanding said original charter and its supplements, as may be necessary to create and establish said consolidated company, and bring its organization into agreement and consistency with the terms and conditions of the charter of the several companies of which the said consolidated company shall be composed: *And provided also*, That the parties to the consolidated company shall be authorized and empowered to adopt

and conform the organization of the said consolidated company to such provisions or enactments as may be required by the legislature of the State of Pennsylvania, touching the name of said corporation, and the construction of the board of president and directors in said consolidated company, and the conditions relating to their appointments."

The second section of the act, among other things, provided that "This act shall take effect whenever and as soon as the said parties hereinbefore referred to shall have agreed to consolidate their several companies into one, and shall have settled, determined and agreed upon the terms and conditions of such consolidation in conformity with the provisions of this act. . . ."

In pursuance of the authority thus conferred upon the Maryland corporation, and in virtue of power granted by the legislature of Pennsylvania to the three Pennsylvania corporations, the consolidation was effected, new stock was issued, and a company came into being known as the Northern Central Railway Company, whose affairs were managed by the new board of directors and officers elected or appointed pursuant to the new charter. The corporation, in availing itself of the provisions of the law of 1854, executed articles of consolidation. Although the act of 1854 only provided that the new corporation should have the corporate "powers and privileges" of the constituent bodies, it is stated in argument that the articles of consolidation executed under the law purported to vest the new corporation with not only the right to the property rights and privileges of the old companies but also with their *immunities*. In 1854, at the time the act of consolidation was passed, the Maryland constitution of 1850 was in force, and provided in section 47, article 5, as follows :

"That corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where in the judgment of the legislature the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time or repealed."

In the years 1872 and 1874 the legislature of Maryland passed

an act imposing a tax of one half of one per cent upon the gross receipts of all steam railroad companies incorporated by the State and doing business therein. Two suits were thereafter (the one in 1873 and the other in 1874) brought by the State of Maryland against the Northern Central Railway Company to recover the one half of one per cent tax upon the gross receipts of that company from that part of its railroad lying in the State of Maryland. The defence of the company was substantially, first, that it was entitled to the exemption from taxation granted by the act of 1827 to the Baltimore and Susquehanna Company; that such exemption was existing and had not been repealed, and if repealed, the repealing act was void because an impairment of the obligations of the contract resulting from the act of 1827 and the transmission of its immunities to the new company created by the act of 1854. The causes were decided in the trial court in favor of the corporation. The cases were taken to the Court of Appeals of the State of Maryland. That court (in 1875) reversed the judgment of the court below and remanded the cases for a new trial. The Court of Appeals in its opinion conceded that when in 1827 the charter of the Baltimore and Susquehanna Railroad Company was granted there was no restriction in the constitution of the State on the power of the general assembly to make a contractual exemption from taxation. It also conceded that at that time there was no general power reserved in the constitution to repeal, alter or amend charters, and that no such reservation was found in the charter of 1827. But the court deemed it unnecessary to pass upon the question of whether the consolidation act of 1854 had endowed the new company with the exemption from taxation expressed in the act of 1827, because, conceding *arguendo* this to have been the case, it was held that as the consolidation had created a new company with new stock, new franchises, new rights and new officers, the charter of such newly created company as to all its provisions, including the exemption from taxation, if such exemption were found in it expressly or by implication, was subject to the power to repeal, alter and amend reserved by the constitution. Construing the acts imposing the taxes which were sued for in connection with

other laws of the State of Maryland, the court held that the exemption from taxation had been repealed. 44 Maryland, 131, 162.

The cause on being remanded to the trial court remained untried in 1880. In that year the legislature of Maryland passed an act on the subject of the taxation of the Northern Central Railway Company. The title of that act purported to adjust and settle finally by agreement all pending controversies on the subject of taxation between the State of Maryland and the railroad company. The preamble referred to and recapitulated the organization of the Baltimore and Susquehanna, the consolidation by the act of 1854, and the pending suits on the subject. The title and preamble are reproduced in the margin.[1]

[1] An act to adjust and settle finally, by agreement, all pending controversies between the State of Maryland and the Northern Central Railway Company, by subjecting the franchises and property of said company within this State to taxation for state purposes to a certain extent, and by providing for the payment of a certain indebtedness claimed by the State of Maryland to exist on the part of said Northern Central Railway Company to said State of Maryland, being an act supplementary to the act of eighteen hundred and fifty-four, chapter two hundred and fifty, entitled An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Rail Company, and the Susquehanna Railroad Company, by the name of the Northern Central Railway Company.

Whereas, a controversy has arisen and exists between the State of Maryland and the Northern Central Railway Company in reference to the rights of the State of Maryland to subject to taxation the franchises and property of the Northern Central Railway Company, the said company claiming exemption of the same from taxation upon the grounds that among the terms and conditions of the union and consolidation of the several companies by which said Northern Central Railway Company was formed is one, that the latter should have all the rights, privileges and immunities of each of said companies, which said terms were entered into under the authority given by the act of Maryland of eighteen hundred and fifty-four, chapter two hundred and fifty, which moreover declared that said Northern Central Railway Company should have all the powers and privileges expressed in the charter granted by the State of Maryland to the Baltimore and Susquehanna Railroad Company, among which privileges was immunity from taxation.

And whereas, the State of Maryland having, by the act of eighteen hun-

By the first section of the act it was provided that the Northern Central Railway Company "shall have and possess all the powers, rights, privileges and immunities and be subject to all the duties and obligations which are expressed in the act of assembly of Maryland of 1827, chapter seventy-two, entitled An act to incorporate the Baltimore and Susquehanna Railroad Company, but all the franchises and property of every description and gross receipts of said Northern Central Railway Company, within the State of Maryland, shall be subject to taxation for state purposes to the extent of an annual tax of one half of one per centum upon the gross receipts from its railroad and franchise lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland; . . ." The act further provided for the payment of a designated sum by the railroad company for past taxes, declared said payment should acquit such taxes, and directed the discontinuance of all suits pending against the company for such taxes. It was however provided that its provisions should not be operative until the payment which the act required had been made and until the acceptance

---

dred and seventy-two, chapter two hundred and thirty-four, and the act of eighteen hundred and seventy-four, chapter four hundred and eight, imposed an annual tax of one half of one per centum on the gross receipts of all railroad companies worked by steam incorporated by or under the authority of said State of Maryland, and claiming that under said acts the gross receipts of said Northern Central Railway Company are liable to said tax, have instituted suits to recover the same.

And whereas, the property of said company has been also assessed as liable to taxation for county and municipal purposes.

And whereas, the said company has the right to have the question at issue between it and the State of Maryland carried to the Supreme Court of the United States to be there decided.

And whereas, it has been represented to this general assembly that what would be the ultimate decision of said question is a matter of great doubt, and it is deemed to be moreover just and proper that an equitable settlement should be made of the matters so in controversy, and it having been represented to this general assembly that the said Northern Central Railway Company, for the purpose of making such settlement, is willing to pay a tax of one half of one per centum on the gross receipts within this State, upon the terms and conditions hereinafter set forth; now, therefore—

of the provisions of the act by the stockholders of the company. The act was accepted, the money was paid and the suits were discontinued. At the time of the passage of this act of 1880 the constitution of Maryland of 1867 was in force, and therein it was provided (article 3, section 48): "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character, as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void. . . . All charters granted, or adopted, in pursuance of this section and all charters heretofore granted and created, subject to repeal or modification, may be altered, from time to time, or be repealed." In accordance with the act of 1880 the company year by year paid the tax on its gross receipts.

In 1890 the State of Maryland passed a general law entitled "An act to provide for state taxation on the revenues of railroad, telegraph or cable, express or transportation, telephone, parlor car, sleeping car, safe deposit, trust, guaranty, fidelity, oil or pipe line, title insurance, electric light or electric construction companies incorporated under any general or special law of this State and doing business therein." By this act a tax of one per centum was imposed upon the gross receipts "of all railroad companies worked by steam incorporated by or under the authority of this State and doing business therein." Under the asserted authority of this statute a tax of one per cent was levied by the State in each of the years 1891 to 1895, both inclusive, upon the gross receipts of the Northern Central Railway Company for the year preceding, and these taxes were paid by the company under protest. Upon demand, however, being made in 1896 for payment of the tax of one per cent upon the gross receipts for the year 1895, compliance was refused. A tender by the company of the taxes, calculated at the rate of one half of one per cent, was refused by the State, and the present action was thereupon brought to recover the taxes thus asserted to be due and payable under the act of 1890. The company defended on the ground that the act of 1880 was a con-

tract protecting it from a higher rate of tax on its gross receipts than in that act specified; that the act had not been repealed; that if repealed the repealing statute was void, because it impaired the obligations of the contract resulting from the act of 1880. There was judgment in favor of the corporation. The case was taken to the Court of Appeals of the State of Maryland and the judgment was reversed, the court holding that the provisions of the act of 1880 had been repealed by state statutes to which it referred, and that the repeal did not violate the Constitution of the United States by impairing the obligations of the contract, as asserted by the company, because the corporation held its rights subject to the power to repeal, alter and amend, as reserved in the constitution at the time both the acts of 1854 and 1880 were passed. 90 Maryland, 447. The case was remanded for a new trial. It was again tried, the Federal defence of the impairment of the obligation of the contract was again specially urged, the case was decided against the corporation, was taken again to the Court of Appeals of the State of Maryland. That court, adhering to its former view, affirmed the judgment. It is to this judgment that the present writ of error is prosecuted.

Mr. Bernard Carter for plaintiff in error.

Mr. George R. Gaither and *Mr. Louis E. McComas* for defendant in error.

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

In order to confine the controversy arising on this record to the propositions upon which its decision must really rest, to eliminate the questions discussed at bar, which are either irrelevant or so effectually foreclosed by prior decisions of this court as to be no longer open to controversy, the following propositions are stated:

Where a contract is claimed to arise from a state law and it is held below that a subsequent statute has repealed the

alleged contract and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a state and not a Federal question. In such a case this court concerns itself not with the question whether the state law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the state court has given effect to a subsequent law, this court decides whether such effect, so given by the state court, violates the Constitution of the United States. *Gulf & Ship Island Railway Company* v. *Hewes*, 183 U. S. 66. We therefore put out of view the question whether the acts of 1854 or of 1880 were repealed by the subsequent state statutes, as held by the court below, and treating such repeal as an accomplished fact, shall determine whether the repealing acts were void because impairing the obligations of the contract relied upon, in violation of the Constitution of the United States. In considering this question it will be borne in mind that it is elementary that where the constitution of a State reserves the right to repeal, alter or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited. We content ourselves, therefore, by referring to one of them: *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 641. It is, moreover, conclusively determined that where the constitution of a State reserves the power to repeal, alter or amend a charter, such provision is applicable to the charter of a consolidated corporation where as the result of the consolidation a new corporation takes being, new stock is provided for, new franchises are conferred and new officers appointed. In other words, that where a legislature is inhibited by the constitution from making an irrepealable charter it cannot create a new contract and bring into being a new corporation, and yet

by the charter of such corporation give rise to the irrepealable contract which the constitution absolutely prohibits. To state the doctrine in another form, it is this: That where a new corporation is chartered, subject to a constitution which forbids the granting of an irrepealable right, such new corporation cannot become endowed by the effect of a legislative contract with an irrepealable right forbidden by the constitution. If one of the constituent elements of the corporation possessed, prior to the formation of the new corporation, such right, and under the assumption that the right itself passed to the new body, it loses its irrepealable character, because the new corporation is subject by the very law of its being to the provision of the constitution forbidding irrepealable grants.

The doctrine as just stated has been so frequently declared by this court that it is no longer open to discussion. The whole subject has been so recently fully reviewed and restated it is sufficient to refer to that case: *Yazoo & Mississippi Valley Railway Company* v. *Adams*, 180 U. S. 1, 17 *et seq.*, and authorities there cited.

Coming to apply the principles just stated to the case before us, it is apparent that unless there is something peculiar in this case which takes it from under the control of the doctrine referred to, that the court below correctly held that the new corporation created by the act of 1854 had no irrepealable contract exempting it from taxation either as the result of the act of 1854 or of the act of 1880. The positive prohibition existing in the constitution of the State against irrepealable charter grants both when the act of 1854 and the act of 1880 were passed, renders any other conclusion impossible. But it is insisted that as the constitution of 1867, which was in force when the law of 1880 was enacted, reserved the right to repeal, alter or amend only charters granted or adopted, the act of 1880 did not come within the right to repeal or amend because it was not a charter, but a contract entered into between the State and the corporation. True, the act of 1880 was put, not in the form of a charter amendment, but in that of a contract. The lower court, after quoting from the opinion rendered by it, when the case was before it under the act of 1854 (44 Maryland) said:

"It is to be observed that the court did not rest the inability of the legislature to grant to the corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of the want of power in the legislature under the constitution to make such a grant at all. The court certainly in effect determines that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and is therefore subject to alteration or repeal by future legislatures."

Without pausing to consider whether, as contended, the rule as thus announced may have been in some respects too broadly stated, we think it clear that the mere form adopted by a legislature in conferring a right on a corporation cannot be controlling, for if it were so the provision of the constitution, instead of being commanding and prohibitive would merely be precatory or advisory. We are also clearly of the opinion that the act of 1880, in its essential nature and effect in whatever form couched, was intended to be and necessarily operated as an amendment to the charter of the company created by the act of 1854. Such being its essential nature and necessary effect, we think it plainly came within the provisions of the constitution of 1867, and was therefore subject to repeal, alteration or amendment.

It is strenuously however insisted that this case should not be controlled by the reasons previously stated because of the following considerations: The decision of the Court of Appeals of Maryland under the act of 1854 (44 Maryland 131), it is urged, was not unanimous. There was an elaborate dissent. For this reason and because the case was open to review in this court on the question of the impairment of the obligations of the contract, it is said there was necessarily grave doubt as to the rights of the parties. In view of the foregoing conditions and of such doubt, the act of 1880 embodied but an honest effort by way of contract and compromise to close the doubtful controversy in the interest of both parties, the State on the one hand and the corporation on the other, hence the act of 1880 was

not subject to repeal, alteration or amendment. Conceding, *arguendo*, the premise upon which the above deduction is based, the conclusion itself is devoid of foundation. It but reiterates in another mode of statement the argument that the form in which a contract is couched, and not its substance and necessary effect, is the criterion by which to ascertain whether it is controlled by the constitutional provision forbidding irrepealable contracts. Moreover it disregards the elementary principle that the power to grant an irrepealable right by a compromise agreement depended on the existence of the authority to make such grant by original action. The power to compromise on the subject was as limited as the power to contract originally. *District of Columbia* v. *Bailey* (1897), 171 U. S. 161. Indeed, the entire argument upon this branch of the case, reiterated in many forms, amounts but to the contention, when ultimately considered, that because the act of 1880 is asserted to have been enacted with the view of settling what was honestly deemed to be a pending and serious controversy, it was unwise, and it may be unjust to repeal it. Pretermitting the infirmity in the proposition which naturally is suggested by the fact that shortly after the decision in 44 Maryland this court decided that the possession of the rights and privileges of a former corporation did not endow a new corporation with an exemption from taxation enjoyed by the old, *Morgan* v. *Louisiana* (1876), 93 U. S. 217, and putting out of view the other cases to the same effect, decided by this court prior to 1880, the proposition is untenable. It but invokes reasons of expediency or policy. Into these considerations we may not enter; we are concerned alone with the question of power, and on passing on such question cannot hold that an act which by the very terms of the state constitution was made repealable, nevertheless engendered an irrepealable contract protected from impairment by the Constitution of the United States.

Affirmed.

EVANS *v.* NELLIS.

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

No. 66. Argued November 4, 1902.—Decided December 1, 1902.

The statutory liability of stockholders of corporations (other than railway, religious or charitable) equal to the amount of their stock under sections 32 and 34 of the General Statutes of Kansas of 1868, as decided by the highest court of that State, could not be collected by the receiver of an insolvent corporation, but was an asset which a creditor of the corporation alone could recover for his individual benefit to the extent required to pay his judgment obtained against the corporation.

The highest court of the State having decided that sections 14 and 15 of the laws of Kansas enacted in 1899, (Laws of 1898, c. 10,) repealed sections 32 and 34 of the statutes of 1868, and that the statutory liability of stockholders can be collected only by the receiver for the benefit of all creditors, and that the receiver must, under the system for collecting the assets and paying the debts of an insolvent corporation as provided in the statute, bring an action against the corporation and all the resident stockholders, it follows that the receiver of an insolvent corporation of Kansas (other than railway, religious or charitable) appointed in 1898, who has not brought an action against the corporation and all the stockholders resident in Kansas, cannot maintain an action either under the statute of 1868 or the law of 1899, in a Circuit Court of the United States, against an individual stockholder for the amount of the statutory liability.

THE questions to be answered and the case on which they arise are shown in the statement of facts and resulting questions of law constituting the certificate of the court below, which is as follows:

"*Statement of facts.*

"That the Inter-State Loan and Trust Company is a corporation created and organized under and by virtue of the general laws of the State of Kansas, July 22, 1885, and as such was authorized to transact business as a land mortgage company; that in or about the month of November, 1897, E. B. Crissey commenced an action against the said The Inter-State Loan

and Trust Company in the United States Circuit Court for the District of Kansas, first division, to which court jurisdiction in that behalf duly appertained; that said action was duly commenced by the issue of a summons to said company; that said summons was duly served upon the said company, and that said company duly appeared in said suit by attorney and defended the same, and that such proceedings were afterwards had in said action that on the 31st day of December, 1897, a judgment was duly given and made in and by said court in said action in favor of the said plaintiff and against the said company, in and by which judgment it was decided, adjudged and decreed that there was due and owing to the plaintiff therein from and by the said company the sum of $6792.20 and $56.45 costs, and that the plaintiff therein have and recover said sum from the said company, with interest thereon from said date at the rate of six per cent per annum, and that the said plaintiff have execution therefor against the said company; that thereafter an execution against the property of the said The Inter-State Loan and Trust Company was duly issued out of the said court upon said judgment for the said sum of $6792.20 and the costs as aforesaid, directed to the United States marshal for the District of Kansas, and that thereafter the said marshal duly returned said execution wholly unsatisfied for the reason that no property, real or personal, belonging to said company could be found whereon to levy the same; that thereafter and on or about the 9th day of June, 1898, upon the application of the said E. B. Crissey, the plaintiff herein was duly appointed receiver of the said The Inter-State Loan and Trust Company by the Circuit Court of the United States for the District of Kansas, first division, to which said court jurisdiction therein duly appertained, and has duly qualified and acted as such; that thereafter and on or about the 9th day of February, 1899, an order was duly given and made in and by said Circuit Court of the United States for the District of Kansas, first division, by which order it was considered, adjudged, ordered and decreed that the said John H. Evans, as receiver, proceed against all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a re-

covery can be had to collect all of their liability as stockholders in said company, a copy of which order is hereto annexed and marked Exhibit A, and which copy the plaintiff herein prays may be considered as part of his complaint as if herein set forth in full; that the defendant is a citizen of the State of New York, and prior to the month of November, 1897, became a stockholder of said corporation and the owner of 602 shares of the capital stock thereof of the par value of $100 a share, and has ever remained a stockholder and the owner of said shares. At the time when the defendant became a stockholder of said corporation, and from that time ever since, it was provided by the constitution of the State of Kansas (sec. 2, article XII) as follows: 'Dues from corporations' (organized and existing under the laws of the State of Kansas) 'shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations nor corporations for religious or charitable purposes.' At the time the defendant became a stockholder of said corporation it was provided by the General Statutes of Kansas of 1868 (sections 32 and 44) as follows:

"'SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.'

"'SEC. 44. If any corporation, created under this or any gen-

eral statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved.'

"By a law of Kansas enacted January 11, 1899, sections 32 and 44 aforesaid were repealed, and by sections 14 and 15 it was provided as follows:

"'SEC. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which such execution was issued, or to the judge thereof, a receiver shall be appointed to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all

costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them.

"'SEC. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: Sec. 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors.'

"The present action was brought in the Circuit Court of the United States for the Northern District of New York by the receiver of the said The Inter-State Loan and Trust Company, appointed as aforesaid, against the defendant to recover the sum of $60,200, alleging his liability as a stockholder and the owner of the said 602 shares of the said corporation.

"Upon the foregoing facts this court desires instructions upon the following questions:

"*Questions of Law.*

"1st. Are sections 14 and 15 of the laws of Kansas of 1899 valid legislation in view of the provision of the constitution of the State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than 'dues from corporations?'

"2d. Do sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

"3d. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?

"In accordance with the provisions of section 6 of the act of March 3, 1891, establishing Courts of Appeal, etc., the foregoing questions of law are by the Circuit Court of Appeals for the Second Circuit hereby certified to the Supreme Court."

Mr. L. A. Stebbins, *Mr. C. J. Evans*, *Mr. P. Tecumseh Sherman* and *Mr. S. B. Stanton* for plaintiff in error.

Mr. Andrew J. Nellis, defendant in error, *pro se.*

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

The third question lies at the threshold, and requires to be answered before approaching the consideration of the first and second questions. This becomes apparent when it is seen that if the first and second be answered in such a manner as to sustain the cause of action, the question would yet remain whether the receiver, appointed as stated, had authority to prosecute the suit, whilst, on the other hand, if the conclusion be reached that the receiver was without power to bring the suit—irrespective of what might be the reply to the two first questions—these questions become irrelevant and the case is disposed of.

The judgment against the corporation in the Circuit Court of the United States for the District of Kansas was rendered on December 31, 1897, prior, therefore, to the enactment of the Kansas statute of 1899. So, also, the execution was issued and the receiver appointed prior to the passage of that act. After the receiver had been appointed, however, and subsequent to the passage of the act of 1899, the court entered an order, directing the receiver to proceed against "all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company." Now the authority to so direct the receiver must rest upon either the statute of

Kansas of 1868, referred to in the certificate, or upon the statute of 1899. But the right of the receiver of the assets of the corporation to sue under the Kansas law to recover the liability of a stockholder, cannot be evolved from the act of 1868, since that act made the liability of the stockholder not an asset of the corporation, but an asset which the creditor of the corporation alone could recover for his individual benefit, to the extent required to pay his judgment obtained against the corporation. In *Abbey* v. *Dry Goods Company*, 44 Kansas, 415, 418, it was said, referring to the liability under the act of 1868:

"The nature of this liability is peculiar; it seems to have been created for the exclusive benefit of corporate creditors; the liability rests upon the stockholders of the corporation to respond to the creditors, for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves, in their own right and for their own benefit."

The nature and extent of the liability under the Kansas statute of 1868 was so fully reviewed and stated in *Whitman* v. *Oxford National Bank*, 176 U. S. 559, that we content ourselves with referring to that case as conclusively demonstrating the proposition previously stated. Tested, then, by the Kansas act of 1868, it is manifest that the receiver had no authority to bring this suit even in the courts of the State of Kansas, and he clearly, therefore, had no power to prosecute such action in the courts of another jurisdiction. Indeed, it is manifest that the suit brought by the receiver which is now under consideration was not deemed by him to be a suit under the Kansas act of 1868, since the recovery which he seeks was not the amount of the judgment rendered in favor of the creditor in the particular suit wherein the receiver was appointed, but the whole sum of the stockholder's double liability, which could only be upon the theory that the receiver was entitled to take such liability as the receiver of the corporation and as a corporate asset to pay the debts generally. In fact, the foregoing propositions might have been taken as conceded, since in the argument at bar the right of the receiver to sue was upheld, not on the ground that he was acting under the act of 1868, but that he was proceeding

in furtherance of and in supposed conformity to the act of 1899. This contention being in effect rested on the proposition that although the judgment was rendered and the receiver appointed before the passage of the act of 1899, the order of the court empowering him to enforce the liability of stockholders was entered after the enactment of the act of 1899, and therefore conferred upon the receiver the authority which it is in the argument assumed, he would have had a right to exercise if appointed under that act.

The question then is, conceding *arguendo* the proposition that the receiver was appointed under the act of 1899 and in supposed conformity to it, was he authorized to prosecute this suit by virtue of the act of 1899? The import of the Kansas act of 1899 and the extent of the powers which it called into being, were decided by the Supreme Court of Kansas in *Waller* v. *Hamer*, (June 7, 1902,) not yet reported in the official reports but found in the advanced sheets of the 69th Pacific Reporter, p. 185. In that case two creditors obtained judgment in a Kansas court against a corporation. Execution having been issued and returned no property found, one of the creditors moved for the appointment of a receiver to close up the affairs of the corporation, which motion was allowed. The receiver thus appointed brought suit against a stockholder to recover his unpaid subscription and statutory liability. The defendant filed an answer and a plea in abatement, which, among other things, we quote from the opinion of the Kansas court, asserted "that the receiver should not be permitted to further prosecute the action against him until all the stockholders were brought into court, to the end that a final ascertainment of the debts of the corporation and an adjustment and settlement of the liabilities of the stockholders to the corporation and as between themselves might be had. To this plea in abatement the plaintiff demurred, which demurrer was sustained. Thereafter, upon leave of court, the defendant demurred to the petition for the reasons: (1) That the plaintiff had no legal capacity to institute and maintain the present action; (2) that the petition did not state facts sufficient to constitute a cause of action against the defendant; (3) that there is a defect of

parties plaintiff; (4) that there is a defect of parties defendant. This demurrer was overruled, and thereafter the defendant answered." In reviewing the action of the trial court the Supreme Court of Kansas said:

"Prior to the enactment of chapter 10, Laws of 1898, the creditor of a business corporation, other than a railway or bank, might proceed against the individual stockholders only (1) by motion after judgment and execution against the corporation returned *nulla bona;* (2) by action after dissolution, either by expiration of time, judgment of dissolution, or suspension of business for more than one year, as provided in sections 32, 46, Corp. Act, 1868. Chapter 10 of the Laws of 1898 repealed said sections 32 and 46, and substituted therefor sections 14 and 15."

The sections of the act of 1899 referred to are those set out in the certificate of the court below. The court then further said that it was obvious that the act of 1899 created an "entirely different remedy from that provided by the act of 1868," and declared, referring to the act of 1899, that "there exists no other statute by which the creditor of an insolvent or dissolved corporation may proceed against its stockholders. It follows, therefore, that if a creditor desires to make a stockholder respond for the debts of the corporation he must proceed against him in the mode prescribed and no other." Proceeding, then, to test the right of the receiver to sue, by the act of 1899, the court held that, as he had not brought a suit against the corporation and all the resident stockholders, in order in such suit to fix the sum required to pay the corporate debts, he, the receiver, was wholly without authority under the statute to make any demand whatever against a stockholder, as the previous suit to fix the sum required to pay the debts was an essential prerequisite under the statute to any action by a receiver appointed under the act of 1899 against a stockholder. Summing up its view of the act of 1899, the court said:

"This act provides a complete system for collecting the assets and paying the debts of an insolvent corporation, and of adjusting the liabilities of the stockholders between themselves. To do this the receiver must bring in all stockholders that are within the jurisdiction of the court, that in one proceeding the

court may ascertain and determine the indebtedness of the corporation, the amount each stockholder should pay, and, if one has paid more than his proportion, award him such relief against the other stockholders as may appear just. The receiver having failed to comply with this plain statutory requirement, the demurrer to the plea in abatement should have been overruled."

It therefore follows that there was no authority conferred by the act of 1899 of Kansas, from which the right of the receiver to bring the suit which is now before us, can be deduced. It having been heretofore demonstrated that there was no such right under the act of 1868, and as there is no such power under the act of 1899, it follows necessarily that the receiver was without any authority whatever, and the third question must be answered no. Of course, in answering this question we express no opinion whatever as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal. We of course also express no opinion whatever upon the question of how far the rights and remedies conferred by the act of 1899 could lawfully be enforced against stockholders in corporations who became such stockholders prior to the passage of that act. And this of course excludes the intimation of any opinion as to how far a judgment rendered in a court of Kansas in a suit brought by a receiver against the corporation and the resident stockholders, to fix the sum required to pay the corporate debts, would be binding upon non-resident stockholders not directly a party to such action especially where their subscription to stock had been made prior to the enactment of the act of 1899.

The third question will be answered no, and it is unnecessary to answer the other questions.

LAWDER *v.* STONE, COLLECTOR.

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

No. 82. Submitted November 11, 1902.—Decided December 1, 1902.

Section 23 of the Customs Administrative Act of June 10, 1890, permitting importers to abandon imported articles to the United States and be relieved from the payment of duties thereon, provided the portion so abandoned amounts to at least ten per cent of the total value or quantity of the invoice, does not apply to a cargo of fruit, a portion whereof (which is less than ten per cent) decays on the voyage becoming utterly worthless, and necessarily dumped overboard under the sanitary regulations of the port after arrival of the vessel.

It would be unequitable and presumably not within the intention of Congress to assess duty upon articles which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption.

Articles thus circumstanced are not in truth within the category of goods, wares and merchandise imported into the United States, within the meaning of the tariff laws. (*Marriott* v. *Brune*, 9 Howard, 619, and cases since decided on the authority thereof, followed.)

Article 1236 of the Customs Regulations of 1899, which is based upon sec. 2984 Rev. Stat. relates to merchandise which is destroyed or deteriorates after actually having been entered and is not applicable where the merchandise, as in this case, was never actually entered because it was destroyed before it could be entered.

When Congress enacted the Customs Administrative Act of 1890, it must be presumed to have possessed knowledge of the decisions of this court and the consistent application made of the doctrine of those decisions by the officials charged with the execution of the tariff laws, and in the light of this fact it would require a clear expression by Congress of its intention to adopt a contrary policy before a court would be justified in holding that such was the purpose of the legislative branch of the government.

In the months of May, June and July, 1897, the petitioners, copartners, trading as S. M. Lawder & Sons, imported into the port of Baltimore from the British West Indies several cargoes of pineapples, invoiced as a specified number of dozens.

Upon the discharge of the cargo at Baltimore, after the pine-

Counsel for Parties.

apples had been taken out of the vessels and their number estimated by the inspectors, there remained in the holds a quantity of what was described as "slush," consisting of decomposed vegetable matter, mixed with bilge water and other *débris* of the cargo, some of it in a semi-liquid condition. This slush was brought up from the holds in baskets and included by the inspectors in their appraisement of the cargoes. The pineapples alleged to be contained in the slush were uncountable, and their number was roughly estimated by the inspectors by counting the pineapple tops and butts contained in a number of baskets of the slush, striking an average of those baskets, and then calculating the number contained in the whole quantity of slush according to that average. The material thus removed from the vessels was commercially valueless, and under the sanitary regulations of the city of Baltimore was taken down the river on a scow and dumped overboard. The number of pineapples so estimated by the inspectors to be contained in the slush was less than ten per cent of the total invoice, and the collector treated the loss as a case of damage to the cargo within the meaning of section 23 of the customs administrative act of June 10, 1890, and assessed duty on the whole number of pineapples estimated by the inspectors to be contained in the cargoes, including this quantity of slush.

The board of general appraisers sustained a protest of the importers against the assessment of duties on the worthless and indistinguishable mass referred to, and this decision was affirmed, on appeal of the collector, by the Circuit Court of the United States for the District of Maryland. On a further appeal by the collector the Circuit Court of Appeals for the Fourth Circuit reversed the decisions which had been made in favor of the importers and sustained the action of the collector. 101 Fed. Rep. 710. The case was then brought to this court by writ of certiorari.

Mr. Edward S. Hatch for petitioners.

Mr. Assistant Attorney General Hoyt for respondent. *Mr. James A. Finch* was with him on the brief.

Opinion of the Court.

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

As mentioned in the preceding statement, the collector of customs for the district of Baltimore treated the loss arising from the worthless condition of the portion of the cargo in question as a case of damage to the entire cargoes, within the meaning of section 23 of the customs administrative act of June 10, 1890. That section reads as follows:

"That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: *Provided*, That the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction, or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe."

Do pineapples, which, on the voyage to this country, become so decayed as to be utterly worthless, constitute, upon arrival within the limits of a port of entry of the United States, goods, wares and merchandise imported into the United States, within the meaning of this expression as employed in the section above quoted? is the question for decision.

In *Marriott* v. *Brune*, (1850) 9 How. 619, it was held that, under the eleventh section of the tariff act of July 30, 1846, where a portion of a cargo of sugar and molasses was lost by leakage on the voyage to this country, duty should be exacted only upon the quantity of sugar and molasses which arrived here and not upon the quantity which appeared to have been shipped. In the course of the opinion the court said (p. 632):

"The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*—for

nothing is imported till it comes within the limits of a port. See cases cited in *Harrison* v. *Vose*, 9 How. 372. And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or what is imported. 5 Stat. 548, 558. The very act of 1846 under consideration imposes the duty on what is 'imported from foreign countries.' (p. 68.) The Constitution uses like language on this subject. (Article 1, secs. 8, 9.) Indeed, the general definition of customs confirms this view; for, says McCulloch (vol. 1, p. 548), 'Customs are duties charged upon commodities on their being imported into or exported from a country.'

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate per pound, before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad, whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights.

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can reëxport for drawback. 1 Stat. 680–689; 4 Stat. 29."

After instancing certain cases provided for in a statute where

a fixed percentage was directed to be deducted for leakage and breakage and a reduction in weight for tare and draff, the court further said (p. 633):

"But beside these instances, in cases of an actual injury to an article arriving here in a damaged state, a reduction from the value is permitted expressly on account of the diminished value. 1 Stat. 41, 166, 665.

"The former cases, referred to for illustration, rest on their peculiar principles, and allowances in them are made by positive provisions in acts of Congress, even though the quantity and weight of the real article meant to be imported should arrive here. Because, knowing well that the whole is not likely to arrive, and being able to fix, by a general average, the ordinary loss in those cases with sufficient exactness, the matter has been legislated on expressly.

"Yet there are other cases of loss, from various causes, which may be very uncertain in amount, for which no fixed and inflexible rate of allowance can be prescribed, and which must, therefore, in each instance, be left to be regulated by the general provisions for assessing duties, and the general principles applicable to them, as before explained. Consequently, where a portion of the shipment in cases like these does not arrive here, and hence does not come under the possession and cognizance of the custom-house officers, it cannot, as heretofore shown, be taxed on any ground of law or of truth and propriety, and does not therefore require for its exemption any positive enactment by Congress.

"Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship; or by fire, or piracy, or larceny, or barratry, or a sale and delivery on the voyage, or by natural decay. If there be a material loss, it can make no difference to the sufferer or the government whether it happened by natural or artificial causes. In either case, the article to that extent is not here to be assessed, nor to be of any value to the owner.

"To add to such unfortunate losses, the burden of a duty on them, imposed afterwards, would be an uncalled for aggravation, would be adding cruelty to misfortune, and would not be

justified by any sound reason or any express provision of law. On the contrary, Congress, in several instances, when the articles imported actually arrived here, and were afterwards destroyed by fire before the packages had been open and entered into the consumption of the country, have refunded or remitted the duties. 2 Stat. 201; 5 Stat. 284; 6 Stat. 2.

"But much more should duties not be exacted on what was lost or destroyed on its way hither, and which never came even into the possession or control of the custom-house officers, and much less into the use of the community."

The doctrine of this decision clearly supports the proposition that it would be inequitable and presumably not within the intention of Congress to assess duty upon an article which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption. In other words, that articles thus circumstanced were not in truth within the category of goods, wares and merchandise imported into the United States, within the meaning of the tariff laws. The ruling in *Marriott* v. *Brune* was approved and applied in *United States* v. *Southmayd*, 9 How. 637, and *Lawrence* v. *Caswell*, and it has been consistently recognized by this court that as a general rule duties are intended to be levied only upon the value of goods which possess some intrinsic or other value at the time when ordinarily the duty would attach on an article.

That the policy we have stated was regarded by Congress as the true doctrine to be applied, is shown by the legislation with respect to the remission of duties upon goods, wares and merchandise in general, to the extent that the same were damaged. Thus, as stated in *United States* v. *Bache*, 59 Fed. Rep. 762, 763, the statutory system, from 1799 to the adoption of the tariff act of October 1, 1890, in regard to rebates of duties on account of damage to imported merchandise in transit, was embodied in section 2927 of the Revised Statutes, being a substantial reproduction of a section of the act of 1799. The section of the Revised Statutes reads as follows:

"SEC. 2927. In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount, subject to a duty ad valorem, or from the actual or original number, weight, or measure, on which specific duties would have been computed. No allowance, however, for the damage on any merchandise, that has been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may on examining the same prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the custom-house of the port where such merchandise has been landed, within ten days after the landing of such merchandise."

So, also, by section 2921 of the Revised Statutes, it was provided as follows:

"SEC. 2921. If, on the opening of any package, a deficiency of any article shall be found, on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties."

By the act of July 14, 1870, 16 Stat. 256, 265, however, an exception was engrafted upon the general provision as to allowances for damage which might have resulted to goods, wares and merchandise on the voyage, by the enactment that no allowance should be made with respect to certain fruits, for loss by decay on a voyage, unless the same should exceed twenty-five per centum of the whole quantity, and the allowance then made should be only for the amount of loss in excess of twenty-five per centum of the whole quantity. As said in *Scattergood* v. *Tutton*, 2 Fed. Rep. 28, the limitation was applied "manifestly to avoid allowance for trifling losses." While, however, certain fruits were made dutiable by the tariff act of March 3, 1883, 22 Stat. 488, 504, and certain other fruits (including pineapples) were placed on the free list, 22 Stat. 519, the discrimination referred to against damage allowances upon importations of fruit

was not continued, and in section 23 of the customs administrative act of 1890 fruits are not discriminated against.

In its decisions upon applications of importers to be exempted from payment of duties because of the practical destruction of an article while in transit to this country, or for an allowance because of damage occasioned to imported goods before arrival here, the Treasury Department has frequently applied the doctrine enunciated by this court in *Marriott* v. *Brune*, viz., that the purpose of Congress in enacting tariff laws was to exact the payment of duty only upon imported articles which were in truth and in fact, entitled to the appellation of goods, wares and merchandise, articles which were not absolutely worthless but may possess some value for use or consumption. Thus, in Treasury Decision No. 424, of date July 15, 1869, duties were ordered to be remitted on four cases of needles which had become worthless by reason of being submerged in salt water on the voyage of importation. It was held that the case did not come within the prohibition of the thirty-third paragraph of the third section of the act of July 14, 1862, which prescribed that no allowance for partial loss or decay should be made in consequence of rust of iron or steel, etc. Again, in Treasury Decision No. 1167, of date July 8, 1872, fruit which had become worthless on the voyage of importation was held not dutiable, and the provision of the act of July 14, 1870, limiting the damage allowance on fruit, was held not to apply, and it was ordered that the case should be treated as if no importation had been made. In the course of the decision, known as Treasury Decision No. 3236, of date May 14, 1877, after ruling that the "quantity" specified in the act of July 14, 1870, limiting allowances for damage to green fruit, referred to the quantity specified in the damage application and landed in the United States, it was observed (italics not in the original):

"In many instances a *portion* of a cargo of green fruit becomes wholly worthless by decay, and such portion is to be excluded in considering the quantity upon which damage is to be estimated unless it is included in the damage warrant."

In Treasury Decision No. 3272, dated June 21, 1877, passing upon a case where an importer, in his application for damage

allowance upon forty-one barrels of oranges, included as part of the forty-one barrels, twenty and a half barrels of entirely worthless oranges, it was declared that, if the goods had been landed in the United States as any other merchandise and no damage application had been filed, duty would have accrued thereon; whereas if they had been thrown overboard at sea, no duty would accrue, as there would have been no importation of that quantity. In Treasury Decision No. 4126, of date August 1, 1879, upon application being made for a damage allowance upon an invoice of certain oranges and lemons, the goods were reported damaged "to the extent of one hundred per cent, in other words, entirely worthless." The ruling in Treasury Decision No. 1167 was applied, and it was held that, where fruit was so damaged on the voyage of importation as to be entirely worthless, the clause in the statute limiting the damage allowance to the excess over twenty-five per cent did not apply, and that the case should be treated the same as if no importation had been made. Treasury Decision No. 9719, dated November 19, 1889, reads as follows:

"SIR: The Department is in receipt of your letter of the 13th instant, reporting further on the appeal (537*x*) of Messrs. Riley & Grey from your assessment of duty on certain card clothing, imported by them per 'Bulgarian' February 16, 1889, and found, upon examination, to have been destroyed by water during the voyage of importation.

"The appraiser reports that the clothing in question was wound in coils, and has been subjected to a complete soaking with salt water, which has permeated the entire coil, oxidizing the wire and completely rotting the cotton backing, so that it is absolutely worthless, and cannot be used for any purpose whatever, even as old junk.

"In view of this report, the Department is of opinion that the card clothing is not an importation of merchandise within the meaning of the law, and you are hereby authorized to readjust the entry and to refund the duty levied thereon."

After the passage of the customs administrative act of June 10, 1890, the board of general appraisers, on June 6, 1891, announced its decision upon a protest against the exaction of

duty on an alleged shortage of 35,700 oranges, part of an invoice of 280,000 oranges, on which entry had been made and the duty paid. The shortage was not ascertained until after the payment of the duties, and such shortage was presumably represented by a quantity of "rots and slush," which had been removed from the vessel in obedience to the health ordinance of the city of Baltimore. The collector and naval officer reported that they were satisfied by proof that the 35,700 oranges became rotten and worthless on the voyage and never went into consumption. It was held that the collector was authorized to make allowance for the shortage in the liquidation of the duty on the entries. In the course of the decision it was said:

"As they could not be abandoned in the manner provided for the abandonment of merchandise in section 23 of the act aforesaid, the collector exacted duty upon the entire entry. Article 609 of the General Regulations permits an allowance for lost or missing articles when it is shown by proof satisfactory to the collector and naval officer that they have been lost or destroyed by accident during the voyage. Loss of fruit by decay may reasonably be held to be an accident, it being a loss by a contingency, chance or casualty. Section 23 aforesaid would not apply where there had been a total loss of dutiable articles, for the word 'damaged' is there used in the sense of impairment or injury, and the section contemplates that something remains to be abandoned."

Treasury Decision No. 16,138, dated June 8, 1895, related to a claim of allowance for shortage on an importation of cocoanuts, the shortage being occasioned by the rotting and breaking of certain cocoanuts on the voyage of importation. In consequence of the ruling in *United States* v. *Bache*, 59 Fed. Rep. 762, wherein it was held that glass broken on the voyage of importation, *but which possessed some value for remanufacture*, should be allowed for as a damage within the meaning of section 23 of the customs administrative act of 1890, the Treasury Department refused to accept the doctrine laid down by the board of general appraisers, viz., that merchandise the value of which is totally destroyed ceases to be damage and may

properly be treated as a shortage. This last was but another form of stating the proposition that that which has been rendered worthless on the voyage to this country, by casualty, decay or other natural causes, is not embraced within the category of goods, wares and merchandise, even though existent on the vessel on its arrival within the limits of a port of entry. On the controversy, however, being brought into the courts, the decision of the board of general appraisers was upheld. *Shaw, Collector*, v. *Dix*, 72 Fed. Rep. 166. In distinguishing the case before it from the *Bache* case the court said (p. 167):

"In *United States* v. *Bache*, 8 C. C. A. 258; 59 Fed. Rep. 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed, but were damaged. It was clearly a case within the language of section 23, and no question would have arisen but for the fact that 'broken glass fit only to be remanufactured' was by law exempt from duty, and admitted free. The importer claimed that as, during the voyage, a portion of each case became broken glass, its character as merchandise was changed, and it became an article specifically exempted from duty, and entitled to come in free, and that it made no difference that the dutiable and non-dutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on the merchandise as it came into this country and not as it was when it was put aboard the ship in the foreign port. It was held by the Circuit Court of Appeals for the Second Circuit that, Congress having enacted a general statutory system for the ascertainment of the damage to imported goods, and for allowance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by Congress to take the one article of glass out of the general system. The general system provides that, if the damage amounts to ten per cent of the total invoice, the importer may abandon any portion of the

invoice and be relieved from the duties on the portion so abandoned.

"I think it is clear that the board of general appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being impaired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and where the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the act of 1890 is not inconsistent with the general provisions of section 2921 of the Revised Statutes, nor with sections 906 and 922 of the General Regulations, providing that, if the quantity which arrives is less than the invoice, there may be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of *débris* remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small boats through the surf, so that it is not possible to say with any accuracy what number the mass of *débris* did represent. It is quite manifest that there is no ground for the contention that section 23 is applicable to this case. The decision of the board of general appraisers is sustained."

Article 1236 of the customs regulations of 1899 was referred to in the argument at bar as supporting the contention on behalf of the government that Congress intended by section 23 of the customs administrative act of June 10, 1890, to classify everything reaching this country, invoiced from a foreign port, as imported goods, wares and merchandise, however worthless specific articles might have become during the voyage. But the regulation lends no support to this contention. It was based upon section 2984 of the Revised Statutes, which conferred authority upon the Secretary of the Treasury to remit impost

duties paid or accruing upon imported merchandise which had been injured by accidental fire or other casualty after arriving in this country and while in the actual or constructive possession of the officers of the government. In effect, by the terms of the regulation, section 2984 of the Revised Statutes is construed as not conferring authority upon the Secretary of the Treasury to make allowances for any deterioration or damage to such merchandise from natural or avoidable causes, arising after the arrival of merchandise and the attaching of duties thereon, a ruling which throws no light upon the proper decision of the question we are considering.

When Congress enacted the customs administrative act of 1890 it must be presumed to have possessed knowledge of the decisions of this court to which we have referred and the consistent application made of the doctrine of those decisions by the officials charged with the execution of the tariff laws, as evidenced by the cited Treasury decisions. In the light of this fact, it would require a clear expression by Congress of its intention to adopt a contrary policy, before a court would be justified in holding that such was the purpose of the legislative branch of the government. Section 23 of the customs administrative act contains no such clear expression of an intention to alter the prior practice, but the contrary. The reference in section 23 to an allowance for "damage," and the provision that the abandoned portion of cargo should "be sold by public auction or otherwise disposed of for the account or credit of the United States," manifestly imports that it related to an article which when the duty attached was possessed of some value, and therefore negatives the idea that Congress was concerning itself with that which was destitute of all value. When, therefore, it was enacted that in a certain contingency no allowance should be made for "damage to goods, wares and merchandise imported into the United States," it is reasonable to construe this language as not referring to an article, case or package, which though in the semblance of merchandise, had become absolutely valueless by reason of natural causes or casualty occurring thereto while the article, case or package was in transit to the United States. The section then not embracing

articles which upon arrival in this country were outside of the category of imported goods, wares and merchandise, such articles must be held, in accordance with the prior rulings on the subject, not to be susceptible to assessment for duty. If, as is conceded by the government, the rotten and worthless pineapples in question had been thrown overboard before the vessel reached this country, and no duty could have been assessed upon the fruit thus disposed of, the circumstance that the mass of rotten fruit in question could not perhaps have been gotten at upon the voyage by reason of the extent and character of the cargo of which it formed a part, so as to permit of the worthless stuff being dumped overboard before the arrival of the vessel in the United States, ought not, in justice, to debar the importer from successfully contending that the worthless material when it reached this country was not goods, wares or merchandise within the intent of the tariff acts.

Judgment of the Circuit Court of Appeals is reversed; judgment of the Circuit Court affirmed; and the cause remanded to that court with a direction to carry its judgment into effect.

CHEROKEE NATION *v.* HITCHCOCK.

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

No. 340. Submitted October 23, 1902.—Decided December 1, 1902.

In an action brought by the Cherokee Nation to enjoin the Secretary of the Interior from leasing oil lands held for the benefit of said Nation under section 13 of the act of Congress approved June 20, 1898, it is not necessary to join as parties defendants the persons or corporations to whom the Secretary proposes to make the leases.

The act of Congress entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June 28, 1898, which by section 13 thereof gives the Secretary of the Interior exclusive power over oil, coal, asphalt and other minerals in said Territory, and authorizes him to make leases of oil, coal, asphalt and other minerals

Statement of the Case.

under certain prescribed conditions, the royalties and rents to be paid into the Treasury of the United States to the credit of the tribe to which they belong, is, notwithstanding the provisions of the treaties with the Cherokee Nation, a valid exercise of power vested in Congress and fully authorizes the Secretary of the Interior to make such leases in the manner prescribed in the act.

This court has already (*Stephens* v. *Cherokee Nation*, 174 U. S. 445) sustained the validity of the act of Congress of June 28, 1898, and the precedent of co-relative legislation, wherein the United States practically assumed the full control over the Cherokees, as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal properties. That decision necessarily involves the further holding that Congress is vested with authority to adopt measures to make the tribal property productive and secure therefrom an income for the benefit of the tribe.

Under the treaties with, and patents issued to, the Cherokee Nation, whatever of title has been conveyed has been to the Cherokees as a Nation. And no title to any land is in any of the individuals although held by the tribe for the common use and equal benefit of all the members.

This court is not concerned with the question whether the act of June 28, 1898, is wise or will operate beneficially to the interest of the Cherokees, as the power which exists in Congress to administer upon, and guard, the tribal property is political and administrative in its nature, and the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts.

This cause was begun on the equity side of the Supreme Court of the District of Columbia. The complainants named in the bill were the Cherokee Nation, and its principal chief and treasurer and sundry other citizens of the nation, suing on behalf of themselves and of citizens of the nation residing in the Indian Territory. Ethan A. Hitchcock, as Secretary of the Interior, was made sole defendant. It was claimed in the bill that, by virtue of certain treaties and a patent based thereon, the Cherokee Nation was vested with a fee simple title to its tribal lands in the Indian Territory, and it was also averred that, by a treaty executed in 1835, there was secured to the nation the right, by its national council, to make and carry into effect all such laws as the Cherokees might deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as had connected themselves with them. A synopsis

of the pertinent portions of the treaties above referred to is set out in the margin.[1]

---

[1] By article 2 of the treaty of May 6, 1828, 7 Stat. 311, the United States, in order to secure to the Cherokee Nation "a permanent home," agreed to "possess the Cherokees, and to guarantee it to them forever," seven million acres of land, within described boundaries, and in addition "guaranteed to the Cherokee Nation a perpetual outlet, west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States, and their right of soil extend."

By article 1 of the treaty of February 14, 1833, 7 Stat. 414, the United States, by a corrected description as to the seven million acres tract, renewed the guaranty as to such tract, the outlet, etc., contained in article 2 of the treaty of 1828, with the reservation respecting use by other Indians of the salt plain if within the limits of the outlet. The article concluded with the statement that "letters patent should be issued by the United States as soon as practicable for the land hereby guaranteed."

By article 2 of the treaty of December 29, 1835, 7 Stat. 478, after reciting that by the treaties of 1828 and 1833, "the United States guaranteed and secured to be conveyed by patent, to the Cherokee Nation of Indians," a described tract of seven million acres of land, and had further guaranteed to the Cherokee Nation a perpetual outlet west, etc., ceded an additional eight hundred thousand acres of land, in the following terms:

"And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States in consideration of the sum of five hundred thousand dollars therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land."

By article 3 of the same treaty the United States also agreed—

"that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830."

The act of May 28, 1830, 4 Stat. 411, conferred authority upon the President to create districts of territory in land west of the Mississippi to be exchanged for lands held by Indians in a State or Territory. Respecting the title to the lands so to be given in exchange, it was provided in section 3 as follows:

"SEC. 3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that

Statement of the Case.

The patent referred to in the bill was executed on December 31, 1838. It conveyed to the Cherokee Nation the lands secured and guaranteed by the treaties of 1828, 1833 and 1835.

---

the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

The article of the treaty of 1835 upon which is based the claim that an exclusive right is vested in the Cherokee Nation to the use, control and occupancy of its tribal lands is the following, 7 Stat. 481:

"ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: *Provided always*, That they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the government of the same."

"By the treaty of August 6, 1846, 9 Stat. 871, providing for an adjustment of the differences theretofore existing between different portions of the people constituting and recognized as the Cherokee Nation of Indians, it was provided in article 1 as follows:

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, 'to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.'"

The treaty of July 19, 1866, 14 Stat. 799, does not require particular notice.

In the patent the seven million acre tract, together with the perpetual outlet, was described as one tract, aggregating 13,574,135.14 acres. In addition the patent specified the boundaries of a tract of 800,000 acres ceded by the treaty of 1835. The description of the two tracts was succeeded by the following habendum clause:

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre, to have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article, and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same."

Averring that the Cherokee Nation and its citizens possessed the exclusive right to the use, control and occupancy of its tribal lands, it was alleged that the Secretary of the Interior, without having lawful authority so to do, was assuming the power to and was about to pass favorably upon applications for leases, and was about to grant leases of lands belonging to said nation for the purpose of mining for oil, gas, coal and other minerals, one such successful applicant being stated to

be The Cherokee Oil & Gas Company, an Arkansas corporation. Based upon general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title of the nation to its said lands, and the claim that irreparable injury would be caused and wrong and oppression result, and that there would be a deprivation of property rights of the complainants and of other citizens of the Cherokee Nation, an injunction was prayed against further action by the Secretary of the Interior in the premises. A demurrer was filed to the bill upon the grounds following:

"1. Said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or to any relief.

"2. The court has no jurisdiction over the subject-matter of the suit.

"3. There is a defect of parties defendant."

Without considering or passing upon the objection of a defect of parties defendant, the trial court sustained the demurrer and entered a decree dismissing the bill of complainant. This decree was affirmed, on appeal, by the Court of Appeals of the District.

An appeal was thereupon taken to this court.

Mr. William M. Springer for appellants.

Mr. Assistant Attorney General Van Devanter for appellee. *Mr. Assistant Attorney William C. Pollock* was with him on the brief.

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

The grounds of demurrer to the bill of complaint were summarized in the following reasons embodied in a statement filed with the demurrer:

"1. The matters named in the bill are matters of administration, which cannot be taken away from an executive department and carried into the courts.

"2. That the Cherokee Oil & Gas Company named in the bill is a necessary party to the suit, as shown by the bill.

"3. That the defendant is proceeding in conformity with the act of Congress approved June 28, 1898, 30 Stat. 495, which is a valid exercise of the power of Congress over the property of an Indian tribe."

Preliminary to considering the fundamental question raised by the demurrer, it is necessary to notice two subjects not expressly referred to in the opinion below. They are, first, the objection to the formal sufficiency of certain of the averments in the bill; and, second, the claim that the Cherokee Oil & Gas Company was an indispensable party defendant. With respect to the first mentioned ground of objection, without going into detail, we think the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked. So far as the second ground of objection is concerned, we presume that the courts below omitted to pass expressly thereon, because it was deemed that the company named was properly omitted from the bill. As the bill assailed generally the want of power in the Secretary of the Interior to execute leases affecting lands owned by the tribe, and referred to the application pending for a lease made by the Cherokee Oil & Gas Company, as manifesting but a particular instance in which it was charged that the Secretary of the Interior might exercise the power conferred by the statute, the corporation named was not an indispensable party to the bill. Clearly, all the persons with whom the Secretary might contract, if he exercised the discretion vested in him by the statute were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question. This brings us to consider the fundamental question which the case involves, that is, the contention on behalf of the government that the decree below should be sustained because the act of June 28, 1898, is a valid exercise of power vested in Congress, and fully authorized the Secretary of the Interior to do and perform the things which the complainants seek to have him enjoined from doing.

Before noticing the pertinent provisions of the act of June 28,

1898, reference will be made to antecedent legislation by Congress which led up to the enactment of the statute in question. In the statement preceding the opinion, delivered through Mr. Chief Justice Fuller, in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, it was said:

"By the sixteenth section of the Indian Appropriation Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners 'to enter into negotiations with the Cherokee Nation, Choctaw Nation, Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.'

"The Commission was appointed and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895, c. 189, 28 Stat. 939, two additional members were appointed. It is commonly styled the 'Dawes Commission.'"

On November 20, 1894, and November 18, 1895, the Dawes Commission made reports of the condition of affairs in the Indian Territory. These reports, as also a report of the Senate Committee on the Five Civilized Tribes, of date May 7, 1894, were referred to and were quoted from in the statement of facts made by the court in the *Stephens* case. The reports asserted the existence of a state of affairs in the Indian Territory "abhorrent to the spirit of our institutions," and declared the ne-

cessity of assumption by the United States of "responsibility for future conditions in the Territory" and the need of independent legislation by Congress in that behalf. Thus, the Senate Committee on the Five Civilized Tribes of Indians, in a report on May 7, 1894, Sen. Rep. No. 377, 53d Cong. 2d sess., said in part:

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights unless the government does interfere to administer such trust."

By a provision in the act of June 10, 1896, 29 Stat. 321, 339, said commission was directed to continue the exercise of the authority already conferred upon it, and was invested with further powers in respect of hearing and determining applications for citizenship in said tribes and making rolls of the members thereof.

A provision in the act of June 7, 1897, 30 Stat. 62, 84, directed said commission to continue to exercise all authority theretofore conferred upon it to negotiate with said Five Tribes, and gave further direction respecting the making of rolls and citizenship.

The act of June 28, 1898, 30 Stat. 495, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," contains provisions for the completion of the rolls of citizenship of said tribes, for the reservation of townsites

and the sale of lots therein, and for the allotment of the exclusive use and occupancy of the surface of all lands susceptible of allotment among the citizens of the respective tribes, with a provision as follows (sec. 11):

"But all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such land shall carry the title to such oil, coal, asphalt, or mineral deposits."

Section 13 of said act contains provisions for leasing the oil, coal, asphalt, and mineral deposits as follows:

"That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys. Lessees shall pay on each oil, coal, asphalt, or other mineral claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars, in advance, for each succeeding year thereafter, as advanced royalty on the mine or claim on which they are made. All such payments shall be a credit on royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments; and all lessees must pay said annual advanced payments on each claim, whether developed or undeveloped; and should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance shall then become and be the money and property of the tribe. Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the

other land and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land, by the lessee or party operating the same, before operations begin: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral, which have been assented to by act of Congress, but all such interest shall continue unimpaired hereby, and shall be assured to such holders or owners by leases from the Secretary of the Interior for the term not exceeding fifteen years, but subject to payment of advance royalties as herein provided, when such leases are not operated, to the rate of royalty on coal mined, and the rules and regulations to be prescribed by the Secretary of the Interior, and preference shall be given to such parties in renewals of such leases: *And provided further*, That when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and possession has been taken thereunder and improvements made for the development of such oil, coal, asphalt, or other mineral deposits, by lessees or their assigns, which have resulted in the production of oil, coal, asphalt, or other mineral in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior; and in making new leases due consideration shall be made for the improvements of such lessees, and in all cases of the leasing or renewal of leases of oil, coal, asphalt, and other mineral deposits preference shall be given to parties in possession who have made improvements. The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior."

Section 16 contains a provision as to the payment and distribution of rents and royalties due said tribes, as follows:

"That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any

lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever: and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong."

As the acts done and contemplated to be done by the appellee and assailed by the bill of complaint, are presumably not the subject of criticism, in the event that the act of June 28, 1898, was a constitutional and valid exercise of power by Congress, we will now address ourselves to a consideration of that statute.

Prior to the act of March 3, 1871, 16 Stat. 544, 566, now section 2079 of the Revised Statutes, which statute, in effect, voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, the customary mode of dealing with the Indian tribes was by treaty. As however held in *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 653, reaffirmed in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 484, while the Cherokee Nation and other Indian tribes domiciled within the United States had been recognized by the United States as separate communities, and engagements entered into with them by means of formal treaties, they were yet regarded as in a condition of pupilage or dependency, and subject to the paramount authority of the United States.

Reviewing decisions of this court rendered prior to the act of 1871, and particularly considering the status of the very tribe of Indians affected by the present litigation, the court commented upon a declaration made in a previous decision that this government had "admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being invested with rights which constitute them a state, or separate community." It was observed of this declaration that it fell "far short of saying that they are a sovereign state, with no superior within the limits of its territory." Considering the treaty of 1835 with the Cherokee Nation, under which it is now

claimed, on behalf of the appellants, that the Cherokees became vested with the sole control over the lands ceded to them, the court observed (p. 484):

"By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits."

It results then from the doctrine of the decisions of this court that the demurrer was properly sustained, because of the fact that the matters named in the bill were matters of administration, to which the act of June 28 was applicable, and they were solely cognizable by the executive department of the government. The decision in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed. Thus, in the course of its opinion,

after alluding to the legislation concerning the Dawes Commission, the court said :

" It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308. The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 207, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: " Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them."

There is no question involved in this case as to the taking of property ; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and

development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

Affirmed.

EQUITABLE LIFE ASSURANCE SOCIETY *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 320. Submitted October 20, 1902.—Decided December 1, 1902.

The jurisdiction to review judgments or decrees of the courts of the Territory of Hawaii is to be determined, not by the law governing as respects Territories generally, but by Rev. Stat. § 709, relating to the power to review judgments and decrees of state courts.

Although in cases coming within the purview of Rev. Stat. § 709, a Federal question—not inherently such—has been explicitly raised below, if such claim be frivolous or has been so absolutly foreclosed by previous rulings of this court as to leave no room for real controversy, a motion to dismiss will prevail.

A New York life insurance corporation did business in Hawaii and, under statutory regulations, was there subject to suit. It delivered a policy in Hawaii to a person there domiciled, which was among the effects of such person in Hawaii of which possession was taken by an administrator appointed by the Hawaiian courts. Suit was brought in Hawaii upon the policy and judgment was recovered. *Held*, that the assertion that the policy had its *situs*, for the purposes of suit, solely at the domicil of the corporation was unfounded, and that the claim was so completely foreclosed by prior rulings as to come within the principle stated in the preceding paragraph.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr Allan McCulloh for plaintiff in error.

Mr. Cecil Brown, in propria persona, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The questions for decision arise on a motion to dismiss or affirm this writ of error which is prosecuted to a judgment of the Supreme Court of the Territory of Hawaii. The act of April 30, 1900, providing a government for the Territory of Hawaii, c. 339, 31 Stat. 141, enacts (sec. 86) that "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." It follows that the jurisdiction of this court to review judgments of the courts of the Territory of Hawaii is more restricted than is the jurisdiction to review the judgments of the courts of other organized Territories, and is to be measured by the power conferred upon this court to review judgments of state courts. Rev. Stat. § 709. In *Ex parte Wilder's Steamboat Company*, 183 U. S. 545, the distinction made by the law in question between Hawaii and other Territories was pointed out.

The case, as stated below, and as substantially admitted by both parties in their printed argument, is as follows:

David B. Smith died, intestate, on December 24, 1899, in the city of San Francisco. Long prior to and at the time of his death he was domiciled in Honolulu, in the Territory of Hawaii. He there applied to the plaintiff in error, a New York corporation, for a policy on his life payable to his estate. The policy was issued, was delivered to Smith in Honolulu, and was found among his effects in Honolulu after his death. At the instance of the daughter of the deceased, who was his legal heir, the defendant in error was appointed administrator of the estate of

Smith by a Hawaiian court having jurisdiction to that end, and the administrator took possession of the policy and made the requisite proof of death. After the appointment of the Hawaiian administrator and the making by him of the proof of death, a relative of the deceased made application to a court in the city of New York for letters of administration upon the estate of Smith, which were issued. Prior to any attempted action by the New York administrator to enforce the policy in question, in consequence of the refusal of the insurance company to pay the loss, the Hawaiian administrator brought suit in a court in Hawaii having jurisdiction, to recover the amount of the insurance. Service of process in this action was made on the general agent of the insurance company in Hawaii, which agent, the Supreme Court of the Territory declared in its opinion rendered in this cause, "we presume, is the person designated for such purpose by the defendant under the statute. Civ. L. ch. 130, since amended, Laws of 1898, act 45. At any rate, the defendant answered generally, and did not question the validity of the service." Before the trial of the cause in the courts of Hawaii the administrator appointed in New York instituted an action upon the policy against the insurance company in the Circuit Court of the United States for the Southern District of New York. When the suit came to trial in the Hawaiian court, no judgment having been rendered in the suit brought in New York, the defendant corporation, to support its contention that the plaintiff was not entitled to recover, claimed the benefit of the due faith and credit clause of the Constitution of the United States, and to sustain this asserted right offered proof of the appointment of the New York administrator and tendered an exemplification of the record of the proceedings had in the action, brought by the New York administrator in the Federal court in that State. The trial court rejected the evidence and exceptions were duly taken. A verdict was returned in favor of the plaintiff for the full amount sued for. The case having been taken to the Supreme Court of the Territory the judgment was affirmed, the court expressly deciding that the right asserted under the due faith and credit clause of the Constitution of the United States was without merit. From

the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. "There must be a real, substantive question on which the case may be made to turn," that is, "a real and not a merely formal Federal question is essential to the jurisdiction of this court." Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, and authorities there cited. The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject-matter of the controversy is *per se* and inherently Federal. *Swafford* v. *Templeton*, 185 U. S. 487, 493. It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the court as to absolutely foreclose further contention on the subject. *Chanute* v. *Trader*, 132 U. S. 210; *Richardson* v. *Louisville & N. R. R. Co.*, 169 U. S. 128; *Blythe* v. *Hinckley*, 180 U. S. 333, 338.

Is the motion to dismiss or the motion to affirm within the principles established by prior decisions of this court as just previously stated? In substance, the contention of the plaintiff in error is that on the facts above recited the *situs* of the indebtedness upon the policy in question was an asset solely within the jurisdiction of the State of New York and of its courts, and that the debt had not its *situs* in the Territory of Hawaii, the domicil of the deceased, where the policy was delivered and where it was actually present. But this contention has in effect been decided by this court to be unsound. *New England Life Insurance Company* v. *Woodworth*, 111 U. S. 138. In that case recovery was had in a court of the United States in the State of Illinois upon an insurance policy issued on the life of a resident of the State of Michigan by a corporation which had been chartered in the State of Massachusetts. At the time of her death the deceased was still a resident of the State of Michigan. It was argued in this court, on behalf of the defendant in error, that the Illinois court which had granted the letters of administration had no power to do so, because the State of Illinois was not the domicil of the decedent, because there were no assets belonging to the decedent in Illinois at the time of her death, and the bringing of the policy subsequently into Illinois did not constitute the debt thereunder an asset of the estate of the decedent, as such a debt was a simple contract debt and was a local asset only at Boston, the domicil of the debtor company. It was however held that the letters of administration issued by the Illinois court were apparently authorized by law, and that it was essential that the facts detailed in the record should distinctly negative the validity of such authority, before it could be adjudicated that the plaintiff's authority to sue was not supported by them. The court then said (p. 144):

"This is not done. On the contrary, the declaration of the letters that the intestate had personal property in Illinois when she died, is, we think, supported by what appears in the record, even if such property consisted solely of this policy.

"In the growth of this country, and the expansions and ramifications of business, and the free commercial intercourse be-

tween the States of the Union, it has come to pass that large numbers of life and fire insurance companies and other corporations, established with the accumulated capital and wealth of the richer parts of the country, seek business and contracts in distant States which open a large and profitable field. The inconveniences and hardships resulting from the necessity on the part of creditors, of going to distant places to bring suits on policies and contracts, and from the additional requirement, in case of death, of taking out letters testamentary or of administration at the original domicil of the corporation debtor, in order to sue, has led to the enactment in many States of statutes which enable resident creditors to bring suits there against corporations created by the laws of other States. Such a statute existed in Illinois, in the present case, requiring every life insurance company not organized in Illinois to appoint in writing a resident attorney, upon whom all lawful process against the company might be served with like effect as if the company existed in Illinois, the writing to stipulate that any lawful process against the company, served on the attorney, should be of the same legal force and validity as if served on the company, a duly authenticated copy of the writing to be filed in the office of the auditor, and the agency to be continued while any liability should remain outstanding against the company in Illinois, and the power not to be revoked until the same power should be given to another, and a like copy be so filed; the statute also providing that service upon said attorney should be deemed sufficient service on the company. Revised Statutes of 1874, chap. 73, § 50, p. 607.

"In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil, so as to uphold the grant of letters of administration there. The corporation will be presumed

to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died."

Indeed, the contention that because the policy was issued by a New York corporation and was payable in the State of New York, it could not be sued upon by one having possession of it at the domicil of the deceased in another State or in a Territory, is directly contrary to the settled rule upheld by the Court of Appeals of the State of New York. *Sulz* v. *Mutual Reserve Fund Life Association*, 145 N. Y. 563.

From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in *New Orleans Waterworks Company* v. *Louisiana*, *supra*, and authorities there cited. It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, *Richardson* v. *Louisville and*

Nashville R. R. Co., and *Blythe* v. *Hinckley*, *supra*. This being the case, it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. The question then is, To which of the motions should the decree which we are to render respond? As this is a case governed by the principles controlling writs of error to state courts, it follows that the Federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing, that is, the two questions are therefore absolutely coterminous. Hence, in reason, the denial of one of the motions necessarily involves the denial of the other, and hence also one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other. Under this state of the case (there being of course no inherently Federal question, *Swafford* v. *Templeton*, *supra*,) we think the better practice is to cause our decree to respond to the question which arises first in order for decision, that is, the motion to dismiss, and therefore

The writ of error is dismissed.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND *v.* UNITED STATES.

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

No. 381. Submitted October 31, 1902.—Decided December 1, 1902.

1. This court has already sustained the power of the Supreme Court of the District of Columbia to adopt a rule providing that if the plaintiff or his agent shall file an affidavit in any action arising *ex contractu* setting out distinctly his cause of action, etc., and serve the defendant with copies thereof and of the declaration, he shall be entitled to judgment unless the defendant shall file, along with his plea, if in bar, an affidavit of defence

denying the right of the plaintiff as to the whole or some specific part of his claim, and specifically also the grounds of his defence, and has also sustained the validity of the rule as adopted (No. 73) by said court. *Smoot* v. *Rittenhouse*, decided January 10, 1876.

The rule as adopted does not deprive a defendant who files a plea in bar and demands a trial by jury, but who also fails to file the affidavit of defence required by the rule, of a right to a trial by jury, but simply prescribes the means of making an issue in regard to which, if the same be made as prescribed, the right of trial by jury accrues.

2. Congress has the power to change forms of procedure and it has been decided by this court, (*Smoot* v. *Rittenhouse*, *supra*,) that the power to enact rules of procedure has been delegated to the Supreme Court of the District of Columbia.

3. Exceptions based on disputable considerations of the spirit of the rule will not be taken against the interpretation of the Supreme Court of the District of Columbia, which has administered the rule for many years.

4. In this case it was held that the affidavit filed by the plaintiff in error, defendant below, was not sufficient to comply with the rule.

This action was brought in the Supreme Court of the District of Columbia, by defendant in error, against one Peyton D. Vinson, as principal and plaintiff in error as surety, on certain bonds, to recover the sum of $530.06. One of the bonds was in the penal sum of $25,000, for the faithful performance of the covenants and conditions of a contract entered into by said Vinson with the District of Columbia. It was covenanted in the bond that Vinson would "promptly make payments to all persons supplying him with labor or materials in the prosecution of the work provided for in said contract." And it was alleged in the declaration that Lewis E. Smoot furnished said Vinson certain materials, which were used by the latter in the completion of the work under the contract, of the value of $599.73, of which amount only $206.95 was paid, leaving a balance of $392.78 due.

The other bond was for the penal sum of $6000, with like covenants and conditions. The declaration alleged that said Smoot furnished materials of the value of $143.28 to Vinson, which were used in the performance of the latter's contract with the District of Columbia, and that said amount was not paid, though demanded. And recovery of said amounts due was prayed against Vinson and the plaintiff in error, amounting to

the sum of $530.06. The declaration was accompanied by an affidavit made by Smoot under the requirements of rule 73 of the court, hereinafter set out. The affidavit was very full and circumstantial, and virtually repeated the declaration.

The plaintiff in error filed pleas to the declaration, in which it alleged that neither it nor Vinson owed the sums of money demanded, or any part of either, "in the manner and form as the said United States above complained." And also pleaded that neither it nor Vinson had broken the conditions, or any of them, on said bonds "in the manner and form as the said United States had above complained."

The plaintiff in error on March 14, 1902, filed the following affidavit of defence:

"J. Sprigg Poole, being first duly sworn, deposes and says:

"1. That he is now, and for ten years last past has been, the general agent for the District of Columbia of the Fidelity and Deposit Company of Maryland, the defendant in the above-entitled cause.

"2. That the said defendant admits the execution of the bonds as alleged in the declaration in said cause.

"3. That the said defendant, its officers and agents, has no personal knowledge of the contracts alleged in said declaration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson, or of the indebtedness alleged to be due from said Vinson to said Smoot under said alleged contracts; that the said defendant, its officers and agents, has not sufficient information, in the opinion of the affiant and of the counsel of said defendant, its attorney of record in said cause, to be safe in admitting or denying under oath the allegations of said declaration in regard to said contracts between said Smoot and Vinson, or the indebtedness thereunder, and in so far as said defendant is sought to be charged with the payment of said alleged indebtedness from Vinson to Smoot it calls for strict proof of said alleged indebtedness.

"4. That said defendant is advised by its counsel that it is entitled under the law of the land to trial by jury as to the truth of the allegations of the declaration in regard to said alleged contracts between the said Smoot and Vinson and the

alleged indebtedness under said contracts; that said defendant does not waive, but expressly claims, the benefit of the right of trial by jury, and prays that this honorable court will not enter judgment against it, the said defendant, without trial by jury upon the issues tendered by the pleas filed to said declaration.

"That this prayer for trial by jury is not made for the purpose of delay, but solely because the defendant is advised by counsel and believes that, under the law of the land, it is entitled to trial by jury in this cause, and that it cannot waive or surrender that right without exposing itself to the danger of being deprived of its property without due process of law."

On the 18th of March the defendant in error filed a motion "for judgment, under the seventy-third rule, for failure of the defendant to file with his plea a sufficient affidavit of defence."

Upon hearing, the motion was granted and judgment entered as prayed for in the declaration. The judgment was affirmed by the Court of Appeals, and the case was then brought here.

The seventy-third rule is as follows:

"In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defence, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defence denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defence, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of defence his liability for a part of the plaintiff's claim as aforesaid the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due.

"Sec. 2. The provisions of this rule shall not apply to defendants who are representatives of a decedent's estate except when the affidavit filed with the declaration sets forth that the con-

tract sued on was directly with such representative, or that a promise to pay was made by him.

"SEC. 3. When the defendant is a corporation, the affidavit of defence may be made by an officer, agent or attorney of such corporation.

"Rules of the Supreme Court of the District of Columbia adopted at the April term, 1898, p. 28."

Mr. L. H. Poole for plaintiff in error.

Mr. Crandal Mackey for defendants in error.

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

The principal assignments of error are reducible to these contentions: (1) The court had no power to enact the rule; (2) that the rule was invalid, in that it deprived defendants of due process of law and the right of trial by jury, in contravention of the Constitution of the United States and "the mode of proof of trial" prescribed by Revised Statutes, sec. 861 *et seq.*

1. The rule was formerly number 75 and has existed a long time. The Court of Appeals of the District has sustained its validity in a number of cases. This court also sustained its validity in *Smoot* v. *Rittenhouse*, decided January 10, 1876.

The case is questioned as authority because, it is said, that "if this court upheld a rule of such important character and doubtful validity it would give the grounds of its decision." But the objection assumes that the court had doubts. The better inference is that the court regarded the grounds of challenge to the validity of the rule as without foundation. And its validity was challenged and necessarily passed on, which disposes of the contention that the decision was based on another point.

2. There is but one element in this contention—the right of a jury trial. In passing upon it we do not think it necessary to follow the details of counsel's elaborate argument. In *Smoot* v. *Rittenhouse*, *supra*, the validity of the rule was sustained as

well as the power of the court to make it. If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

Certainly a salutary purpose and hardly less essential to justice than the ultimate means of trial. And the case at bar illustrates this. It certainly does not seem unreasonable to charge one who has become responsible for the performance of an act by another with knowledge of that act or with means of ascertaining it, so as to state a defence within the liberal interpretation of the rule declared by the Court of Appeals.

As early as 1879 the Supreme Court of the District recited the history of the rule and explained its purpose. "It was a rule," the court said, "to prevent vexatious details in the maturing of a judgment where there is no defence. . . . Now, what does the rule mean, this being its office? It is couched in very plain language. It says the defendant shall set out his *grounds* of defence and swear to them. It does not mean a defence in all its details of incident and fact, but the foundation of defence. That is all. Those grounds ought not to be vague and indefinite. They should have significance and meaning, and should express the idea of defence upon the ground to which they are addressed. It was never contemplated that this rule required a party to follow his case through all the lights and shadows of the evidence in it. That would be to hold it essential that he should try his case in his plea." *Bank* v. *Hitz*, MacArthur & Mackey, 198.

This interpretation was affirmed in *Cropley* v. *Vogeler*, 2 App. D. C. 28; see also 2 App. D. C. 340; *Gleason* v. *Hoeke*, 5 App. D. C. 1; 12 App. D. C. 161; *Bailey* v. *District of Columbia*, 4 App. D. C. 356.

And the facts stated in the affidavit of defence will be accepted as true. *Strauss* v. *Hensey*, 7 App. D. C. 289.

It would seem a logical result of the argument of plaintiff

in error that there was a constitutional right to old forms of procedure, and yet it seems to be conceded that Congress has power to change them, even to the enactment of rule 73. The concession of that power destroys the argument based on the Constitution, and whether Congress exercised the power directly or delegated it to the Supreme Court of the District of Columbia can make no difference. And that such power had been delegated to the Supreme Court of the District was virtually decided in *Smoot* v. *Rittenhouse*, *supra*.

3. It is urged that the causes of action set out in the declaration "are not within the purview of the rule." By "purview of the rule" is meant, as counsel explains, the spirit of the rule, and that, it is urged, intends only "money demands, pure and simple," not contracts of suretyship or conditional obligations. It is, however, conceded that the causes of action are within the letter of the rule, and we are not disposed to make exceptions based on disputable considerations of its spirit against the interpretation of the court, which has administered the rule for many years.

4. Plaintiff in error asserts the sufficiency of its affidavit and asserts the insufficiency of that of defendant in error. In support of the latter assertion, it is claimed, "copies of the bonds in suit and of the contracts between the District and Vinson should have been filed." We may adopt the reply of the Court of Appeals of a like claim in that court. That learned court said:

"There is no merit in the formal objections urged to the declaration and supporting affidavit of the plaintiff. The bond is alleged to have been executed in accordance with the formal provisions of the statute which makes it a public record, and proffer of it was not required to be made. It is nothing more than a simple statutory obligation to pay any and all demands against the contractor of the nature claimed by the plaintiff. It does not appear that there was any formal written contract between the contractor and the plaintiff relating to the materials furnished by the latter, upon the necessary interpretation of which the liability in whole or in part depends. For the purposes of recovery it was sufficient to say, as was done, that

plaintiff agreed to furnish certain materials at a certain price, for use, by the contractor, that he did furnish the same in specific amounts, and that the contractor received them and then refused to pay the sum due for them."

The affidavit of plaintiff in error was not sufficient. The rule requires the affidavit not only to deny the right of the plaintiff but to state also in precise and distinct terms the grounds of defence, "which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part." See cases cited above.

Finding no error in the record the

Judgment is affirmed.

UNITED STATES *v.* MOSELEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 248. Argued October 28, 1902.—Decided December 1, 1902.

The Secretary of the Interstate Commerce Commission is entitled to be reimbursed for telegrams sent by him pursuant to directions of the Commission, on presenting vouchers in the form prescribed by law to the proper auditing officer of the Treasury Department, approved by the chairman of the Commission and accompanied by the request of the chairman that the rules of the Comptroller as to the production of copies of telegrams for which credit is asked be disregarded on account of the confidential character of the messages, the secretary having also offered to submit the books of the Commission to the Comptroller and Auditors of the Treasury.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Pradt for appellants.

Mr. Holmes Conrad for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This was a petition in the Court of Claims to recover the

sum of $310.37, disallowed by the auditing officers of the government.

The petitioner is Secretary of the Interstate Commerce Commission, and the claim disallowed was incurred for telegrams sent at the direction of the Commission. Judgment passed for the petitioner October 28, 1901, and the United States took this appeal.

The findings of fact and the conclusion of law by the Court of Claims were as follows:

"I. The claimant herein, a citizen of the United States, is Secretary and disbursing agent of the Interstate Commerce Commission, and as such agent it becomes his duty to disburse the moneys appropriated by Congress from time to time to enable the Commission to carry out the provisions of the act of February 4, 1887, and amendments thereto. The disbursements were made under the direction of the Commission; and the accounts therefor, together with itemized vouchers, approved by the chairman of the Commission, were presented to the accounting officers of the Treasury Department for the quarter and year ending June 30, 1899; and also his supplemental accounts, with vouchers so made out and approved, for the same year, among which were the accounts and itemized vouchers for $310.37 for money paid from time to time to the Western Union Telegraph Company and Postal Telegraph Cable Company for sundry dispatches sent over their lines under the direction of said Commission.

"II. The accounts for money so expended for telegrams were disallowed by the Auditor for the State and other Departments, and on appeal to the Comptroller of the Treasury the decision of the Auditor was sustained on the ground that the claimant had not complied with the requirement of the Comptroller to furnish the original telegrams or copies thereof, or, if of a confidential nature, to furnish in lieu thereof a certificate to that effect signed by the chairman of the Commission.

"In response to that ruling the claimant presented and filed with his said accounts the following order, issued by the Commission April 27, 1899:

"'That so much of the Comptroller's communication as requires

copies of telegrams relating to the business of the Commission to accompany telegraph vouchers for which credit is asked be disregarded by the Secretary and disbursing agent, the Commission holding that such messages are so far confidential as to justify refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest.'

"And that the Interstate Commerce Commission did, through their Secretary, address to the Hon. R. J. Tracewell, Comptroller of the Treasury, a letter dated October 4, 1900, containing an invitation to inspect the books, papers and other matters relating to the accounts of the disbursing agent, as follows, viz.:

"'By the act of March 15, 1898, Acts 1897–99, page 316, it is provided:

"'"SEC. 5. All books, papers and other matters relating to the accounts of officers of the government in the District of Columbia shall at all times be subject to the inspection and examination by the Comptroller of the Treasury and Auditors of the Treasury authorized to settle such accounts or by the duly authorized agents of either of said officers."

"'I am authorized by the Commission to extend to the officers and agents referred to in this section the fullest opportunity of making such examination, in the offices of the Commission, of all such books, papers and other matter relating to the accounts of the disbursing agents as they may see proper to examine, and among these all such telegrams as are embraced in the accounts of the disbursing agent. By this means the objections which the Commission have made to the undue publicity of their telegrams will, in some measure, be avoided, and the purposes of the auditing officers should be thereby fully attained.'

"But the decision of the Comptroller was adhered to.

"III. The accounts and itemized vouchers were presented to the accounting officers in the form prescribed by statute; that is to say, that each telegram sent by the Commission, and the cost thereof, and the dates, number of words, persons from and to whom sent, places from and to which sent, and the charge for each message transmitted, were fully shown in a voucher approved by Martin A. Knapp, chairman, and the defend-

ants concede the correctness of the several amounts so expended.

"IV. After the disallowance of the claimant's accounts for the moneys so disbursed to the Western Union Telegraph Company and Postal Telegraph Cable Company, as aforesaid, and to avoid any balance being stated against him, he, under protest, paid into the Treasury of the United States the full amount of the sum so disallowed, to wit, $310.37.

"V. That prior to January, 1899, the original telegrams, or copies thereof, or certificates that such telegrams were of a confidential character, were not required by the auditing officers of the Treasury to be produced by the disbursing officers of the Department of State, or the Post Office Department, or the Navy Department, or the Interstate Commerce Commission, with the vouchers produced by these disbursing officers, for the telegrams sent from such Departments on official business.

"VI. The correspondence by official communications between the Comptroller of the Treasury and the claimant appears in the letter of June 15, 1900, from Edward A. Moseley, Secretary and disbursing agent, to Hon. R. J. Tracewell, Comptroller; letter of July 23, 1900, from the Acting Comptroller to the claimant; the letter of October 4, 1900, from the claimant to the Comptroller, and the letter of October 6, 1900, to the claimant, which were filed as part of the claimant's petition and exhibits therewith.

"*Conclusion of law.*

"From the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment against the United States, on the authority of the *Moseley* case, 35 C. Cl. 347, in the sum of three hundred and ten dollars and thirty-seven cents ($310.37)."

The case is in narrow compass. There is no controversy over the fact of expenditure of the sum sued for, and the Court of Claims found that "the accounts and itemized vouchers were presented to the accounting officers in the form prescribed by statute; that is to say, that each telegram sent by the Commission, and the cost thereof, and the dates, number of words, per-

sons from and to whom sent, places from and to which sent, and the charge for each message transmitted, were fully shown in a voucher approved by Martin A. Knapp, chairman, and the defendants concede the correctness of the several amounts so expended."

Relying on a former decision between the same parties, 35 Court Claims, 347, the court evidently thought that the issue made by the government was not substantial. In that case it was said: "The claimant's statement of account being in the form prescribed by statute, *i. e.*, 'itemized vouchers therefor, approved by the chairman of the Commission,' is *prima facie* correct. The defendants do not controvert the fact of the expenditures therein shown to have been made under the direction of the Commission, nor of the money paid into the Treasury; and, as under the circumstances of this case we have no reason to doubt the correctness or legality of such expenditures, the claimant is entitled to recover, and judgment will be entered accordingly."

The case comes, therefore, to a very narrow question. The act to regulate commerce as amended March 2, 1889, Supp. Rev. Stat. 2d ed. 690, provides "all of the expenses of the Commission . . . shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission." The appropriation act of the same (Supp. Rev. Stat. 2d ed. 698) date provides: "That hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury."

It is claimed that these provisions can be reconciled and leave unimpaired the first as the only condition of the allowance and payment of the expenses of the Commission. Not passing upon that but granting the power of the auditing officers to require something more, we think their requirement was substantially complied with.

It is to be remembered that the petitioner (appellee) is but the Secretary of the Commission. He does not direct its functions, its expenditures, or control its records. He could only submit the requirement of the Comptroller to the Commission and its response to the Comptroller. Its response was "that

Syllabus.

so much of the Comptroller's communication as requires copies of telegrams relating to the business of the Commission to accompany telegraph vouchers for which credit is asked be disregarded by the Secretary and disbursing agent, the Commission holding that such messages are so far confidential as to justify refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest." This was a substantial compliance with the requirement of the Comptroller.

Judgment affirmed.

ELLIOTT *v.* TOEPPNER.

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

No. 85. Submitted November 12, 1902.—Decided December 8, 1902.

The right of a person, against whom an involuntary petition of bankruptcy has been filed, to a trial by jury under section 19 of the bankruptcy act is absolute and cannot be withheld at the discretion of the court.

The trial is a trial according to the course of the common law and the court cannot enter judgment, as the chancellor may, contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.

The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court and recognized by the legislation of Congress from the foundation of the Government.

Congress did not attempt by section 25*a* of the bankrupt act, which provides for appeals as in equity cases from the District Court to the Circuit Court of Appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, to empower the appellate court to reëxamine the facts determined by a jury under section 19, otherwise than according to the rules of the common law. The provision applies to judgments where trial by jury has not been demanded and the court proceeds on its own findings of fact. In such case the facts and the law are reëxaminable on appeal; but in case of a jury trial the judgment is reviewable only by writ of error for error in law, and alleged errors in instructions, the giving or refusal of instructions or in the admission or rejection of evidence which must appear by exceptions duly taken and preserved by bill of ex-

ceptions in the absence of which such alleged errors cannot be considered, although the transcript of the record contains what purports to be the evidence heard by the jury, exceptions reserved to evidence, admitted or excluded, the charge and exceptions, instructions asked and refused and exceptions.

ELLIOTT and others filed their petition for the adjudication of Ferdinand Toeppner as a bankrupt, in the District Court of the United States for the Eastern District of Michigan, which averred that Toeppner was insolvent and that he had committed certain enumerated acts of bankruptcy under subdivisions (1), (2) and (3) of section 3*a* of the bankruptcy act. Toeppner answered denying that he was insolvent at the time the petition was filed, and denying insolvency at the time of the commission of the acts charged under subdivisions (2) and (3); and at the same time filed in writing his demand for a jury trial. The issues were tried before a jury, who returned a verdict of not guilty. A motion for new trial was made and overruled, and the court entered judgment adjudging that Toeppner was not a bankrupt, and dismissing the petition. From this judgment petitioners prayed an appeal to the Circuit Court of Appeals accompanied with an assignment of errors. No bill of exceptions was asked or taken, and no writ of error was asked or allowed.

The appeal was allowed and duly perfected by giving the bond required, and a transcript of the record was filed in the Circuit Court of Appeals for the Sixth Circuit, which included, in addition to the proceedings before stated, what purported to be the evidence heard by the jury; exceptions reserved to evidence admitted or excluded; the charge of the court, and exceptions; and instructions asked and refused, and exceptions.

The errors assigned related exclusively to errors alleged to have been committed during the trial, before the jury, of the issues submitted.

By the certificate to the transcript by the clerk of the District Court, and under its seal, it was certified that "the above and foregoing is a full and true transcript of the record in the matter above entitled; that I have carefully compared the same with the original records and files of said matter in my office, and find the same to be a true transcript of the said originals

and of the whole thereof, together with the original exhibits produced on the trial of said matter."

After the transcript had been filed Toeppner moved the Circuit Court of Appeals to dismiss the appeal, and to strike from the transcript so much as purported to set out the proceedings on the jury trial of the issues submitted to the jury. The motions coming on to be argued the court, being in doubt, certified a statement of the foregoing facts to this court, together with the following question:

"Has this court, under the appeal granted from the judgment refusing to adjudicate Ferdinand Toeppner a bankrupt, authority to reëxamine the proceedings upon the jury trial, and remand for a new trial if it shall appear from the transcript as certified to us, that there was error in instructions given or refused or in the admission or rejection of evidence?"

No appearance for appellants.

Mr. Michael Brennan for appellee. *Mr. Adolph Sloman* was with him on the brief.

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

The judgment of the District Court was a final judgment that Toeppner was not a bankrupt, and that the petition be dismissed. The question is whether the judgment could be otherwise revised than on writ of error, for if a writ of error should have been brought, then the Circuit Court of Appeals had no authority to reëxamine the proceedings on the jury trial, on appeal, or to remand for a new trial because of error in instructions given or refused, or in the admission or rejection of evidence, exceptions not having been preserved by a bill of exceptions.

Section 18*d* of the bankruptcy act provides: "If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented

by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition."

By section 1 of the act "a person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient to pay his debts."

By subdivision (1) of section 3 an act of bankruptcy is committed when a person has "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them;" but by clause *c* "it shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him." *West Company* v. *Lea*, 174 U. S. 590.

Under subdivisions (2) and (3) insolvency must exist at the time of the commission of the acts specified.

In this case, so far as acts of bankruptcy under subdivision (1) were charged, insolvency at the time of the filing of the petition was denied, and so far as acts of bankruptcy under subdivisions (2) and (3) were charged, insolvency at the time the acts were committed was denied.

The burden of proving solvency in proceedings under the first subdivision was on the alleged bankrupt by clause *c*, and on the petitioning creditors in proceedings under the second and third subdivisions, unless in the contingency named in clause *d*.

The issues presented by the pleadings were clearly defined, and Toeppner made written application for a trial by jury, to which he was entitled by section 19, which reads:

"SEC. 19. Jury Trials.—*a*. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as

herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

"*b.* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the District Courts within the jurisdiction of a Circuit Court of the United States, it may be certified for trial to the Circuit Court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such Circuit Court has or is to have a jury first in attendance.

"*c.* The right to submit matters in controversy, or an alleged offence under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury."

The right to a trial by jury on written application thus given is absolute and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.

Section 566 of the Revised Statutes provides that: "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

The District Courts as courts of bankruptcy are invested with "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings" in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bank-

ruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error. *Insurance Company* v. *Comstock*, 16 Wall. 258; *Parsons* v. *Bedford*, 3 Pet. 433, 448; *Duncan* v. *Landis*, 106 Fed. Rep. 839.

By section 41 of the bankruptcy act of 1867 it was provided that the court should, if the debtor so demanded in writing, order a trial by jury to ascertain the fact of the alleged bankruptcy, and in *Insurance Company* v. *Comstock*, Mr. Justice Clifford, speaking for the court, said: "Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law." The first paragraph of section two of the act was referred to, which provided "that the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity," 14 Stat. 517, c. 176; and it was held that the case was excluded from the general superintendence and jurisdiction of the Circuit Court by the exception; and that even admitting that decrees in equity rendered in the District Court might be revised in a summary way if Congress should so provide, it was "clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the Circuit Court in that way, as the Constitution provides that 'no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to

the rule of the common law.' Two modes only were known to the common law to reëxamine such facts, to wit: The granting of a new trial by the court where the issue was tried or to which the record was returnable, or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted." In these observations Mr. Justice Clifford affirmed the rulings in *Parsons* v. *Bedford*, where Mr. Justice Story considered the Seventh Amendment in connection with the language of Article III and the judiciary act of 1789, and treated the last clause of the amendment as "a substantial and independent clause," pointing out that "the phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence."

In *Duncan* v. *Landis* similar views as to review of judgments on verdicts in trials by jury demandable as of right were expressed by the Circuit Court of Appeals for the Third Circuit, whose opinion by Gray, J., contains a lucid exposition of the general subject.

We need not, however, be drawn into a discussion of the controlling force of the Seventh Amendment, as we think the provisions of the present bankruptcy act are consistent with the conclusions heretofore announced.

By the twenty-fourth section of the act the Supreme Court of the United States, the Circuit Courts of Appeals, and the Supreme Courts of the Territories are invested with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." And it is also provided, sec. 25*d*, that "controversies may be certified to the Supreme Court of

the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

In *Bardes* v. *Hawarden Bank*, 175 U. S. 526, we held that the fifth and sixth sections of the judiciary act of March 3, 1891, were not changed by the bankruptcy act. The sixth section gives the Courts of Appeals jurisdiction to review by appeal or writ of error final decisions in the District and Circuit Courts in cases other than those provided for in the fifth section.

Section 24*b* of the bankruptcy act is: "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." This is confined to questions of law and does not contemplate a review of the facts. *Mueller* v. *Nugent*, 184 U. S. 1, 9.

Section 25*a* provides that: "Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; . . ."

The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court, and been recognized by the legislation of Congress from the foundation of the government. *Dower* v. *Richards*, 151 U. S. 658, 663; *Wiscart* v. *Dauchy*, 3 Dall. 321.

So far from any restriction being imposed by section 25*a*, the language used is "appeals, as in equity cases," and on appeals in equity cases the whole case is open.

But Congress did not thereby attempt to empower the appellate court to reëxamine the facts determined by a jury under section 19 otherwise than according to the rules of the common law. The provision applies to judgments "adjudging or refusing to adjudge the defendant a bankrupt," when trial

by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact. In such case, the facts and the law are reëxaminable on appeal, while the verdict of a jury on which judgment is entered concludes the issues of fact and the judgment is reviewable only for error of law.

And it follows that alleged errors "in instructions given or refused or in the admission or rejection of evidence" must appear by exceptions duly taken and preserved by bill of exceptions.

In *Denver First National Bank* v. *Klug*, 186 U. S. 202, the point raised in this case was not suggested. The question was whether the case as presented by the record could be brought by appeal directly to this court, and we held that it could not. The case did not come within section 5 of the judiciary act of March 3, 1891, nor within any provision of the bankruptcy act.

The question is answered in the negative.

IOWA LIFE INSURANCE COMPANY *v.* LEWIS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHEN DISTRICT OF TEXAS.

No. 53. Argued October 21, 22, 1902.—Decided December 8, 1902.

1. As the delivery of a policy of insurance and the payment of the premium are reciprocal or concurrent considerations and together with the method of payment are all essential things, it makes no difference, when the first premium is paid by a note, whether the words "if note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" be printed upon the face or the back of the receipt given for the note or in the policy. As such receipt expressed the conditions upon which the note was received, the memorandum on the back must be considered as embodied in the policy and the endorsements thereon, as well as in the note and the receipt given therefor.
2. When the first premium on a policy of insurance is paid by note and a receipt with such an endorsement thereon is given and accepted therefor, whilst the primary condition of forfeiture for non-payment of the annual premium is waived by the acceptance of the note, a secondary condition thereupon comes into operation, by which the policy will be void if the

Statement of the Case.

note be not paid at maturity and no affirmative action canceling the policy is necessary on the part of the insurance company if the note be not paid when due and presented; and if the policy contains a provision that no person other than the president or secretary can waive any of the conditions, a local agent has no power to extend the time of payment of the note after the same has become part due.

3. A life insurance company may by its conduct waive proof of death and estop itself from setting up the provisions of the policy requiring said proof.
4. This court will adopt the construction of the state courts of a state statute as to the necessity of a demand being made before commencement of an action.

THIS is an action upon a life insurance policy, and was originally brought in the District Court of Tarrant County, Texas, and removed by the defendant, plaintiff in error here, to the Circuit Court of the United States for the Northern District of Texas on the ground of diversity of citizenship.

The action was to recover $3000, alleged to have become due upon a life insurance policy issued by plaintiff in error to Thomas M. Lewis, the husband of the defendant in error. The defendant in error also, under the laws of Texas, art. 3071, Revised Statutes of Texas of 1895, prayed judgment for interest on the said $3000 from the date of the death of the said Thomas M. Lewis, together with a penalty of twelve per cent on the amount due, and for an attorney's fee of $750.

The case was tried by a jury and resulted in a verdict for the defendant in error for $3000, the principal of the policy, with interest from January 1, 1900, $300 damages, and an attorney's fee of $500. Judgment was entered in accordance with the verdict.

The statute of the State of Texas, allowing interest and attorney fees, was attacked by plaintiff in error as being in contravention of the Constitution of the United States. The statute was sustained, and the case was brought here under section 5 of the Judiciary Act of 1891.

By the policy the plaintiff in error promised to pay defendant in error the sum of $3000 upon the death of Thomas M. Lewis, if death should occur on or before the fourth day of March, 1900, and to pay the sum within sixty days after the

receipt by plaintiff in error of satisfactory proofs of death and its cause. Lewis died on the seventh of October, 1899.

The issues in the case besides the constitutionality of the Texas statute are (1) whether the insurance company waived proof of death; (2) whether the policy had ceased and determined before the death of the insured by non-payment of the premium. The evidence bearing upon the issues is as follows:

"The first sentence of the policy sued upon, appearing upon the face thereof, reads as follows: 'The Iowa Life Insurance Company, in consideration of the stipulations and agreements in the application herefor (a copy of which is hereto attached), and of the provisions and requirements upon the next page of this policy, all of which are a part of this contract; and in consideration, also, of the payment of seventy-four dollars and sixty-one cents, being the premium hereon for the first year, hereby promises to pay the sum of three thousand dollars to Lula T. Lewis (wife of the insured) if living; if not living, to the insured's executors, administrators or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis, of Fort Worth, county of Tarrant, State of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March, A. D. 1900.'

"Upon the second page of the policy is a provision reading as follows, it being one of the provisions referred to in the sentence above quoted from the face of the policy: 'This policy is a contract made and to be performed in accordance with the laws of the State of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said State, and shall not go into effect until the premium hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon payment of the premium there shall be delivered a receipt signed by the

president or secretary, and countersigned by an authorized agent.'

"Another provision appearing upon the second page of the policy reads as follows: 'All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company.'

"The policy sued upon is of the kind designated by the defendant as a 'ten-year convertible term stock' policy. It is dated March 13, 1899. The annual premium thereon is $74.61.

"The policy sued upon was issued in pursuance of a written and printed application therefor made by the insured under date of March 4, 1899. Said application requests the issuance of a 'ten-year convertible term stock' policy, and states that the premium of $74.61 is to be paid annually. It concludes with a recital as follows: 'A note for premium of $74.61 has been paid under this application, to make the insurance binding from the date hereof, on condition that if the risk is not assumed by the company, this sum is to be returned, in accordance with the receipt given as voucher for said payment.'

"On March 4, 1899, the insured executed and delivered to S. E. Starn, as agent of the defendant, in partial settlement of his premium, his note, reading as follows:

"'$37.30. March 4th, 1899.

"'Six month after date I promise to pay to the order of myself thirty-seven 30–100 dollars, at Ft. Worth, Texas, value received, with interest at 6 per cent per annum.

"'T. M. Lewis, M. D.'

"Which he endorsed in blank as follows: 'T. M. Lewis, M. D.'

"On March 5, 1899, S. E. Starn transmitted to the defendant the insured's said application and note with a letter, which in so far as it is material to this bill of exceptions, reads as follows: 'I herewith hand you application of Thomas M. Lewis for $3000.00, 10-year term con. stock. Also his note to cover settlement.' These papers were received by the defendant March 8, 1899, at its office in Chicago.

Statement of the Case.

"The application was accepted by the defendant March 13, 1899. The defendant did not signify to Thomas M. Lewis its acceptance of his application in any way other than by making out and forwarding to its agent, S. E. Starn, for delivery the policy sued upon, and the premium receipt hereinafter mentioned, which it did on March 16, 1899.

"On March 18, 1899, S. E. Starn countersigned the premium receipt, and delivered it and the policy sued upon to the insured. The policy and receipt were delivered at the same time and were received by the insured.

"Said premium receipt reads as follows:

"'Iowa Life Insurance Company.

"'Chicago office.

"'Received $74.61, being the first annual premium due March 4, 1899, under policy No. 30,140, on the life of Thomas M. Lewis, subject to the terms of the contract and the conditions on the back hereof.

"'Read the notice to policyholders on the back of this receipt.

"'This receipt is not binding unless it is countersigned by

"(Signed) 'C. E. Mabie, *President.*

"'S. E. Starn, *Ag't, Ft. Worth, Tex.*

"'Countersigned this 18th day of March, 1899.

"'S. E. Starn.'

"(On back of receipt.)

"'For terms of mutual agreement, see application and policy.

"'*Notice to Policyholders.*

"'This receipt, to be valid, must be signed by the president or secretary of the company, and in exchange therefor, cash or its equivalent, be given by the holder of the policy, on or before date payment is due and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

"'If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine.'

"For the first annual premium, the insured gave the above-described note for $37.30, and agreed to perform professional

services for S. E. Starn to the value of the remaining $37.31. Starn was to furnish professional work to be done by Dr. Lewis in the examination of applicants for insurance and otherwise and Dr. Lewis was to do it and let Starn have the fees. No work ever was done and no money ever was paid to S. E. Starn or the defendant in pursuance of this verbal arrangement. Except that the note was given and the verbal agreement made, as just above stated, the defendant never received, and the insured never paid, anything upon account of the premium for the policy sued upon. S. E. Starn testified that before the issuance of the policy he reported to the defendant his agreement with Dr. Lewis concerning the payment of the premium.

"The policy sued upon is in the form always used by the defendant in making contracts of insurance of the kind designated by its 'ten-year convertible term stock' contracts. At the time of issuing said policy it was the defendant's universal practice to issue with its policies premium receipts in form like the one delivered to the insured in this case.

"The defendant never sold or transferred the note received by it from the insured, but continued to be the owner thereof until the time of the trial. Some time before its maturity the defendant sent said note to S. E. Starn for collection. S. E. Starn deposited it for collection with the Farmers' & Mechanics' National Bank of Fort Worth, Texas, on August 24, 1899. The bank held the note until September 25, 1899, when it returned it unpaid to S. E. Starn. The manager of its collection department testified that it would have accepted payment of the note at any time before its return to S. E. Starn, and that it had received no instructions from S. E. Starn with reference to the acceptance of payment after maturity.

"S. E. Starn made no effort to collect the note before its maturity, except that he deposited it in the bank for that purpose, nor had he, up to that time, furnished any professional work for the insured to do, in pursuance of the verbal agreement, or made any effort to get the insured to do any work, or pay any money on account of such agreement.

"About September 29, 1899, S. E. Starn called at the residence of the insured in Fort Worth (he being at the time con-

fined to his bed from illness, the nature of which was typhoid fever, and from the effects of which he died October 7) and there had an interview with the plaintiff and the insured. Concerning this interview the evidence is conflicting. The evidence introduced by the plaintiff tended to prove that Starn stated that he had called for the purpose of collecting the note, that the plaintiff promised that it should be fixed up at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1 following. The evidence was sufficient to have supported a verdict that this was a fact. Mr. Starn denied that he called for the purpose of collecting the note, and denied that he had made the statement that the note could be paid at any time before October 1, or the date on which he would make his report to the defendant.

"Dr. Green, one of the physicians attending the insured, met Mr. Starn as the latter was coming out of the plaintiff's house. Starn inquired of the doctor if he intended returning to the city after seeing his patient. Being answered in the affirmative, Starn stated that he would wait in the doctor's buggy and go up town with him. While the doctor was in the house the plaintiff requested him to call on J. R. Reeves at the latter's pharmacy and ask him to pay off the insured's note for them, held by Starn; the doctor agreeing to do so. Dr. Green and S. E. Starn rode in the former's buggy from the plaintiff's residence to the business portion of the city of Fort Worth. Mr. Starn left the buggy as soon as the business portion of the city was reached and Dr. Green drove immediately to Reeves' pharmacy and indicated to him the plaintiff's request. Mr. Reeves agreed to pay off the note as requested, and the doctor agreed to notify Starn.

"Concerning the conversation which ensued between Dr. Green and Mr. Starn on the way to town, the evidence is conflicting. Dr. Green testified that Mr. Starn stated that he had called at the plaintiff's house to collect the note. Mr. Starn denied having made such statement.

"Some time during the afternoon of this day Dr. Green notified S. E. Starn that J. R. Reeves, the druggist, would pay

off the note. Concerning the conversation which occurred between Dr. Green and Starn immediately following this notification, the evidence is conflicting. Dr. Green testified that Starn said he would go down to the pharmacy for that purpose; that some statement was made about his going to Reeves' pharmacy to get the money that evening, and that Starn said it would not be necessary, that he would go down by nine or ten o'clock the next morning. S. E. Starn testified that he stated to Dr. Green that he would call and see Mr. Reeves the next morning.

"The night following this interview Mr. Starn sent to the defendant a night-rate telegram, reading as follows:

"'Fort Worth, Texas, September 29, '99.

"'Iowa Life Ins. Co., Chicago:

"'Dr. T. M. Lewis offers to pay premium to-day. Very sick. Shall I receive it? S. E. STARN.'

"The next morning, September 30, 1899, the defendant, through its secretary, telegraphed to S. E. Starn as follows:

"'To S. E. Starn, 615 Grove St., Fort Worth, Texas:

"'Do not accept payment on note due September 4. Answer.

"'R. E. SACKETT, *Sec.*'

"On the same day defendant wrote to S. E. Starn a letter reading as follows:

"'Mr. S. E. Starn, 615 Grove St., Fort Worth, Texas.

"'Dear Sir: We are in receipt of your telegram as follows: "Dr. T. M. Lewis offers to pay premium to-day. Very sick. Shall I receive it?" to which we replied as follows: "Do not accept payment of note due September 4. Answer." We presume this telegram refers to policy No. 30,140, Thomas M. Lewis, $3000, convertible term, premium $37.60, upon which note was received at this office in the sum of $37.30, due September 4, 1899, and which was sent to you for collection.

"'Very truly yours, R. E. SACKETT, *Sec.*'

"Some time in the morning of September 30, 1899, S. E. Starn called at the pharmacy of J. R. Reeves, and Mr. Reeves

informed him that he had the money to pay off the Lewis note and had been waiting for him. Mr. Starn thereupon informed Mr. Reeves that he could not accept the payment of the note because he had received a telegram from the company instructing him not to do so. Later in the day Mr. Reeves and Dr. Green called on Mr. Starn, and Reeves made a tender of the amount of the note, which Starn refused to accept. Reeves kept the money he tendered to Starn and did not pay or deliver same to the plaintiff or the insured or to any one for them, and had no interview with the plaintiff or the insured.

"On the same day Starn telegraphed the defendant as follows:

"'Fort Worth, Texas, September 30th, '99.

"'Iowa Life Ins. Co., Chicago:

"'I have refused payment on Lewis policy this 10:30 A. M.

"'S. E. STARN.'

"The only testimony with regard to any consideration for the promise claimed by the plaintiff to have been made to her by S. E. Starn that he would accept payment of the note is the following passage from the cross-examination of the plaintiff: 'Q. Did you pay Mr. Starn anything? A. No, sir. Q. He simply told you he had come to see the doctor about his note, and that it ought to be fixed up, and you said you would attend to it? A. Yes, sir. Q. That is all that occurred between you? A. Yes, sir.'

"The attention of the plaintiff was not directed to the fact that she was being questioned concerning a consideration for the extension of the time for payment of note other than is indicated by the questions put to her.

"At the request of the defendant, S. E. Starn returned to it the note of the insured, which thereafter continued in the defendant's possession. The defendant never offered to return the note to the insured and never before the death of the insured did anything in the way of an affirmative forfeiture or cancellation of the policy, and no communication passed between the defendant and S. E. Starn regarding said note between the transmission of the note to Starn for collection and Starn's above-quoted telegram of September 29, 1899.

"Except for the evidence upon the question of the extent of S. E. Starn's authority the foregoing is a full statement of all material facts upon the issue of the forfeiture of the policy sued upon for non-payment of the premium note, and the waiver of such forfeiture."

Mr. Maurice E. Locke for plaintiff in error.

Mr. Michael J. Colbert for defendant in error. *Mr. William Capps* and *Mr. S. B. Cantey* were with him on the brief.

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

1. It will be observed that there was printed upon the back of the receipt given for the first premium the following: "If note be given for the payment of the premium hereon, or any part thereof, and same is not paid at maturity, the said policy shall cease and determine." The contention of plaintiff in error is that such provision constituted a part of the contract; and contending also that the note was not paid, it urges that the policy ceased and determined. The same contention was made in the trial court but rejected. The court held that the provision on the back of the receipt constituted no part of the contract, and instructed the jury, against the objection of plaintiff in error, "that the contract by its own explicit terms, is wholly included in the policy—the life insurance proper, and in the application for such life insurance policy, which, by the terms of the policy, is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. *Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement between the parties as to the*

provision upon the back of the receipt. [The italics are ours.] Such provision is nowhere noted in the face of the contract of insurance; it is nowhere noted in the application for the insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere. Even if the provision were considered a part of the contract entered into between the parties, yet it is such a provision that, if taken advantage of, would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity the company should have within a reasonable time thereafter notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that any such action was taken on the part of the insurance company."

The court also instructed the jury "that it was the duty of the company to notify the insured of the non-payment of the note, and that the policy, because of such non-payment, had ceased and determined, and that the company would no longer be liable thereunder."

As these instructions expressed the conception of the law and the rights of the parties as entertained by the court, the court, also regarding the conduct of the company as waiving proofs of death, naturally instructed the jury that it was its "duty to return a verdict for the plaintiff for the face of the policy," with interest and penalty, and attorney's fees, as prescribed by the Texas statute. "This, therefore," said the court, "leaves to the jury but one question to determine, the fixing of reasonable attorney's fees for the prosecution of this suit."

Were the instructions correct? And first, as to what papers constituted the contract.

The delivery of a policy of insurance and the payment of the premium are reciprocal or concurrent considerations. Necessarily, therefore, the payment of the premium can be exacted simultaneously with the delivery of the policy. Of course, such payment can be waived and a note—the credit of the assured—accepted, either absolutely or upon conditions.

And we do not see how it can make any difference where the conditions are expressed—whether in the policy, in the note or in the receipt given for the premium, or whether on the face of the latter or on its back. The agreements of parties may be expressed in many papers, and if the connection of the papers is not apparent it may be shown by parole. The present case does not even need the aid of that rule. The receipt expressed the conditions upon which the note was received—unmistakably expressed them. The receipt of the premium was expressed to be "subject to the terms of the contract and the conditions on the back" of the receipt. And the assured was directed to read the notice upon the back of the receipt. The notice was as follows: "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

It is not contended that it was not competent for the company to make the condition. It is asserted that it did not become a part of the contract upon which the minds of the parties met—that the minds of the parties only met upon the application, the policy and the note. We cannot assent to this view. The payment of the premium was a very essential thing, and the manner of its payment, whether in cash or by note, and provision for the payment of the note and the effect of its non-payment, were also essential things, and necessarily must have been of mutual concern to the parties and upon which their minds must be considered as having met. To hold otherwise would be to hold that the parties were indifferent to that which materially concerned them. It was certainly of concern to the assured to know whether he would be indebted upon an overdue note or whether his insurance had lapsed.

All of the papers, therefore, embodied the agreement of the parties. In *Insurance Co.* v. *Norton*, 96 U. S. 234, the agreement was considered as "embodied in the policy and the endorsement thereon, as well as in the notes and the receipt given therefor." (page 240.)

2. But determining that the minds of the parties met upon the receipt does not solve the main question in the case. The receipt provides that, if the note, or any part of it, be not paid

at maturity, the policy shall "cease and determine." What does this mean? That the policy shall cease and determine at the occurrence of maturity, or at the option and upon some affirmative action of the company? The latter is the contention of the defendant in error and, as we have seen, the ruling of the trial court; the former is the contention of the plaintiff in error. Upon the issue thus made the cases are not harmonious. The decisions of this court, however, support the contention of plaintiff in error.

In *New York Life Insurance Company* v. *Statham et al.*, 93 U. S. 24, Mr. Justice Bradley, delivering the opinion of the court, said: "Promptness of payment is essential in the business of life insurance. . . . Delinquency cannot be tolerated nor redeemed, except at the option of the company. . . . Time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract. . . . Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence." The intervention of war was held not to avoid a forfeiture.

This case was quoted and its doctrine announced again in *Klein* v. *Insurance Co.*, 104 U. S. 88; and again in *Thompson* v. *Insurance Co.*, 104 U. S. 252.

In *Klein* v. *Insurance Co.* it was said: "If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on the failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of

the premiums, is to destroy the very substance of the contract."

A forfeiture, of course, may be waived, for the obvious reason expressed in *Insurance Co.* v. *Norton*, 96 U. S. 235, "a party always has the option to waive a condition or stipulation made in his own favor," and an agent can be given such power and whether it has been given or not may be proved by parol.

The latter case is an important one. The policy provided that not only a failure to pay any premium, but "the failure to pay at maturity any note, obligation or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein."

The court not only asserted the doctrine of strict punctuality of payment *ad diem*, but applied the rule to a note for part payment.

Expressing its view of forfeitures, the court said: "Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in *Statham's* case, 93 U. S. 24, that in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture."

We shall presently consider how far these principles apply to a claim of waiver of forfeiture in the case at bar. Our present inquiry is when and how does forfeiture occur, and it seems an obvious conclusion from the cited cases that forfeiture occurs upon non-payment of the premium *ad diem*. But against the conclusion *Insurance Co.* v. *French*, 30 Ohio St. 240, and its approval by this court in *Thompson* v. *Insurance Co.* are cited.

It was contended in the latter case that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture, and *Insurance Company* v. *French*, 30 Ohio St. 240, was cited to support the contention. To the

contention and citation it was replied: "But, in that case, no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity."

A review of *Insurance Company* v. *French* is demanded. Was the reasoning in that case approved or only its conclusion? The policy passed upon contained a provision for forfeiture if the *premium* should not be paid, but no provision for forfeiture if *premium notes* should not be paid. The receipt which had been given was absolute. The provision for forfeiture was contained in the note. The case was somewhat complicated by questions of fact regarding the power of the company's agent to accept the notes or to grant extensions of time, but that the power existed was accepted as concluded by the verdict. The insurance company, nevertheless, asserted as a conclusion from the non-payment of the note that the policy had been forfeited. To this the court (Supreme Court of Ohio) replied:

"In most of the cases which have been cited in argument the policy contained a clause, that it should be void upon non-payment of the premium, or any note given for such premium. This policy, however, contains no clause of avoidance for the non-payment of notes given for premium.

"It is not insisted that the non-payment of the check alone forfeited the policy, but it is claimed that failure to pay the note does work out this result. It will be seen that the note stipulates in terms that, if it is 'not paid at maturity, said policy is to be null and void.'

"It cannot be successfully maintained that this clause makes

the policy absolutely void upon non-payment of the note. Under the authorities such a clause, being introduced for the benefit of the insurance company, means that the policy shall be void if the company insist upon it; but it is their option to say whether this result shall follow or not."

And further—

"We, therefore, cannot consider payment of this note as absolutely necessary before the renewal attached. It may not perhaps be necessary to hold, as did the court below, that demand of payment the day the note was due was necessary to work a forfeiture, but certainly something must be done between the date the note was due and the end of the year to establish and proclaim the forfeiture, or it must be held to be waived."

To sustain the conclusion the following Illinois cases were cited: *Teutonia Life Ins. Co.* v. *Anderson*, 77 Illinois, 384; *Illinois Central Ins. Co.* v. *Wolf*, 37 Illinois, 354; *Provident Life Ins. Co.* v. *Fennell*, 49 Illinois, 180. The court also cited *Joliffe* v. *Madison Ins. Co.*, 39 Wisconsin, 119, and quoted the following principle: "Forfeitures are not favored in the law, and will not be sustained upon mere inferences. Where, upon breach by one party of a condition or stipulation in a contract, the other party thereto has the option to declare the contract forfeited, and thus relieve himself from liability upon it, and seeks to exercise such option, he must do so unconditionally, and in plain, positive, and unmistakable terms." And the court finally concludes that, "in the case at bar, the company should not have retained the check and note, and remained silent, as they did. Yet it appears that on July 6, 1868, when Simpson refused the premium for that year, French offered to give up his policy if the company would return his check and note. This was refused."

What, then, did this court mean by pronouncing the decision in *Insurance Company* v. *French* as "entirely correct?" Were the various principles the law expressed in that case approved or only the conclusion of the court from the facts? Did this court intend to approve the proposition that to cause a forfeiture some affirmative action was necessary by the company—a

declaration to that effect and the surrender of the premium notes? To hold the latter would be to hold that this court intended to reverse a number of decisions made upon careful consideration. Indeed it would be contrary to the reasoning in the very opinion in which the *French* case is approved. A replication was set up alleging a usage of the insurance company to give notice to the assured of the date of payment and answering it this court said: "This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. . . . The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not."

And again, as to the usage of the company not to demand punctual payment at the day, or to give thirty days of grace, it was said: "This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of 'leniency.'"

In our other decisions, which we have cited, it was held that time is the essence of the contract, and non-payment at the day involves absolute forfeiture. In none of the cases was there any affirmative action by the company. Forfeiture occurred from non-payment of the premium. The same principle was announced and illustrated in *Life Insurance Company* v. *Pendleton*, 112 U. S. 696. In that case a foreign bill of exchange was accepted in payment of the premium, but upon presentation to the drawee was not accepted. There was some controversy as to whether it was presented for payment. The trial court (Circuit Court of the United States) held (7 Fed. Rep. 169) and instructed the jury that the true measure of the duty of the company was to be found in the rules of law governing the holder of commercial paper; that by taking the draft the company assumed all of the duties of the holder of such paper, and that it was, therefore, the duty of the company to have had the draft protested and to have given notice of non-accept-

ance as a condition of forfeiture. This court disagreed with the Circuit Court and held that protest and notice were not necessary. In other words, held, not the law of commercial paper, but the contract of the parties determined the conditions of forfeiture, and that the contract of the parties was expressed in the draft to be that the policy should become void if the draft was not paid at maturity. "We think it clear," was said:

"Therefore, that notwithstanding the renewal receipt, the condition expressed in the draft was binding on the insured. As we have shown, that condition was that the policy should become void if the draft was not paid at maturity. The draft, being without grace, matured on the 14th of October, 1871. If not paid on that day the policy was forfeited, unless it was the usage of the New Orleans banks to grant days of grace even when they were waived, of which there was some evidence on the trial. In such case the forfeiture would take place, if the draft were not paid on the 17th of October. Of course, it must be presented for payment on the one day or the other—for the drawees could not pay it unless it was presented, for they would not know where to find it. But supposing it to have been presented for payment, and payment refused by the drawees, the condition of forfeiture was complete. Protest and notice of non-payment might be further necessary to hold the drawer, if the insurance company desired to hold him; but they were not necessary to the forfeiture. That occurred when non-payment at maturity or presentation occurred. The drawer, Pendleton, who took entire charge of the policy for his children, put its existence on the condition of payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid; that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not. Such, we think, was the clear purport of the condition, and as the court below took a different view, holding that the insurance company was bound not only to present the draft for payment, but to have it protested for non-payment, before a forfeiture of the policy would ensue, the judgment must be reversed."

See also same case, 115 U. S. 339.

It has been held in cases in the state courts, as in *Insurance Co.* v. *French*, that no forfeiture is incurred until notice by the company has been given that it is claimed. And other cases hold that when the condition of forfeiture is in the note only, the mere fact of non-payment at maturity does not of itself avoid the policy. A review of the cases we do not consider necessary. We prefer to follow our own decisions.

Some of those decisions hold, however, as we have seen, that a waiver of forfeiture may be inferred from the conduct of the company, and that "courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture." *Insurance Co.* v. *Norton*, 96 U. S. 244.

We do not think such circumstances exist in this case. Of course, such circumstances must have come from the company or from its agent acting within his authority. In the case at bar we need only look at that which took place after the note was given. What preceded that, including the arrangement between Starn, the agent of plaintiff in error, and the assured, for the employment of the latter by the former, must be considered as having been approved by the company. Its rights and the rights of the assured depend, therefore, upon what it did in regard to the note before or after it became due or what Starn did within his authority. The company did nothing but send the note to Starn for collection, and Starn deposited it for collection with the Farmers' and Mechanics' National Bank of Fort Worth, Texas, on August 24, 1898—a month before it was due. The assured did nothing; made no movement, as far as the record shows, for its payment. In other words, the day of maturity came and went, and the note was not paid, and the condition upon which the policy should "cease and determine" occurred, unless Starn's authority lasted and could be exercised after the note became due. He received the note back from the bank on the 25th of September, and on the 29th of September he called at the residence of the assured—the latter then being confined to his bed with typhoid fever (of which he died October 7). The evidence of what transpired there was conflicting, but the record admits would have supported a ver-

dict; "that Starn stated that he had called for the purpose of collecting the note; that the plaintiff promised that it should be fixed at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1st following." And it must also be accepted as true that Starn told Dr. Green that he (Starn) had called at Lewis' house to collect the note, and that the doctor notified Starn that Reeves, the druggist, would pay it, and the latter, on September 30, in the presence of Dr. Green, tendered the amount of the note to Starn, who refused it.

On the 29th of September, as set out in the statement of facts, Starn telegraphed to the company that Lewis offered to pay the premium, and asked if he should receive it. On the 30th the company replied in the negative, and on the same day wrote to Starn. Were Starn's acts authorized? They can only be so held as an inference from the authority given him to collect the note. In other words, that the authority to collect the note conferred authority to extend the time of payment and to waive the forfeiture which had occurred by non-payment. It would be difficult to so hold even if his contract with the company did not forbid the exercise of such power and the provisions of the policy preclude it. The policy provides as follows: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company."

And the contract constituting Starn the company's agent contains the following: "The party of the second part agrees to submit to and abide by all rules and regulations of said company. . . . Agents are not authorized to collect any renewal premium after the day on which the same becomes due, except in accordance with special instructions from the company in each individual case."

There is no evidence of any course of dealing of the company or of Starn which enlarged or modified these instructions, or which induced and excused the default of the assured.

3. The Circuit Court instructed the jury substantially that

the plaintiff in error was estopped from setting up the provision of the policy requiring proofs of death. The instruction is assigned as error. We concur with the Circuit Court. The conduct of the company was tantamount to a waiver. *Life Insurance Co.* v. *Pendleton*, 112 U. S. 696.

4. Notwithstanding our decision in *Mutual Life Association* v. *Mettler*, 185 U. S. 308, the plaintiff in error urges the unconstitutionality of the Texas statute, authorizing the recovery of damages and attorney's fees for failure by life and health insurance companies to pay losses. We are, however, entirely satisfied with the case and its reasoning.

It is insisted, however, that to justify a recovery of the statutory damages demand of payment of the policy before suit was necessary, notwithstanding the denial of liability by the company. The contention is sustained by the decision of the Court of Civil Appeals of Texas in the case of the *Northwestern Life Assurance Co.* v. *Sturdivant*, 24 Tex. Civ. App. 331. That case also decided "that the suit itself would not be such demand as the statute intended." It was held, however, that demand could be made after suit and set up by "an amended petition, as an original suit." The Supreme Court of Texas refused a writ of error to review the case. 94 Texas, 706. We may therefore adopt its construction of the state statute. It can be easily conformed to by defendant in error if a new trial of the case at bar be prosecuted.

On account of the errors indicated

The judgment of the Circuit Court is reversed and the cause remanded with directions to award a new trial.

LAYTON *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 69. Submitted November 6, 1902.—Decided December 22, 1902.

Where the record does not show that it was contended in the state court that a state law under which the plaintiff in error was convicted was in contravention of the Constitution of the United States, the objection that the law is unconstitutional must be regarded as relating only to the constitution of the State.

Where the highest court of a State sustains the validity of a statute of the State when tested by the provisions of the constitution of that State, it cannot be regarded as having decided a Federal question because the provisions of the state constitution are similar to those of the Fourteenth Amendment, if it appears from the record that it was not called upon to do so and its decision rested upon another ground.

When the highest court of a State holds that it has no jurisdiction of an appeal on the ground that a constitutional question is involved unless the question was raised in, and submitted to, the trial court, this court cannot interfere with the action of the state court in adhering to that conclusion.

Nor can this court review the final judgment of the state courts on the ground that the validity of state enactments under the Constitution of the United States has been adjudged when those courts have done nothing more than to decline to pass on the Federal question because not raised in the trial court as required by the state practice.

See also *Jacobi* v. *Alabama*, decided this term, p. 133, *ante*.

Layton was prosecuted in the St. Louis Court of Criminal Correction, on information, for violation of an act of the general assembly of the State of Missouri, entitled, "An act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of any article used or to be used in the preparation of food," approved May 11, 1899, and reading as follows:

"Sec. 1. That it shall be unlawful for any person or corporation doing business in this State to manufacture, sell or offer to sell any article, compound or preparation, for the purpose of being used or which is intended to be used in the preparation

of food, in which article, compound or preparation, there is any arsenic, calomel, bismuth, ammonia or alum.

"SEC. 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than one hundred dollars, which shall be paid into and become a part of the road fund of the county in which such fine is collected." Laws, Missouri, 1899, p. 170.

The information charged that the defendant in the city of St. Louis, then and there doing business in the State of Missouri, unlawfully manufactured, sold and offered for sale a certain compound and preparation for the purpose of its being used and with intent that it should be used in the preparation of food, and that said compound and preparation so manufactured and sold contained alum.

Defendant pleaded not guilty, and, a jury being waived, the cause was submitted to the court for trial.

The compound and preparation consisted of two dozen one pound cans of baking powder and the facts as charged in the information were admitted, but defendant contended that he should not be convicted because the statute was unconstitutional. And he offered voluminous evidence tending to show the details of the manufacture of baking powders of various kinds, and among them baking powders containing alum, as well as the history of the business of the manufacturing, selling and using alum baking powders, which tended to establish that that business was, and had been for many years, very extensive in Missouri and in the United States, and that defendant for some years before the statute was enacted had been engaged in that business. He further offered evidence to the effect that the use of alum in baking powders was wholesome, useful and economical; and that most grocers in Missouri kept and sold alum baking powders, and no harm had been known to result from their use in the preparation of food. All this evidence, on objection by the State for incompetency, irrelevancy and immateriality, was excluded by the court, and defendant excepted.

Defendant asked the court to give six separate instructions predicated on the admission of the testimony which had been

excluded, in which the court was requested to declare the law to be that defendant must be acquitted, if the court sitting as a jury found the facts to be as the excluded evidence tended to show. These instructions were refused and defendant excepted.

The court found defendant guilty as charged in the information, and assessed the penalty at $100. Motions for new trial and in arrest were made and overruled, and exceptions taken. Judgment having been entered, defendant perfected an appeal to the Supreme Court of the State of Missouri, and the cause was docketed in Division No. 2 of that court, being the criminal division. The judgment was affirmed, 160 Missouri, 474, and thereupon defendant moved that the cause be transferred to the court in banc, which motion was overruled. The case was then brought here on writ of error.

Mr. Silas H. Strawn and *Mr. James L. Blair* for plaintiff in error. *Mr. James H. Seddon* and *Mr. Stanley Stoner* were with them on the brief.

Mr. E. C. Crow, attorney general of the State of Missouri, for defendant in error.

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

While it appears from the proceedings on the trial and the grounds assigned for the motion for new trial that the unconstitutionality of the act was relied on in defence, the record does not show that it was contended in the trial court that the act was in contravention of the Constitution of the United States; and it is settled that the objection in the state courts that an act of the State is "unconstitutional and void," relates only to the power of the state legislature under the state constitution. *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131; *Jacobi* v. *Alabama*, *ante*, p. 133.

In the Supreme Court of Missouri, Division No. 2, Layton filed his statement and brief, which brief contained an assignment of errors, as required by the rules of that court. Four

errors were assigned, the third of which was that "the court erred in refusing to declare that the law under which the defendant was convicted was unconstitutional and void." This assignment was followed by points, one of which was that "the law under which the defendant was convicted conflicts with the Fourteenth Amendment to the Constitution of the United States, which guarantees to every man the equal protection of the law;" and these points were accompanied by printed arguments, in which it was insisted that the law violated "the guaranties of the constitutions of the State of Missouri and of the United States, in that it deprives the appellant of his liberty and his property without due process of law."

The Supreme Court, however, did not in terms pass on the question whether the act was in contravention of the Constitution of the United States, and on the contrary said that its constitutionality was assailed on two grounds, namely: that it violated the provisions of section 28 of article 4 of the constitution of Missouri, providing that no bill "shall contain more than one subject, which shall be clearly expressed;" and that it conflicted with sections 4 and 30 of article 2 of that constitution, providing "that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government . . . ;" and "that no person shall be deprived of life, liberty or property without due process of law."

It was held that when an act of the legislature is attacked as unconstitutional because invading the right of the citizen to use his faculties in the production of an article for sale for food or drink, the rule of construction that legislative acts should not be declared void "unless the violation of the constitution is so manifest as to leave no room for reasonable doubt," required the test of constitutionality to be that "if it be an article so universally conceded to be wholesome and innocuous that the court may take judicial notice of it, the legislature, under the constitution, has no right to absolutely prohibit it; but if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it;" and the validity of the act was sustained.

The decision was strictly a decision sustaining its validity when tested by the provisions of the state constitution, and whatever the similarity between the language of those provisions and that of the Fourteenth Amendment the state court cannot be regarded as having decided the Federal question now suggested because necessarily involved in the case, if it appears from the record that it was not called upon to do so, and that its decision rested on another ground.

After judgment was entered affirming the judgment of the trial court, defendant moved that the cause be transferred to the court in banc, and the motion was denied.

By the constitution of Missouri, the Supreme Court was divided into two divisions, Division No. 1, consisting of four judges, and Division No. 2, consisting of three judges, the latter having exclusive cognizance of all criminal causes; and it was provided that cases, in certain circumstances, among others when a Federal question was involved, on the application of the losing party, should be transferred to a full bench for decision. *Duncan* v. *Missouri*, 152 U. S. 377; *Moore* v. *Missouri*, 159 U. S. 673, 679. And see *Railway Company* v. *Elliott*, 184 U. S. 530, as to exclusive appellate jurisdiction of state Supreme Court over cases involving constitutional questions.

It thus appears that the Supreme Court, not only by declining to consider the contention in the brief and argument in respect of the Fourteenth Amendment, but by denying the motion to transfer the cause, was of opinion that the validity of the statute was not so drawn in question for repugnancy to the Constitution of the United States as to require decision as to its validity in that view.

The rules of the court provided: "The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct." Rule 15, cl. 3, 160 Missouri, Appendix, iv.

By rule of Division No. 2, in criminal cases, printed statements containing assignment of errors and brief of points of argument were required, or, in prosecutions *in forma pauperis*, the same in typewriting. 160 Missouri, Appendix, vi.

Errors were so assigned, but the only one of them which referred to the constitutionality of the act was the third, stating that "the court erred in refusing to declare that the law under which the defendant was convicted was unconstitutional and void." This related to the state constitution, and the court so treated it, and confined its decision to the errors specified. Whether it was obliged to do this is not material, as the court in any event proceeds on the record of the trial court for errors committed there. Exceptions in criminal cases occupy the same footing as in civil. *State* v. *Cantlin*, 118 Missouri, 111; *State* v. *Sacre*, 141 Missouri, 64; *State* v. *Wiley*, 141 Missouri, 274; *State* v. *Barton*, 142 Missouri, 450.

And it has been repeatedly laid down by the Supreme Court of Missouri in disposing of questions of jurisdiction as between itself and intermediate courts of appeal that: "The appellate jurisdiction of the Supreme Court contemplates a review only of the matters submitted to, and examined and determined by the trial court. Hence it is well settled that this court has no jurisdiction of an appeal, on the ground that a constitutional question is involved, unless the question was raised in and submitted to the trial court." *Browning* v. *Powers*, 142 Missouri, 322; *Bennett* v. *Railway Co.*, 105 Missouri, 645; *Shewalter* v. *Railway Company*, 152 Missouri, 551.

As we observed in *Jacobi's* case, p. 133, *ante*, we cannot interfere with the action of the highest court of a State in adhering to the usual course of its judgments, and we have frequently ruled that this court cannot review the final judgments of the state courts on the ground that the validity of state enactments under the Constitution of the United States had been adjudged where those courts "did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice." *Erie Railroad Company* v. *Purdy*, 185 U. S. 148, 154.

This case falls within that rule, and the writ of error is

Dismissed.

BURT *v.* UNION CENTRAL LIFE INSURANCE COMPANY.

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

No. 70. Argued November 6, 1902.—Decided December 22, 1902.

As public policy forbids the insertion in a contract of a condition which would tend to induce crime, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.

Where a man, who has commited murder, thereafter assigns a policy of insurance on his own life payable to his estate and is subsequently convicted and executed for the crime, the beneficiaries cannot recover on the policy. The crime of the assured is not one of the risks covered by a policy of insurance, and there is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy.

It is the policy of every State to uphold the dignity and integrity of its courts of justice and as contracts insuring against miscarriage of justice would encourage litigation and bring reproach upon the State, its judiciary and executive, they would be against public policy and void; and therefore an action cannot be maintained by the beneficiaries of an insurance policy on the life of a man executed for murder on the ground that his conviction and execution were unjust.

THIS was an action, to recover on a policy of life insurance, commenced in the District Court of Travis County, Texas, and removed to the Circuit Court of the United States for the Western District of Texas. The policy was issued August 1, 1894. William E. Burt was the insured. The policy, in case of death, was payable to Anna M. Burt, the wife of the insured, if living, otherwise to his executors, administrators or assigns. On September 10, 1895, the beneficiary Anna M. Burt and her husband, the insured, assigned a one half interest to plaintiffs to secure them as creditors of the assignors. On July 24, 1896, the beneficiary, Anna M. Burt, died intestate, as did also the only children of the beneficiary and the insured. On February 4, 1897, the insured, William E. Burt, conveyed to the plaintiffs the remaining interest in the policy, making them the sole owners of it. They are also his sole heirs, and as such are

entitled to the full benefit of the policy, there being no administration on his estate nor any necessity for one.

On November 27, 1896, the insured, having been indicted for the murder of his wife, Anna M. Burt, the beneficiary, was tried and convicted in the District Court of Travis County, Texas, a court of competent jurisdiction, was sentenced to be put to death, and on May 27, 1898, was hanged pursuant to such sentence. The petition in this case alleged that, notwithstanding such conviction, sentence and execution, the insured, William E. Burt, did not in fact commit the crime of murder, nor participate therein, but that if he did the policy was not avoided thereby, because he was at the time insane.

The policy, which in its general scope was an ordinary policy of life insurance, contained these provisions:

"Third. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void.

* * * * * * * *

"The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same."

A demurrer to the petition was sustained and judgment entered for the defendant, which was thereafter affirmed by the Court of Appeals of the Fifth Circuit, 105 Fed. Rep. 419, and thereupon the case was brought here on certiorari. 181 U. S. 617.

Mr. Gardner Ruggles for petitioners.

Mr. Robert Ramsey for respondent.

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

There is nothing in the policy which in terms covers the contingency here presented, the extracts therefrom given in the

preceding statement being all that even remotely by suggestion or inference can have any bearing. The question therefore is whether an ordinary life policy, containing no applicable special provisions, is a binding contract to insure against a legal execution for crime. The petitioners would distinguish between cases in which the insured is justly convicted and executed and those in which he is unjustly convicted. The allegation here is that, notwithstanding his conviction and execution, he was not in fact guilty, that he did not participate in the killing of his wife, and that if he did he was insane at the time, and therefore not responsible for his actions.

Accepting the division made by counsel as one facilitating a just conclusion concerning the rights of the parties hereto, we inquire, first, whether a policy of life insurance is a contract, binding the insurer to pay to the beneficiary the amount of the policy in case the insured is legally and justly executed for crime. In other words, do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

The researches of counsel have found but one case directly in point, *The Amicable Society* v. *Bolland*, decided by the House of Lords in 1830, and reported in 4 Bligh N. S. 194, 211. The Lord Chancellor, delivering the opinion, after stating the question, answered it in the following brief but cogent words:

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds

of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

There are some differences between that case and the present in the surrounding facts, but none that are material. There the policy was taken out for the benefit of the insured's estate. Here the beneficiary was the wife of the insured, or, if she should not be living at the time of his death, his estate. As her death preceded his, the conditions of the insurance became practically the same. In that case the insured had assigned all his interest in the policies upon certain trusts, though the plaintiffs were his assignees in bankruptcy. Here he and his wife, the original beneficiary, transferred a half interest to these plaintiffs, who were their creditors, but the amount of the indebtedness is not shown, and the policy provided "should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment;" a requirement which does not appear to have been complied with. So that the rights of the plaintiffs depend mainly if not wholly upon the fact of the assignment made by the insured after the killing of his wife and prior to his execution, and the further fact that they are his sole heirs. The plaintiffs therefore in each of the cases claimed directly under the insured and sought to recover on a policy obtained by him, the maturity of which was accelerated by his execution for crime. In neither policy was there any express stipulation in respect to such a contingency, so that the reasoning of the Lord Chancellor is pertinent to this case, and it is reasoning the force of which it is impossible to avoid. It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to

induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.

That case was cited with approval in *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139, in which we held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he in sound mind intentionally took his own life—and this irrespective of the question whether there was a stipulation in the policy to that effect or not. In the opinion other cases were cited bearing more or less directly on the general question. Among them was *New York Mutual Life Insurance Company* v. *Armstrong*, 117 U. S. 591, 600, an action by the assignee of a life insurance policy, and the defence that the assignee murdered the insured in order to get the benefit of the policy, in respect to which Mr. Justice Field, speaking for the court, said:

"It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

Also *Hatch* v. *Mutual Life Insurance Company*, 120 Massachusetts, 550, 552, an action on a policy of insurance on the life of a married woman whose death was caused by a miscarriage produced by illegal operation performed upon and voluntarily submitted to by her with an intent to cause an abortion, and without any justifiable medical reason for such an operation, from the opinion in which these words were quoted:

"We can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth."

Also *Supreme Commandery &c.* v. *Ainsworth*, 71 Alabama, 436, 446, a case of the suicide of the insured, in which is this language:

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and

consideration of the contract. It cannot be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money. . . . The fair and just interpretation of a contract of life insurance, made with the assured, is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing or intended to produce it; . . . The extinction of life by disease, or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

But the stress of the plaintiffs' contention rests on the allegation that the insured was unjustly convicted and executed; that he did not in fact commit the crime of murder or participate therein, and that if he did it was while he was insane and not responsible for his actions. It is urged that according to the authorities heretofore cited the risk which is not insured against is death as a punishment for crime; that if there be no crime, no wrong done by the insured, the mere fact of his death as the outcome of proceedings in a court of justice does not vitiate the contract of insurance unless there is some express stipulation therefor. It is said that the adjudication in the criminal case is not as to these plaintiffs conclusive of the insured's guilt; that they may show in this independent action facts which would satisfy a jury that the outcome of those legal proceedings was unjust because the insured did not participate in the crime, or if he did that he was legally irresponsible therefor by reason of insanity. It is not doubted that the criminal prosecution was an adjudication of the insured's guilt, his sanity and legal responsibility for the crime, but the principle of *res judicata* is that a judgment is conclusive only as between the parties and their privies, and these plaintiffs say they were not parties to the criminal action and are not privies to either party thereto.

If the case turned on the applicability of the principle of *res judicata* there would be little difficulty in reaching a conclusion. There is no identity of parties, nor are the two parties to

this action privies to those in the criminal proceeding. A judgment in a criminal prosecution for assault and battery cannot be invoked as *res judicata* in a civil action by the party injured to recover damages. But there the two actions run along parallel lines, and the relief sought in each is the direct and natural result of the wrong complained of. Here, the civil action is founded upon the result of the other—cannot be maintained but for the fact of that result. If the insured had been acquitted there would have been no cause of action on the policy, while the fact that the defendant in the illustration given was acquitted of the criminal offence would not bar the civil action to recover damages. *Cottingham* v. *Weeks*, 54 Georgia, 275.

This action can be maintained only on the assumption that there was a failure of justice in the criminal case. It implies a miscarriage of justice. But can there be a contract of insurance against the miscarriage of justice? In the opinion of the Court of Appeals the question is thus stated and answered:

"Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another jury and court, not infallible.

* * * * * * * *

"It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kind were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon of the executive. Such contracts would encourage litigation and bring reproach upon the

State, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires, for error, a new trial of a convicted defendant, but never after his execution."

The views thus expressed commend themselves to our judgment. There is a wagering feature in such a stipulation which forbids its being incorporated into a policy of insurance, and if it cannot be formally incorporated into the contract its omission therefrom does not by implication give it life and validity.

See to what any other conclusion would lead: Suppose beneficiaries at the time of the trial of an insured for murder were possessors, and the sole possessors, of a knowledge of facts that would establish his innocence. As good citizens it would be their duty to furnish that evidence and thus prevent a miscarriage of justice. As beneficiaries it would be their interest to withhold their evidence and thus let an innocent man be punished. Can a contract be upheld which is not only a wager upon the result of criminal proceedings but also tends to place before individuals an inducement to assist in bringing about such miscarriage of justice?

In *Evans* v. *Jones*, 5 Mees. & W. 77, an action was brought on a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, and it was held that the action could not be sustained. Lord Abinger observed: "No man has a right to acquire by his own act an interest in interfering with the proceedings of courts of justice, more especially of criminal justice, in which a man is bound honestly to declare all he knows relative to the case in the course of adjudication. Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to pervert the course of justice, is a sufficient foundation for the illegality of such wagers." (p. 81.) Baron Parke concurred in these words: "I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to the legality of a

wager, that it has a tendency to influence and pervert the course of criminal justice. There ought to be a disposition in every person to come forward and give any evidence which he may be in possession of, tending to insure either the acquittal or conviction of a person lying under a criminal charge; but the necessary tendency of a wager of this description is to induce the party to it either to give false testimony, if it be his interest to procure a conviction, or, if the other way, to withdraw from the court evidence which he may either possess at the time of laying the wager, or which may afterwards come to his knowledge. And even if a party be not in a situation to suppress or fabricate evidence, still he may influence the result of the trial by prejudicing the public mind on the case, and thus deprive the party charged of the fair trial to which he is entitled." (p. 82.)

It may be said the plaintiffs have made no contract in which any element of wager exists. The contract was between the insured and the company, and in that there was no other element of wager than is found in any ordinary insurance policy. This may be technically true. The plaintiffs made no contract, but they are seeking to enforce one containing, so far as they are concerned, all the elements which, as indicated in the quotations just made, forbid its enforcement on the ground of public policy. They claim in part, under an assignment made before the homicide, the value of which, however, they do not disclose, and they were the heirs of the insured, and after the death of his wife and children, would, in the absence of any will, become the beneficiaries in full. So they stood prior to the trial, with a personal interest drawing them in one direction and a public duty which might possibly compel active efforts in a contrary direction. That these plaintiffs may have known nothing in respect to the circumstances of the homicide, or been unable to furnish any evidence *pro* or *con* on the matter of insanity, is immaterial. It is enough that the contract has such a tendency, and it is not essential that, in fact, it produced a conflict in the minds of these plaintiffs or changed their conduct.

The judgment of the Court of Appeals is

Affirmed.

PAM-TO-PEE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 211. Argued October 22, 23, 1902.—Decided December 22, 1902.

Where Congress has passed an act giving the Court of Claims jurisdiction over the claims of certain Indians against the United States, and in an action brought under such act a fund has been created and the mode of distribution has been prescribed by the court which established the amount of the fund, and such method has been approved by this court, its disposition in accordance with the course prescribed by the courts must be held a finality. Where the circumstances are as in the case at bar any further relief must be obtained from Congress and cannot be given by the courts.

The jurisdiction of the Court of Claims, as of other courts, extends beyond the mere entry of a judgment to an inquiry whether the judgment has been properly executed.

On March 19, 1890, Congress passed an act, 26 Stat. 24, giving to the Court of Claims jurisdiction to try all questions arising out of treaty stipulations between the United States and the Pottawatomie Indians of Michigan and Indiana, unembarrassed by reason of any estoppel supposed to arise from the joint resolution of Congress, approved April 18, 1866, or a receipt in full given by certain Pottawatomie Indians under the provisions of that resolution. Under the authority of this act two petitions were filed in the Court of Claims, one on April 14, 1890, in behalf of "the Pottawatomie Indians of Michigan and Indiana," no individuals being named, by John Critcher, their attorney, his authority being, as stated, an "agreement between said Critcher and the business committee of said Indians, dated September 29, 1887," the other on November 5, 1890, by Phineas Pam-to-pee and thirteen hundred and seventy-one other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney. On January 8, 1891, these two cases were consolidated, and on June 27, 1892, 27 C. Cl. 403, a judgment was rendered against the United States for $104,626. The claimants in each of the cases so con-

solidated appealed to this court, which on April 17, 1893, affirmed the judgment. 148 U. S. 691. On April 20, 1893, the mandate was filed in the Court of Claims.

While the judgment determined the amount due from the United States it did not determine to how many or which of the various individual plaintiffs, or in what proportion, the amount thus adjudged to be due from the United States should be paid. The Court of Claims, in its opinion, said (p. 414):

"Congress have recognized by the very title of the act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians."

By this court it was stated (p. 703):

"How the moneys so awarded shall be distributed among the several claimants it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition."

And after quoting the language of the court below we further said:

"On the other hand, it is contended, with great show of reason, by the petitioners who are represented in case No. 1125 (16,842 in the court below), that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty, in disposing of this part of the subject, is that we have neither findings nor concessions that enable us to deal with it intelligently.

"It is to be observed that the court below found, as a fact (see finding 10), that the average proportion between the Indians who removed west and those who remained was as 2812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

"The petitioners, however, number 1371 in case No. 1125, but the number represented in No. 1133 (16,473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1125 that only 91 Indians are actually represented in case No. 1133, and that the other 200 Indians are among those represented in case No. 1125.

"But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians, entitled to distribution, are represented by the respective attorneys or agents.

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

"As these petitioners no longer have any tribal organization, and as the statutes direct a division, of the annuities and other sums payable, by the head, and as such has been the practice of the government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. *United States* v. *Old Settlers*, 148 U. S. 427."

On August 23, 1894, Congress passed an act, 28 Stat. 424, 450, appropriating money for the payment of judgments of the Court of Claims, including therein the amount of this judgment in favor of the Pottawatomie Indians. On March 2, 1895, it passed a further act, 28 Stat. 876, 894, directing the Secretary of the Interior to detail or employ an Indian inspector to take a census and prepare a roll of the Pottawatomie Indians of Michigan and Indiana who were entitled to share in such judgment, and appropriated the sum of $1000 therefor. After an inspector had been appointed under this act, and while he was engaged in taking the census, counsel for the present petitioners, who was counsel for petitioners in the second of the original suits, addressed a communication to the Secretary of the Interior of date July 27, 1895, representing that such cen-

sus by reason of the basis upon which it was ordered would omit many Indians entitled to share in the judgment. Before any further instructions could be given, and in August, 1895, the inspector filed in the Interior Department his report and census. Acting upon the suggestions made in the letter of counsel a new inspector was on February 5, 1896, designated to examine and report upon the claims of any parties other than those already upon the census roll, and upon his report, of date March 14, 1896, making some slight additions, payment of the entire amount of the judgment was made, and made per capita, to all the individuals on the revised list. Thereafter, and on April 22, 1899, these petitioners filed their petition in the Court of Claims, alleging in substance that they were entitled to participate in the sum awarded against the United States, and as they had not received their share of those moneys they prayed a judgment therefor. Upon a hearing the Court of Claims decided against them and on May 20, 1901, entered a judgment, 36 C. Cl. 427, dismissing their petition, from which judgment this appeal was taken.

Mr. John B. Shipman for appellants.

Mr. Special Attorney William H. Button for appellees. *Mr. Assistant Attorney General Pradt* was with him on the brief.

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

There is an apparent hardship in the result of this litigation, but one which we are constrained to believe the plaintiffs are chiefly responsible for, and which can be relieved only by the action of Congress. Two sets of claimants appeared in the former suits, each represented by separate counsel, and after a consolidation the litigation proceeded only so far as to determine the fact of the liability of the government and the extent of that liability, leaving undetermined the individuals entitled to share in the amount awarded against the government or the proper basis of distribution between those so entitled. In the

first of the suits ninety-one Indians were, it is said, represented, while the petition in the second suit set forth the names of 1371 persons whose names and residences were given, and who were alleged to be entitled to share in whatever money should be awarded against the government. The Court of Claims, after finding the amount that was due, in terms declared that it left "the question of distribution to that department of the government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians." This court affirmed that decision, and in so doing, after saying that there was nothing in the record which would enable them to identify the claimants, added: "Perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund." Such being the final orders in the consolidated cases, proceedings for ascertaining the individual beneficiaries were rightfully had in accordance with the directions then made. It is no argument against upholding that which was done to say that some other and more satisfactory procedure might have been ordered. Possibly it would have been better for the court to have appointed a master and proceeded according to the rules of equity in identifying the beneficiaries of the fund. However, it was not so ordered, and both the claimants and the government were instructed and concluded by the decision in respect to the method of identification.

The mandate of this court was filed in the Court of Claims on April 20, 1893, and on August 23, 1894, Congress passed an act appropriating money for the payment of the judgment. The fund thereby became available for distribution. No action, so far as appears, was taken in the Court of Claims or in the Indian department looking to an identification of the parties entitled to this money until after March 2, 1895. Nearly two years had passed and no effort had been made by the petitioners to establish to the satisfaction of the court or the officers of the Indian department their right to be counted among the distributees of this fund. Obviously these petition-

ers, whose names and places of residence were stated in the second of the original petitions, could if they had seen fit have furnished proofs of identification.

After the passage of the act of March 2, 1895, appropriating $1000 for expenses, an inspector was detailed as agent to take a census and prepare a list or roll. Then for the first time and after he had commenced his work do we hear of any action on the part of these petitioners, and that action consisted wholly of a single letter from their counsel to the Secretary of the Interior. This was the scope of that letter, which was of date July 27, 1895: The instructions given to the agent were that in taking the census he should be guided by a pay-roll made in 1866, upon which there had been a *pro rata* distribution of money awarded by Congress, and to account for all the Indians whose names appeared upon that roll, and also to enroll all who could furnish proof of being their legal descendants. The letter was a protest against these instructions, calling attention to the fact that there were prior rolls, particularly those of 1843 and 1844, which should be taken into account in preparing the new census or list. The writer also attached a list of the names of some, who, so far as ascertained, were, he stated, heirs of persons named on one or other of these rolls, and of other individuals who were also entitled to enrollment. Apparently before any action was taken by the department upon this protest the agent had returned a list or census roll of those found by him entitled to share in the fund.

Nevertheless the contention made in the letter of counsel having been presented to the Secretary of the Interior, he ruled that those persons should be enrolled who were on any of the rolls made during the years from 1843 to 1866, or descended from one upon those rolls. Thereupon a new agent was appointed and directed to ascertain what additions to the list returned by the first agent should be made under the new rulings. The work of this agent was not fruitful in results, as he only reported the names of two persons entitled to be added to the list or roll. Thereafter one was added by the department, and upon the list thus completed the money was paid out per capita. The number to whom distribution was made, being all included

in the completed list or roll, was 272. This distribution was made during the month of November, 1896, according to the statement of Chief Justice Nott, in delivering the opinion of the court, although there is no specific finding to that effect. The report of the second agent was dated March 14, 1896. No action appears to have been taken by the petitioners intermediate this report in March, and the distribution in November; none indeed until the filing of this petition on April 22, 1899, more than three years after the report.

The fourth finding in the present suit contains this statement:

"None of the Indians, parties in or represented by the present suit, were paid as aforesaid. A large number of them, to wit, 272, whose names are set forth in Schedule A annexed to claimants' request for findings, were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844, and 1866."

But in respect to this finding it was stated by Chief Justice Nott:

"The evidence now produced to establish the fact that 272 of the present claimants are direct descendants of the Indians who were upon the rolls in 1843 and 1844 is not altogether satisfactory to the court, but in the absence of countervailing testimony it may be said to present a *prima facie* case."

So the case stands thus: Congress having referred to the Court of Claims an inquiry whether anything was due to "the Pottawatomie Indians of Michigan and Indiana" by reason of treaty stipulations, nearly fifteen hundred individuals appeared in two suits, subsequently consolidated, claiming that there was a large amount due under those stipulations, and representing that they were the parties entitled to the benefit thereof. The result of that litigation was to determine that a certain amount was due to those Indians, but there being no evidence to identify the individuals who came within the description and were entitled to share in the amount found due, the judgment was simply for a recovery of such amount, and it was specially directed that the identification of the individuals entitled thereto should be left to the officers of the Indian department. After two years had passed without any evidence being furnished by

individuals of their right to participate in the fund, Congress directed the Secretary of the Interior to appoint an agent to examine into the matter and prepare a proper roll or list. While such agent was acting a protest was made by the counsel in one of those suits against the basis upon which he was preparing the roll. Although that agent had finished his work the Secretary of the Interior accepted the suggestion of counsel, and directed a new agent to examine and report any names which upon the basis suggested by counsel should be added to the roll already prepared. As the result of the reports of these two agents a roll was prepared containing the names of 272 persons, and the fund was distributed among them.

There is nothing in the record in the way of finding, report or letter tending to show what efforts the first agent made in respect to the matter of identification, what course he pursued or what steps he took, and in respect to the second agent all that is disclosed is that which appears in his report, which details at some length his various efforts to secure evidences of identification of different individuals. In short, it must be assumed, in the absence of any showing to the contrary, that the officers of the government acted reasonably, fairly and with all needed diligence in discharging the duty imposed upon them. While from the present findings it appears that they made a mistake, and did not include all who ought to have been included as beneficiaries, yet their instructions conformed to the suggestions of counsel for petitioners, and there is nothing to show that they did not make a full and honest effort to carry out those instructions. Complaint, therefore, must be upon one of two grounds: Either that the proper course to pursue in the way of identification was not taken, but that objection comes too late, for it was concluded by the prior decision; or that a mistake having been made in the matter of identification the government must assume all the burden of the mistake and pay a second time that which it has once paid in pursuance of the directions of the court. That is really the contention of the petitioners.

They were petitioners in one of the original suits, and contend that they were entitled to share in the fund, and that as

the full amount awarded by the court and appropriated by Congress has already been paid to others, they are entitled to a judgment against the government for that which ought to have been paid to them out of the prior appropriation. The Court of Claims finds that of these petitioners 272 ought to have been placed upon the census roll, and were entitled to a share in the fund. The failure to receive their share may be a hardship to these petitioners, but it must be remembered that the method of ascertaining those entitled was prescribed by the court and pursued by the government. Having been so pursued that fund must be considered as properly distributed.

This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the absolute duty is cast upon the defendant to see that the right party is paid, but a case in which the amount of a fund for distribution was determined, and directions made for ascertaining the beneficiaries of that fund. The debtor and the beneficiaries were each interested in the question of identification, and both bound by the conclusion reached in respect thereto if the directions were fully complied with.

To what would any other ruling result? The finding which, evidently, from the opinion of Chief Justice Nott was not very clearly established, that 272, in addition to those already paid, were entitled to a part of the fund, does not conclude other claimants, and if these petitioners should obtain a judgment against the United States, other petitioners might come forward with like claim, and so the government be compelled to pay over and over again, although it had made one payment in compliance with the directions of the court. Further, if there were really more beneficiaries entitled to share in this fund than those who actually received payment, those who were paid received each too much and should return the overplus; and the amount of that overplus would be constantly increased as in successive actions there were added further beneficiaries, for the distribution was, as stated, *per capita*—a mode of distribution contended for by the petitioners. Petitioners seem to assume that, although the government took the course prescribed by the court in ascertaining the individuals entitled to

share in that fund, it assumed all the risk of mistake, however made; and that they could wait until after the government had acted and made the distribution, and that no responsibility rested upon them to furnish evidences of their title. For reasons stated we cannot assent to this view. Where a fund has been created and the mode of distribution prescribed by the court which established the amount of the fund, its disposition in accordance with the course prescribed by the court must be held a finality, and in the case at bar any further relief must be obtained from Congress and cannot be given by the courts.

It is suggested, though not by counsel, that the Court of Claims had no jurisdiction to entertain this action, and that therefore our order should be to reverse the judgment and remand the case with instructions to dismiss for want of jurisdiction. The basis of this suggestion is the contention that the act of March 19, 1890, simply gave to the Court of Claims jurisdiction to determine the sum due the Pottawatomie Indians of Michigan and Indiana, without the power to identify the particular individuals entitled to share in the amount found due, and it is said that this was so decided in the prior case. We do not so understand that decision. The act, so far as material, reads as follows:

"Whereas representatives of the Pottawatomie Indians of Michigan and Indiana, in behalf of all the Pottawatomie Indians of said States, make claim against the United States on account of various treaty provisions which, it is alleged, have not been complied with: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon; power is hereby granted the said court to review the entire question of difference *de novo*, and it shall not be estopped by the joint resolution of Congress approved twenty-eighth July, eighteen hundred and sixty-six, entitled 'Joint Resolution for the relief of certain

Chippewa, Ottawa, and Pottawatomie Indians,' nor by the receipt in full given by said Pottawatomies under the provisions of said resolution, nor shall said receipt be evidence of any fact except of payment of the amount of money mentioned in it."

Two suits were commenced in the Court of Claims, as heretofore stated, and by that court consolidated. In one a certain number of individuals were named as petitioners. In the other it was admitted that ninety-one persons were represented by their authorized attorney, as appeared by agreement between the attorney and their business committee. The court, after consolidating the two actions, proceeded to determine the amount due, and made no finding as to the individuals entitled to share in such amount. But such identification was for want of sufficient evidence to enable the court to determine the question. This is apparent from the opinion of that court in the present case, for it is said by Chief Justice Nott, in delivering that opinion, "It is unfortunate for some of the claimants in the present suit that the evidence upon which they now rely was not before the court then. . . . The court deemed itself bound by the action of the government in recognizing the parties represented by the former suit (that is, one of the two suits consolidated), and accordingly rendered judgment for them; but the court did not undertake to determine who the then existing individual claimants were who were entitled to participate in the distribution."

Again, after quoting from the opinion of this court, he said: "At this point, if the former case had been a similar suit in chancery between ordinary litigants, it would have been referred to a master or referee to ascertain and report as to the individual claimants entitled to recover, and the final decree would not have been entered until a coming in and confirmation or correction of the master's report. The Secretary of the Interior, however, seems to have inferred from language in the opinions of the two courts that he was authorized to proceed and ascertain who those Indians were, and to prescribe the methods for so ascertaining and determining the amount to be distributed to each individual claimant." And after referring

to a plea in behalf of these individual claimants on account of their ignorance, added, "but the former case, in which the court might have exercised the discretion of a court of equity and allowed parties to come in even after the decree and assert their rights, is closed; the judgment therein has been satisfied; the claimants stand directly upon their legal rights, and there can not be one law for the intelligent and another for the ignorant."

And this court, in its opinion, used the language quoted in the preliminary statement of fact. It is obvious from these quotations from the opinions that both the Court of Claims and this court understood that the act gave jurisdiction not only to ascertain the amount due, but also to identify the individuals entitled to share therein, and that the failure to find the latter resulted from a lack of evidence—a lack the plaintiffs endeavor in this action to supply.

But even if the language of the prior opinions of the Court of Claims and this court can be tortured into a different construction, still there can be no question of the jurisdiction of the Court of Claims over the present action. The jurisdiction of a court is not exhausted by the mere entry of a judgment. It always has power to inquire whether that judgment has been executed, and the contention here is—and it is the basis of this suit—that the judgment which was rendered in the prior suit has not been executed. It would be an anomaly to hold that a court having jurisdiction of a controversy and which renders a judgment in favor of A against B had no power to inquire whether that judgment has been rightly executed by a payment from B to C. If the Court of Claims had no authority to inquire into the execution of its judgment it was shorn of a part of the ordinary jurisdiction of a court. The question what is essential in order to confer jurisdiction in this court over the judgments of the Court of Claims was exhaustively examined by Chief Justice Taney in *Gordon* v. *United States*, reported in 117 U. S. 697, and that judgment has been more than once referred to by this court as conclusive of the questions therein considered. *District of Columbia* v. *Eslin*, 183 U. S. 62; *District of Columbia* v. *Barnes*, p. , *post.* In that opinion he said (p. 702):

"The inferior court, therefore, from which the appeal is taken, must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect. And Congress cannot extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect.

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court, in the exercise of its appellate jurisdiction: yet it is the whole power that the court is allowed to exercise under this act of Congress."

It follows from these considerations that the Court of Claims not only had jurisdiction to find the amount due from the United States to the Pottawatomie Indians of Michigan and Indiana and render judgment therefor, but also to inquire into the question whether that judgment had been duly and properly executed.

The judgment is

Affirmed.

Justices White and McKenna, dissenting.

Mr. Justice White, with whom concurred Mr. Justice McKenna, dissenting.

It results from the findings of the court below that the petitioners in that court who are appellants, apart from the question of their laches, are entitled to the relief which they seek. This was conceded by the court below in the conclusion of law which it drew from the findings of fact, was not challenged by the government in the argument at bar, and is, besides, not now questioned by this court in its opinion. But the lower court held, and this court now affirms such conclusion, that because of their laches the petitioners are cut off from obtaining that judicial relief to which they would otherwise be entitled. In other words, it is decided that although the power exists in the court to grant relief, its duty is not to exert its lawful powers to that end because the petitioners have so neglected their rights that they are not entitled now to enforce them. From this conclusion I am constrained to dissent, because, in my opinion, there is no power in the court to entertain jurisdiction, and therefore no right in it to decide the question of laches. In other words, I think the plaintiffs in error must be relegated to Congress for relief, not because they have lost their right to redress in the courts by their neglect, but because the wrong which they have suffered is one which can only be remedied by Congress, the courts being without jurisdiction over the subject matter. Whilst both in the opinion of the court and in my view the plaintiffs in error can only obtain relief at the hands of Congress, there is a serious difference in the grounds upon which the conclusion proceeds, for manifestly it is one thing to refer the plaintiffs to Congress because they have lost their rights by neglect, and another to refer them to Congress because that body alone has power over the subject. Because of the difference between these views and the effect which this difference may have on the rights of the parties when their claim for relief is presented to Congress, I deem it my duty to state quite fully the reasons for my dissent.

The history of this controversy was stated in the opinion in *Phineas Pam-to-pee* v. *United States*, 148 U. S. 691. For the

purpose of present clearness, however, the salient facts are again recapitulated.

On the 26th and 27th of September, 1833, by a treaty and articles supplementary thereto, the united nation of Chippewa, Ottawa and Pottawatomie Indians ceded certain lands in Michigan and Illinois to the United States, and agreed to remove within three years west of the Mississippi. 7 Stat. 431, 442. Among other payments to be made on account of the cessions, there was to be paid to the Indians under the treaty proper the sum of $280,000, and under the articles supplementary $40,000, in twenty annual installments of fourteen thousand dollars and two thousand dollars respectively.

Appended to the articles supplementary was a provision wherein it was recited:

"As since the signing of the treaty a part of the band residing on the reservations in the Territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now reside shall be paid to them at l'Arbre Croche." 7 Stat. 445.

Only a portion of the Indians embraced by the provision just quoted removed from their reservations to the northern part of Michigan. The others disbursed throughout Michigan and a few settled in Indiana.

From the year 1843 to the year 1865, inclusive, payments were made to the Pottawatomie Indians who had not removed West, and who were deemed to be entitled to the annuity benefits stipulated in the articles supplementary signed on September 27, 1833. These payments were made at the Mackinac agency, and it would seem that the payments embraced Indians who had not removed to the northern part of Michigan, but who had located elsewhere in Michigan and Indiana. A schedule showing the dates of payments, the names of the agents who made them, and the number of Indians to whom the aggregate sums were paid, is annexed in

the margin.[1] The amounts which were paid, as stated in the schedule, embraced sums deemed to be due under an annuity of sixteen thousand dollars, arising from a treaty made on July 27, 1829, and the annuity of two thousand dollars, mentioned in the articles supplementary of September 27, 1833.

By a treaty signed in June, 1846, 9 Stat. 833, all the Indians (Chippewas, Ottawas and Pottawatomies) embraced in the treaty of 1833, who had removed to the West and retained their tribal organization, were designated as the Pottawatomie Nation.

In accordance with a joint resolution of July 28, 1866, 14 Stat. 370, the sum of $39,000 was paid to the Chippewa, Ottawa and Pottawatomie Indians in Michigan and Indiana. This sum was paid to the "chiefs, headmen, heads of families, and individuals without families" of the Indians in question, within the Mackinac agency, there being 230 persons falling within the classes above designated, each one of the distributees receiv-

[1]

Year.	*Name.*		*No. paid.*	*Amount.*
1843	Robert Stuart		253	$1587.50
1844	do		269	1587.50
1845	Wm. A. Richmond		217	1587.50
1846	do		204	1587.50
1847	do		244	1587.50
1848	do		260	1587.50
1849	Chas. P. Babcock		260	1587.50
1850	do		218	1587.50
1851	Wm. Sprague		229	1587.50
1852	do		214	1587.50
1853	Henry C. Gilbert		219	1587.50
1854	do		236	1587.50
1855	do		236	1587.50
1856	do		221	1587.50
1857	A. N. Fitch		229	1587.50
1858	do		234	1587.50
1859	do		253	1587.50
1860	do		236	1587.50
1861	De Witt C. Leach		235	1587.50
1862	do		247	1587.50
1863	do		246	1587.50
1864	do		242	1237.50
1865	Richard M. Smith, principal in currency	$1587.50		
	do	gold premium in currency 692.24	232	2279.74

ing an equal share, that is, $169.50. The money thus paid was receipted for as in full and complete satisfaction of all payments of every kind and nature, past, present or future, in favor of the persons to whom the payment was made and those by them represented, against the United States or the Pottawatomie Nation of Indians. Despite the receipt in full thus given, the Indians to whom the payment in question had been made continued to assert a claim against the United States on account of what was alleged to be still due to them under treaty stipulations. Finally, by the act of March 19, 1890, 26 Stat. 24, the Court of Claims was authorized "to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon." It was provided that the payment of $39,000 heretofore referred to should not be given the finality which its terms imported, and appellate jurisdiction over any judgment which might be rendered was conferred upon this court. The second section of the act reads as follows:

"SEC. 2. That said action shall be commenced by a petition stating the facts on which said Pottawatomie Indians claim to recover, and the amount of their claims, and said petition may be verified by a member of any 'Business Committee' or authorized attorney of said Indians as to the existence of such facts, and no other statements need be contained in said petition or verification."

Under this act two petitions were filed in the Court of Claims. The first of these petitions was entitled *The Pottawatomie Indians of Michigan and Indiana* v. *The United States;* the second was entitled *Phineas Pam-to-pee and* 1371 *other Pottawatomie Indians of Michigan and Indiana* v. *The United States.* The right asserted in both of these petitions was based on the averment that the petitioners were entitled to recover a stated sum from the United States, because they had not received their due proportionate share of the annuities or other sums due the Pottawatomie Nation of Indians. However, although both the petitions substantially stated the same facts as constituting the cause of action, the amount claimed in each petition was widely different. This arose from the fact that in the first pe-

tition it was asserted that about 300 of the Indians who had not removed West were entitled to their proportionate share of the tribal annuities under the articles supplementary to the treaty of 1833, it being alleged that those who had removed West were about 4000 in number. The claim was that the distribution should proceed upon that basis; whilst in the second petition it was asserted that the Indians who had not removed West were 1200 in number, and that distribution should be made in the ratio that 1200 bore to 4000, the latter being the number of Indians asserted to have gone West. Although, however, there was a difference in the claims of the two petitions as to the amount of the indebtedness owing by the United States, in both petitions recovery was only sought of an aggregate sum as due to the Pottawatomie Indians in Michigan and Indiana entitled to take under the articles supplementary to the treaty of 1833, and in neither petition was there any allegation as to the proportionate sum of the total amount claimed to which any particular Indian was entitled, nor did either petition purport to state the representative capacity in which any particular Indian was entitled to take his share of the whole fund, if any.

The two petitions referred to were consolidated and heard together. The Court of Claims decided that there was due to the Pottawatomie Indians of Michigan and Indiana, after deducting payments made, the sum of $104,626, and entered judgment for that sum. 27 C. Cl. 403, 421.

The " just proportion " which the court thus found to be due to the Pottawatomie Indians of Michigan and Indiana, in the aggregate, entitled to share in the funds of the Pottawatomie Nation, was arrived at first by ascertaining from various reports the number of the Indians who had moved West under the treaty of 1833, and then by ascertaining the number of Indians entitled to share who had remained in Michigan. This latter number was arrived at by averaging the number of such Indians as shown by various payments made from 1843 to and including 1866, as manifested in the schedule of such payments heretofore excerpted or referred to.

The court was of opinion that under the jurisdictional act of

JUSTICES WHITE and MCKENNA dissenting.

1890 it could only find and decree the aggregate amount due all the Indians entitled to participate in the fund found due, and that it was not incumbent upon it to determine who were the particular Indians entitled to take such aggregate amount and the distributive share to which each particular Indian was entitled. It said:

"Congress have recognized by the very title of the act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians."

On appeal this court affirmed the judgment of the Court of Claims. 148 U. S. 691. After determining that there was no error in the judgment under review, in so far as it fixed the aggregate amount due, the question was then considered whether it was the duty of the court to ascertain what particular Indian was entitled to share in the fund and the amount of his or her distributive share. On this subject, after quoting approvingly the reasoning of the Court of Claims, by which that court sustained its action under the jurisdictional act of 1890, in finding only the aggregate amount due and leaving the distribution of the fund to the executive officers of the government, and after pointing out that the suit was brought to recover only such aggregate amount, and that there was no finding made by the court below which would justify a decree distributing the fund, the court said (p. 705):

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

"As these petitioners no longer have any tribal organization, and as the statutes direct a division, of the annuities and other sums payable, by the head, and as such has been the practice of the government, perhaps the necessities of the situation de-

mand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. *United States* v. *Old Settlers*, *ante*, 427."

By the deficiencies appropriation act of August 23, 1894, 28 Stat. 424, c. 307, various sums were appropriated, "For payment of judgments of the Court of Claims," one item reading as follows: "To the Pottawatomie Indians of Michigan and Indiana, $104,626.00." In the Indian Department appropriations act of March 2, 1895, 28 Stat. 876, c. 188, was contained the following, italics not in the original (p. 894):

"Miscellaneous.

* * * * * * * *

"That the Secretary of the Interior is hereby authorized and directed to detail or employ an Indian inspector to take a census of the Pottawatomie Indians of Indiana and Michigan who are entitled to a certain sum of money appropriated by Congress to satisfy a judgment of the Court of Claims in favor of said Indians. *And for the purpose of making the payment to the Pottawatomie Indians, of Indiana and Michigan*, of the $104,626, appropriated by the last Congress to satisfy a judgment of the Court of Claims, there is hereby appropriated the sum of one thousand dollars."

In the Indian Department appropriations act of August 15, 1894, 28 Stat. 286, c. 290, there was appropriated $6243.90 as the "amount due certain Pottawatomie Indians of Indiana and Michigan" for their proportion due June 30, 1893, June 30, 1894, and June 30, 1895, "of the perpetual annuities ($22,300.00) . . . as ascertained by the judgment of the Supreme Court of the United States pronounced in the case of the Pottawatomie Indians of Michigan and Indiana against the United States, on April 17, 1893, and which annuities were not embraced in the judgment aforesaid." 28 Stat. 295. An appropriation of $2081.30 for the proportion of the perpetual annuities due the Pottawatomie Nation for the year ending June 30, 1896, was made by the Indian Department appropriations act of March 2, 1895, 28 Stat. 876, 885, c. 188. It was recited, as in the previous statute, that the amount of the perpetual annuities

had been ascertained by the judgment of this court on April 17, 1893. By a proviso the Commissioner of Indian Affairs was directed "to withhold from distribution among the said Indians so much of any moneys due them by the United States as may be found justly and equitably due for legal services rendered, and to pay the same on account of the prosecution and recovery of the moneys aforesaid." In the Indian Department appropriations act of June 10, 1896, 29 Stat. 321, c. 398, there was appropriated to pay the same Indians $2081.30 as their proportion of the perpetual annuities for the year ending June 30, 1897, and also the sum of $41,626.00, as a "final settlement by capitalizing their proportion of the perpetual annuities in question." Reference was made to the judgment of this court as in the prior appropriation acts.

The action of the Secretary of the Interior in respect to the disbursement of the moneys so appropriated is summarized in finding of facts numbered III made by the Court of Claims in this action. It reads as follows:

"In June, 1895, the Secretary of the Interior ordered and directed that a census of the Indians be made under the act 2d March, 1895, 28 Stat. 894. The census roll was prepared under instructions of the Commissioner of Indian Affairs, dated June 8, 1895—approved by the Secretary of the Interior June 15, 1895—by John W. Cadman, and is known as the 'Cadman census roll.' While the agent was so engaged in taking the census, John B. Shipman, Esq., attorney of record in the case of *Pam-to-pee* v. *United States*, addressed a communication to the Secretary of the Interior, dated July 27, 1895, representing that such census, by reason of the manner in which it was being taken, would omit many Indians entitled to be paid under the judgment of the court. Before further instructions were given by the Secretary of the Interior the agent, Cadman, in August, 1895, made and returned and filed in the Interior Department the census so made by him.

"After this roll had been prepared many applications for enrollment were received by the Commissioner of Indian Affairs, based upon the statement that while such applicants were not on the roll of 1866 they were on prior rolls from 1843 to 1866,

or were the descendants of such persons. The question was then submitted to the Secretary of the Interior for an opinion as to whether the rolls from 1843 to 1866 should be considered in connection with the enrollment of those who were entitled to participate in the distribution of the $104,626 awarded by the Court of Claims.

"On January 10, 1896, the Secretary of the Interior made his final decision in regard to the Indians who should be enrolled and paid under the judgment of this court and the appropriation of Congress. Marcus D. Shelby, a special Indian agent, was designated by the Commissioner of Indian Affairs to examine and report upon the claims of the several parties alleging to be descendants of the Pottawatomie Indians of Indiana and Michigan who were permitted by supplemental clause to the treaty of September 27, 1833, to remain east, and for whom the Court of Claims rendered a decision in their favor of $104,626, June 27, 1892. The instructions given to the agent by the Commissioner were dated February 5, 1896. The agent so designated proceeded to Michigan and reported the result of his investigation, bearing date of March 14, 1896. The report so made was accepted by the Secretary of the Interior as substantially correct, and the amount appropriated by Congress in satisfaction of the judgment of this court, 28 Stat. 450, as well as other funds appropriated to pay the Indians upon treaties mentioned in the petitions in said suits, (the sum paid being $118,554.52) paid to the persons upon the roll made by Cadman, after adding thereto two names on the recommendation of Shelby in closing his report as persons mentioned on the census roll of 1866. Later one more was added by the department. The money was paid to the Indians as communal owners. That is to say, it was paid *pro rata* to every living member of that portion of the tribe entitled to participate in the fund and not *per stirpes*.

"Enclosed in the said letter of John B. Shipman was a list containing the names of over one hundred and fifty of the claimants herein, the names of their ancestors and number on the pay-roll of 1843 and 1844 being given as stated in the letter."

The report of agent Shelby was made a part of the findings of the court. The manner in which he proceeded to ascertain who were entitled to be added to the Cadman roll was thus summarized in the opinion below:

"His report to the Commissioner of Indian Affairs, March 14, 1896, shows that he traveled through the country where these Indians resided, or were supposed to reside, and notified them, so far as he could, to appear and prove their cases. In his report he said: 'I found these people very badly scattered, and as they do not frequent post offices, the notices prepared for me to be posted in the various post offices, to give them notice of my coming, were of but little value. In nearly every instance, on reaching the vicinity of these Indians, I had to take teams and drive to their homes. I got, however, the newspapers to publish the principal points I would visit.' A number appeared, some of whom claimed because their ancestors' names were on the rolls of 1843 and 1844, others because they had Pottawatomie blood in their veins. All of these applicants were rejected for various reasons; some because their proof was insufficient; some because they or their forefathers had allied themselves with other Indian tribes; some because their fathers' names had been erroneously placed, in the opinion of Indian agents, upon the former rolls, and had been dropped from subsequent rolls."

There was no finding that any notice had been given to Mr. Shipman of the movements of agent Shelby, nor was it found that any of the Indians whose names were furnished by Mr. Shipman to the Secretary of the Interior ever had actual notice of the investigation which the representative of the Secretary of the Interior made intermediate the receipt of the instructions of February 5, 1896, and the return of Shelby to Washington in the early part of the following month.

On April 22, 1899, the present action was instituted in the Court of Claims, the petition being filed on behalf of Phineas Pam-to-pee and 362 other named Indians, alleged to be a portion of the Indians in whose favor the judgment for $104,626 was rendered. The proceedings in the prior actions were set out and the passage of the various appropriating acts to which

allusion has already been made was averred, as also that distribution had been made of the greater part of the funds among 273 Indians, while nothing had been paid to the petitioners. Judgment was prayed for such proportionate amount of the various funds as the evidence might show the petitioners were entitled to, to be "allotted and awarded to them severally."

After issue joined, the cause was tried and the Court of Claims filed findings of facts and conclusions of law. Finding III has heretofore been set out. Finding IV reads as follows:

"None of the Indians, parties in or represented by the present suit, were paid as aforesaid. A large number of them, to wit, 272, whose names are set forth in Schedule A annexed to claimants' requests for findings were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844, and 1866. A portion of the Indians who remained in Michigan as coming within the exemption of the treaty of September 27, 1833, were represented in both petitions in the cases of the *Pottawatomie Indians* v. *The United States* and the *Pam-to-pee Indians* v. *The United States*."

The Court of Claims thus expressly found that a large number of the Indians, claimants in this suit, had received nothing in the distribution made by the Secretary of the Interior, although some of these Indians were parties to or represented in the consolidated case, and were also represented by Mr. Shipman before the Secretary of the Interior, and were entitled to share in such distribution. In addition, from the facts found concerning the investigation made by Agent Shelby prior to the distribution referred to, the court below expressed the opinion that the investigation by Agent Shelby "was hurried, and to the judicial mind is unsatisfactory." Moreover, the court, considering the judgment rendered in the previous consolidated case and the acts of Congress making the appropriation to pay the judgment of $104,626, arrived at the conclusion that "there is not a line in the judgment of this court or in any statute of Congress which empowered or authorized the Secretary to dispose of the fund." It was decided that the suit must be dismissed, because the petitioners had been guilty of such laches in pressing their claims after the appropriation was made and whilst the distribu-

tion was pending, as to debar them from all right to relief at the hands of the court.

It is difficult for me to determine precisely on what ground the theory of laches was predicated. In one aspect of the opinion below it would seem to have been rested upon the theory that, as the distribution of the money was a judicial act and not an administrative one, it was incumbent on the petitioners to have invoked the power of the court to control the Secretary of the Interior and compel him to distribute the money rightfully; on the other, that although the petitioners had formally notified the Secretary of their claims, they were nevertheless guilty of laches because they did not foresee that that officer would distribute the money without notice to them, and after an investigation which the court itself finds to have been wholly unsatisfactory to the judicial mind.

In the argument at bar the error which was committed in the distribution in question as shown by the facts found by the court below is not disputed. On the contrary, in addition to the error in the distribution so shown, it is expressly conceded that the distribution was besides fundamentally wrong, because it was made on an illegal basis. Thus it is said in the brief on behalf of the United States:

"It appears from the record in this case that the judgment was distributed not *per stirpes* but *per capita*. That is to say, all the Indians discovered were allowed to participate equally in the fund, irrespective of the generation to which they belonged. The son of an Indian who appeared on one of the pay rolls was allowed only the same amount which each of, say, five grandchildren of an Indian on one of the pay rolls was allowed. They should have taken by representation. The aggregate of the five shares of the five grandchildren mentioned should have equaled the share of the son of the original payee. The consequence is that the whole judgment was distributed on a wrong basis. The payments became due to individuals at various times. The record discloses no reason why the estate of the individual to whom such payment was due is not entitled to the whole of such payment.

"If any one on the pay rolls at the time the annuities became

due died without heirs who could inherit, there is no reason why this share should not escheat. It is perfectly evident that a mere enumeration of the Indians, and an equal division among them, does not fulfill the requirements of the situation."

The deduction which the government makes from the admission just quoted being that the petitioners are not entitled to relief, because relief cannot be administered without making parties defendant all those to whom the distribution was made and securing an entire readjustment and settlement of the rights of all parties.

This court now affirms the judgment of the court below. In effect the application of the rule of laches made by the lower court is approved, and the decisive result of the laches is additionally sustained by the conclusion that, although it was not shown that any notice was served upon the petitioners prior to the distribution made by the Secretary of the Interior, the presumption that the officers of the government discharged their duty raises the legal inference that before making the payment such full and fair investigation had been made by the executive officers as warranted the paying out of the money in the manner in which it was disbursed. This court now, moreover, holds that as the judgment in the consolidated case, although it only found the amount due to the Pottawatomie Indians in Michigan and Indiana as a body, had remitted the question of what Indians were entitled to such gross sum to the proper executive department of the government, the executive officers who made the distribution in effect acted under the order of the court.

The jurisdiction to entertain the action can alone be predicated upon the following considerations: First, the act of Congress of 1890, by the authority of which the original judgment in the consolidated case was rendered, or upon the judgment thus rendered; or, second, the appropriation made by Congress to pay such judgment and the acts of Congress in connection therewith.

By section 1066 of the Revised Statutes it is provided that the jurisdiction of the Court of Claims "shall not extend to any claim against the government . . . growing out of or dependent on any treaty stipulation entered into . . . with

the Indian tribes." Clearly, therefore, aside from the jurisdiction conferred by the act of 1890, there was no power in the courts to consider and determine the question of the proper distribution of the funds due the Pottawatomie Nation of Indians, or to fix the just proportion to which the Pottawatomie Indians of Michigan and Indiana were entitled. Now, the act of 1890, which conferred jurisdiction on the Court of Claims to determine the sum due the Pottawatomie Indians of Michigan and Indiana out of the tribal funds, was susceptible of being construed in one of two ways: First, that it alone delegated the power to determine the aggregate amount of the just proportion of the tribal funds due to the Indians in question, or that it conferred such authority, and, in addition, imposed the duty of ascertaining the particular Indians who were entitled to share in the distribution when the total sum for distribution was judicially determined. That the statute embraced only the first power, that is, of fixing the aggregate amount, seems to me to conclusively result from the judgment rendered by the Court of Claims and affirmed by this court. It cannot be doubted that the Court of Claims expressly decided that the authority conferred by the act of 1890 related only to determining the aggregate amount, and not to the ascertainment of the particular persons entitled to share in the same and the amount they were respectively entitled to take. True, this court, in its opinion, in 148 U. S. 691, referred to the absence of evidence as to who were entitled to the distributive shares, and the impossibility of rendering a decree on that subject, yet it nevertheless, in affirming the judgment, expressly approved the conclusion of the Court of Claims limiting the judgment to the determination of the aggregate amount and leaving the distribution of that sum, when Congress should thereafter appropriate therefor, to the action of the executive officers of the government.

It follows that the jurisdictional power conferred by the act of 1890 was exhausted by the decree of affirmance, and the subsequent distribution of the gross sum when the appropriation had been made was solely a matter within the jurisdiction of Congress and the administrative officers of the government.

That such was the legislative conception of the effect of the judgment of affirmance rendered by this court, is conclusively shown by the appropriation to pay the money and the other legislative acts concerning that sum and other sums awarded to the Indians in question, since such acts treat of the ascertainment of the individuals entitled to the gross amount found due as a purely administrative question, with no intimation whatever that it was conceived that the administrative discretion which the acts imposed was subject to be reviewed and controlled by the judicial branch of the government. To repeat, the jurisdiction, under the act of 1890 having been exhausted and the judgment fixing the aggregate sum having expressly remitted the distribution to the administrative branch of the government, it follows that no support for the jurisdiction over the present suit, either in the Court of Claims or in this court, can be founded upon the act of 1890 or the judgment rendered thereunder. Did, then, jurisdiction arise from the act of Congress appropriating the sum necessary to pay the judgment referred to or from the other appropriation acts to which reference has heretofore been made?

From what has already been stated, it would seem that a negative answer must be given to this question. In view of the terms of section 1066 of the Revised Statutes, I think it is clearly requisite that the intention of Congress to commit to the courts the ultimate regulation and control of a distribution *prima facie* intended to be made or expressly directed to be made among unascertained beneficiaries by the executive officers of the government, should be plainly made to appear before it should be held that such authority was conferred on the judiciary. Now there had been no claims presented to Congress on behalf of Pottawatomie Indians seeking individual relief; but the claims urged were on behalf of the whole body of Pottawatomie Indians in Michigan and Indiana, who asserted the non-payment of their just proportion of the tribal annuities. On twenty-four different occasions, during as many years, Congress, through the Interior Department, had ascertained and determined who were the individuals constituting the Pottawatomie Indians of Michigan aud Indiana, entitled to a just

proportion of tribal annuities, and neither in the jurisdictional act of 1890 nor in any of the appropriating acts was language used importing that it was deemed that a necessity existed for a judicial ascertainment of the particular individuals who might possess a right to share in the "just proportion" referred to. The various acts in which the appropriations in question were embodied made provision for numerous other appropriations, in compliance with stipulations embodied in treaties made with sundry Indian tribes, and as in the particular appropriating paragraphs in question payments were merely directed to be made to unascertained individuals constituting a body of Indians, there was certainly no clearly implied or expressed intention that the payments should be subject to the ultimate control of the courts or that the disbursement of the funds should be under any other direction or control than that of the Secretary of the Interior, who had made prior payments of a similar character upon his own ascertainment of the individual beneficiaries. As a matter of fact, also, a contrary intent is clearly manifested in several of the appropriating paragraphs. Thus, in the act of March 2, 1895, 28 Stat. 894, the duty is expressly imposed on the Secretary of the Interior to take a census of the Indians who were entitled to the fund appropriated by the previous Congress to pay the judgment of $104,626, thus implying that there had not been any provision in the judgment of the Court of Claims or of this court for the ascertainment of such individual beneficiaries; and one thousand dollars was appropriated "*for the purpose of making the payment*," obviously to those who, by a proper performance of the duty imposed on the Secretary of the Interior, should be found to be embraced within the class. So, also, in the same act, 28 Stat. 885, the absolute control which Congress deemed it was exercising for the distribution of the sums found due to the Indians as a body was evinced in the direction to the Commissioner of Indian Affairs "to withhold from distribution among the said Indians so much of any moneys due them by the United States as may be found justly and equitably due for legal services rendered, and to pay the same on account of the prosecution and recovery of the moneys aforesaid." Bearing in mind that the appropriated

sums in question, though a "just proportion," were in fact tribal funds, and that the expenditure of tribal funds is peculiarly regulated by Congress and committed to the Indian Department, Rev. Stat. sec. 2086, *et seq.*, it seems to me beyond reasonable controversy that Congress intended that the ascertainment of the particular beneficiaries entitled to the funds and the distribution among them should be performed solely by its own agencies.

The decision in *United States* v. *Weld*, 127 U. S. 51, is not an authority opposed to the views just expressed. In that case a judgment had been rendered by the Court of Commissioners of Alabama Claims, in favor of certain claimants, and they had received a portion of such judgment. The amount of the gross fund due all claimants had been fixed in the statute, what should be deducted had been specifically declared, and it had also been explicitly provided that the balance which would necessarily result should be distributed to the judgment creditors. The holding of this court was simply that creditors, whose claims against the fund had been adjudicated by the commission provided for in the statute, possessed a right to sue in the Court of Claims to recover their share of a portion of the fund which had been improperly retained by the Treasury Department.

Being of opinion that the judgment below should be reversed for want of jurisdiction, and that the sole remedy of the petitioners lies in an appeal to the fairness and sense of justice of the legislative branch of the government, it would, of course, be out of place for me to discuss the grounds upon which the laches is held to apply. It is manifest, however, that the reasoning by which I have been led to the conclusion that the court was without jurisdiction, if sound, is in absolute conflict with the theory that laches can be imputed to the petitioners because they did not invoke the aid of the court below to control the discretion to distribute the money vested in the Secretary of the Interior by the acts of Congress making the appropriations. This ground of laches being put out of view, the only other theory upon which it can be rested is, that although the petitioners formally presented their claim to the Secretary of the Interior and called his attention to their rights,

they yet lost them because they did not foresee that that officer would, without notice, proceed to distribute the money to the wrong persons and upon a basis which the government now, whether advisedly or not I need not consider, declares to have been absolutely unjust and illegal.

I am authorized by MR. JUSTICE MCKENNA to say that he joins in this dissent.

YOUNG WOMEN'S CHRISTIAN HOME *v.* FRENCH.

FAUL *v.* FRENCH.

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

Nos. 73, 74. Argued November 5, 6, 1902.—Decided January 5, 1903.

By her last will and testament Mrs. Sophia Rhodes provided for her husband by securing to him the income from one half her estate, subject to which the whole was devised and bequeathed to her only son; in the event of her son's predecease, the entire estate to trustees in trust for the husband for life, and on his death to the Young Women's Christian Home; in the event testatrix survived husband and son, then to the Home. The mother and son survived the husband, and perished in a shipwreck, going down together. The estate was claimed by the next of kin of Mrs. Rhodes; by the next of kin of the son; and by the Young Women's Christian Home. *Held:*

(1) That there is no presumption of survivorship in the case of those who perish by a common disaster, in the absence of proof tending to show the order in which dissolution took place; and, actual survivorship being unascertainable, descent and distribution take the same course as if the deaths had been simultaneous.

(2) Whether by a particular will a condition precedent, a condition subsequent, or a conditional limitation is imposed, is, in the absence of unmistakable language, matter of construction, arrived at in view of the familiar rules that the intention of the testator must prevail, and that intestacy should be prevented, if legally possible.

(3) As the state of facts at the time of Mrs. Rhodes' death did not substantially differ from what the will showed she contemplated when

Statement of the Case.

it was executed, the interpolation of some phrase covering the contingency of inability to ascertain survivorship is unnecessary, and her intention as sufficiently declared on the whole will may be carried into effect.

(4) The use of the words, "if she survived," instead of the words, "if they did not survive," is not material, and, on principle, the estate of Mrs. Rhodes should go as directed as if she survived her son, in the absence of proof to the contrary. The property remained where it was vested, there being no evidence that it had been divested.

THESE are appeals from a decree of the Court of Appeals of the District of Columbia on a bill of interpleader exhibited in the Supreme Court of the District by the administrators with the will annexed of the estate of Sophia Rhodes, deceased. At the conclusion of the administration there remained in the hands of the administrators a fund of $14,891.89 for distribution, which was claimed by the Young Women's Christian Home, a corporation of the District of Columbia, created by act of Congress; the next of kin of Sophia Rhodes; and the administrator of the estate of Eugene Rhodes, deceased; and the interpleader was filed to determine the rights of the parties.

The will of Sophia Rhodes was executed at Washington, May 10, 1894, and read as follows:

"In the name of the bountiful Giver of all. Amen.

"I, Sophia Rhodes, of the city of Hutchinson, in the State of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

"I now dispose of the property and estate which it has pleased Almighty God to intrust to me, as follows, viz.:

"*Imprimis.* I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

"*Item* 1. I give, devise and bequeath unto my husband Oliver Wheeler Rhodes, during his life one half (½) of the income from all my properties and estate in the next following item of this last will and testament disposed of, to be paid

over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

"*Item* 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"*Item* 3. In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz.:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name us the giver connected with them during that time.

"2d. All the rest and residue of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"*Item* 4. In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution.

It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

"*Lastly.* I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

The facts were stipulated, and may be shortly stated thus: Oliver Wheeler Rhodes died at Washington, January 27, 1895, at which time his wife, Sophia Rhodes, and their only child, Eugene Rhodes, were in Heidelberg, Germany. They sailed for home from Bremen on the steamship Elbe at three o'clock P. M. on Tuesday, January 29, 1895. About half-past five o'clock the next morning the Elbe collided with another steamship, and sank in about twenty minutes after the collision. Mrs. Rhodes was about fifty-two years old, corpulent, and short of breath, and her son was about twenty-three years old, a single man, and rather a good swimmer. His body came up in a fishing net off the coast of Holland some six weeks after the collision, but his mother's body was never recovered. Of the persons who survived the shipwreck, only two had any knowledge of the mother and son at the time of the disaster. One of them saw Mrs. Rhodes come out of her cabin just after the collision with a blanket over her night dress, and some minutes later saw her son. The other saw the mother and son on deck after the collision, the son endeavoring to put a shawl around his mother, and she with her arms thrown around her son's neck. This person was the last to get into the last boat to leave the ship, and, when it had gotten some distance away, the ship went down with a lurch and every one on board was drowned. He testified that "both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosened until after death, no one else saw them."

The Supreme Court of the District held that there was no presumption of survivorship as between the mother and son; that the will manifested an unmistakable desire to guard

Argument for Appellant, Young Women's Christian Home.

against intestacy; and that the intention of Mrs. Rhodes was clearly apparent that if her husband and son should not survive her so as to receive the property, or if it remained under her control at the time of her death, it should go absolutely to the charity she had named, the Young Women's Christian Home; and decreed accordingly. From this decree Barbara Faul and Andrew Wasner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, carried the case to the Court of Appeals of the District, which concurred in the view that there was no presumption of survivorship as between the testatrix and her son, but held that the terms of the will "vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a *prima facie* right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival;" and that the representatives and next of kin of the son were entitled to the entire fund. The decree was thereupon reversed, and the cause remanded to the court below with a direction to enter a decree in conformity with that conclusion. 18 App. D. C. 9.

Mr. J. J. Darlington, with whom was *Mr. John B. Larner* on the brief, for the appellant, the defendant in error, the Young Women's Christian Home:

The facts relied upon by which to uphold his contention that as Eugene Rhodes was younger than his mother, as well as the stronger and a good swimmer he should be presumed to have survived are insufficient under the common law to create any presumption upon which the courts can act; and in the absence of evidence mother and son will be presumed to have died simultaneously; citing English authorities as follows: *Bradshaw* v. *Toumlin*, 2 Dick. 633; *Wright* v. *Samada*, 2 Phill. 261; *S. C.*, 2 Salk. 593; *Satterthwaite* v. *Powell*, 1 Curt. Ecc. Rep. 705; *Durant* v. *Friend*, 5 De G. & Sm. 343; *Barnett* v. *Tugwell*, 31 Beav. 232; *Underwood* v. *Wing*, 19 Beav. 459; *S. C.*, *sub nomine*, *Wing* v. *Angrave*, 8 H. L. C. 183; *In re Wainwright*, 1 Sw. & Tr. 257; *In re Ewart*, 1 Sw. & Tr. 258; *In re Wheeler*, 31 L. J. P. & M. 40; and

American authorities as follows: *In re Ridgway*, 4 Redf. 226; *Stinde* v. *Goodrich*, 3 Redf. 87; *Newell* v. *Nichols*, 12 Hun, 604, affirmed 75 N. Y. 78; *In re Hall*, 9 Cent. L. J. 281; *Johnson* v. *Merithew*, 80 Maine, 111, 116; *Cowman* v. *Rogers*, 73 Maryland, 403; *Ehle's Estate*, 73 Wisconsin, 445, 459–460; *In re Willbor*, 20 R. I. 126.

Citing also where the testator and beneficiary having perished together, the property was distributed as that of the owner at the time of the common disaster, *Taylor* v. *Diblock*, 2 Phill. Eccl. Rep. 261; *Mason* v. *Mason*, 1 Meriv. 308; *Goods of Murray*, 1 Ecc. Rep. 596; *Doe dem. Knight* v. *Nepean*, 27 E. C. L. 45; and in cases of intestacy, where a similar rule had been followed as to intestate and heir, *Johnson* v. *Merithew*, 80 Maine, 116; *Ehle's Estate*, 73 Wisconsin, 445; *Russell* v. *Hallett*, 23 Kansas, 196–7; *Coye* v. *Leach*, 8 Metc. 375; *Schaub* v. *Griffin*, 84 Maryland, 562, 566; *Satterthwaite* v. *Powell*, 1 Curt. Ecc. Rep. 705; *In re Wilbor*, 20 R. I. 126.

Also citing on other points, *Wollaston* v. *Berkeley*, L. R. 2 Ch. Div. 213; *Scrutton* v. *Patillo*, L. R. 19 Eq. 369; 24 Am. & Eng. Ency. 1027–32. As stated in *Newell* v. *Nichols*, 12 Hun, 604, affirmed 75 N. Y. 78, "when a testator means to dispose of all his property, and uses the words 'if the legatee should not survive,' it is held to mean 'if the preceding legacy should from any cause fail,'" citing *Avelyn* v. *Ward*, 1 Ves. Sr. 419; *Rickman* v. *Morgan*, 2 Brown's Chancery Cases, 396; *Jones* v. *Westcombe*, 1 Eq. Abbt. 245; *Foster* v. *Cooke*, 3 Brown's Ch. 347; *Doo* v. *Brabant*, 3 Bro. C. C. 397; *Taylor* v. *Taylor*, A. & R. 386; *Jackson ex dem. Beach* v. *Durland*, 2 Johns. Cas. 314. The intention is to be carried into effect, where apparent, although expressions must be discarded or modified to effectuate that purpose, and the testator must not be presumed to have died intestate if possible. *Towns* v. *Wentworth*, 11 M. P. C. 520; *Abbott* v. *Middleton*, 7 H. L. Cas. 68; *S. C.*, 21 Beav. 143; *Liston* v. *Jenkins*, 2 W. Va. 62, and cases cited; *Cox* v. *Britt*, 22 Arkansas, and cases cited; *Chapman* v. *Brown*, Burr. 1635, Lord Mansfield; *McKeehan* v. *Wilson*, 53 Penn. St. 74; Redfield on Wills, 454, note 1; Jarman on Wills, 456, 414, Cap. 17; *Anlick* v. *Wallace*, 12 Bush, 531, citing numerous authorities;

Argument for Appellants, Faul *et al.*

In re Redfern, 6 Ch. Div. 133; *Doe dem. Leach* v. *Micklem*, 6 East, 486; *Eatherly* v. *Eatherly*, 1 Cold. 461; *Freeman* v. *Freeman*, 8 Vin. Abr. tit. Devise, 51; *Sessoms* v. *Sessoms*, 2 Dev. & B. 453; Perry on Trusts, sec. 724; *Key* v. *Key*, 4 De G. M. & G. 73; *Pearsoll* v. *Simpson*, 15 Ves. 29; *Robison* v. *Portland Orphan Asylum*, 123 U. S. 702; *Smith* v. *Bell*, 6 Pet. 68, 80; *Patch* v. *White*, 117 U. S. 210; *In re Swenson's Est.*, 55 Minnesota, 300; *Yates* v. *Shern*, 84 Minnesota, 165; *Metcalf* v. *Framingham Parish*, 128 Massachusetts, 370, 374; *Finley* v. *King's Lessee*, 3 Pet. 377; also citing and distinguishing *Illinois Land Co.* v. *Bonner*, 75 Illinois, 317; *Gibson* v. *Seymour*, 102 Indiana, 485; *Rupp* v. *Eberly*, 79 Pa. St. 141.

That under the principles of construction governing wills, and especially the principle which subordinates the letter to the plain intention, to be gathered from the testator's standpoint and from the four corners of the instrument, the Young Women's Christian Home is the party intended by the will of Mrs. Rhodes, under the circumstances which have occurred, to receive her estate; and that the principle deducible from the authorities upon the subject is, that, under the English law, the estate of the person so dying is to be administered as though he, as to that estate, was the survivor, and that the estate of Mrs. Rhodes is accordingly to be so administered.

Mr. A. A. Hoehling, Jr., on behalf of Barbara Faul *et al.*, next of kin of the mother, appellants, and whose contentions were opposed to those of the Young Women's Christian Home:

I. It is not permissible under the guise of construction to incorporate distinct provisions into a will, nor to insert therein conditions or contingencies not provided for by the testatrix. Redfield on Wills, vol. 1, 4th ed. par. 33–1, pp. 458–472; Roper on Legacies, vol. 1, p. 750; 2 Roper on Legacies, 1464; 2 Redfield on Wills, 283; *Wing* v. *Underwood*, 4 De G. M. & G. 633, 654; *Wing* v. *Angrave*, 8 H. L. 205; *Illinois Land Co.* v. *Bonner*, 75 Illinois, 317; *Gibson* v. *Seymour*, 102 Indiana, 485; *Rupp* v. *Eberly*, 79 Penn. St. 141.

II. The will of the testatrix does not show an intent that

the Home should receive her entire estate, save only in the event of the substantial survivorship of the son.

III. The authorities cited by counsel for the Home are not in point. *Finley* v. *King's Lessee*, 3 Peters, 346; *Clark* v. *Boorman's Exrs.*, 18 Wall. 493; *Colton* v. *Colton*, 127 U. S. 300; *Lee* v. *Simpson*, 134 U. S. 572; *Robison* v. *Orphan Asylum*, 123 U. S. 702; *Metcalf* v. *Framingham Parish*, 128 Massachusetts, 370, 374, cited and distinguished.

IV. Where two or more persons perish in a common disaster, and the order of their deaths is unascertainable by evidence, there is no legal presumption of survivorship in favor of any such persons, and in such case property rights are disposed of as if death had occurred to all at the same time. Citing cases on brief of other appellant, and *The King* v. *Hay*, 1 Wm. Black. 640; *Murray's Case*, 1 Curteis, 596; *Satterthwaite* v. *Powel*, 1 Curteis, 705. *Silleck* v. *Booth*, Younge & Collyer Ch. Rep. 121; *In re Selwyn*, 3 Hagg. Eccl. Rep. 748, cited and distinguished.

Mr. J. W. Smith and *Mr. William Henry Dennis* on behalf of the administrator of Eugene Rhodes, the son, appellee:

In whatever way the matter may be reasoned out, whether by choosing among the three contingencies possible—that the mother, the son, or neither, survived the other—or by passing those contingencies by as unascertainable and seeking ground beyond for *prima facie* right, the result must be the affirmance of the decision appealed from, for, if the former course be followed, the son's survivorship must be found as a fact, and if the latter be followed, every other ground for *prima facie* right must be deemed secondary and subordinate to that of the unextinguished and unextinguishable preference made by the will and the law in the son's favor.

The evidence was sufficient to show that the son survived his mother: by reason of his better size, stronger sex and the nature of his clothing, he was better able to withstand the death cause; his knowing how to swim would ward off despair and collapse and give him self-possession to look out for wreckage and keeping afloat; his younger and warmer blood would

stand him in good stead in the icy waters of the North sea; "when shipwreck occurs men are more apt to be saved than women. . . . Persons with apoplectic tendencies (the mother was corpulent and short winded) are more apt to be struck with the disease when precipitated into the water." Wharton and Stillé, Med. Jur. § 726. Of 60 women and 70 children on the Elbe only one woman survived; only one woman out of 176 was saved on the Burgoyne; not a woman or child was saved on the Atlantic.

Where rested the fatal *onus* at the start? As between the Home as legatee, and testatrix's next of kin—if not her son, then her brother and sister. The next of kin having a *prima facie* right, the *onus probandi* is on the other party.

In such cases the common law requires evidence from start to finish, judgment going in the end, if there be not evidence enough to shift the burden of proof, against the party resting under that burden at the start.

Neither a codemise nor a survivorship is presumed by law, nor is the evidence such cases admit of sufficient to shift the burden of proof.

As between a testator's next of kin and his legatee, the burden rests on the legatee of proving the contingency or contingencies that underlie his bequest, the next of kin having *prima facie* right at the start; or, as applied to the cases at bar, the burden lies on the Home of proving codemise or the mother's survival (*i. e.* the son's non-survival), the next of kin, whoever they were, having *prima facie* right.

Citing many of the authorities on appellants' briefs and also Best's Ev. Book III, pt. 1, 369; *Balder* v. *Middeke*, 92 Ill. App. 227; Greenleaf on Evidence, 16th ed. note 5, § 30, p. 126; *Hildebrant* v. *Armes*, Texas Ct. of Appeals, 1901, 66 S. W. 128; *Ommany* v. *Stillwell*, 23 Beav. 330.

In the construction of the will the most natural intention was that the property was not to be willed away from the son at all *unless* he was no longer in being to take it at his mother's death; and the real question is not whether the son survived any length of time, but where the burden rests of proving the order of deaths. The claim of the Home draws its strength,

not so much from what *is* in the will as from what, judging from this post-mortem statement, *ought* to be there.

As to who are the next of kin, the *onus* rests on the *remoter* kin to prove that all the *nearer* kin once known to exist had ceased to exist before the testator's death. *Emerson* v. *White*, 29 N. H. 482; *Schaub* v. *Griffin*, 84 Maryland, 557; *Posey* v. *Hanson*, 10 D. C. App. 496; Wharton's Ev. sec. 1280; *Cowman* v. *Rogers*, 73 Maryland, 403. Other cases cited in opposing briefs distinguished.

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

The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, and that circumstances surrounding a calamity of the character appearing on this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous. *Underwood* v. *Wing*, 4 De Gex, M. & G. 633; *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Newell* v. *Nichols*, 12 Hun, 604; *S. C.*, 75 N. Y. 78; *Johnson* v. *Merithew*, 80 Maine, 111; *Cowman* v. *Rogers*, 73 Maryland, 403; *Russell* v. *Hallett*, 23 Kansas, 276; *In re Willbor*, 20 R. I. 126; 1 Greenl. (15th ed.) §§ 29, 30.

Conceding this to be so, the next of kin of Mrs. Rhodes contend that her estate has passed to them as in case of intestacy, because it does not appear that the son survived the mother, or that the mother survived the son, and the estate was given to the son only in the one event, and to the Young Women's Christian Home only in the other. This view was rejected by the District Supreme Court in holding that the intention of the testatrix was plain that the Young Women's Christian Home should take in the event that the husband and son did not survive her, and should be carried out; and the Court of Appeals rejected it in holding that the will by its terms vested the

estate in Eugene Rhodes immediately on the testatrix's death, and that a *prima facie* right existed in the personal representatives of the son, which was not displaced by proof of the mother's survival.

The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail if consistent with the rules of law. And another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given. *Kenaday* v. *Sinnott*, 179 U. S. 606, 616.

In this case, we think it is apparent that Mrs. Rhodes designed to dispose of her entire property; to provide for her husband by securing to him for life an income from one half of her estate; to provide for her son by leaving him the estate absolutely, subject to the husband's income; and, if her son died before his father, that the husband should have the income of the whole estate for his life, and at his death the estate should go to the Young Women's Christian Home. But that if her husband and son should both be dead when she died, the estate should go at once to the charitable institution, that is to say, that if they did not survive her, the property on her death was immediately to take that destination.

But the argument is that the testatrix's wishes cannot be carried out, inasmuch as, it is insisted, each of the devises and bequests was on the express condition of survivorship, and to give effect to the alleged intention would require the interpolation of some phrase covering the contingency of inability to ascertain survivorship, which interpolation would be wholly inadmissible.

This, however, is matter of construction, and if the state of facts at the time of Mrs. Rhodes' death did not substantially differ from what the will shows she contemplated when it was executed, then no interpolation is required, and the property must go according to the intention necessarily deducible.

The applicable principle is well expressed by Mr. Justice

Gray, then Chief Justice of Massachusetts, in *Metcalf* v. *Framingham*, 128 Massachusetts, 370.

The case is stated in the head notes thus: "A testator bequeathed personal property in trust for the benefit of his wife's sister and her husband during their lives, as follows: During her life, to pay the net income to her semi-annually; in case she should die before him, to transfer one half of the principal to a charitable institution, and to pay the income of the remainder to him during his life; in case he should die before her, then at her death to transfer the whole of the principal to the same institution. She died before her husband, and one half of the principal was paid to the institution and the other half kept in trust for him. *Held*, that on his death the institution was entitled to this part of the principal also, and that it did not pass to the residuary devisees; although a similar bequest for the benefit of another husband and wife contained an express direction for a transfer of the second half of the principal to the charitable institution upon the death of the survivor."

Gray, C. J., said: "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

"It is a question in each case," said Mr. Justice Matthews in *Robison* v. *Portland Orphan Asylum*, 123 U. S. 702, "of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." In that case Robison left a will providing, thirdly, that his widow should have the income of all his estate, with the right to spend it, but not to have it accumulate for her heirs; fourthly, that if his sisters, Ann Smith and

Eleonora Cummings Robison, "be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate so long as they may live, and at their death to be divided in three parts, one third part of the income to go to the Portland Female Orphan Asylum," and one third to each of two other institutions. Both sisters died before the testator.

It was ruled that the fact that the sisters died before their brother, "whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift;" that unless it appeared on the face of the will "that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which, by reason of the contingency, has failed;" and that considering the third and fourth subdivisions together, the limitations were to be taken as a complete disposition of his estate, in the mind of the testator, who did not intend to die intestate as to any portion thereof, giving to the widow an estate for life, with an estate over for life to the sisters, contingent on surviving the widow, and with the ultimate remainder to the charitable institutions.

In *Newell* v. *Nichols*, 12 Hun, 604, affirmed in 75 N. Y. 78, a wife had died leaving a husband and two children, a son and a daughter. By her will she created three funds, one of $30,000, the income of which was to go to her husband, and, on his death, the principal to the heirs of her body then living, and in default of such heirs to certain named remaindermen; another fund of $15,000, the income to be paid to the daughter during her life, the principal to be paid at her death to the heirs of her body then living; in default of such heirs, to her appointees by will; and in default of appointment, to the heirs of the body of the testatrix then living, and in default of such heirs, then to the same remaindermen; while a third sum of $15,000 was settled upon the son as to the income, with the same provisions

as to the principal at his death as in respect of the daughter. The husband and children were lost at sea, and there was no evidence of survivorship between them. The case was decided at special term by Van Vorst, J., whose careful and elaborate opinion was adopted by the court in general term, and fully approved by the Court of Appeals. It was held that the intention of the testatrix plainly was that the limitation over to the remaindermen should be effectual if for any reason the children could not take, and that the death of the children without issue or appointment, under the circumstances, and in the absence of evidence of survivorship, entitled the remaindermen to have the limitation carried into effect.

It was observed by Van Vorst, J.: "Where a devise is limited to take effect upon a condition or contingency annexed to a preceding estate, if that preceding estate should not arise the remainder over will take place, the first estate being considered as a preceding limitation and not as a preceding condition. . . . As when a testator meant to dispose of all his property and uses the words, 'if the legatee should not survive,' held to mean 'if the preceding legacy should from any cause fail.'"

Underwood v. *Wing* and *Wing* v. *Angrave* are relied on to the contrary. 19 Beavan, 459; 4 De Gex, M. & G. 632; 8 H. L. Cas. 183.

The facts were these: Underwood and his wife had three children—Catherine, Frederick and Alfred. Being about to emigrate with their children, Mr. and Mrs. Underwood made mutual wills, dated October 4, 1853. Mr. Underwood by his will devised his real and personal estate to Wing, his heirs, etc., in trust for Mrs. Underwood, her heirs, etc., absolutely; and the will proceeded: "And in case my said wife shall die in my lifetime, then I direct that my said real and personal estate shall be held by my said trustee, upon trust for such of them, my three children, Catherine Underwood, Frederick Underwood and Alfred Underwood, as, being sons or a son, shall attain the age of twenty-one years, and being a daughter, shall attain that age, or marry under that age, to be equally divided between or among them, share and share alike; and in case all

of them my said children shall die under the age of twenty-one years, being sons, or under that age and unmarried, being a daughter, then I give, devise and bequeath all my real and personal estate, as aforesaid, unto and to the use of the said William Wing, his heirs, executors, administrators and assigns, to and for his and their own absolute use and benefit." And the testator appointed his wife and defendant Wing executors. Mrs. Underwood by her will, made by virtue of a power, devised, bequeathed and appointed all the real and personal estate subject to the power, to Mr. Underwood, his heirs, etc., absolutely; and the will proceeded: "(Subject to the estates and interests of my children therein, under or by virtue of the will of the said John Tulley, deceased.) And in case my said husband should die in my lifetime, then I devise, bequeath and appoint the said hereditaments and premises, and sum and sums of money, and arrears of income aforesaid, unto and to the use of William Wing, his heirs, executors, administrators and assigns, to and for his and their own absolute use and benefit." And she appointed her husband and William Wing executors.

Mr. and Mrs. Underwood and their three children embarked for Australia, their ship foundered, and all on board, with the exception of one sailor, perished. Both parents and the two boys were washed into the sea by the same wave, but the daughter survived for half an hour. All the children died under twenty-one and unmarried. Wing proved both wills and plaintiff obtained letters of administration of the estate of Catherine Underwood. 19 Beav. 459, 460.

The courts agreed in the conclusion that at common law there could be no presumption of prior decease in the absence of proof, although the evidence tended to show that the husband was in good health and an able swimmer, while his wife was in delicate health, and their children of tender age; and this ruling has ever since been accepted in the English courts and by the uniform current of authority in the United States.

Under the wills, the husband, wife and children, having practically died simultaneously, the intention of both testators that their estate should pass to Mr. Wing seemed plain, but

the House of Lords (and the courts below) held otherwise, and that as Mr. Wing could not show either that the death of the husband occurred in the wife's lifetime, or that the wife's death occurred in the husband's lifetime, he could receive neither estate. In the construction which produced this result it cannot be said that the courts of this country have generally concurred. Lord Campbell, then Lord Chancellor, dissented, and, referring to the wife's will, said: "Of course, I fully recognize all the cases where, there being in a will a gift really meant to be on condition, or the happening of a particular event, the court decided that it could not take effect unless the condition was performed, or the event had happened. But the present seems to me to be a case of substitution; to take effect on failure of the prior estate." Granting that effect is to be given to the expressed, not the conjectural or probable intention of testators, he thought that by this will the testatrix clearly expressed her intention that if her husband did not take the property, William Wing should take it. "The lapse of the bequest to her husband by his predecease being substantially the only event upon which the bequest to him could fail, when she says, 'In case my said husband should die in my lifetime,' does she not, in substance say, in case the bequest to my husband should fail, then William Wing is the object of my bounty, and all shall go to him? She has not provided for the event of there being an impossibility to determine whether she or her husband died first. But although she has not in terms provided for this event, she has clearly intimated her intention, that in case of the gift to her husband not taking effect, the ulterior gift to William Wing should take effect. And this seems to me not to be an interpolation into her will, but a necessary implication from what she has said. How can it be supposed that if she had foreseen the event of an uncertainty as to whether she or her husband died first, so that her husband could not take from that uncertainty, she would have altered the intention she had so plainly expressed in favor of William Wing? Can it be considered possible that William Wing would, in that event, have ceased to be the object of her bounty? What other destination of the property, by her, can

be conjectured? If her husband should not take, William Wing was substituted for him. . . . It seems to me to be a fallacy to say that this was a gift merely on the happening of a particular event, unless that event is taken to be the failure of the prior gift to her husband."

It will be perceived that it was held that for the purpose of giving effect to the wills, the husband was not to be assumed to have survived the wife, nor the wife to have survived the husband; and yet, the wills having been thus eliminated, it was declared that the heirs and next of kin of Mr. Underwood were entitled to his property as though he had been the survivor, and that the heirs and next of kin of Mrs. Underwood should take her property as though she had been the survivor.

Whether in a given case a condition precedent, a condition subsequent, or a conditional limitation, is prescribed, is, in the absence of unmistakable language, matter of construction. And conditions cannot be annexed from words capable of being interpreted as mere description of what must occur before the estate given can arise. *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35.

As in all of these cases, so in this, we are remitted to the language of the will to ascertain the intention of the testatrix, and if that intention is clearly deducible from the terms used, taking the whole will together, then we are bound to give that construction which will effectuate and not defeat it. Reading this will from the standpoint of the testatrix, as we must, we think it not open to doubt that she intended to dispose of all her estate, and did not intend to die intestate as to any part of it; that she had in mind only three objects of her bounty, her husband, her son and the Home, and that her intention, failing husband and son, was that the Home should take. If husband alone survived it was to go to the Home at his death. If neither husband nor son survived it was to go to the Home at once. Is her manifest intention to be defeated because instead of saying, "If neither my husband nor my son should survive me, I give and bequeath my property to the Home," she said: "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I give and

bequeath all my property to the Young Women's Christian Home?"

We do not feel compelled to so hold, and, by accepting so technical and literal a view, to reach an adverse result on the theory of a change in the burden of proof, or of an accidental omission to prevent it. This is not a case of supplying something omitted by oversight, but of intention sufficiently expressed to be carried out on the actual state of facts. And as the estates of persons perishing in a common disaster, intestate, notwithstanding the statutes of descent and distribution may not have made provision in respect thereof, are disposed of as if each survived as to his own property, we think, upon principle, that the property of Mrs. Rhodes should go as directed as if she survived her son, in the absence of proof to the contrary.

It necessarily follows that title did not *prima facie* vest in the son, who is not shown to have survived his mother, and must be taken to have died at the same time. The property remained where it was vested, there being no evidence to show that it had been divested.

The situation is illustrated by the case of *In re Willbor*, 20 R. I. 126. There Charlotte, Martha and Eliza Willbor, three sisters, perished in the same calamity, and there was nothing from which it could be inferred that either survived the other. Each left a will devising all her real and personal property, excepting certain legacies, to her two sisters, or either of the survivors, and to their heirs and assigns forever. The Supreme Court of Rhode Island said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. . . . If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters or either of the survivors did not take effect, there being no interval of time as between the deaths of the three during which

titles to property could vest, and the wills therefore stand as if they contained only the bequests to the legatees subsequently named."

The result is that the property passed under the will to the Home, and neither the next of kin of the mother nor the next of kin of the son can defeat its destination.

The decree of the Court of Appeals is reversed and the cause remanded with a direction to affirm the decree of the Supreme Court.

WESTERN UNION TELEGRAPH COMPANY *v.* BOROUGH OF NEW HOPE.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 101. Argued December 2, 3, 1902.—Decided January 5, 1903.

An ordinance of the borough of New Hope, Pennsylvania, imposing an annual license fee of one dollar per pole and two dollars and a half per mile of wire on the telegraph, telephone and electric light poles within the limits of the borough is not a tax on the property of the telegraph company owning the poles and wires, or on its transmission of messages or on its receipts for such transmission, but is a charge in the enforcement of local governmental supervision, and as such is not in itself obnoxious to the commerce clause of the Federal Constitution.

As the elements entering into such a charge are various, and as in this case the courts of Pennsylvania have decided that the charge imposed by the ordinance is reasonable in the circumstances and the ordinance valid, this court does not feel justified in holding that conclusion to be so manifestly erroneous as to require revision.

By an ordinance passed in 1894, the borough of New Hope, Pennsylvania, imposed an annual license fee of one dollar per pole and two dollars and a half per mile of wire on the telegraph, telephone, and electric light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto and had since maintained and operated a line of telegraph poles and wires through the borough, and this was an action brought in the Court of Common Pleas of Bucks

Statement of the Case.

County, in that State, against the company to recover license fees for the four years commencing with 1895. The case came on for trial before the court and a jury, and plaintiff put in evidence the ordinance in question, and it was agreed "between the parties that for the year beginning October 1, 1895, there were seventy-five poles and twenty miles of wire, and for the three succeeding years, beginning October 1, 1896, there were thirty-six poles and twelve miles of wire maintained by the defendant in said borough." Plaintiff then rested, and defendant offered evidence tending to show that the wires were used as through wires, for the transmission of messages between the different States, and the United States and foreign countries; that the company had no office at New Hope, which it operated itself, but that the Philadelphia and Reading Railroad Company handled the business there, and transferred it to the Western Union at Philadelphia; that no part of the business that went to or from New Hope went over these lines of wires and poles; and that the local business handed to the Western Union at Philadelphia amounted to from about seven to seven and one half dollars per month. The evidence further tended to show that the cost value of its lines through New Hope was about $372, and that the cost of inspection, repairs and maintenance of the plant of the company had averaged for thirteen years one dollar and forty-nine and one half cents per wire per annum; that since October, 1894, the borough had not expended any money on account of the poles and wires of the company; that its expenditures were for repairing streets, street lamps, moderate sums in payment of official services, etc., and that when on holidays the burgess saw fit to appoint a policeman he often called on the constable, who was generally paid $2.50 per day. A lineman testified that during those years the borough never did anything, to his knowledge, "in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies." Defendant contended that the requirement of payment of the license fee in question amounted to a regulation of commerce, and that the ordinance was therefore void.

The court left it to the jury to find whether the license fee

exceeded what was reasonable under the circumstances. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon, which on error to the Superior Court was affirmed. 16 Pa. Superior Ct. Rep. 306. The Supreme Court of Pennsylvania refused to allow an appeal to that court.

Mr. Silas W. Pettit, for plaintiff in error, with whom *Mr. H. B. Gill*, *Mr. Robert M. Yardley*, *Mr. George H. Fearons* and *Messrs. Brown & Wells* were on the brief, conceded that the court below correctly stated the result of the decisions of the Supreme Court of Pennsylvania; did not argue that the borough of New Hope might not supervise the location of the poles erected to sustain the telegraph wires, require them to be properly painted, and make such inspection of them as might be necessary to protect public welfare and for the cost of such regulation and supervision impose a reasonable license fee, or in other words, that the municipality might not make a telegraph company repay to it the expense to which it has been put by reason of the said telegraph company's occupation of its highways. They contended, however, that any license fee in excess of the amount necessary to so reimburse the municipality is unreasonable, and is also a tax upon, and regulation of, the interstate commerce carried on by means thereof, against which the company can be protected by the Supreme Court of the United States.

If the rule adopted by Pennsylvania and put in practice by numerous of her municipalities should be extended throughout that State and other States, the aggregate of the pole and wire tax thus imposed on telegraph companies would exceed all other taxation and exceed the net revenue of the companies. In fact, the total amount of such taxes has now assumed very grave proportions and is yearly increasing, and, inasmuch as the courts of Pennsylvania have imposed no restrictions established by the authorities in respect to such license charges upon other kinds of property or occupations, the telegraph company is helpless, except in so far as the Federal courts will protect it by establishing some rule to which the municipalities must conform.

Argument for Plaintiff in Error.

In support of this contention and as to how reasonableness of charge should be measured, the briefs cited: Cooley on Const. Lim. 4th ed. § 201; Cooley on Taxation, 4th ed. § 408; Dillon on Mun. Corp. 4th ed. § 768; *Laundry License Case*, 22 Fed. Rep. 701; *North Hudson Ry. Co.* v. *Hoboken*, 41 N. J. L. (12 Vroom) 71; *Taylor Borough* v. *Postal Tel. Co.*, 202 Pa. St. 583, 584. That under the guise of the power to regulate, a city cannot exercise a power to tax: *State* v. *Hoboken*, 4 Vroom, 280; *New York* v. *Second Ave. R. R. Co.*, 32 N. Y. 261; *Cincinnati* v. *Bryson*, 15 Ohio, 625; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Dunham* v. *Rochester*, 5 Cowen, 462.

The decisions of this court in regard to the ordinance of the city of St. Louis were cited as not sustaining the claim of the borough of New Hope. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92, 97, 98, affirming 39 Fed. Rep. 59; 149 U. S. 465, 467; and see also on retrial, 63 Fed. Rep. 68.

The construction and maintenance of telegraph lines within the State of Pennsylvania having been authorized by the constitution of the State, and the legislature having authorized the construction of the lines, this authority is all that is needed, and as the Commonwealth owns the franchise of every highway, no municipal corporation has any power over the highways not delegated by the State. Citing *O'Connor* v. *Pittsburgh*, 18 Pa. St. 187–189; *Stormfelt* v. *Manor Turnpike Co.*, 13 Pa. St. 555–559; *Millvale Boro.* v. *Evergreen Ry. Co.*, 131 Pa. St. 1–23, 24; *Commonwealth* v. *R. R. Co.*, 27 Pa. St. 339–354; *Case of Phila. & Trenton R. R. Co.*, 36 Pa. St. 318; *Mercer* v. *Pittsburgh &c. Ry. Co.*, 36 Pa. St. 99; *City of Pittsburgh's Appeal*, 120 Pa. St. 1; *Homestead Street Ry. Co.* v. *Pittsburgh &c. Ry. Co.*, 166 Pa. St. 162; 2 Dillon on Mun. Corp. 3d ed. 657; *Millerstown* v. *Bell*, 123 Pa. St. 151, construing act of 1851.

The company should not be obliged to provide an insurance or guarantee fund to insure the municipality from damages for which it might be held liable by reason of the construction and maintenance of the poles and wires, as seemed to be the controlling thought in *Chester City* v. *West. Un. Tel. Co.*, 154 Pa. St. 464; *Phila.* v. *Am. Un. Tel. Co.*, 167 Pa. St. 406; the municipality cannot be held for such liability, as it cannot exclude

the company from occupying the highways under the law of the State. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92–98; *Phila.* v. *West. Un. Tel. Co.*, 40 Fed. Rep. 616.

The Western Union Telegraph Company is engaged in interstate commerce, as was decided by this court in *Telegraph Co.* v. *Telegraph Co.*, 96 U. S. 1; and interstate commerce cannot be taxed by the State. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *McCall* v. *California*, 136 U. S. 104; *Brennan* v. *Titusville*, 153 U. S. 289. It was held in *Leloup* v. *Port of Mobile*, 127 U. S. 640, that the Western Union Telegraph Company could not be made to pay a license tax of $245 to the city, citing, also, *Crutcher* v. *Kentucky*, 141 U. S. 47; *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Leslie* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161.

It is not legitimate under the guise of an exercise of the police power to place a burden upon, and a regulation of, the interstate commerce carried on by the telegraph company. *Walling* v. *Michigan*, 116 U. S. 446–460; *Railway Co.* v. *Illinois*, 118 U. S. 557; *Leslie* v. *Hardin*, 135 U. S. 100–108; *Crutcher* v. *Kentucky*, 144 U. S. 47–59; *Brennan* v. *Titusville*, 153 U. S. 289–302; *Brown* v. *Maryland*, 12 Wheaton, 419–444; *Welton* v. *Missouri*, 91 U. S. 275–278–281; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645, 658; *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692.

Mr. William C. Ryan, for defendant in error, contended that the possession of power by the municipality to inspect and regulate the erection and maintenance of poles and wires in its street implies a duty to do so, which duty it is presumed it will discharge, and it is therefore empowered to impose license fees to indemnify it against, or reimburse it for, any expense which may be incident to such supervision and regulation. The fees have not been fixed with reference to the value of the company's property located within the municipal limits of the borough, or the amount of its gross receipts. Citing as to this and as to meas-

ure of reasonableness of charge, *Taylor Borough* v. *Postal Tel. Co.*, 202 Pa. St. 583, 584; *Chester City* v. *West. Un. Tel. Co.*, 154 Pa. St. 466.

Although the business of company is interstate commerce and the poles and wires are instruments used in the conduct of the business, such property is not exempt from the police regulations of the municipality, which, while it cannot exclude the poles and wires from the streets, is required by the public welfare to see that they do not become a menace to the safety of those using the streets as highways. This case is distinguished from *Brown* v. *Maryland*, 12 Wheaton, 419; *Almy* v. *California*, 24 How. 169, 173; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 589.

There is a distinction between regulating interstate commerce and taxing property engaged in such commerce. *State Freight Tax Cases*, 15 Wall. 232; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Mobile* v. *Kimball*, 102 U. S. 691; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *Moran* v. *New Orleans*, 112 U. S. 69; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Walling* v. *Michigan*, 116 U. S. 446; *Picard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Phila. & S. S. Co.* v. *Penna.*, 122 U. S. 326; *West. Un. Tel. Co.* v. *Pendleton*, 112 U. S. 347; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

In conclusion the following propositions were submitted:

1. That the provisions of the ordinance do not constitute an attempt on the part of the municipality to regulate or impose a burden upon interstate commmerce.

2. That the adoption and enforcement of said ordinance is a lawful exercise of the police power with which said borough is vested under the constitution and laws of Pennsylvania.

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

It is conceded that the borough had the right in the exercise

of its police power to impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable. But it is insisted that on the evidence in this case the presumption of reasonableness is rebutted, and that the ordinance as administered is void because a regulation of interstate commerce. While in the exercise of its control over its streets, it is admitted that the borough may supervise the location of the poles erected to sustain the wires of the plaintiff in error, may require them to be marked, may make such inspection of them as may be necessary to protect the public welfare, and may impose a reasonable license fee for the cost of such regulation and supervision, and of the issuing of such permits as may be required for the enforcement thereof, yet it is contended that if the license fee turned out to be in excess of the amount necessary to reimburse the municipality the ordinance became unreasonable and invalid. The Superior Court in its opinion referred to many decisions of the Supreme Court of Pennsylvania as definitively establishing, among other propositions, "that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defence," and "that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities." And it was said that in many of the cases cited the license fee was the same as that imposed by this ordinance. 16 Superior Ct. Rep. 309. The Supreme Court affirmed the judgment in a similar case on the opinion given below in this. 202 Pa. St. 532.

In *Chester City* v. *Telegraph Company*, 154 Pa. St. 464, in which it was averred in the affidavit of defence that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the Supreme Court said: "For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary

or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

In *Taylor Borough* v. *Telegraph Company*, 202 Pa. St. 583, the Supreme Court said: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. . . . Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same." And see *City of Philadelphia* v. *Western Union Telegraph Company*, 89 Fed. Rep. 454.

Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily applied, and the ordinance held void because of failure to meet it. As the Supreme Court pointed out, the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court, and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.

This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on. *St. Louis* v. *Telegraph Company*, 148 U. S. 92; 149 U. S. 465.

Judgment affirmed.

Mr. Justice White, Mr. Justice Peckham and Mr. Justice McKenna dissented.

CARY MANUFACTURING COMPANY *v.* ACME FLEXIBLE CLASP COMPANY.

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

No. 122. Submitted December 17, 1902.—Decided January 5, 1903.

Judgments and decrees of the Circuit Court of Appeals in all cases arising under the patent laws and under the criminal laws are made final by section six of the judiciary act of March 3, 1891, and cannot be brought from that court to this by appeal or writ of error. And even if a constitutional question so arises in the Circuit Court that a party may bring his case directly to this court under section five of that act, yet if he does not do so, but carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court.

The case is stated in the opinion of the court.

Mr. A. G. N. Vermilya for plaintiff in error.

No appearance for defendant in error.

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

The Acme Flexible Clasp Company brought suit in the Circuit Court of the United States for the Southern District of

New York against the Cary Manufacturing Company for alleged infringement of letters patent No. 314,204, granted to W. O. Swett, March 17, 1885, for a staple fastener for wooden vessels, which went to a decree sustaining the validity of the patent and adjudging the Cary Manufacturing Company to have infringed it. 96 Fed. Rep. 344. Defendant appealed to the Circuit Court of Appeals for the Second Circuit and the decree was affirmed. 101 Fed. Rep. 269. Proceedings in contempt were subsequently commenced by the Acme Company to punish the alleged violation of the injunction issued under the decree, and the Circuit Court imposed a fine of $2000 for contempt, to be paid to the clerk of the court, one half of the sum to be paid to the Acme Company and one half to be paid to the United States. The Cary Company sued out a writ of error from the Circuit Court of Appeals to review this judgment, and the judgment was affirmed. 108 Fed. Rep. 873. Thereupon this writ of error was allowed.

It is apparent that the writ of error cannot be maintained, as the judgment of the Circuit Court of Appeals was final. Judgments and decrees of those courts in all cases arising under the patent laws and under the criminal laws are made final by section six of the judiciary act of March 3, 1891. Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under section five of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court. *Robinson* v. *Caldwell*, 165 U. S. 359; *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277; *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. 290; *Ayres* v. *Polsdorfer*, p. 585, *post*.

Writ of error dismissed.

MEXICAN CENTRAL RAILWAY COMPANY *v.* ECKMAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 124. Submitted December 17, 1902.—Decided January 5, 1903.

1. The jurisdiction referred to in the first subdivision of the fifth section of the judiciary act of March 3, 1891, is the jurisdiction of the Circuit and District Courts of the United States as such; and when a case comes directly to this court under that subdivision, the question of jurisdiction alone is open to examination.
2. The general rule is that the jurisdiction of the Federal courts depends not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record.
3. It appears from the statutes of Texas and the decisions of the highest court of that State that a general guardian has the legal right to bring a suit in the state courts of Texas in his own name; it follows that a citizen and resident of the Western District of Texas, who has been duly appointed by the proper court of Texas the guardian of the person and estate of a minor, whose father and mother are residents, citizens and inhabitants of another State, and are not and never have been residents, citizens or inhabitants of Texas, may bring an action in his own name in the United States Circuit Court for the Western District of Texas against a corporation of another State, as the jurisdiction of the Circuit Court is dependent on the citizenship of the guardian and not on the citizenship of the ward.

This was an action brought in the Circuit Court of the United States for the Western District of Texas by J. W. Eckman, a citizen and resident of that district, as guardian of Alfonso Huesselmann, a minor, against the Mexican Central Railway Company, a corporation of Massachusetts, to recover damages for injuries sustained by him in the Republic of Mexico through the negligence of the company, in whose employment he then was. The complaint set out certain sections of the constitution, of the penal and civil codes, and acts of Congress and regulations thereunder, of Mexico, and averred that, "by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth,"

plaintiff had a right of action in Mexico, and that the same existed in the United States; and also that the acts of negligence complained of were wrongful and actionable in the United States and in the State of Texas, as well as in the Republic of Mexico. Defendant filed a plea in abatement to the effect that Huesselmann was not then, or at the time of the infliction of the injuries, a citizen or resident of the State of Texas, but that he and his parents were citizens and residents of the State of Illinois; and that defendant was a resident and citizen of Massachusetts, and had not waived its right to be sued there, which right it pleaded, and asked that the action be dismissed. The plea was overruled, and defendant filed an answer containing seven exceptions or pleas to the jurisdiction, an exception to the complaint for insufficiency, and a general denial. All of the pleas were overruled, and the case was tried before a jury, a verdict rendered in plaintiff's favor, and judgment entered thereon. Thereupon a writ of error was allowed from this court on a certificate that the following questions of jurisdiction arose:

"First. That Alfonso Huesselmann, at the time of the filing of this suit, and now being a minor under twenty-one years of age, and his father and mother both being now alive, and at the time of the filing of this suit and now being residents, citizens and inhabitants of the State of Illinois, and never having been residents, citizens and inhabitants of the State of Texas, nor the Western District of Texas, and the defendant, The Mexican Central Railway Company, Limited, being incorporated under and by virtue of the laws of the State of Massachusetts, and at the time of the filing of this suit, and now, being a resident, inhabitant and citizen of said State of Massachusetts, and never having been incorporated under the laws of the State of Texas, and was not at the time of the filing of this suit a resident, inhabitant or citizen of the State of Texas or of the Western District of Texas; that said J. W. Eckman, being guardian of the person and estate of said Alfonso Huesselmann at the time of the filing of this suit, and being such now, and being a resident, inhabitant and citizen of the State of Texas and of the Western District of Texas, now,

Counsel for Parties.

and at the time of the filing of this suit; has this court jurisdiction to try said cause, and does the citizenship of said guardian, J. W. Eckman, confer jurisdiction on this court, or does the citizenship of the minor and his parents control so as to defeat the jurisdiction of this court?

"Second. Whether or not this court has jurisdiction to try and determine said suit, where the minor, Alfonso Huesselmann, and defendant, Mexican Central Railway Company, Limited, are not citizens of this State and district, and where the cause of action arose in the Republic of Mexico, in which republic the contract of service was made and the services thereby contemplated were to be performed?

"Third. Whether or not this court has jurisdiction to try and determine this suit under the laws of Mexico as pleaded and proved in this case, in so far as such laws give rights that are to be determined by successive suits, give the right to extraordinary indemnity, considering the social position of the injured party, and in so far as the same are vague, indefinite and dissimilar to the laws of our county and contrary to our policy?

"Fourth. Where plaintiff's cause of action arose in the Republic of Mexico, and the rights are to be determined by the laws of said republic, and where defendant has continuously kept its property and operated its road in said republic, has this court jurisdiction to hear and determine this cause in the absence of any reason shown in the pleading or proof why plaintiff did not bring his suit in the Republic of Mexico?

"Fifth. Where, according to the laws of the Republic of Mexico, no civil liability exists unless the acts that give rise to the civil liability must be found to be a violation of the criminal laws of Mexico, is the enforcement of such liability penal in its nature, and can this court determine the guilt of defendant thereunder, and adjudicate the rights of the parties based upon the criminal laws of said republic?"

Mr. Eben Richards, *Mr. Addis B. Brown* and *Mr. Alexander Britton* for plaintiff in error.

Mr. Millard Patterson for defendant in error.

Opinion of the Court.

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

This case is brought directly from the Circuit Court to this court under the first subdivision of the fifth section of the judiciary act of March 3, 1891, providing that that may be done: "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." It must be regarded as settled that the jurisdiction here referred to is the jurisdiction of the Circuit or District Courts of the United States as such, *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501; that the whole case is not open to us, but only the question of jurisdiction, *Horner* v. *United States*, 143 U. S. 570, 576; *United States* v. *Jahn*, 155 U. S. 109, 112; and that review by certificate is limited to the certificates by the Circuit or District Courts, made after final judgment, of questions made as to their own jurisdiction, and to the certificates by the Circuit Courts of Appeals of questions of law in relation to which the advice of this court is sought as therein provided. *United States* v. *Rider*, 163 U. S. 132.

Counsel for plaintiff in error condenses the propositions relied on into these: (1) That "the citizenship of the ward, the actual plaintiff, not that of the guardian, the nominal plaintiff, controls;" (2) that "the laws of Mexico as pleaded and proved and which are relied on to support this case are so vague and indefinite and so dissimilar to the laws of Texas as to be incapable of enforcement in our courts, and are inconsistent with the statutes and public policy of Texas;" and (3) that these laws "are penal in their character and such as should be given no extraterritorial effect."

But apart from the question of jurisdiction in respect of citizenship, it is apparent that the jurisdiction of the Circuit Court as a court of the United States was not put in issue, for the other contentions were matters on the merits, and this judgment to the contrary is not void but is only open to be attacked for error, while, in any aspect, the objections applied to all courts of this country and not particularly to the Federal courts.

And if the jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, the case should have been taken to the Circuit Court of Appeals for the Fifth Circuit, to which court previous similar cases have been carried, and by which the questions suggested here have been dealt with. *Evey* v. *Mexican National Railway Company*, 52 U. S. App. 118; *Mexican National Railway Company* v. *Marshall*, 34 C. C. A. 133.

These matters, however, are not properly before us in this case, and we intimate no opinion upon them.

The question for us to determine is whether the jurisdiction of the Circuit Court can be sustained through the citizenship of the guardian.

It is admitted that Eckman was duly appointed guardian of both the person and estate of Huesselmann by the proper court of Texas thereto empowered, and that he was a citizen and resident of the Western District of Texas.

Under the act of March 3, 1887, c. 373, as corrected by that of August 13, 1888, c. 866, actions may be brought in any district in which either the plaintiff or the defendant resides. We have held that a corporation incorporated in one State only cannot be compelled to answer in a Circuit Court of the United States held in another State, to a civil suit, at law or in equity, brought by a citizen of a different State." *Shaw* v. *Quincy Mining Company*, 145 U. S. 444. But that is not this case, as here the action was brought by a citizen of Texas in the district of his residence.

The question is whether under the laws of Texas a guardian can sue in his own name to recover damages for injuries sustained by the ward, and it is unaffected by the permanent domicil of the ward. *Hoyt* v. *Sprague*, 103 U. S. 613; *New Orleans* v. *Gaines' Administrator*, 138 U. S. 595, 606; *Delaware County* v. *Diebold Safe Company*, 133 U. S. 473, 488.

It is true that where a State or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, not-

withstanding the general rule that the jurisdiction of the Federal courts depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines' Administrator*, by Mr. Justice Bradley, "we have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law."

If in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond.

The Revised Statutes of Texas provide, Sayles' Civ. Stat. of 1897:

"Art. 2623. The guardian of the estate is entitled to the possession and management of all property belonging to the ward; to collect all debts, rents, or claims due such ward; to enforce all obligations in his favor; to bring and defend suits by or against him; but in the management of the estate the guardian shall be governed by the provisions of this title.

"Art. 2624. The guardian of both person and estate has all the rights and powers, and shall perform all the duties of the guardian of the person and of the guardian of the estate."

"Art. 2627. The guardian of the estate shall use due diligence to collect all claims or debts owing to the ward, and to

recover possession of all property to which the ward has a title or claim; provided, there is a reasonable prospect of collecting such claims or debts, or of recovering such property; and if he neglects to use such diligence he and his sureties shall be liable for all damages occasioned by such neglect."

In *Roberts* v. *Sacra, Guardian*, 38 Texas, 580, it was ruled that the guardian for minor heirs might sue in his own name on a promissory note payable to the ancestor of his wards on showing that they were the only heirs of the payee, and that there was no administration on the estate.

In *Houston & Texas Central Railway Company* v. *Bradley, Guardian*, 45 Texas, 171, 176, it was held that under a law authorizing suit for death by wrongful act, which provided that actions thereunder should be "for the sole and exclusive benefit of the surviving husband, wife, child, or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any one of them," the suit might properly be brought in his own name by the guardian of the estate of minor children of the person whose death was caused by such act, and the court said: "It is not regarded as material whether the suit is brought in the name of the guardian for his ward or in the name of the ward by his guardian. By the laws of Texas, the guardian of the person is entitled to the charge and control of the person of the ward, and the guardian of the estate is entitled to the possession and management of the property belonging to the ward, and to collect all claims and debts due him, to enforce all obligations in his favor, and to bring and defend suits by or against him."

And see *March* v. *Walker, Guardian*, 48 Texas, 372, where Walker sued as guardian of one of three children, and as next friend of the two others, and attention was called in respect of the two to the then statute, subsequently repealed, providing for the appointment of a special guardian to prosecute suits; and *Gulf &c. Railway Company* v. *Styron, Next Friend*, 66 Texas, 421, in which the action had been brought "by W. W. Styron, as next friend of Millie Styron, a minor," and it was decided that it was not necessary "that the pleadings must

show, in so many words, that the action is brought by the minor by next friend," although cases so ruling could be found.

We are unable to hold that the Circuit Court erred in assuming that this guardian had the legal right to bring the action in his own name, and it is on his citizenship and not on the citizenship of the ward that the jurisdiction of the Circuit Court depended.

Judgment affirmed.

UNITED STATES *v.* SAMPSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 273. Petition for new parties submitted December 29, 1902.—Decided January 5, 1903.

Where a rear admiral of the United States Navy who has filed a libel in prize in his own behalf and also in behalf of all the officers and enlisted men in the Navy taking part in the engagement, dies, and his death has been suggested on the record, it is not necessary that the personal representatives of the deceased should come in or that any person should be designated *ex officio*, but the court may substitute any one interested in the prosecution of the litigation, who has personally appeared in the case.

THE case is stated in the opinion of the court.

Mr. James H. Hayden, for petitioners on this motion, appellees.

THE CHIEF JUSTICE. This libel in prize was filed by Rear Admiral Sampson in his own behalf and also in behalf of all of the officers and enlisted men of the United States Navy, who took part in the engagement off Santiago de Cuba on July 3, 1898, in the Supreme Court of the District of Columbia, and went to a decree of condemnation from which this appeal was prosecuted.

On May 19, 1902, the death of Rear Admiral Sampson was suggested by the Attorney General, and a motion made that

the cause proceed under its then caption and without the substitution of any other individual as a party, which was postponed to the hearing of the case on its merits.

That hearing has been had, and counsel, in aid of the court, have made application for the substitution of the administratrix of Admiral Sampson, and submitted considerations in respect of the substitution also of one or more officers, as, and if, deemed necessary.

We think some one to carry on the proceedings in the interest of all should be substituted, but that it is not necessary that the personal representatives of those who may have deceased should come in, or that any person should *ex officio* be designated. The matter is merely one of convenience and without significance in itself.

Rear Admiral Evans, Rear Admiral Taylor, Captain French E. Chadwick, and others are represented in the litigation by counsel; but Rear Admiral Schley and others are not. Of those so represented, Rear Admiral Evans is absent on a foreign station, while Rear Admiral Taylor is within the jurisdiction. It seems to us that the substitution of Rear Admiral Taylor will satisfactorily meet the exigency, and it will be

Ordered accordingly.

OSHKOSH WATERWORKS COMPANY *v.* OSHKOSH.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 74. Argued November 6, 1902.—Decided January 5, 1903.

1. While, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing.
2. The Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract, according to the course of justice as established when the contract was made. Neither could be done without impairing the obligation

of the contract. But the Legislature may change existing remedies or modes of procedure, without impairing the obligation of contracts, if a substantial or efficacious remedy remains or is provided, by means of which a party can enforce his rights under the contract.

The contract clause of the Constitution of the United States has reference only to a statute of a State enacted *after* the making of the contract whose obligation is alleged to have been impaired.

THE case is stated in the opinion of the court.

Mr. Moses Hooper for plaintiff in error.

Mr. John F. Kluwin for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case presents a question under the clause of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of contracts.

The question arose upon demurrer by the defendant, the city of Oshkosh, to the complaint filed against it on the 16th day of June, 1900, by the Oshkosh Waterworks Company, a municipal corporation of Wisconsin. The principal ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action.

The complaint set forth two causes of action, on the first one of which the company claimed a judgment for $4085, which was alleged to be due from the city under an agreement made between it and the company on June 18, 1883, in reference to the building and maintaining by the company of a waterworks plant for supplying water for domestic and fire purposes, and the renting of public fire hydrants.

On the second cause of action the company asked a judgment for $1060, which amount was claimed under an agreement of the 31st day of August, 1891, having reference to the company's extensions of its then existing mains, and the rentals to be paid by the city for hydrants to be located on such extensions.

After the contract of 1883 was made the charter of the city was amended and revised—the revision taking effect March 23, 1891.

Opinion of the Court.

The revised charter contained certain provisions as to suits against the city, imposing on suitors conditions or restrictions that did not previously exist.

The company insisted that the revised charter could not be applied to this suit without impairing the obligation of its contracts with the city. This view was rejected by the state court, the demurrer was sustained and the suit dismissed.

The general principles which must control in determining whether a state enactment impairs the obligation of contracts have become so firmly established by the decisions of this court that any further discussion of their soundness would be inappropriate. It is only necessary to recall them, and then ascertain their applicability to the particular state legislation now alleged to be repugnant to the Constitution of the United States.

It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Green* v. *Biddle*, 8 Wheat. 1, 85; *Bronson* v. *Kinzie*, 1 How. 311, 317; *Planters' Bank* v. *Sharp*, 6 How. 301, 327; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Murray* v. *Charleston*, 96 U. S. 432, 438; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Vance* v. *Vance*, 108 U. S. 514, 518; *McGahey* v. *Virginia*, 135 U. S. 685, 693; *Barnitz* v. *Beverly*, 163 U. S. 118; *McCullough* v. *Virginia*, 172 U. S. 102, 104. The decisions of the Supreme Court of Wisconsin as to what are to be deemed laws impairing the obli-

gations of contracts are in harmony with the decisions of this court. *Lightfoot* v. *Cole*, 1 Wisconsin, 26, 34; *Von Baumbach* v. *Bade*, 9 Wisconsin, 559; *Paine* v. *Woodworth*, 15 Wisconsin, 298; *Northwestern Mut. Ins. Co.* v. *Neeves*, 46 Wisconsin, 147; *Lee* v. *Buckheit*, 49 Wisconsin, 54; *Rosenthal* v. *Wehe*, 58 Wisconsin, 621.

Having these principles in view, we proceed to inquire whether the revised charter of Oshkosh so changed existing remedies for the enforcement of contract rights against municipal corporations as to impair the obligation of the contract made in 1883 between the Waterworks Company and the city.

By the act of the Wisconsin Legislature revising and amending the charter of the city of Oshkosh, that municipal corporation was made capable of suing and being sued in all courts of law and equity. Laws of Wisconsin, 1883, vol. 2, p. 687, c. 1, § 1. The same act provided that all moneys, credits and demands of the city should be under the control of the common council, and "be drawn out only upon the order of the mayor and city clerk, duly authorized by a vote of the common council." 2 Laws of 1883, p. 724, c. 7, § 1. It was further provided that "any account or demand against the city, before acted on or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law, and any person who shall falsely swear to any such amount or demand shall be deemed guilty of perjury, and shall be punished according to law." 2 Laws of 1883, p. 726, c. 7, § 10.

The Supreme Court of Wisconsin, in its opinion, states that except for the above restrictions upon the payment of money, the city of Oshkosh was, in 1883, subject to be sued upon contract liability like any private person or corporation.

But by the city's amended charter of 1891 certain changes were made, and the question is whether those changes, if applied to the contract of 1883, would impair its obligation. 2 Laws of Wisconsin, 1891, p. 321, c. 59.

The revised charter retained substantially the above provisions in the charter of 1883, and the following, among other, additions, were made:

"§ 4. No action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part: *Provided*, That the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof.

"§ 5. The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided.

"§ 6. Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council disallowing said claim to the Circuit Court of the county in which the city is situated, by causing a written notice of such appeal to be served on the clerk of the city within twenty days after the making of the decision disallowing such claim; and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant in the Circuit Court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council with its decision thereon and shall transmit the same, together with all the papers in the case, to the clerk of the Circuit [Court] of the county. Such case shall be entered, tried and determined in the same manner as cases originally commenced in said court: *Provided, however*, That whenever an appeal is taken from the allowance made by the common council upon any claim, and the recovery upon such appeal shall not exceed the amount allowed by the common council exclusive of interest upon such allowance, the appellant shall pay the costs of appeal, which shall be deducted from the amount of the recovery; and when the amount of costs exceed the amount recovered, judg-

ment shall be rendered against the appellant for the amount of such excess." 2 Laws of 1891, p. 412, c. 21.

It is not alleged in the complaint that the Waterworks Company before commencing this action presented its claims to the common council for allowance.

The company contends that if the above provisions are construed to mean what the Supreme Court of Wisconsin have declared similar provisions in other municipal charters to mean then such burdens and restrictions have been imposed upon the enforcement of its contract with the city of Oshkosh as to impair its obligation. This suggestion renders it necessary to ascertain the import of those decisions.

In *Drinkwine* v. *City of Eau Claire*, 83 Wisconsin, 428, 430, it appeared that Drinkwine preferred a claim against the city of Eau Claire, which was disallowed by the common council. He appealed from that action of the council, and executed a bond, which recited that he had appealed to *the Circuit Court of Eau Claire County*, and conditioned for the payment of all costs that should be adjudged against him by *the court aforesaid*, and not generally by *the court*, as prescribed by the statute. It was contended that the bond was insufficient since, in the event of a change of venue in the case, the surety would not be bound by a judgment for costs in the court that actually tried the case. After referring to prior cases in that and in other courts, particularly to *Sharp* v. *Bedell*, 10 Illinois, 88, in which it had been held that if an appellant failed to comply substantially with the requirements of the statute in relation to the perfecting of appeals the Circuit Court did not acquire jurisdiction of the person of the opposite party or of the subject matter, and should dismiss the appeal, the Supreme Court of Wisconsin said: "The liability of a surety is *strictissimi juris*, and cannot be extended by implication. He has a right to stand on the exact words of his contract. . . . The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the engagement to pay the costs, if the appellant should be defeated on a trial in Eau Claire County, in the city where the alleged cause of action arose, and quite unwilling to undertake for the pay-

ment of the costs, in like event, of a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpœnaing them. A similar ruling in *Myres* v. *Parker*, 6 Ohio St. 502–504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute." The ruling in the *Drinkwine* case was reaffirmed in *Oshkosh Water Works Co.* v. *City of Oshkosh*, 106 Wisconsin, 85, and in other cases.

In *Mason* v. *Ashland*, 98 Wisconsin, 540–547, it was held that, under the charter of the city of Ashland, the right of appeal from the disallowance of a claim by the common council was perfect at the expiration of sixty days from the filing of the claim with its clerk, and that the claimant "was obliged to exercise it within the twenty days allowed by statute, or be forever barred from thereafter prosecuting his claim in any court" —citing *Fleming* v. *Appleton*, 55 Wisconsin, 90, and *Kock* v. *Ashland*, 83 Wisconsin, 361.

In *Telford* v. *City of Ashland*, 100 Wisconsin, 238, it was adjudged that as the objection that the appeal was not taken within twenty days after the adverse action of the council goes to the jurisdiction of the subject matter, it may be raised for the first time in the appellate court.

In *Seegar* v. *City of Ashland*, 101 Wisconsin, 515, it was held that under a provision in a city charter to the effect that in case any person presented his claim or demand against the city, which the common council disallowed in whole or in part, the council "shall not again consider or allow such claim," and its failure to act upon a claim within sixty days after being presented was equivalent to a disallowance—the right to appeal therefrom expiring in twenty days after such disallowance.

Accepting these decisions as our guide in determining the meaning and effect of the provisions in the revised charter of Oshkosh, we perceive no reason for holding that the change in remedies made by that charter impair, in the constitutional sense, the obligation of the contract of 1883 between the Waterworks Company and the city.

The requirement that a claim or demand against the city should be presented to the common council and be disallowed,

in whole or in part, before the city can be subjected to suit upon it, is a reasonable regulation for the protection of the city against the cost of unnecessary litigation. It does not affect the substance of the creditor's right, without being unreasonably delayed, to institute an action against the city. It only stays his hand until the city has full opportunity to look into his claim before paying or refusing to pay it. Nor does the above regulation unduly obstruct the creditor; for, by it the city is in effect allowed only sixty days for such examination, and the creditor is protected against a vexatious or indefinite delay by the provision that the failure of the council, for sixty days, to pass upon the claim shall be deemed a disallowance thereof, and the creditor may at once appeal to the Circuit Court of the county. In that court the necessary issues can be framed, under the direction of the court, and according to the usual modes of pleading, and the rights of the parties judicially ascertained and enforced.

Equally without merit is the objection to that clause of the revised charter making the disallowance of a claim, in whole or in part, by the council, final and conclusive, unless an appeal be taken to the Circuit Court of the county within a prescribed time. We take it that the purpose of that provision was to protect the public against the dangers attending persistent and frequent applications to the common council after it had once acted and to compel claimants to proceed with promptness while all the facts connected with their demands were fresh in the minds of the members of the council. This is a wholesome regulation, of which no creditor can justly complain, since the charter enables him, without serious delay, after the disallowance of his claim, to invoke the jurisdiction of a court of general jurisdiction for the enforcement of such claim.

But it is earnestly insisted by the Waterworks Company that the provision requiring an appeal from the disallowance of a claim to be perfected within twenty days thereafter is so unreasonable, in the matter of time, as, by its necessary operation, to impair the obligation of its contracts with the city. We cannot assent to this view. The time within which the creditor must perfect his appeal is undoubtedly short. But it is

sufficient for the purpose of enabling him to get his case, with reasonable dispatch, into the Circuit Court and have its judgment as to his claim against the city, with the same right that other litigants have to take the case to the highest court of the State. Here again is disclosed the purpose of the Legislature to bring to a speedy conclusion all disputes as to claims against the city. It surely was competent for the Legislature to effect such an object, and it cannot be said, as matter of law, that a provision requiring the creditor within twenty days after the disallowance of his claim to serve notice of appeal on the city clerk materially affects or obstructs the presentation of his claim to the proper Circuit Court.

Objection is also made to the requirement in the new charter that the appeal bond shall be approved by both the city attorney and comptroller. In support of that objection it is said that one or the other or both of those officers *might* be absent from the city at the time the bond is tendered by the creditor; also, that one or both of them *might* object to the bond when he ought to accept it as sufficient. But these contingencies may never arise. They certainly have not arisen in respect of the claim of the Waterworks Company, for it is not alleged that the company ever presented its claim to the common council for allowance, and consequently had no occasion to tender the city attorney and comptroller an appeal bond. Besides, it is not at all clear that the revised charter requires, as a condition of the right to appeal, that a bond be executed by the creditor within twenty days after the disallowance of his claim by the common council. It does expressly require that the notice of appeal shall be served within that time on the clerk of the city, but no such absolute requirement is made as to the time within which the appeal bond must be executed. It may be that a construction that would defeat the creditor's appeal, because of the absence of the city attorney and comptroller, or either of them, at the time a bond is tendered for their approval, or a refusal to approve a bond that was sufficient, would make the revised charter, in its application to such a case, repugnant to the contract clause of the Constitution. But no such case is now presented, and no such question

as that suggested need be now decided. It should not be assumed that the right of appeal will be lost where the creditor has done all that was required in order to perfect his appeal. As the Waterworks Company does not allege that it presented its claim to the common council for allowance, it is not in a position to ask a judicial determination of a question that cannot arise in this case.

Another objection remains to be noticed. It is founded on the decision in *Drinkwine* v. *City of Eau Claire*, 83 Wisconsin, 428, above cited, in which it was held that the appeal bond provided in the charter of Eau Claire must relate to costs as adjudged by the Circuit Court, and not by the Circuit Court of any named county. We have seen what were the reasons that governed the Supreme Court of Wisconsin in so interpreting a provision similar to the one here in question in the revised charter of the city of Oshkosh. If that interpretation was, as suggested, too technical it would not follow that the charter thus construed would impair the obligation of contracts. It would be extraordinary if this court should hold the new remedies and modes of procedure provided by the revised charter to be illegal because of the possibility that a creditor might, by mistake or carelessness, execute a bond not conditioned, as required by that charter, for the payment of the costs adjudged by the Circuit Court, generally, but by a named Circuit Court.

As to the contention that the obligation of the contract of August 31, 1891, was impaired by the revised charter, it is sufficient to say that that charter went into operation March 23, 1891. The contract of 1891 was a new contract, independent of that of 1883, and the Waterworks Company could not therefore say that its obligation was impaired by a statute in force at the time the contract was made. The contract clause of the Constitution of the United States has reference only to a statute of a State enacted after the making of the contract whose obligation is alleged to have been impaired. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 391; *Pinney* v. *Nelson*, 183 U. S. 144, 147; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 351. If, however, the agreement of 1891 had such connection with that of 1883 that they may be regarded as one agreement,

then what has been said as to the application of the revised charter to the contract of 1883 applies, in all respects, to that of 1891. The obligation of neither contract was impaired by the charter of 1891.

We have noticed all the points that require consideration, and adjudge, therefore, that the changes made by the revised charter of Oshkosh in respect of remedies for the enforcement of claims against that city provided for its creditors a substantial and adequate remedy, and therefore did not impair the obligation of contracts with that municipal corporation.

The judgment of the Supreme Court of Wisconsin must be

Affirmed.

PACIFIC STEAM WHALING COMPANY *v.* UNITED STATES.

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

No. 26. Argued December 8, 1902.—Decided January 5, 1903.

Where an applicant files with the District Court of Alaska a petition for a license for vessels and salmon canneries under section 460 of the act of 1899 providing a criminal code for Alaska, 30 Stat. 1253, 1336, and with it a protest against being required to take out or pay for such license on various grounds stated therein, to which petition and protest the clerk of the District Court is not made a party—although the papers may have been served on the district attorney—and the District Court thereafter makes an order granting the license, stating therein that so far as the protestant seeks relief against the payment of the licenses "the same is overruled, denied and ignored," an appeal to this court will not lie as there is no action, suit, or case, within the constitutional provision (Article III, section 2) in which was entered a final judgment or decree such as entitled the petitioner to appeal to this court.

SECTION 460 of the act of March 3, 1899, 30 Stat. 1253, 1336, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district," reads:

"That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:"

Then follows a list of forty-two callings and occupations, among which, applicable to the present case are the following:

"Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton.

* * * * * * * *

"Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, one dollar per ton per annum, on net tonnage, custom-house measurement of each vessel."

Section 461 makes it a misdemeanor to engage in any of the occupations referred to without first obtaining a license. Section 463 reads:

"That the licenses provided for in this act shall be issued by the clerk of the District Court or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon. The clerk of the court shall be entitled to receive from each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof: *And provided*, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of the Treasury may require and in such form as the Attorney General may approve, and all moneys received for licenses by him or them under this act shall be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe."

On July 6, 1899, the Pacific Steam Whaling Company filed

in the District Court of the United States for the District of Alaska a petition entitled:

"In the matter of the application of the Pacific Steam Whaling Company for a license for the steamship Wolcott, the steamship Excelsior, the steamship Newport, and the steamer Golden Gate, and canneries, and protest thereon."

It alleged that the petitioner was the owner of the steamships Wolcott, Excelsior, Newport and Golden Gate, engaged in doing a local business for hire in Alaskan waters, and was also engaged in the business of carrying on salmon canneries at certain named points in the district. It denied that it was subject to any license for the prosecution of either business, notwithstanding the provisions of the statute referred to; that in view of the stringent penalties provided in that statute for carrying on business without the required license it made the following protest: That the steamships were taxed as its property in the Port of San Francisco, California, of which State the petitioner was a corporation, and was therefore not subject to a license tax in the District of Alaska; that a license fee at the rate of $1 per ton, together with the tax charged in California against the petitioner, made a double tax, and was unreasonable, exorbitant, oppressive and amounted to the taking of petitioner's property without due process of law; that the title of the act under which this license section was found had no reference to the granting of a license for the prosecution of a lawful business, and the provisions of the act, so far as they purport to require the payment of license fees, are vague, unintelligible and doubtful, so that it cannot be reasonably inferred that Congress intended to require their payment, and that sections 460 and 461 of the act were contrary to the provisions of sections 8 and 9 of Article I of the Constitution of the United States, and therefore null and void. The prayer of the petitioner was as follows:

"1. That the said court first try and determine the matter as to whether or not it is necessary for the said petitioner to pay into court any license or sum of money whatsoever as provided under said act.

"2. That if said court shall determine that your petitioner

with respect to said steamships Wolcott, Excelsior, Newport and Golden Gate should first pay the said license fee required under said act in your court, before the trial and determination of said cause and matters herein set out, that the same be held by the clerk until the trial and determination of the matters and facts set forth herein.

"3. That if the court determines that a license in the meantime should be granted to the said steamships, or either of them, as ocean and coastwise vessels, and doing local business for hire, plying in Alaskan waters, that such license be so granted and said money so held by the clerk of the court under protest as aforesaid, subject to the further action of this honorable court."

This petition was verified by the oath of the attorney of the petitioner. A copy of the petition was served upon the United States district attorney for the District of Alaska, the amount of the license fees was deposited with the clerk of the court, and a final order entered on January 2, 1900, which directed the clerk to issue the license and turn the money deposited into the Treasury of the United States, adding: "So far as said protestants seek relief against the payment of a license on the several businesses therein described, the same is overruled, denied and ignored in each case of protest." An appeal was allowed by the district judge and a transcript of the record filed in this court on August 15, 1900.

Mr. S. M. Stockslager for appellant. *Mr. W. W. Dudley*, *Mr. L. T. Michener*, *Mr. J. F. Malony*, *Mr. J. H. Cobb*, *Mr. George C. Heard*, *Mr. John R. Wynne* and *Mr. John G. Heid* were on the briefs.

Mr. Solicitor General Richards for the United States. *Mr. Assistant Attorney General Beck* was with him on the brief.

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

The proceeding in this case is a novel one, and the first ques-

tion is whether there was any action or suit—any case within the constitutional provision, Article III, sec. 2, extending the judicial power of the United States "to all cases, in law and equity, arising under this Constitution"—in which was entered a final judgment or decree such as entitled the petitioner to an appeal. "A case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws or treaties of the United States, it is within the judicial power confided to the Union." 2 Story on the Constitution, sec. 1646; *Osborn* v. *United States Bank*, 9 Wheat. 738, 819. Here a petition was filed, which was in form an application for a license, with a protest that the petitioner ought not to be compelled to take one out. The application was granted, and the petitioner could certainly not appeal from an order granting that which he asked for. The application, it is true, was coupled with a protest, but who ever heard of an appeal being sustained from a protest? There was no suit against the clerk to restrain him from receiving the license money. He was not made a party, entered no appearance, and no decree was rendered for or against him.

The power to grant licenses was by the statute vested in the District Court, or a judge thereof. Giving an interpretation to the petition the most favorable to the petitioner, it was an application to a tribunal having judicial functions to restrain itself from the discharge of administrative duties. It is contended that the nature of the proceeding is not changed by uniting judicial functions and administrative duties in the same tribunal; that it is the same as though such functions and duties were exercised by different bodies or officers, and that it is to be treated as though it was an application to a judicial tribunal to restrain a different and administrative officer from the discharge of administrative duties. Congress, it is said, cannot by imposing both sets of duties upon the same tribunal deprive a party of a right which he would have if those duties were entrusted to different officials. If we are justified in giving this interpretation to the proceeding we meet the familiar doctrine that an injunction will not lie to

restrain the collection of a tax on the mere ground of its illegality. *Dows* v. *City of Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *State Railroad Tax Cases*, 92 U. S. 575; *Milwaukee* v. *Kœffler*, 116 U. S. 219. And this is true whether these taxes are local or general, or, if general, whether internal revenue or direct taxes. Indeed, in respect to internal revenue taxes, section 3224, Revised Statutes, specifically provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Something more than mere illegality is necessary to justify the interference of a court of equity. But it does not appear that the tax if unpaid would cast a cloud upon the title to any real estate, or work irreparable injury. While it may be that the failure to pay the tax would expose the petitioner to a multiplicity of prosecutions for misdemeanor, yet neither the District Court, nor the judge, nor the clerk initiates criminal proceedings, and the district attorney—the prosecuting officer—was not made a party to the suit. True, an order was entered that he be notified of the pendency of the application and he appeared as *amicus curiæ*. Even had he been made a party, would equity entertain a bill to restrain criminal prosecutions? *In re Sawyer*, 124 U. S. 200; *Harkrader* v. *Wadley*, 172 U. S. 148; *Fitts* v. *McGhee*, 172 U. S. 516.

It is said that unless this application can be sustained the petitioner is without remedy, and that there is no wrong without a remedy. While as a general statement this may be true, it does not follow that it is without exceptions, and especially does it not follow that such remedy must always be obtainable in the courts. Indeed, as the government cannot be sued without its consent, it may happen that the only remedy a party has for a wrong done by one of its officers is an application to the sense of justice of the legislative department. Still we must not be understood as deciding that the only remedy in this case was an appeal to Congress. It was held in *Elliott* v. *Swartwout*, 10 Pet. 137, 156, that, under the law as it stood at that time, Congress having made no special provision, where a collector had charged excessive duties, and the party paying them, in order to get possession of his goods, accompanied the

payment by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid and by a notice not to pay it over to the Treasury, an action could be maintained against the collector for the excessive charge. The court said that the question as to the right to recover must be answered in the affirmative, "unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him; but that recourse must be had to the government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection, sanctioned by any principles of law or sound public policy." See also *Cary* v. *Curtis*, 3 How. 236; *Curtis' Administratrix* v. *Fiedler*, 2 Black, 461. In *Erskine* v. *Van Arsdale*, 15 Wall. 75, a case of internal revenue taxes, it was said by Chief Justice Chase (p. 77): "Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them." And in *State Railroad Taxes*, *supra*, p. 613, Mr. Justice Miller observed: "The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid." *Patton* v. *Brady*, *Executrix*, 184 U. S. 608, 614. By the statute the clerk is made the collector of the license taxes, and if this tax was illegal and paid under protest, and nothing in this or other legislation of Congress restrict such an action, very likely under these authorities an action would lie against him for the money thus wrongfully taken from the petitioner.

It may be also that an action could be maintained in the Court of Claims or in one of the Circuit or District Courts of the United States, under the Tucker act, to recover directly

from the United States. *Dooley* v. *United States*, 182 U. S. 222. But we are not called upon to decide what remedy by suit or action, if any, the petitioner may have. It is enough now to hold, as we do, that this novel proceeding was not a suit or action in which a final decree or judgment was rendered from which the petitioner could take an appeal to this court.

The order of the District Court is

Affirmed.

The CHIEF JUSTICE took no part in the decision of this case.

PACIFIC COAST STEAMSHIP COMPANY *v.* UNITED STATES.

SAME *v.* SAME.

SAME *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

Nos. 29, 30, 31. Argued December 8, 1902.—Decided January 5, 1903.

Affirmed on authority of *Pacific Steam Whaling Co.* v. *United States*, decided simultaneously herewith, p. 447, *ante*.

THESE cases were argued by the same counsel as in No. 26, p. 450, *ante*.

MR. JUSTICE BREWER delivered the opinion of the court.

These three cases are substantially similar to the one just decided, and for the reasons stated in the opinion therein the orders of the District Court in each are

Affirmed.

The CHIEF JUSTICE took no part in the decision of these cases.

CORBUS *v.* ALASKA TREADWELL GOLD MINING COMPANY.

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

No. 10. Argued December 8, 1902.—Decided January 5, 1903.

Before a court of equity will in any way help a party to thwart the intent of Congress, as expressed in a statute, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury.

If the party primarily and directly charged with a tax is unable to make a case for the interference of a court of equity no one subordinately and indirectly affected by the tax should be given relief unless he shows not merely irreparable injury to the tax debtor as well as to himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor.

The fact that this court entertained the bill of equity in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation, but really for its benefit; and where a bill is filed by a stockholder to enjoin the officers of a corporation from paying a tax as required by a statute of the United States, this court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation as will justify the suit, and if it appears that the suit is collusive or that the plaintiff has not done everything which ought to have been done to secure action by the corporation and its directors, and justify under the assumption of a controversy between himself and the corporation his prosecution of a litigation for its benefit, the bill will be dismissed.

THIS, like the preceding cases, was brought to prevent the payment of an Alaskan license tax. The method pursued was, however, different. It is a suit in equity brought by a stockholder against a corporation—the stockholder and the corporation being the sole parties plaintiff and defendant—to restrain it from paying the tax. Notice was given to the United States district attorney of the pendency of the suit, who appeared as *amicus curiæ*, and, disclaiming any intention of, in any manner, representing or binding the United States, denied the jurisdic-

tion of the court, its right to enjoin the defendant from paying the license, and argued in favor of the constitutionality of the law.

The bill alleged that the defendant was incorporated under the laws of the State of Minnesota, and engaged in mining and milling ore in the District of Alaska, with an office and manager in the district; that "the general control of the affairs of said company is entrusted to a board of directors who reside in San Francisco, State of California, and are non-residents of the District of Alaska; that the complete control and management of the affairs of said company in Alaska is under the supervision and control of its general superintendent and manager, J. P. Corbus."

It is further averred that the company by its general superintendent in Alaska is intending to pay the license tax which, for the year beginning July 1, 1899, amounted, with the clerk's fee, to the sum of $1875. After denying the legality of the tax the bill proceeds:

"Your orator further shows that this suit is not a collusive one, brought to confer jurisdiction of the case upon this court, of which it would not otherwise have cognizance; that your orator has not been able, because of the great distance at which the directors of said company reside, to request them to refuse to pay said tax and to apply for said license, but has made such request of the officers or agents of said company controlling its business in Alaska, but they have failed and refused not to make such application and pay such tax, for the reason that, though they doubt the constitutionality of said law, the pains and penalties imposed by said act for the omission so to do are so severe that said company and its said officers and agents fear, and have reason to fear, the great loss and injury in defending prosecution that might be brought against it for the failure to comply with said law; that they deem it better to submit to the illegal tax than to incur the consequences of the failure to comply with it; that your orator is advised that there is no procedure provided by law whereby said company could test the validity of said law and the constitutionality of said tax without incurring the pains and penalties therein provided for

the violation thereof, inasmuch as the said act requires the voluntary payment of the tax imposed under a penalty of heavy forfeiture and fines for the failure to make such voluntary payment; that the said company, in view of the foregoing, has refused and still refuses and intends omitting to comply with complainant's demand to refuse to pay said tax, and has resolved and determined and intends to comply with all and singular the provisions of said chapter 44 of said act of Congress, and to pay said tax upon its stamps and upon its said mercantile establishment, amounting to the said sum of eighteen hundred and seventy-five dollars for the said year, and to continue the payment of a like or greater sum for each year hereafter.

"Your orator further shows that if said company and its officers, as they have proposed and declared their intention to do, shall pay said tax the assets of the said company will be thereby diminished and lessened, as well as the dividends to be declared upon the stock thereof, and the value of the shares of said company, including the shares owned by your orator and all others in whose behalf this suit is brought; and your orator further shows that this involves more than the sum of five thousand dollars; that unless the company should comply with said act or this court grant the relief herein prayed for the said company would be exposed to a multiplicity of suits and prosecutions for the violation of said act, and would be put to great expense and suffer irreparable injury in defending said suits and avoiding the fines and forfeitures provided by the said act, and its assets and the value of its shares would be thereby greatly lessened, to the great and irreparable injury and damage to your orator and other shareholders in said company."

A demurrer to the bill was sustained and a decree entered dismissing the suit. A single opinion was filed by the district judge in disposing of all of these tax cases. In that opinion, and with special reference to the present case, he said:

"In the cases at bar the district attorney, so far as he had the right to do so, the government not being a party to the suits, raised not only the question of the jurisdiction of the court because the plaintiffs had a plain, speedy, and adequate remedy

Counsel for Parties.

at law, but insisted that the suits were of a friendly nature, collusive in character, and brought for the sole purpose of conferring jurisdiction upon the court, to the end that the defendants might escape paying the license fee imposed by law; and when all the facts are taken together, as disclosed by the record, some color is lent to the latter contention. Take the case of *Corbus* v. *The Treadwell Co.;* the bill was filed July 17, the subpœna served July 19, commanding the defendant to answer the bill within twenty days. No appearance was made by defendant, however, and no pleading filed until November 15, nearly four months after the filing of the bill, and not until about the time the matter was called up for hearing, when a demurrer was interposed. Counsel for defendant did not contend for his demurrer, made no argument, and filed no brief in support of the same, and in the very nature of the case the interests of the plaintiff and defendant are identical. Then, if the object and purpose of the suit is solely to test the constitutionality of the law without first paying into the United States Treasury the amount of the license tax, and there can be no other object, and if the court will sustain the plaintiff and enjoin the defendant as prayed, how is the private citizen to avail himself of a similar remedy? Who shall enjoin him and save him from paying his tax until the constitutionality of the law is determined? And if he cannot avail himself of this manner of suit, why should corporations or copartnerships be permitted to do so? Why should not corporations and individuals have and be permitted to exercise identically the same legal rights and remedies under the law?"

From the decree of dismissal the plaintiff appealed to this court.

Mr. S. M. Stockslager for appellant. *Mr. W. W. Dudley, Mr. L. T. Michener, Mr. J. F. Malony, Mr. G. H. Cobb, Mr. George C. Heard, Mr. John R. Wynne* and *Mr. John G. Heid* were on the briefs.

Mr. Solicitor General Richards for the United States. *Mr. Assistant Attorney General Beck* was with him on the brief.

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

The thought suggested by the quotation from the opinion of the district judge impresses us forcibly. Evidently the plaintiff patterned his proceeding upon *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429. But that case does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation but really for its benefit. *Hawes* v. *Oakland*, 104 U. S. 450, is pertinent in this direction. In that case a citizen of New York, a stockholder in the Contra Costa Waterworks Company, a California corporation, filed his bill in the Circuit Court of the United States for the District of California against the city of Oakland, the waterworks company and its directors. The gravamen of the bill was that the city claimed and received from the company without compensation a supply of water for all municipal purposes whatever; that the claim had no legal foundation, and that such supply without compensation resulted in a diminution of the dividends which should come to the plaintiff and other stockholders, and a decrease in the value of their stock. The bill further alleged that the plaintiff applied to the directors to desist from such illegal practice and take immediate proceedings to prevent the city from taking water from the waterworks without compensation, but that they declined to do so and threatened to continue to furnish water to the city of Oakland free of charge for all municipal purposes, as had theretofore been done. To this bill the company and its directors failed to make answer or other defence. The city of Oakland filed a demurrer, which was sustained and the bill dismissed, and from such decree the case was appealed to this court. The opinion, which is too long to quote in full, opens with these observations (pp. 452, 453):

"Since the decision of this court in *Dodge* v. *Woolsey*, 18 How. 331, the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who

possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

"This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of resorting to the state courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing

on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction."

After a full discussion, with the citation of many authorities, the conclusion is summed up in these words (pp. 460, 461):

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the

shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." See also *Detroit* v. *Dean*, 106 U. S. 537–542; *Quincy* v. *Steel*, 120 U. S. 241.

While this case is unlike that in that it does not attempt to transfer from a state to a Federal court a controversy which really belongs in the former—there being none other than Federal courts in the Territory—yet the principle is the same, for it is an effort to secure for the benefit of the corporation an injunction which it could not itself obtain and which no individual similarly situated can obtain.

Immediately after announcing the decision in *Hawes* v. *Oakland*, *supra*, this court promulgated an additional equity rule (Rule 94):

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Opinion of the Court.

It must not be understood that a mere technical compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs. As said in *Dodge* v. *Woolsey*, 18 How. 344: "The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

It appears from the bill that the capital stock of the corporation is divided into 200,000 shares of the par value of $25 each, of which the plaintiff is the owner of 100 shares; that the total annual tax, including fees, amounts to $1875, which results in a charge upon the plaintiff's interest of less than one dollar a year. This would scarcely be a case of "irremediable injury or a total failure of justice," as indicated in next to the last paragraph of the quotation from the opinion of this court in *Hawes* v. *Oakland*. Indeed, the tax upon the company of $3 a stamp for each of the 540 stamps used by it in the crushing and reduction of ore does not appear to be such as threat-

ens ruin to the company. It does not appear from the bill that any other stockholder shares with the plaintiff his belief in the illegality of the tax or objects to its payment by the corporation, although of course it may be assumed that every person is willing to be relieved from the payment of a tax if other parties will bring about that relief without any trouble to himself.

Again, as suggested by the district judge in his opinion, the plaintiff could not maintain an injunction suit to restrain a similar tax upon himself and why should he be permitted to secure a relief to the corporation (of which he is a minor stockholder) which he could not secure for himself individually? Are corporations the favored parties in respect to the enforcement of taxes? And when the assistance of a court of equity is invoked the purpose of the suit and the object which is sought to be accomplished are frequently matters which may properly be considered. Not only is it the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality, but also, as appears by its legislation, Congress has attempted to enforce that rule and to require payment of a tax by the party charged therewith before inquiry as to its validity will be permitted. See *Pacific Steam Whaling Company* v. *United States*, *ante*, p. 447. Now before a court of equity will in any way help a party to thwart this intent of Congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury. No considerations of mere convenience are sufficient. And if the party primarily and directly charged with a tax is unable to make a case for the interference of a court of equity, no one subordinately and indirectly affected by the tax should be given relief unless he shows not merely irreparable injury to the tax debtor as well as to himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor. We have seen how small the burden of this tax is upon the plaintiff and how comparatively light it is upon the corporation—how far short it comes of anything like irretrievable ruin. It is clearly an attempt to thwart in behalf of this corporation the obvious purpose of Congress, that a tax must be paid before its validity

is challenged. Under those circumstances a court of equity should scrutinize with the utmost care the conduct of the plaintiff and see that he has done everything which ought to have been done to secure action by the corporation and its directors, and justify under the assumption of a controversy between himself and the corporation his prosecution of a litigation for its benefit.

It appears affirmatively that no demand has been made on the directors to protect the corporation against this alleged illegal tax. The only demand shown is that upon the managing agent of the corporation in charge of the business in Alaska, and the excuse is that the directors (living in San Francisco) are too far away to be reached by notice. The act went into effect March 3, 1899, and this bill was filed July 17, 1899. The rule requires that the plaintiff must set forth with particularity the efforts made by him to secure action by the directors. It does not appear that he made any effort to secure such action, but he relies simply on the distance of the directors from the place where he resides and in which the court is held as an excuse for not applying to them. We are of opinion that the excuse is not sufficient. He should at least have shown some effort. If he had made an effort and obtained no satisfactory result either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented, but to do nothing is not sufficient. For aught that the bill discloses he may have been in San Francisco from the time of the passage of the act until he left to come to Alaska for the purpose of bringing this suit. The district judge, in his opinion, said that the facts disclosed by the record lend color to the contention that the suit was collusive. In addition to the matters pointed out by him it may also be stated that since the case was brought to this court the company has not appeared by counsel in either brief or argument.

Putting all these things together we are of opinion that the action of the District Court in dismissing the suit was right, and it is

Affirmed.

The CHIEF JUSTICE took no part in the decision of this case.

STEWART *v.* WASHINGTON AND ALASKA STEAMSHIP COMPANY.

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

No. 13. Argued December 8, 1902.—Decided January 5, 1902.

In an action similar to the preceding, *Corbus* v. *Alaska Treadwell Gold Mining Company*, p. 455, *ante*, brought by a stockholder to restrain a corporation from paying certain taxes in which the bill does not show where the directors reside and does not contain any averment of an application to the directors, or to the president and treasurer, to take action to relieve from the burden of the taxes, the bill was properly dismissed.

THIS case was argued by the same counsel as appeared in No. 10, p. 458, *ante*.

MR. JUSTICE BREWER delivered the opinion of the court.

This case resembles the preceding, in that it was a suit by a stockholder to restrain a corporation from paying certain taxes. The corporation, its president and treasurer were made defendants. The bill alleges that the two officers reside in the city of Tacoma, in the State of Washington; that to them is entrusted the general control and management of the business of the corporation. Where the directors reside is not shown, and there is no averment of any application to the directors or to the president and treasurer to take action to relieve from the burden of the taxes. Under these circumstances the District Court properly dismissed the suit, and its judgment is

Affirmed.

The CHIEF JUSTICE took no part in the decision of this case.

HARTFORD FIRE INSURANCE COMPANY *v.* WILSON.

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

No. 79. Argued November 10, 1902.—Decided January 5, 1903.

Where a policy of insurance is written at the request of a broker, and delivered to him by the agent of the company on his promise not to regard it as binding until the company shall have inspected and accepted the risk, the policy being subject to immediate cancellation, and the company thereafter promptly inspects and rejects the risk, and the agent of the company so notifies the broker who thereupon agrees to return the policy, and no premium is charged or paid as between the broker and agent, there is no final and absolute delivery of the policy, but the delivery is conditional only; and, as no completed contract of insurance is ever actually entered into, the fact that the policy, by inadvertence on the part of the broker, is not returned as promised to the agent, but is sent to the person named therein as insured, will not render the insurance company liable in case the building insured is destroyed by fire, even though the policy came into the hands of the insured prior to the fire and without any knowledge on his part of the action of the company or the mistake made by the broker in delivering the policy.

This case was commenced in the Supreme Court of the District of Columbia by Albert A. Wilson and John B. Larner, trustees, against the Hartford Fire Insurance Company to recover upon two policies of insurance, charged to have been executed and delivered by the company to the plaintiffs on April 17, 1895, and insuring certain property of the Ivy City Brick Company, for the benefit of the trustees, the plaintiffs. The declaration alleged the destruction by fire of the property on May 17, 1895, notice of the loss to the company, and its refusal to pay. After the pleadings had been completed the case was submitted to the court upon an agreed statement of facts. The facts agreed upon, so far as they are pertinent to the questions presented, are as follows:

"1. Prior to April 17, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the city of Washington, D. C., authorized the firm of Tyler & Rutherford, of said city, at their

request, to place insurance for the company, loss, if any, payable to Albert A. Wilson *et al.*, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000), and Tyler & Rutherford averring a much larger sum.

"On said April 17, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said city of Washington, of the Hartford Fire Insurance Company, of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

"2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies amounting to $2000, equally divided on the buildings and machinery, upon the condition that the same should be held by said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancellation (the 5 days' notice in the policy conditions being waived) by notice that said company rejected the risk.

"3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

"4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge

of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, 'All right; send up and get them.'

"5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employé was informed by one of the clerks of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

"6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, 'Canceled by order of the company,' which was accordingly done.

"7. On the first day of May ensuing the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

"8. The existence of the two policies was never reported to the said Duncanson nor to any one connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

"9. The two policies had been overlooked by Tyler & Rutherford and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

"10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancellations as those fixed between

said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16 know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

"11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfilment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford, and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

"12. On the morning of May 17, after the fire, which occurred about one o'clock A. M., on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan and Trust Company, the beneficiary of the trust held by Wilson *et al.*, trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

Statement of the Case.

"Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned, and sundry correspondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan and Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford, and said Washington Loan and Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case."

The policies, which are alike, contained the following provisions:

"*Underwriters' Policy.*

"No. 20,229. $1000.

"By this policy of insurance the Hartford Fire Insurance Company, of the city of Hartford, in the State of Connecticut, in consideration of the stipulations herein named and of seventeen and 50–100 dollars premium, does insure Ivy City Brick Company for the term of one year from the 17th day of April, 1895, at noon, to the 17th day of April, 1896, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding one thousand dollars, to the following-described property, while located and contained as described herein, and not elsewhere, to wit: Ivy City Brick Company. $1000. On machinery of every description, dryers, cars, apparatus, equipments and tools, contained in their one-story brick and frame structure with metal roof (about 118 × 165 feet) and one-story frame and brick addition with metal roof. Situate on their tract known as 'Ivy City,' about one mile northeast of Washington, D. C. Other concurrent insurance permitted without notice until required. Loss, if any, payable as interest may appear to Albert A. Wilson and John B. Larner, trustees. (Mortgagees' clause with full contribution attached.)

Attached to and made a part of policy No. 20,229 of the N. Y. Underwriters' agency.

"THOS. F. BARRETT, *Agent.*

* * * * * * * *

"This policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

* * * * * * * *

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

"In witness whereof, this company has executed and attested these presents this seventeenth day of April, 1895.

"This policy shall not be valid until countersigned by the duly authorized agent of the company at Washington, D. C.

"GEO. L. CHASE, *President.*
"P. C. ROYCE, *Secretary.*
"THOS. TURNBULL,
"*Ass't Secretary.*
"CHAS. E. CHASE,
"*2d Ass't Secretary.*

"Countersigned by—
"THOS. F. BARRETT, *Agent.*"

Opinion of the Court.

Upon these facts judgment was on December 13, 1899, entered in favor of the defendant. This judgment was taken on appeal to the Court of Appeals of the District and by that court on June 12, 1900, reversed and the case remanded with directions to enter judgment for the plaintiffs. 17 D. C. App. 14. Thereupon the case was brought here upon certiorari. 181 U. S. 617.

Mr. Samuel B. Paul for petitioner. *Mr. Alexander Wolf* and *Mr. Maurice D. Rosenberg* were with him on the briefs.

Mr. Henry P. Blair for respondent.

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

The question is whether at the time of the fire there was a valid and subsisting contract of insurance. The negotiations in respect to the policies were not between the insurer and the insured directly, but between agents of each. As shown by paragraphs 2 and 3 of the agreed statement of facts, the agent of the insurer delivered the policies to the agent of the insured upon a condition, which was agreed to by both. That condition failed, notice of which was given by the former to the latter, accepted by the latter as putting an end to the policies, and the former notified to come and get the policies. Several times the former went to the office of the latter to receive the policies, but failed to obtain them owing to the absence of the latter from his office. Both agents treated the policies as dead, and no charge for premiums was presented on the one hand or asked for on the other. Unintentionally the policies were on the day before the fire handed in a package with other papers to the treasurer of the Ivy City Brick Company.

In view of these facts thus agreed upon the question broadly stated above narrows itself to one whether there can be a conditional delivery of a policy of insurance? If there can be, then (as there is no question of estoppel and as there was a failure of the condition) these policies had no binding force at

the time of the fire. That as to contracts generally there can be a conditional delivery, and that the failure of the condition prevents the contract from taking effect is not doubted. In this court the question is at rest. *Burke* v. *Dulaney*, 153 U. S. 228, 238. That was an action brought on a promissory note executed and delivered by the defendant to the plaintiff, and it was held, reversing the trial court, competent to show a parol agreement between the parties made at the time of the delivery of the note that it should not become operative as a note until the maker could examine the property for which it was given and determine whether he would purchase it. Mr. Justice Harlan, delivering the opinion, reviewed several authorities and summed up by stating that "according to the evidence so offered and excluded the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election, within a reasonable time, to take such interest, was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves." See also *Quebec Bank of Toronto* v. *Hellman*, 110 U. S. 178.

If an instrument containing an absolute promise to pay may be conditionally delivered, it is difficult to perceive any good reason why an instrument containing a promise to pay upon a contingency may not likewise be conditionally delivered. If the failure of the condition in the one case prevents the instrument from becoming definitely operative, why not in the other? The rule as to conditional delivery and the effect of a failure of the condition has not been limited to promissory notes, but has often been applied to other instruments, as, for instance, a deed of land; *Leppoc et al.* v. *National Union Bank of Maryland*, 32 Maryland, 136; *Clark* v. *Gifford*, 10 Wend. 310; a

sight draft, *Benton* v. *Martin*, 52 N. Y. 570; a guaranty, *Belleville Savings Bank* v. *Bornman*, 124 Illinois, 200; *Merchants' Exchange Bank* v. *Luckow*, 37 Minnesota, 542.

But, coming closer to the case at bar, let us see what has been decided in respect to insurance policies. In *Brown* v. *The American Central Insurance Company*, 70 Iowa, 390, the plaintiff applied to an agent of the defendant for a policy of fire insurance. The agent doubted his authority to insure the particular property but executed a policy therefor, and, with the consent of the plaintiff, placed it, after receiving the premium, in the hands of a third party to hold until he could communicate with his principal and ascertain whether the risk would be accepted. The defendant refused to accept the risk. The property was destroyed by fire before the notice of its refusal had been received. The court held that there was no delivery of the policy save upon the condition that the insurance company accepted the risk, and that, as it did not accept it, the policy never became operative.

In *Millville Mutual Marine & Fire Insurance Company* v. *Collerd*, 38 N. J. Law, 480, Perrin, the lessee of Collerd, the owner of a mill, applied for fire insurance, as required by his lease. Three policies, each in a different company, were sent him by the insurance agent to whom he had applied. He retained the policies, paying the premium on two, and sent word to the agent to the effect that he would look into the standing of the other company, and if satisfied about that would pay the premium on its policy. The property having been destroyed by fire before any notice or other action by him, he went to the agent and offered to pay the premium, which the latter declined to accept. In an action on the policy it was held that the company was not liable. In the course of the opinion the court said (p. 483) that Perrin "merely held the policy in his possession until he could examine it; or, to use his own expression, 'look into the standing of the company.' He distinctly refused to accept the policy and settle for it, until he was satisfied. This was, in effect, postponing the delivery, the acceptance, and the payment of the premium until a future time, and to this the company, by their agent, Buckley, assented.

The condition for prepayment remained, and the company was entitled to notice of acceptance and prepayment of the premium before the contract for insurance was complete. After Perrin had rejected the policy it remained in his hands, not as an executed contract of insurance, but as a proposal to insure which he must accept by payment of the premium, before the company would be bound."

In *Harnickell* v. *New York Life Insurance Company*, 111 N. Y. 390, the plaintiff, who was the owner of several policies of life insurance issued by different companies, was applied to by the agent of the defendant to take out policies in his company. The result of the negotiations between the plaintiff and the agent was an agreement to take out policies in the defendant company, providing he could surrender the policies he already had to the companies issuing them and obtain satisfactory surrender values thereof. In pursuance of an application duly prepared by the agent and signed by the plaintiff, the defendant company issued two policies, and sent them to its agent. The latter, under the agreement, delivered them to the plaintiff, who gave two notes and a check in payment therefor, which were returned by the agent to the company. The plaintiff, having after some effort failed to make any satisfactory arrangement with the other companies, returned the policies to the defendant and demanded a surrender of his notes and the check. The company declining to make such surrender, this action was brought, and it was held that the policies were delivered only conditionally, that the condition had failed, and that, therefore, the plaintiff could rightfully surrender the policies and obtain a return of his notes and check. The opinion of the court in that case was delivered by Judge Peckham, now a justice of this court, and in it, after referring to the agreement, it was said (p. 398):

"This, we think, was clearly a condition precedent to the full delivery and acceptance of these policies issued by the defendant, and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance existed between these parties."

See also *Nutting* v. *Minnesota Fire Insurance Co.*, 98 Wisconsin, 26.

In the case at bar the learned justice of the Court of Appeals, who delivered the opinion of the majority, after referring to other cases of conditional delivery, (some of which we have noticed in this opinion,) stated as a reason for distinguishing this case:

"The contracts and instruments involved in those cases are very different from the policies of insurance sued upon. These are elaborate instruments and abound in stipulations and conditions. Among these, note the following, that is embraced in the general clause recited in the preliminary statement: 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto.'

"This and other clauses limiting the powers of agents and requiring all additional terms and contitions to be endorsed in writing upon the policies, were devised by the insurance company, itself, to prevent questions concerning the conditions upon which its policies shall be 'made and accepted' from being left to the vagueness and uncertainty of oral proof.

* * * * * * * *

"The condition in this case was one in addition to those contained in the policies and upon which they were 'made and accepted,' and was not in writing endorsed upon them or executed simultaneously therewith.

"Our conclusion is, that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition, making their existence as contracts depend upon the subsequent ratification of another agent."

The argument is that because the policies contained various stipulations restricting the power of the agent, it is incompetent to prove that the contract never came into operative force by a final unconditional delivery. But these stipulations apply only to a contract which has become executed and do not apply where the contract has not been completed by an absolute delivery of the instrument. No instrument could be more absolute than a promissory note, yet it is clear from the

authorities that parol evidence is admissible to explain its possession by the payee, and show that that possession was not the result of a final delivery, but only of one upon condition, and also that the condition failed. Possession cannot be conclusive upon the question of delivery. Otherwise, a possession wrongfully, even feloniously, obtained would bind a party to a contract when, perchance, much remained to be done before the maker was ready to assume the obligations of the contract. There is no stipulation in this policy which either in terms or by implication forbids such a transaction as was in fact had between these two agents. There is no attempt, by parol testimony, to contradict any stipulations of the policy, something which we have recently held cannot be done. *Northern Assurance Company* v. *Grand View Building Association*, 183 U. S. 308. With reference to this question we quote approvingly from *Harnickell* v. *New York Life Insurance Company*, 111 N. Y. *supra*, (pp. 398, 399, 400):

"The provisions contained in the policies, which are above quoted, relate to the policies themselves after they should become executed instruments between the parties. All negotiations had before such event, and all parol agreements between the assured and the agent of the defendant, would have been merged in the contract evidenced by the policies themselves, had the negotiations been carried out as intended, and such policies been absolutely delivered to and accepted by the plaintiff. Hence any oral representation or statements made by the agent of the company, and not contained in the contract of insurance, would have formed no part thereof, and could not have been insisted upon by the plaintiff as against the defendant company. . . . Insurance companies may, with entire propriety, provide in the same manner as the defendant provided in the policies in question, in cases where the contract of insurance becomes executed. There it is highly necessary and important for the company to know exactly how far they are bound and the entire nature of the contract which has been made between them and the assured. But an agreement between an individual and the agent of a company, by which the policy is accepted only upon conditions relating to the same,

and an agreement to hold the policy until the performance of those conditions, or a failure to perform, cannot, as we think, result in any serious inconvenience to the company. But whether that is so or not cannot alter the right of an individual to refuse to be bound by a policy of insurance until he has absolutely received and accepted it."

For these reasons we are of opinion that the facts found show that there was no final and absolute delivery of the policies; that the condition upon which they were deposited with the agent of the insured failed, and, therefore, that at the time of the fire there was no subsisting contract of indemnity between the company and the insured.

The judgment of the Court of Appeals is reversed and the case remanded to that court with instructions to set aside its judgment and enter one affirming the judgment of the trial court.

MR. JUSTICE BROWN concurred in the result.

MOBILE TRANSPORTATION COMPANY *v.* MOBILE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 62. Argued November 3, 1902.—Decided January 5, 1903.

1. A motion to dismiss for want of a Federal question cannot be sustained when the title involved depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 with Spain, and a patent of the United States in alleged confirmation of such claim.
2. It has been conclusively settled by this court that the State of Alabama, when admitted to the Union, became entitled to the soil under the navigable waters below high water mark within the limits of the State, not previously granted. *Pollard's Lessee* v. *Hagan*, 3 How. 212.

The act of the legislature of Alabama of January 31, 1867, conveying to the city of Mobile the shore and soil under Mobile River is not unconstitutional as impairing vested rights of owners of grants bordering on Mobile River, as the rule in Alabama that a grant by the United States of lands bordering on a navigable river includes the shore or bank of such river and ex-

tends to the water line at low water, does not relate to land bordering on *tidal* streams.

As the State held the lands under water below high water mark as trustee for the public it had the right to devolve the trust upon the city of Mobile.

3. All the land below high water mark having passed to Alabama on her admission to the Union in 1819, there was nothing left upon which a patent of the United States dated in 1836, could operate, and the person claiming to hold land below high water mark under said patent has no vested interest in such land, which would require compensation or proceedings in eminent domain on the part of the State to take such lands.

There is a difference between the legislature of a State granting land beneath navigable waters of the State, and below high water mark, to a private railroad corporation and granting it to a municipal corporation whose mayor, aldermen and common council are created and declared trustees to hold, possess, direct, control and manage the shore and soil granted in such manner as they may deem best for the public good. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, distinguished.

While this court can decide as an original question the power of a State to convey property to a corporation, when the case comes from the Circuit Court of the United States, if the case comes up on writ of error to a state court, and the highest court of the State has itself put a construction upon an act of its own legislature, and upon its conformity to the constitution of the State, the decision of such court upon those questions is obligatory on this court.

Defences appearing on the record in this case, which are of a local nature, present no Federal question.

THIS was an action in ejectment brought in the state Circuit Court by the city of Mobile against the Mobile Transportation Company, to recover a portion of the shore and bed of the Mobile River in the city of Mobile, between high water mark and the channel line or point of practical navigability.

In support of its title the city relied upon the following acts:

1. An act of Congress approved March 2, 1819, entitled "An act to enable the people of Alabama Territory to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original States." 3 Stat. 489.

2. An ordinance of the convention of Alabama adopted August 2, 1819, accepting the proposition offered by Congress. Code of Alabama, 1876, p. 68.

3. A resolution of Congress of December 14, 1819, declaring

Counsel for Parties.

the admission of the State into the Union, with a constitution which had been adopted by the State. 3 Stat. 608.

4. An act of the general assembly of Alabama, approved January 31, 1867, entitled "An act granting the city of Mobile the riparian rights in the river front." Acts of 1866–1867, p. 307.

5. An act of the assembly, approved February 18, 1895, entitled "An act to fix the right of the city of Mobile to certain real estate." Acts of 1894–1895, p. 815.

6. An act approved December 5, 1896, Acts of 1896–1897, p. 49, amending the last act.

Several acts respecting the incorporation of the city of Mobile, unnecessary to be considered, were also offered in evidence. It was admitted that defendant was in possession of the lands.

Defendant pleaded the statute of limitations, and offered in evidence certain "Documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress," and particularly that relating to the claim of one Regis Bernoudy, who claimed under a Spanish grant made March 3, 1792, to Joseph Munora, together with evidence of the report of the land commissioner in favor of his claim, and a patent of the United States dated December 28, 1836, to the assignees of Bernoudy, wherein it was recited that the claim of Bernoudy (entered as No. 11) was affirmed, had been surveyed, and was by such title granted unto his assignees. The defendant also offered an unbroken chain of deeds from these assignees to the Transportation Company, as well as proof of an adverse possession of the lands described in the complaint, under a color of right, for twenty years before bringing suit.

All this evidence was excluded by the Circuit Court, whose action in that particular was affirmed by the Supreme Court of the State. 128 Alabama, 335.

Mr. Frederick G. Bromburg for plaintiff in error. *Mr. Eugene H. Lewis* was with him on the brief.

Mr. Harry T. Smith for defendant in error. *Mr. Gregory L. Smith* was with him on the brief.

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

1. Motion was made to dismiss this writ of error for the want of a Federal question, but in view of the fact that defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain, 8 Stat. 252, and a patent of the United States dated December 28, 1836, in alleged confirmation of such claim, we do not see how such motion can be sustained, unless upon the theory that the Federal questions so raised are frivolous and undeserving of further notice. We are of opinion that they cannot be so considered, and the motion to dismiss must therefore be denied.

There are fifty-eight assignments of error, none of which require separate consideration, since all turn upon the respective titles of the parties to the land in question. As the plaintiff in an action of ejectment is bound to recover upon the strength of his own title, we shall first consider the several objections made to the title of the city.

2. That the State of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters, below high water mark within the limits of the State, not previously granted, was so conclusively settled by this court in *Pollard's Lessee* v. *Hagan*, 3 How. 212, as to need no further consideration. This was also an action of ejectment for lands below high water mark in the city of Mobile. The plaintiffs insisted that, by the compact between the United States and Alabama, on her admission into the Union, it was agreed that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying within the State, that the same should remain at the sole disposal of the United States; and that all the navigable waters within the State should forever remain public highways; and hence, that the lands under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and that, to give any other construction to these compacts, would be to yield up to Alabama,

and the other new States, all the public land within their limits. This court, however, held that, when Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the time she ceded the Territory of Alabama to the United States, and that nothing remained to the latter, according to the terms of the agreement, but the public lands. In summing up its conclusions the court held: "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The Supreme Court of Alabama having approved a charge to the jury that "if they believed the premises sued for were below the usual high water mark, at the time Alabama was admitted into the Union, then the act of Congress" (passed in July, 1836, confirming the title of the plaintiff) "and the patent in pursuance thereof, could give the plaintiffs no title," its judgment was affirmed. The opinion of the court was pronounced in 1844.

Prior to this time, however, and in 1839, the Supreme Court of Alabama in the case of *Mayor &c. of Mobile* v. *Eslava*, 9 Porter, 577, had also held that the navigable waters within that State, having been dedicated to the use of the citizens of the United States, it was not competent for Congress to grant a right of property in the same, and that the navigable waters extended not only to low water, but embraced all the soil within the limits of high water mark. This case was also affirmed by this court, 16 Pet. 234, though the case as here presented did not turn upon the rights of the State to land beneath its navigable waters below high water mark.

This was also declared to be the doctrine of the Supreme Court of Alabama as late as 1853, when in *Magee* v. *Hallett*,

22 Alabama, 699, it was held that, if the Mobile River were the eastern boundary of the grants in question, the lines could not under the decisions of that court, as well as those of the Supreme Court of the United States, extend beyond high water mark at that time, citing *Pollard's Heirs* v. *Thorp*, 3 Alabama, 291, affirmed as above stated in 3 How. 212; *Abbot's Ex'r* v. *Kennedy*, 5 Alabama, 393, and *Goodtitle* v. *Kibbe*, 9 How. 471. This last case was little more than an affirmance of *Pollard* v. *Hagan*.

On January 31, 1867, the general assembly of Alabama passed "An act granting the city of Mobile the riparian rights in the river front," the first section of which enacted that "the shore and the soil under Mobile River, situated within the boundary lines of the city of Mobile, as defined and set forth in section two of 'An act to incorporate the city of Mobile,' approved February 2, 1866, be, and the same is hereby granted and delivered to the city of Mobile."

"SEC. 2. *Be it further enacted*, That the mayor, aldermen and common council of the city of Mobile be, and are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good."

In *Boulo* v. *New Orleans &c. R. R. Co.*, 55 Alabama, 480, decided in 1875, it was also held that the title to the shore of all tide-water streams resides in the State, for the benefit of the public, and its use by the public for the purpose of commerce was not only permissible, but in accordance with the trust annexed to the title. The place in controversy was a slip beneath two wharves, but whether it was covered at high tide by the water of the river was a fact about which the evidence conflicted, though the court inclined to the opinion that land had been formed which was not usually covered by water at high tide. It was held the title was in the State.

In *Williams* v. *Glover*, 66 Alabama, 189, part of the land in controversy was an island in the Tennessee River. Some twelve acres of the tract lay between high and low water marks, and was covered with water in high floods. The court held that the ownership of the plaintiff extended to the margin

of the water at its ordinary stage, and hence embraced the land between high and low water marks. As the Tennessee River is not a tidal stream, but empties into the Mississippi far to the north of Alabama, the court in using the words "between high and low water marks" must have had reference to the difference between the river at floods and at its ordinary stage. No reference was made to the prior authorities respecting tide waters.

In *City of Demopolis* v. *Webb*, 87 Alabama, 659, the case did not turn upon the ownership of land below high water mark, although the court, in delivering the opinion, said: "Under our decisions, when a person own lands on a navigable river his ownership is held to extend so far as to embrace the land between high and low water marks," citing *Williams* v. *Glover*, 66 Alabama, 189, which, as before stated, related to land upon an island in the Tennessee River and not upon a tidal stream. The land in question was in the city of Demopolis, on the Tombigbee River, a navigable stream emptying into the Bay of Mobile, and at this point apparently far above the tidal effect. In the same case afterwards before the court on its merits, *Webb* v. *Demopolis*, 95 Alabama, 116, the court held that whether a grant of the United States to land lying on a navigable stream within the limits of a State extends to high or to low water mark or to the middle thread of the stream, was not a Federal but a local question, citing *Barney* v. *Keokuk*, 94 U. S. 324; *Packer* v. *Bird*, 137 U. S. 661; *St. Louis* v. *Rutz*, 138 U. S. 226; *Hardin* v. *Jordan*, 140 U. S. 371; and *Kaukauna Co.* v. *Green Bay &c. Canal Co.*, 142 U. S. 255, and also held that "the rule which this State has adopted and declared through this court is that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low water." In none of the above cases cited from our reports were the lands situated within tide waters.

Relying upon these cases from the Supreme Court of Alabama, the Transportation Company attacks the constitutionality of the act of January 31, 1867, conveying to the city of Mobile the shore and soil under Mobile River, "because the act impairs

vested rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of lands bordering on a navigable river includes the shore or bank of such river and extends to the water line at low water." In this connection the company insists that the decisions above cited constitute a rule of property in the nature of a contract with the owners of land adjacent to the Mobile River, which have been impaired by the construction given to the act of January 31, 1867; but, as we have already noticed, none of the cases related to tidal streams.

In its opinion in this case the Supreme Court of Alabama seems to admit that in *Webb* v. *Demopolis*, and one or two other cases relating to the shore line of streams *above the ebb and flow of tide waters*, the defendant was correct in supposing that the title of the riparian proprietor extended to low water mark, but, said the court, "these cases in nowise conflict with the common law rule so often approved by this court and other jurisdictions that on streams where the tide ebbs and flows grants of adjoining lands only extends to the ordinary high tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in *Webb* v. *Demopolis* to disturb this rule of property supported by a vast array of authorities without making reference to them."

But we are of opinion that there is no conflict between the cases in Alabama, inasmuch as the cases which hold that the rights of the riparian proprietor extend only to high water mark are cases arising upon navigable *tide* waters, where the rise and fall are of daily occurrence, and not usually subject to much variation in height. In regard to this class of cases the rule laid down by the Supreme Court of Alabama in *Mayor &c. of Mobile* v. *Eslava*, 9 Porter, 577, that private ownership extends only to high water mark, has been consistently adhered to ever since, and notably so in *Kennedy* v. *Bebee*, 8 Alabama, 909, 914; *Pollard's Heirs* v. *Greit*, 8 Alabama, 930, 941; *Magee* v. *Hallett*, 22 Alabama, 699, 719; *Abbot* v. *Kennedy*, 5 Alabama, 393; *Boulo* v. *New Orleans &c. R. R. Co.*, 55 Alabama, 480; while, upon the other hand, in the cases which

hold that private ownership extends to low water mark, *Bullock* v. *Wilson*, 2 Porter, 436; *Williams* v. *Glover*, 66 Alabama, 189; *Demopolis* v. *Webb*, 87 Alabama, 659, and *Webb* v. *Demopolis*, 95 Alabama, 116, the lands were situated upon a navigable river far above the tidal influence, and high and low water marks were determined, not by the action of the tides, but by the actual rise and fall of the river at different seasons of the year. With regard to this latter class of cases there is a great conflict of authority in the state courts, some holding that the rights of the riparian proprietor are bounded by high water mark, others by low water mark, and still others by the thread of the stream. Some of these cases are mentioned in the opinion of Mr. Justice Bradley in *Hardin* v. *Jordan*, 140 U. S. 371, 382, and a large number of them are reviewed in part I, chap. 3, of Gould on Waters, where nearly all the cases seem to be collected.

But even if it were conceded that there had been a change of opinion in Alabama with respect to riparian rights upon tide waters, such change by no means raises a case under the contract clause of the Constitution. The status of real estate within a particular jurisdiction is not so much one of contract as of policy, which may be changed at any time by the legislature, provided no vested rights are disturbed. Of course, if riparian proprietors have acquired the title to the property below high water mark by a grant or prior possession, good against the State, they could only be dispossessed by proceedings in eminent domain. The act of 1867 declared no more than that the rights possessed by the State in the shore and soil under Mobile River were granted to the city. We see nothing objectionable in this act. What the State held it held as trustee for the public, and it had a right to devolve this trust upon the city of Mobile. What it had not it could not grant, and the rights of the riparian proprietors were neither enlarged nor restricted by the act. If subsequent cases have given any construction at all to that act, of which there seems to be some doubt, such construction would not present a Federal question, and if the Supreme Court of Alabama had changed its views with respect to the limit of private owner-

ship upon tide waters, its decision in that regard cannot be reviewed by this court. *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Hanford* v. *Davies*, 163 U. S. 273. Upon the whole, we are of opinion that there is no defect upon the face of the title of the city of which the Transportation Company was entitled to avail itself of.

3. We are next to consider whether the defendant has a vested right in these lands which could not be taken from it without compensation or proceedings in eminent domain.

By the eighth article of the treaty between the United States and Spain of February 22, 1819, 8 Stat. 252, "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." In support of this alleged grant from the King of Spain, defendant offered in evidence volume 3 of the American State Papers, entitled "Documents, legislative and executive, of the Congress of the United States in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress, March 4, 1789, to June 15, 1834." That part of it relating to the claim of Regis Bernoudy of the land in question is printed in the margin.[1] The difficulty

[1] Register of claims to land in the district east of Pearl River, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident.

* * * * * * * *

(Page 30.)

Number, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph Munora.
Where situated, Mobile River.
Quantity claimed, area in arpens, 600.
Cultivation and inhabitation, from 1809 to 1813.

* * * * * * * *

(Page 31.)

(Signed) WILLIAM CRAWFORD,
Commissioner.

with this report is that it contains no grant, but merely a supposition of the claimant that a grant once existed, and had been lost by time or accident. It is needless to say that this is no evidence of an actual grant; but a further and even more serious objection to the document is, that it contains no other description of the land granted than that it was 600 arpents in area, and was situated on the Mobile River, but that no survey of the land existed.

REMARKS.—Though the original grants upon which the preceding claims are founded, have been lost, yet it is conceived that the claims to such lands, not exceeding a reasonable quantity, as were inhabited and cultivated under the Spanish government, ought to be confirmed.

(Signed) WILLIAM CRAWFORD,
Commissioner.

* * * * * * * *

(Page 400.)

No. 9.

Report on the conflicting claims of Joseph McCandless and Regis Bernody, both of whom claim the same tract of land, and in relation to whose claims the former commissioner reported favorably.

Former Commis's Report.

No. of report, 10.
No. of claim, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph S. Munora.

Nature of claim, and from what authority derived, grant lost by time or accident.

Date of claim, 3 March, 1792.
Quantity claimed, area in arpens, 600.
Where situated, Mobile River.
By whom issued, Carondelet.
Surveyed, no survey.
Cultivation and inhabitation, from 1809 to 1813.

* * * * * * * * *

Report 10, claim 11.—The claim of Regis Bernody is founded on a conveyance made to him by Joseph Gaspar Munora, at Pensacola, which passed through the office of the commandant, as all authentic conveyances must have done in the Spanish posts of the intendancy, and recognizes the original grant or concession of the same made by the Baron de Carondelet in favor of said Munora, on the 3d March, 1792, which grant was produced by Munora on the day of the execution of the conveyance to Bernody. The proof of the inhabitation and cultivation by Bernody (until forcibly expelled by McCandless) is complete, and the inference is strong that Munora,

Apparently in confirmation of this claim defendant also offered in evidence a patent of the United States, dated December 28, 1836, wherein it was recited that this claim had been confirmed by acts of Congress passed in 1819 and 1822, and that it had been surveyed. Referring to these acts of Congress we find that both contain a proviso that the confirmations and grants provided to be made by the acts "shall amount only to a relinquishment forever, on the part of the United States, of any claim whatever to the tract of land so confirmed or granted." Had this patent been issued before the admission of Alabama into the Union, it would be difficult to see why it did not convey a perfect title; but it was fully settled by this court with respect to these titles in *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471, and *Doe* v. *Beebe*, 13 How. 25, that, inasmuch as all lands below high water mark had passed to the State of Alabama upon her admission into the Union in 1819, there was nothing left upon which a subsequent patent of the United States could operate.

There are other defences presented by the record in this case, such as that of estoppel, by reason of improvements made upon this land with the acquiescence of the city, license to build a wharf, and payment of taxes; the unconstitutionality of the act of 1867, because the title of the act does not describe its subject; want of power in the State to convey its title to

---

the grantee, did comply with the essential conditions of the grant, inasmuch as the instructions of Morales expressly charge the notaries and commandants not to pass any conveyances of lands, where the conditions of the grant were not previously proven to have been complied with; and, independently of this consideration, the declaration of Munora, in the conveyance to Bernody, that it was "the same land that Antonio Espejo worked with his permission," made, too, at a time when it could not be imagined that any rival claim would arise, furnishes a violent presumption that the land was inhabited or cultivated by or for Munora agreeably to the Spanish regulations. A full report of all the evidence presented by the conflicting claimants is herewith presented.

Upon the best view we have been able to take of the relative merits of these claims, we are decidedly of opinion that the claim of Joseph McCandless ought to be rejected, and that of Regis Bernody confirmed.

W. Barton, *Register.*

the city, and the statute of limitations. These, however, are all of a local nature and present no Federal question.

In connection with the power of the State to convey its interest in these lands to the city, as it attempted to do by the act of 1867, much reliance is placed by the Transportation Company upon the case of the *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. This case, however, is inapplicable for two reasons, first, it turns upon the power of the State to convey its right to the soil beneath the *navigable* waters of the State, and of course below low water mark, not to a municipal corporation whose officers were "created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted in such manner as they may deem best for the public good," but to a private railroad corporation to hold and control for its own purposes; second, that case came to this court from the Circuit Court of the United States, which was called upon to declare as an original question what power the State of Illinois had to convey the property in question to the Illinois Central Railroad Company; while this case comes up by writ of error to the Supreme Court of a State, which has itself put a construction upon an act of its own legislature and upon its conformity to the constitution of the State. The decision of that court upon these questions is obligatory upon us.

The judgment of the Supreme Court of Alabama is

Affirmed.

JOHNSON *v.* NEW YORK LIFE INSURANCE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 87. Argued November 12, 1902.—Decided January 5, 1903.

1. A party claiming a title, privilege or immunity under the Constitution of the United States within the third clause of § 709 of the Revised Statutes, which must be specially set up and claimed by the party seeking to take advantage of it, but which cannot be set up in any pleading anterior

Statement of the Case.

to the trial, must make the claim either on the motion for new trial or in the assignments of error filed in the Supreme Court of the State. It is insufficient, if it first appears in the petition for a writ of error from this court.

2. Where the courts of one State fully consider a statute of another State and the decisions of the courts of that State construing it, and the case turns upon the construction of the statute and not upon its validity, due faith and credit is not denied by one State to the statute of another State, and the manner in which the statute is construed is not necessarily a Federal question.

THIS was an action upon a policy of insurance upon the life of Frank C. Johnson, dated December 27, 1890, whereby the defendant insured his life in the sum of $25,000 for the benefit of his executors, administrators or assigns. This policy was assigned to the plaintiff in 1895, and on September 28, 1896, Johnson died. The annual premium was fixed at $1060, payable in advance on November 11 of each year. There was the usual provision for forfeiture in case of non-payment of premiums. The premium was paid on November 11, 1892, but no payments were made thereafter. After Johnson's death, and on February 20, 1897, plaintiff tendered the past due premiums with interest thereon, which defendant refused to accept, and this action was begun.

The insurance company was incorporated under the laws of the State of New York, the policy was issued in that State, and the application contained an agreement that the contract contained in such policy and in the application should be construed according to the laws of the State of New York—the place of said contract being agreed to be the home office of the company in the city of New York.

Plaintiff, in reply to the defence of non-payment of premiums, relied upon the statute of 1877 of the State of New York, which we have heretofore had occasion to consider in several cases, and which provided that "no life insurance company doing business in the State of New York shall have power to declare *forfeited or lapsed* any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof," except upon a written notice to the insured stating the amount of the premium due on the policy, the

place where it should be paid, and the person to whom the same was payable, with the further proviso that "no such policy shall in any case be forfeited . . . or lapsed until the expiration of thirty days after the mailing of such notice."

There was, however, in the State of New York another statute, commonly known as the net reserve law, giving to holders of life insurance which had been in force three full years the benefit of the net reserve on their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default.

The policy in question contained a stipulation that "if this policy shall lapse, or become forfeited for the non-payment of any premium, after there have been paid thereon three full premiums, . . . a paid-up policy will be issued, on demand made, within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payment of premiums . . . for such an amount as the net reserve on this policy at the time of lapse, computed by the American table of mortality, and interest at $4\frac{1}{2}$ per cent, after deducting all indebtedness to the company, will purchase as a single premium, at the present published rates of the company, at the age of the insured, at the time of lapse."

On December 10, 1892, about two years after the policy was issued, Johnson requested the defendant, in writing, to extend to his policy "the benefits of its accumulation policy." In reply, the company issued a policy or certificate, extending to his policy the benefits of the accumulation policy plan, and providing that "after this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter to the company of any indebtedness to the company on account of this policy: 1, the insurance will be extended for the face amount, as provided in the table below; or, 2, on demand made within six months after such non-payment of such premium dues with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or, 3, the policy will be reinstated within the said six months upon payment of the overdue premium, with interest at the rate of

five per cent per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing." By the "table" above mentioned it was provided that if the premiums were paid to November 11, 1893, the insurance would be extended to May 11, 1896.

In this connection the company insisted that the thirty days' notice law of New York had no application to the contract involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died.

Construing the certificate which extended to the original policy the benefits of the accumulation policy plan of the company, the Supreme Court of Iowa held "that the clause of the original policy providing for its forfeiture for the non-payment of premiums was so far modified and changed that upon such failure the policy became a paid-up contract for the amount of the original insurance for a certain and definite term. On demand of the assured within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture of Johnson's life contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his default in the payment of the premium due November 11, 1893, became transmuted into a paid-up policy for a term ending May 11, 1896. . . . The benefits of that statute" (for thirty days' notice) "were given only to policies which had *lapsed or been forfeited* for non-payment of premium, debt, or interest; and the notice had to be given, to effect this forfeiture or fix such lapse. After the default, the life contract continued in force until it was determined according to the statute. . . . In the case at bar, under the modified contract, immediately on default in payment of the premium of 1893 the policy became a paid-up contract for a term; and, if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force. It went into effect by reason of the con-

tract. . . . Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy, without any further payment being required of her. . . . The notice is required only when it is sought to declare the contract *forfeited or lapsed.* . . . Our conclusion is that this was a policy for a term that expired before Johnson's death, and therefore plaintiff has no right of recovery." 109 Iowa, 708.

Mr. Constantine J. Smyth for plaintiff in error.

Mr. James H. McIntosh for defendant in error. *Mr. George W. Hubbell* and *Mr. Frederic D. McKenney* were with him on the brief.

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

This case must be dismissed for two reasons.

1. Plaintiff relies for a reversal upon the fact that full faith and credit were not given to the law of the State of New York requiring a notice of thirty days before the forfeiture of any insurance policy, which was pleaded in the case. This however is a title, right, privilege or immunity claimed under the Constitution of the United States, within the third clause of Rev. Stat. sec. 709, which must be "specially set up and claimed" by the party seeking to take advantage of it. Conceding that it was unnecessary to set it up in any pleading anterior to the trial, since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State. In neither does it appear, nor is there any allusion to it in the opinion of the Supreme Court. It first appears in the petition for a writ of error from this court. This is clearly insufficient.

2. The Supreme Court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully

considered, and the decision of the state courts of New York were called to its attention and cited in its opinion. The court held that notice is required by that statute only as a basis for declaring a forfeiture or lapse of a policy for non-payment of premium or interest, and that the law had no application, because it was a non-forfeitable policy of term insurance, which had expired by limitation before the insured died. Whether the Supreme Court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of *Banholzer* v. *New York Life Insurance Co.*, 178 U. S. 402, and in principle by *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another State had been construed to his detriment.

The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. *Commercial Bank* v. *Buckingham*, 5 How. 317; *Baltimore &c. R. R. Co.* v. *Hopkins*, 130 U. S. 210.

The writ of error is

Dismissed.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA dissented.

DOWNS *v.* UNITED STATES.

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

No. 318. Argued October 29, 1902.—Decided January 5, 1903.

When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process or in whatever manner or under whatever name it is disguised, it is a bounty upon exportation. As under the laws and regulations of Russia, the Russian exporter of

Argument for Petitioner.

sugar obtains from his government a certificate solely because of such exportation, which certificate is salable and has an actual value in the open market, the government of Russia does secure to the exporter from that country, as the inevitable result of such action, a money reward or gratuity whenever he exports sugar from Russia, and which is in effect a bounty upon the export of sugar which subjects such sugar, upon its importation into the United States, to an additional duty equal to the entire amount of such bounty under the act of Congress of July 24, 1897, 30 Stat. 205.

This was a writ of certiorari to review a decree of the Circuit Court of Appeals, affirming a decree of the Circuit Court for the District of Maryland, which itself affirmed the action of the board of general appraisers, holding a cargo of refined sugar imported into Baltimore from Russia subject to a countervailing duty leviable upon merchandise upon which a bounty is paid upon exportation.

The proceedings were instituted by a petition filed in the Circuit Court setting up the importation of sugar on the steamship Assyria, July 6, 1899, the imposition of a countervailing duty by the collector of customs at Baltimore, and the payment of the same under protest; and the fact that the decision of the collector had been affirmed by the board of general appraisers. The grounds stated in the petition for a review are, generally, that the country from which the sugar was exported did not pay or bestow, directly or indirectly, any bounty or grant upon the exportation of said sugar.

The return of the general appraisers contained a copy of the proceedings before them, including a copy of the Russian law and regulations, a stipulation of facts, a copy of certain reports from the United States consul at Odessa, and their opinion overruling the protest, and affirming the decision of the collector. The Circuit Court affirmed the action of the general appraisers, and upon appeal to the Circuit Court of Appeals that court in turn affirmed the decree of the Circuit Court. 113 Fed. Rep. 144.

Mr. Ernest A. Bigelow on behalf of petitioner supported the contention that no bounty or grant was paid or bestowed by the Russian government upon the exportation of the consign-

ment of sugar involved in the action. The Russian sugar law is not a covert scheme to pay concealed bounties on exportation, but the genuine effort of a paternalistic government to wrest the control of the trade from a pernicious sugar ring and to regulate the industry in the interest of producer and consumer alike.

Section five of the tariff act of 1897 (in full in opinion, p. 501 *post*), applies only to bounties on exportation and is distinguished from bounties on production. *Allen* v. *Smith*, 173 U. S. 402. By specifying only bounties upon exportation, Congress must have intended to *exclude* bounties on production from the operation of section five, and unless the bounty alleged to be paid by the Russian government be conditioned solely on exportation, and in such fashion that the exporter gets it and the non-exporter does not, unless, in other words, the exporter is placed in a better position than if he had not exported, then the bounty is not a true bounty on exportation, and section five can have no application thereto. The purchase price of the "free sugar" export certificate is not a bounty on exportation; and merely liquidating the value of the right cannot convert that into a bounty on exportation which was not one before. The enhanced prices secured to manufacturers by the operation of a high protective tariff constitute a virtual bounty on *production*. Alexander Hamilton's Report on Manufactures; *United States* v. *Realty Co.*, 136 U. S. 427, 434; *Colder* v. *Henderson*, 54 Fed. Rep. 802, 803; Lord Pirbright, P. C., Prest. of Sugar Conference of 1888, in Empire Review for April, 1902, p. 264. The question is not whether protective duties are indirect bounties, but whether Congress intended to include them within the scope of section five, and it is plain that Congress could not have had any such intention. The action of the Russian government in further limiting the market to a portion only of the product distinguishes the system in degree, but not in principle, from the American system. The wording of the section excludes the theory that Congress intended to include therein the "virtual bounties" resulting from the operation of protective tariffs or other artificial limitations of the home market.

The Russian law does not, either directly or indirectly, re-

quire the manufacturer to export any portion of his sugar as a condition precedent to selling the balance in the home market, but on the contrary invites him not to do so but to carry over his surplus into the next campaign. This disposes of all arguments based on a supposed obligation to export in order to obtain the benefit of the artificially high prices in the home market. The Brussels Sugar Conference decided, not that Russia paid a bounty on exportation, but that the artificially high prices ensured on the home market by the high protective tariff acted as virtual bounties on production, enabling the manufacturer to endure losses abroad. If such conclusions are to be adopted the United States is the greatest bounty paying country in the world. Congress never intended the words "bounty or grant" as used in section five to have any such extreme application. The remission of excise taxes on the exportation of sugar is not a bounty or grant on exportation as the terms are used in section five. If the question is one in doubt, the doubt must be resolved in favor of the importer "as duties are never imposed on citizens upon vague or doubtful interpretation." *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616; *Adams* v. *Bancroft*, 3 Sumner, 38.

Mr. Assistant Attorney General Hoyt, for the United States, respondent.

The single question involved is whether a bounty was bestowed by Russia on the exportation of the sugar. The point of jurisdiction which might be urged in favor of exclusive executive authority to determine the question appears to have been waived by the Secretary of the Treasury having voluntarily submitted the matter to the judicial determination of the Board of General Appraisers and the courts. The only other case under this law is *Hills* v. *United States*, 99 Fed. Rep. 425; on appeal, 107 Fed. Rep. 107, which decided that the practical effect of the Dutch law is to make the remission of the Excise Tax from the standpoint of other countries a bounty on exportation.

The Russian government desires to maintain prices, and therefore limits the output on the domestic market. It also

desires to stimulate production, and for this purpose puts a premium on exportation. It is neither necessary nor proper to suggest a covert purpose to bestow a bounty by seeking a covert method; but the Russian attitude offers some excuse for such a suggestion. It is enough to establish that the premium on exportation, the indirect bounty, is the necessary effect and result of the scheme. The grant as a governmental allowance is shown by the complete control of the government over it. The government reserves the right to suspend the remission of excise in order to guard against the effect of such a rise of prices in the rest of Europe as might cause an abnormal domestic over-production. One highly significant feature in the arrangement is the cession or transfer of free sugar from one mill to another in order to facilitate exportation, which transfer carries a consideration to the producer who cedes his home market right, and constitutes the concrete evidence of the premium or indirect bounty on exportation. *Hartranft* v. *Wiegmann*, 121 U. S. 609, distinguished, but see *Henderson* v. *The Mayor*, 92 U. S. 259, 268, as to the doctrine of reasonable interpretation. This court does not accept a foreign remission of internal tax as conclusive upon its effect with respect to our own laws. *United States* v. *Passavant*, 169 U. S. 16. The Russian scheme carried out under their sugar law and regulations clearly amounts to the paying or bestowing indirectly of a bounty or grant upon the exportation of sugar which properly subjects the merchandise upon importation into this country to the countervailing duty presented by section five of the tariff act of 1897.

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

This case involves the single question whether, under the laws and regulations of Russia, a bounty is allowed upon the export of sugar which subjects such sugar, upon its importation into the United States, to an additional duty equal to the entire amount of such bounty, under the act of Congress of July 24, 1897, 30 Stat. 205, which reads as follows:

Opinion of the Court.

"SEC. 5. That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

A bounty is defined by Webster as "a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufactures." And by Bouvier, as "an additional benefit conferred upon or a compensation paid to a class of persons." In a conference of representatives of the principal European powers, specially convened at Brussels in 1898 for the purpose of considering the question of sugar bounties, the definition of bounty was examined by the conference sitting in committee, who made the following report:

"The conference, while reserving the question of mitigations and provisional disposition that may be authorized, if need be by reason of exceptional situations, is of opinion that bounties whose abolition is desirable, are understood to be all the advantages conceded to manufacturers and refiners by the fiscal legislation of the States, and that, directly or indirectly, are borne by the public treasury."

"There should be classified as such, *notably:*

"(*a*) The direct advantages granted in case of exportation.

"(*b*) The direct advantages granted to production.

"(*c*) The total or partial exemptions from taxation granted to a portion of the manufactured products.

"(*d*) The indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates.

"(*e*) The profit that may be derived from an excessive drawback.

"In addition, the conference is of opinion that advantages similar to those resulting from the bounties hereinbefore defined may be derived from the disproportion between the rate of customs duties and that of consumption dues (surtaxes), especially when the public powers impose, incite or encourage combinations among sugar producers.

"It would be desirable to regulate surtaxes in such manner as to confine their operation to the protection of home markets."

A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1890, allowing a bounty upon the production of sugar, and Rev. Stat. sections 3015–3027, allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant*, 169 U. S. 16.

The laws of Russia, regulating the production and exportation of sugar, are very complicated, not easily understood, and too long to justify their full incorporation in this opinion. Such, however, as bear upon the question of bounty are reproduced from a translation of the Russian law of November 20, 1895, and regulations thereunder, the accuracy of which is stipulated by the parties, together with certain statements also stipulated to be read as evidence.

The objects of the Russian law are stated in the words of a recent note delivered to the representatives of the powers at St. Petersburg, as follows: "The Russian government only

regulates the distribution of sugar on its home market, its purpose being, on the one hand, to antagonize over-production of sugar, and on the other, gradually to bring about lower prices and greater consumption for that product in this country. It protects home consumption against rises in the prices, and production against sudden and considerable falls." Counsel for petitioner insists that the chief object of the government is to prevent, or at least to discourage, over-production with its attendant evils, and, to accomplish this, the law penalizes over-production by imposing thereon double the regular excise tax.

From the stipulation of facts it appears that at the opening of each sugar campaign a committee of ministers, upon a report of the Minister of Finance—

"(1.) Estimates the total consumption and the total production of sugar, and the total amount which may be put upon the market at the normal excise of one and three fourths roubles (a current rouble being equal to about fifty-one cents) per pood (of thirty-six pounds) is definitely fixed at the total amount required for consumption." (This excise amounts to about two and a half cents per pound.) "This is known as free sugar."

"(2.) The first sixty thousand poods produced by each factory is free sugar. The balance of the production is divided into free sugar, obligatory reserve and free surplus or free reserve."

"(3.) The amount of free sugar in each factory is proportioned to its total production, as the estimated consumption is to the total production of the country. This percentage is fixed by the government according to the estimates of production and consumption."

For instance, if the ministers estimate the home consumption at thirty-five million poods, and the probable production at fifty million poods, 35–50 of the daily production of each factory will be set apart as "free sugar" by the inspector, and 15–50 (less a certain portion of "indivertible reserve") will be set apart as surplus.

"(4.) Under the Russian law therefore all sugar is divided into the three following classes:

"*a*. 'Free sugar,' which consists of a certain quantity of sugar which the Russian government permits a factory or refinery to sell for home consumption under an excise tax of 1.75 roubles per pood."

"*b*. An 'obligatory or indivertible reserve' of sugar, which consists of a certain quantity kept at each factory or refinery by order of the government and which may not be sold or removed without the special permission of the government."

The object of this reserve is to enable the Minister of Finance, in case the price in the home market exceeds the price fixed as a maximum, to authorize the issue of sugar from this reserve upon payment of the usual tax in quantities sufficient to bring about a reduction in prices.

"*c*. 'Free reserve or free surplus,' which consists of sugar as is manufactured over and above the quantity of 'free sugar' and 'obligatory or indivertible reserve.' This sugar cannot be sold for home consumption except upon payment of the regular tax of 1.75 roubles and an additional tax of 1.75 roubles, or 3.50 roubles in all."

The Russian government also fixes and determines (*a*) the total quantity of sugar required for home consumption from all the factories and refineries, that is, free sugar; (*b*) the quantity of sugar to be kept by each factory as an obligatory reserve; (*c*) the maximum of prices during the prevalence whereof such reserve must remain intact in the factories, as well as the conditions under which the sugar in reserve can be put on the market.

2. The quantity of sugar produced in excess of the amount for home consumption (free sugar) is considered as an excess of production, and when sold is subject to a double tax.

3. This excess is distributed among the factories in proportion to the quantity of sugar produced by each of them over and above sixty thousand poods.

4. The obligatory reserve of sugar to be kept by each factory is derived and completed from the quantity of sugar in excess of the normal quantity, by taking from such excess the necessary percentage to constitute the prescribed reserve.

5. Sugar in excess of the normal production cannot be put

on the home market otherwise than upon payment of an additional tax, the normal tax being payable according to the general regulation. However, it is allowed to the manufacturers to keep this excess of sugar as free reserve, and in such case, so long as the sugar does not leave the factory, they are not required to pay either the additional or regular excise.

6. The sugar in the obligatory reserve is not liable to the payment of tax until it is withdrawn by permission under the conditions indicated in section 7.

"7. In cases where the prices in the home market exceed the normal prices fixed, the Minister of Finance authorizes the issuance of sugar from the obligatory reserve and from the free reserve (if necessary) in sufficient quantities to cause a decrease of price without payment of the additional tax, but with payment of the normal excise."

"8. In case of loss without the fault of the manufacturer, of sugar comprised in the obligatory or free reserve, the Minister of Finance is authorized to strike the lost sugar from the factory's account, without exacting the excise and additional tax charged against it."

"9. Upon the exportation from the factories of the excess of sugar the same is exempted from the excise and additional tax in full measure."

For the purpose of insuring to the domestic manufacturer a profitable home market the Russian government imposes a duty of three roubles per pood (practically prohibitive) upon imported sugar. Upon the other hand, and to insure to the consumer a reasonable price, it fixes a maximum price, during the prevalence of which the obligatory reserve must remain intact. This reserve is set aside from the production of each mill, so that when the prices in the home market rise beyond the maximum fixed, the Minister of Finance authorizes the sale of sugar from the obligatory reserve, and from the free reserve if necessary, in sufficient quantities to reduce the price, upon payment only of the normal excise. The amount of free sugar to which each factory is entitled is determined by the ministry upon the basis of the probable national consumption and the probable production, the product of every factory be-

ing divided according to the ratio between these estimates. Each manufacturer can sell his quota of free sugar upon the home market upon the payment of the normal excise of 1.75 roubles per pood. He can only place his surplus upon the home market by paying a double excise; but he may leave it in the mill where it is not subject to the tax; or he may have it transferred to the production account of the next campaign, where it will serve him to increase the amount on which his percentage of free sugar is estimated; or he may export it free from excise. The last alternative is the one usually adopted.

It frequently happens, however, that a manufacturer located near a seaport town is unable to find a market for his free sugar at home, but by a remission of the excise may export his sugar to some foreign country at a profit, while the manufacturer in an interior town may be able to dispose of a much larger amount of "free sugar" than he is entitled to put upon the market, but is located too far from the seaboard to export at a profit. As the government is interested only in the amount of free sugar produced, and not in the particular person producing it—the allotment to each factory being merely to do equal justice to all—it permits the seaboard manufacturer to export his free sugar without tax, and to assign his right to the interior manufacturer to sell as much additional free sugar as is represented by the amount exported or convert his "surplus" into "free sugar," thus saving the additional tax.

The method by which this assignment is effected is shown by the following regulations of the government "on transfers of free sugar from one mill to another in order to facilitate the exportation of the surpluses to foreign countries":

"Sec. 39. A manufacturer may cede to another manufacturer his right to place on the home market free, *i. e.*, without the payment of an additional tax, his alloted quota of sugar.

"Sec. 40. In relation to such cession the following rules may be observed:

"(1.) The manufacturer who assigns to another manufacturer his right to dispose of a certain quantity of sugar free must give notice thereof to the local excise board, which first orders to be held at the mill a quantity of free sugar equal to that

about to be assigned, and immediately thereupon duly communicates with the excise board having jurisdiction of the mill in whose favor the assignment is being made.

"(2.) If the assignment is accepted by the latter mill, the quantity of free sugar in said mill is correspondingly increased by transfer from the free surplus (not from the indivertible reserve), of which a memorandum is made by the excise officers in charge; thereupon the excise board, from which the communication in relation to the assignment of free sugar has been received, is notified of the acceptance of said assignment.

"(3.) Upon receipt of the notification that the assignment has actually been accepted, the quantity of 'free sugar' at the factory by which the assignment has been made is correspondingly reduced by transferring the same into the free surplus (or free reserve), of which a memorandum is made by the excise officer in charge.

"(4.) The reduction of the quantity of free sugar at one mill and the increase thereof by assignment at another mill are entered in the proper books of the mill."

It thus appears that, by a series of book entries carried on under the direction of the local excise board having jurisdiction of the mill of the assignor, and the corresponding board having jurisdiction over the mill of the assignee, and without any actual transfer of sugar from one mill to the other, or the issue of a certificate, the "surplus" sugar of the assignee manufacturer is converted into "free sugar," which he can sell at the normal excise, and the "free sugar" of the assignor manufacturer has become "surplus," which he can place on the home market by paying the double tax, (practically prohibitory) leave in the mill where it is not subject to the tax, have transferred to the production account of the next year, or export to a foreign country.

Should the assignor manufacturer deem it best to adopt the last alternative of exporting, he will obtain in a foreign market a price somewhat less than he would have obtained had he sold his sugar as free in the local market. Hence, the consideration which the interior manufacturer must pay to induce the other to transfer his rights to free sugar to him, is measured by the

difference between the home market price and that prevailing in the foreign market. With regard to this, we quote from the report of the American consul appearing in the record:

"As the first and second methods of disposing of his sugar (by selling under the double tax or exporting) are less advantageous than placing the article on the home market as free sugar, the manufacturer who ceded his right received from the manufacturer who acquired the right the price per pood agreed upon between them, which is usually determined by the differences existing at the moment between the price obtainable for the sugar on the home market and the price obtainable by sale abroad. This is what is termed a *transfer*. Dependent upon the fluctuations in the price of sand sugar in Russia and abroad, the price for these transfers also varies; therefore, the person who sells or transfers the right of issue in the home market, charges several copecks more than the difference mentioned above. This is done on account of the risk that is taken that sugar prices abroad may fall, and also for the trouble involved in exporting, etc. Example: The price of sand sugar at a station in the southwestern region (*a*) for the home market, Rs. 4.25 per pood, or without excise Rs. 2.50; (*b*) for abroad, Rs. 1.25. Consequently the difference of value of transfer is Rs. 1.25; but in that case, for the reasons given, Rs. 1.28 to 1.30 is paid for the transfer."

While it is true that this transfer of the right of issuing free sugar does not involve as a condition thereto the export of any sugar whatever, the only condition being that the assignor's free sugar shall diminish *pari passu* with the increase of the assignee's, yet, as a matter of practice, the object of making such transfer appears to be to increase the amount which the assignor *may* export, although he may, as a matter of fact, find it more profitable to leave his surplus in the mill to be transferred to the production account of the following year. If his factory be located far inland, he will be likely to do this, while if he be near a seaport town, he will probably prefer to export his surplus, even at the lower prices obtainable abroad.

Provision is made for the manner of exporting sugar to foreign countries by the following regulations, the first of which

(section 37) applies to free sugar, and the second of which (section 38) applies to the free surplus:

"I.—*On the Manner of Exporting Sugar to Foreign Countries.*

"SEC. 37. *Free sugar*, exempt from the additional tax, may be exported to foreign countries in compliance with the rules heretofore existing; the exportation of such sugar requires, however, a permit from the excise office, which must be duly endorsed on the bill of lading, as set forth in sections 31 and 34 of these instructions.

"NOTE.—The mill owner is allowed to export free sugar (this rule does not apply to purchased sand or refined sugar produced from purchased sands) on account of his surplus for the same campaign. For this purpose the export is made in the manner hereinafter, in subdivisions 1 to 4 of section 38, set forth, except that the excise office notes on the certificate 'free sugar,' and requires no security for the *additional* tax. Upon the return of the certificate with the custom-house export mark, the excise office credits the exported quantity of sugar to the free surplus of the mill, if such there be, and increases by a like quantity the allowance of free sugar, of which a memorandum and an entry in the book must be made.

"SEC. 38. In relation to exports of the *free surplus* (free reserve) of sugar from the mills, the following special order must be observed, in addition to the rules now in force.

"(1) The transport of sugar from the *free reserves* intended for export to foreign countries must be shipped in the presence of the excise authorities, who, after examining the transport, endorse on the bill of lading accompanying the same that said sugar has been removed from the free reserve for exportation abroad, and issue a separate certificate to the mill owner, setting forth the name of the mill, the bill of lading accompanying the transportation, and the statement of the weight of the sugar contained therein.

"(2) The *additional tax*, at the rate of roubles 1.75 per pood, chargeable to the exported sugar, must first be secured in full by *cash*, excise credit vouchers, or such funds as are accepted as security for the tobacco excise, or by the stock of sugar, free

or of the free reserve, on hand in the factory, as set forth in section 30 of these instructions. (The 75 kopeck portion of the excise due on exported sugar is to be paid or secured in accordance with the rules now in force.)

"(3) The custom-house duly examines the exported shipment of the free surplus, the tare previously certified by the excise office being accepted at its actual weight as per bill of lading annexed to the export certificate. After forwarding the transport across the border, the custom-house delivers to the shipper, in lieu of refunding the *excise*, (not the *additional* tax, however,) a voucher crediting the same on his sugar excise account, and marks down by endorsement on the certificate of the excise office presented by him (subdivision 1) the time of export, the net weight of the exported sugar, and the credit voucher issued stating the amount of excise allowed.

"(4) The certificate with the endorsement of the custom-house must be returned by the mill owner to the excise office within six months from the date the sugar was shipped from the mill, whereupon the *additional* tax charged upon the exported sugar is remitted by the excise office, by a corresponding credit in proportion to the quantity of sugar exported, and the deposits securing the same are released. If the certificate is not returned within said time, or does not account for the full quantity of sugar which was to have been exported, then, upon the failure of the mill owner to pay within two weeks the additional tax due, the excise office must proceed with the collection thereof in regular manner."

It thus appears that free sugar, which may be sold in Russia, at the normal excise of R. 1.75 per pood, may be exported under a permit from the excise office, and upon the return of the free sugar certificate with the custom-house export mark, the excise office credits the exported quantity of sugar to the free surplus of the mill. With the free surplus, however, which is subject not only to the normal excise of R. 1.75 per pood, but to an additional tax of the same amount, a somewhat different course is pursued. The *additional* tax chargeable to the exported sugar must first be secured in full cash or its equivalent, and an export certificate delivered, which must be returned by the

mill owner to the excise office within six months, whereupon the additional tax is remitted by the excise office by a corresponding credit in proportion to the quantity of sugar exported. For the *normal* excise, a voucher crediting the same on the sugar excise account is delivered, as in the case of free sugar.

The following facts were stipulated:

"5. That the sugar which was imported in this case, and which is covered by this protest, consists of free sugar as above defined, and would have been subject to an excise tax of 1.75 roubles per pood if sold in Russia."

"6. That upon the exportation of said sugar from Russia the Russian government, under its laws and regulations, released said sugar from said tax of 1.75 roubles either by a refund of the tax or a cancellation of the indebtedness, or otherwise."

"7. That in addition to remitting said excise tax the government issued to the exporter a certificate certifying that he had exported such a quantity of so-called free sugar; that the said certificates have a substantial market value, and are transferable, and that the price thereof is usually determined by the difference existing at the time between the price obtainable for sugar on the home market and price abroad."

8. That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve," or "free surplus," to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 roubles per pood (to which free sugar is regularly subject) instead of a tax of 3.50 roubles per pood.

This appears to be the real function of the free sugar export certificate—to obtain a transfer of sugar from "surplus" to "free sugar" account. This free sugar export certificate being negotiable, any holder of the same is at liberty to call for the transfer of a like amount of sugar from surplus to free sugar account, and is thereby enabled to put his sugar upon the market at the normal excise instead of the double tax imposed upon surplus.

By this arrangement neither the total amount of free sugar allowed to the two manufacturers nor the total export has been increased, since what the assignor exports the assignee sells as free sugar. The assignee, however, has secured the large profits of the sale of his sugar at home and saved his freight to the coast, while on the other hand the seaport merchant has sacrificed those profits by exporting his sugar at a less remunerative price. It follows that the price which the seaport manufacturer receives for his export certificate is the difference between what he would have received had he sold his free sugar at home and the price he would have obtained on the foreign market. For instance, if the price in the home market is R. 2.50 per pood, and in the foreign market R. 1.25, the certificate will be worth the difference between these two, and the exporter will receive the same gross amount as if he had not exported his free sugar, but had sold in the home market. Thus:

By sale at home he obtains the market price..... R. 2.50
By sale abroad he obtains the foreign market price .....R. 1.25
Also the price of certificate.....R. 1.25
R. 2.50

In practice, of course, as in the case of all commodities, the market value of these certificates must vary according to the demand and supply, but the theory underlying the transaction is always this, that the exporter shall suffer no loss because he has exported his free sugar instead of selling it in the home market.

It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production. The answer to this is that every bounty upon exportation must, to a certain extent, operate as a bounty upon production, since nothing can be exported which is not produced, and hence a bounty upon exportation, by creating a foreign demand, stimulates an increased production to the ex-

tent of such demand. Conversely, a bounty upon production operates to a certain extent as a bounty upon exportation, since it opens to the manufacturer a foreign market for his merchandise produced in excess of the demand at home. A protective tariff is the most familiar instance of this, since it enables the manufacturer to export the surplus for which there is no demand at home. If there were no tariff at all, and the expense of producing a certain article at home were materially greater than the expense of producing the same article abroad, there would be none produced, and, of course, none to export. But with the aid of such tariff production would be stimulated, and might become so much greater than the home demand, that a manufacturer would look to foreign markets for his surplus. In the case of Russian sugar the effect of the import duties is much enhanced by the fact that, the supply of free sugar from the home market being limited, the selling price is very remunerative, and each producer has therefore an interest in placing as much sugar as he can on the home market; and as the total amount of free sugar is distributed among all the manufactories in proportion to their entire production, it may become to their interest to export their surplus even at a loss, if such loss can be compensated by the profits on sugar sold in the home market. This would not make the tariff a bounty upon exportation, but a mere incident to its operation upon production. But, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; but where in addition to that these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation.

The argument of the petitioner in this connection is that, if a manufacturer sell his free sugar on the home market, he receives the home market price of, say, R. 2.50 per pood; whereas if he export his "free sugar," he receives the foreign price, say, R. 1.25 and R. 1.25, the price of his export certificate. "In other words, by exporting his 'free sugar' and selling his export certificate, the exporter receives exactly the same amount he would have received had he sold his 'free sugar' on the home market. All producers fare equally well before the law. Those who sell at home receive the high prices insured on the home market, while those who export what is the equivalent thereto: —the foreign market price plus the price of the export certificate. Hence there is no bounty on exportation, for the reward of the manufacturer is not conditioned on exportation, nor is it greater than it would have been had he not exported. Bounty on production this reward may be, but certainly not bounty on exportation, for it is a contradiction in terms to call that a bounty on exportation which is received in one form or another by all manufacturers alike, whether they export or do not export."

It is true that when a manufacturer exports free sugar for account of surplus, and thereby avoids the necessity of giving security for the additional tax, he obtains an export certificate which he may use to obtain the transfer of an equal amount of "surplus" sugar to "free sugar" account. This right of issue of free sugar into the home market at the normal tax he transfers when he sells his export certificate. The certificate, however, none the less represents a bounty upon exportation, although it *may* be used for the purpose of obtaining a transfer of a certain amount of surplus sugar to the free sugar account for the home market.

But the fact that he receives the same amount, whether the goods are exported or sold at home, is not the proper test whether a bounty is paid upon exportation. If no bounty at all were paid all sugar, or at least all "free sugar," would pay the same tax, whether sold at home or exported abroad; and in this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75

per pood, which would prevent the manufacturer from selling it at such a price abroad as would enable him to realize a profit. The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market. All manufacturers would prefer to sell at home if they could realize a greater price than by selling abroad, but if by being paid a drawback, or by a remission of taxes, they can find a profitable market in a foreign country, so much sugar as is not needed at home will be sent abroad.

The details of this elaborate procedure for the production, sale, taxation and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. The mere imposition of an import duty of three roubles per pood, paid upon foreign sugar, is, like all protective duties, a bounty, but is a bounty upon production and not upon exportation. When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.

The difference in price between Russian sugar sold at home and abroad is thus shown by the delegate of Austria-Hungary at the Sugar Conference of 1898 by the following quotations from the Odessa exchange under date of June 10, 1898:

	Francs per 100 kilos.	Cents per pound.
For Russia: 5.8 rubles per pood, say.....	82.70	7.25
For export: 1.73 rubles per pood, say.....	28.16	2.47
Hence a difference: 3.35 rubles per pood, say.....	54.54	4.78
Deducting the tax: 1.75 rubles per pood, say.....	28.49	2.50
There remains a discrepancy of 1.60 per pood, say	26.05	2.28

"The same merchandise, on the same date, and at the same place, thus commanded a different price according to its des-

tination, and the difference amounted to 26.05 francs per 100 kilos (2.28 cents per pound).

"If we are to investigate the reasons which may impel Russian manufacturers to produce more sugar than is needed for home consumption, and to bring the surplus for exportation down to a comparatively much lower price, we shall find the explanation of this strange phenomenon in the legislative system of Russia. Such is our intimate conviction."

The object of issuing certificates of sugar exported seems to have been merely to enable the exporting manufacturer to obtain the best price for the privilege he assigns to the interior manufacturer of putting an equal amount of free sugar upon the market by assigning the certificates to the one who would offer the best price. In this connection the Circuit Court of Appeals found: "That the Russian exporter of sugar obtained from his government a certificate, solely because of such exportation, which is worth in the open market of that country from R. 1.25 to R. 1.64 per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia." We all concur in this expression of opinion.

The decree of the Circuit Court of Appeals is, therefore,

Affirmed.

WORDEN *v.* CALIFORNIA FIG SYRUP COMPANY.

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

No. 36. Argued March 18, 19, 1902.—Decided January 5, 1903.

When the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public it is essential that the plaintiff should not in his trade mark or in his advertisements and business, be himself guilty of any false or misleading representation, and if he makes any material false statement

Statement of the Case.

in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; and where any symbol or label claimed as a trade mark is so constructed or worded as to make or contain a distinct material assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained.

On June 1, 1897, the California Fig Syrup Company, created under the laws of the State of Nevada, and having its principal place of business in San Francisco, California, filed a bill in equity in the Circuit Court of the United States for the Northern District of California, against Clinton E. Worden & Company, a corporation of the State of California, and against J. A. Bright, T. F. Bacon, C. J. Schmelz and Lucius Little, citizens of the State of California.

The bill alleged that, in the year 1879, one Richard E. Queen invented "a certain medical preparation or remedy for constipation and to act upon the kidneys, liver, stomach and bowels, which medical compound is a combination in solution of plants known to be beneficial to the human system, forming an agreeable and effective laxative to cure habitual constipation and many ills, depending upon a weak and inactive condition of the liver, kidneys, stomach and bowels;" that shortly after the said invention the said Queen sold and transferred all his right, title and interest in and to said medical compound, and in and to the trade name, trade marks and good will of said company to the complainant company, which has ever since been engaged in the manufacture and sale of said medical preparation or remedy; that said medical preparation has always been marked, named and called by the complainant "Syrup of Figs," that name being printed or otherwise marked upon every bottle, and also printed upon the boxes, packages or wrappers in which the bottles of the preparation were packed for shipment and sale; that the complainant and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation in the manner illustrated by Exhibits "A" and "B" attached to the bill—that is to say, in an oblong, rectangular box or carton, with statements of the virtues of the preparation printed in different languages upon the back and sides of the

carton, and on the border within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words "Fig Syrup Company," or "California Fig Syrup Company," and below which appear, in large letters, the words "Syrup of Figs," and below these last-named words appears a brief statement of the virtues of this preparation, together with the words "Manufactured only by the California Fig Syrup Company;" that the complainant has spent more than one million dollars in advertising said preparation, always under the name of "Syrup of Figs," or "Fig Syrup," throughout the United States and other countries, and that millions of bottles of said preparation have been sold; that, by virtue of the premises, the complainant has acquired the exclusive right to the name, "Syrup of Figs," or "Fig Syrup," as it is indifferently called by the public, or any colorable imitation of the same, as applied to a liquid laxative medical preparation irrespective of the form of bottle or package in which it may be sold to the public; that, by virtue of the premises, the complainant has acquired the exclusive right to the manner and form of packing the same for sale, in connection with the words "Syrup of Figs" or "Fig Syrup," or any colorable imitation of the same, as a part of the business name of a concern making a liquid laxative medical compound.

The bill charges that the defendant company, wishing to trade to its own profit and advantage upon the reputation of the complainant's preparation, and desiring to impose a worthless production upon the public, has caused to be made, put up and sold, and offered for sale, a liquid laxative medical compound, resembling complainant's preparation, under the name "Syrup of Figs" and "Fig Syrup," and marking the boxes and packages containing the same with the name "Fig Syrup" or "Syrup of Figs," and has put the preparation, under said name, in bottles and packages or cartons, so closely in imitation of the complainant's bottles and packages, as to be likely to deceive purchasers, and so as to enable unscrupulous retail dealers to palm off defendant's preparation on the consumers as and for the complainant's preparation; and that purchasers frequently have been deceived and induced to buy the compound prepared

Statement of the Case.

by the defendant; that the complainant has been greatly injured in the business in the manufacture of its liquid laxative preparation "Syrup of Figs" or "Fig Syrup," and believes that it has suffered damage and injury by reason of defendant's acts to the extent of at least ten thousand dollars; that this is a continuing wrong, and one which it is impossible to exactly calculate, and one which, if permitted to continue, will work irreparable injury to the complainant.

Wherefore the complainant prayed, in its said bill, for an injunction restraining the defendant and its agents, servants, etc., from manufacturing, selling or offering for sale, directly or indirectly, any liquid laxative medical preparation, marked with the words "Syrup of Figs" or "Fig Syrup," or marked with any words which may be a colorable imitation of the name of "Syrup of Figs" or "Fig Syrup," and from putting up, selling or dealing in any liquid laxative medical preparation which shall have a tendency to deceive the public and induce buyers to purchase defendant's preparation, believing the same to be complainant's preparation, and that defendant be perpetually enjoined from using the words "Fig Syrup Company" as a business name, or from using the words "Fig Syrup" or "Syrup of Figs" as part of its business name, in connection with the manufacture and sale of a liquid laxative preparation. The complainant also prayed for an account for damages to complainant and for gains and profits derived by the defendant company, and for such other and further relief as may be agreeable to equity and good conscience.

The defendant company and the other defendants filed a joint and several answer, admitting many of the allegations of the bill, but denying and putting the complainant on proof of those which alleged any intentional or actual appropriation by the defendant company of proprietory or business rights of the complainant. The answer proceeded to make the following allegations:

"And, for a separate and further defence, these defendants aver, upon their information and belief, that the preparation made and sold by complainant under the name of 'Syrup of Figs' does not and never did contain any syrup of figs or any

fig syrup; or any juice of figs or any part or portion or quantity of figs in any form; and that the name 'Syrup of Figs' and 'Fig Syrup' and the name of the company, 'The California Fig Company,' and the form and appearance of the labels and the pictures on the labels, and the statements on the labels adopted and used by complainant in connection with its liquid laxative medicine, were all designed, adopted and used with the deliberate intent and purpose to deceive the public and the user of the medicine and to perpetrate a fraud upon them by inducing them to believe that the preparation contained figs in some form, and that by reason thereof the said medicine derived its laxative properties and also a pleasant and agreeable taste; that the complainant has been successful in perpetrating the said fraud upon the public and for years last past has perpetrated said fraud by wholesale and have induced the public generally throughout the world to believe the statements aforesaid concerning the said medicine and its connection with figs, and thereby complainant has made and realized large profits, gains and advantages from the sale of said medicine, all of which was caused and which accrued and were made by reason of said false, fraudulent and deceptive statements; that, as a matter of fact the said so-called 'Syrup of Figs,' sold by complainant, consists of the ordinary and well-known laxative called senna as a basis, together with certain aromatic carminatives added for the purpose of giving it a pleasant and agreeable taste, as a cure to the naturally griping effect of senna when taken alone; that in order to sell such a compound complainant made the false, fraudulent and fictitious statements hereinabove charged against it, and was enabled to sell the same solely by virtue of said false, fraudulent and fictitious statements, and said complainant has built up its business and its trade upon the strength of and by virtue of the said false, fraudulent and fictitious statements, for which reason complainant is not entitled to relief in a court of equity."

The cause was put at issue by a replication filed by the complainant company. Pending the trial an application for a preliminary injunction was made, which was allowed upon the ground that the complainant had made such a showing by the

pleadings and affidavits that it was entitled to an injunction against the sales of "Fig Syrup" by the defendant. 86 Fed. Rep. 212.

A large amount of evidence was taken, and, on June 7, 1899, a decree was entered by the Circuit Court perpetually enjoining the defendant company and the other defendants from making, selling or offering to sell any liquid laxative medicine or preparation under the name of "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs," and from making, selling or offering to sell any medical liquid laxative preparation, put up in bottles, boxes or packages similar in form or arrangement to the bottles or packages used by the complainant in the manufacture and sale of its said liquid laxative preparation, or so closely resembling the same as to be calculated to deceive the public, and from using the name "Fig Syrup Company," and from using a name whereof the words "Fig Syrup," or "Syrup of Figs Company," form a part as a business name in connection with the manufacture of a liquid laxative preparation. 95 Fed. Rep. 132.

There was an appeal to the Circuit Court of Appeals for the Ninth Circuit, where the decree of the Circuit Court was affirmed, Ross, C. J., dissenting. 102 Fed. Rep. 334.

The cause was then brought to this court by a writ of certiorari allowed on November 20, 1900.

Mr. John H. Miller and *Mr. Purcell Rowe* for petitioner.

The words "Syrup of Figs" or "Fig Syrup" as applied to the medicine in question are either descriptive or deceptive and in neither event can they be appropriated as a trade mark.

Under § 991, Civil Code of California, no words can be adopted as a trade mark which relate to name, quality or description. *Choynski* v. *Cohen*, 39 California, 501; *Burke* v. *Cassin*, 45 California, 467; *Schmidt* v. *Brieg*, 100 California, 673; *Canal Co.* v. *Clark*, 13 Wall. 311, followed by a long list of instances showing the extent to which this rule has been carried.

In this case the words themselves, *ex proprio vigore*, convey the impression that the medicine is a syrup made from figs. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

If the compound contains no appreciable quantity of figs and there is no such thing known to pharmacy as a syrup made from figs, then the use of the words "Syrup of Figs" or "Fig Syrup," as a trade mark for this medicine is fraudulent and will not be protected in equity. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G., J. & S. 137, 142, 144, affirmed 11 H. L. Cas. 523; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Holzapfel's Compositions Co.* v. *Rahtjen's Am. Composition Co.*, 183 U. S. 1; *Allan B. Wrisley Co.* v. *Iowa Soap Co.*, 104 Fed. Rep. 548; *Clotworthy* v. *Schepp*, 42 Fed. Rep. 62, 63; *Alden* v. *Gross*, 25 Mo. App. 123, 128, 130; *Connell* v. *Reed*, 128 Massachusetts, 147; *Seabury* v. *Grosvenor*, 14 Blatchf. 262, 263; *S. C.* Fed., Cas. 12,576; *Krauss* v. *Jos. R. Peebles' Sons*, 58 Fed. Rep. 585, 594; *Fetridge* v. *Wells*, 13 How. Prac. 385, 390, 393; *Schmidt* v. *Brieg*, 100 California, 672, 678; *Phalon* v. *Wright*, 5 Philadelphia, 464, 467; *Prince Mfg. Co.* v. *Prince Metallic Paint Co.*, 135 N. Y. 24, 38, 39. It has more than once been held that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept secret and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Kohler Mfg. Co.* v. *Beeshore*, 8 C. C. A. 215; 59 Fed. Rep. 547, 572, 574; *Fowle* v. *Spear*, 1847, 7 Pa. Law J. 176; *Heath* v. *Wright*, 3 Wall. Jr. 141; *Wolfe* v. *Burke*, 56 N. Y. 115; *Smith* v. *Woodruff*, 48 Barb. 438; *Laird* v. *Wilder*, 9 Bush, 132.

The statement that the medicine is a *California liquid fruit remedy* is equally false. It is not a fruit remedy at all. The quantity of fruit in it is infinitesimal. Nor was it a California fruit remedy at the start, because it was invented, manufactured and sold in Nevada. Beyond all doubt the public has been grossly deceived by that statement, purchasing a concoction of drugs under the belief that they were purchasing a liquid fruit remedy, (then reciting formulæ). The medicine is nothing more than a decoction of senna mixed with sugar, water, flavoring extracts and a little ginger to prevent griping. *California Fig Syrup Co.* v. *Stearns*, 73 Fed. Rep. 813. In the new label there are several distinct misrepresentations in that the medicine is

not made from figs; does not overcome habitual constipation and the small quantity of juice of figs does not promote a pleasant taste or add anything to the medicine; again citing the cases already cited under the previous points and *Siegert* v. *Abbott*, 61 Maryland, 276.

The lower court erred in holding there had been unfair competition in trade by reason of simulated labels and wrappers. There is no showing that any one has ever been actually deceived, but even if there were such similarity between the labels of the appellant and appellee as to entitle the appellee to an injunction on the score of unfair competition, the appellee is disentitled to any such relief by reason of its fraudulent representations and practices regarding its medicine. If there be fraud on the part of a complainant he is not entitled to protection for his label any more than for his trade mark. In this respect both stand on the same footing.

There should in no event be any accounting as there is no allegation in the bill that the defendants (appellants) have ever realized any profits from the infringement.

Prior adjudications in other circuits clearly establish the fact that the appellees are not entitled to any relief.

Mr. John G. Carlisle and *Mr. Warren Olney* for respondent.

The lower court was right upon the doctrine of *unfair competition.*

It was proven here that the name was a true and honest name when applied to the medicine, and the wording on the cartons, criticized in other cases between the parties, was entirely eliminated long before the appellant flooded the Pacific coast with its counterfeits. Respondent, plaintiff below, has a standing in court, and the maxim relied upon by the appellant as to coming into court with clean hands does not apply in this case.

The inventor used senna as a basis for a liquid cathartic, overcoming the bitter taste and eliminating the griping quality with figs and named it "Syrup of Figs," and at first figs were uniformly used.

Among pharmacists and physicians a formula set out in the

U. S. Pharmacopia, to which a name has been given, becomes official and a recognized article. This preparation could not be called "Syrup of Senna," as there was an official formula for such a preparation, and as this was not made in accordance with such formula, physicians would have refused it recognition, so it was called "Syrup of Figs," and the record shows that the medical profession endorsed it and have not objected to the name. As figs were freely used it was natural to name the preparation "Syrup of Figs." There was no fraud. The reduction of figs was after the name had been given in good faith and after the demand required the manufacture of the article in large quantities.

Reversing this judgment will result in flooding the market with all kinds of nostrums under the name of "Syrup of Figs," will ruin the complainant and injure the public, and the only effect will be to enable the appellant to commit a fraud.

Where a man has an established business which he is seeking to protect from unfair competition, he should be given relief if he can make any reasonable explanation of statements claimed to be false; and he is entitled to the benefit of every reasonable doubt.

The following cases cited and quoted from at length: *Cochrane* v. *Macnish*, 1896, App. Cas. 225; *Ins. Oil Co.* v. *Scott*, 33 La. Ann. 946; *Siegert* v. *Findlater*, 7 Chan. Div. 801; *Fettridge* v. *Merchant*, 4 Abbott's Pr. 156; *Ford* v. *Foster*, 7 Chan. App. 611; *Bardou* v. *Lacroix*, 27 Annales, 214; Brown on Trade Marks, 83–85, criticizing *Siegert* v. *Abbott*, 61 Maryland, 276; *S. C.*, 48 Am. Rep. 101; *Meriden &c. Co.* v. *Parker*, 39 Connecticut, 450; *S. C.*, 12 Am. Rep. 401; *Simons Medicine Co.* v. *Mansfield Drug Co.*, 23 S. W. Rep. 169; *Smith* v. *Sixbury*, 25 Hun, 232; *Tarant Co.* v. *Hoff*, 76 Fed. Rep. 957; *Conrad* v. *The Joseph Uhrig Brewing Co.*, 8 Mo. App. 277; *Funke* v. *Dreyfus*, 34 La. Ann. 80; *Moxie Nerve Food* v. *Baumbach*, 32 Fed. Rep. 205; *Rogers Mfg. Co.* v. *Rogers & Spurr Mfg. Co.*, 11 Fed. Rep. 495 (in which are cited *Levy* v. *Walker*, L. R. 10 Ch. D. 436, and *Massam* v. *Thurley Co.*, L. R. 14 Ch. D. 748); *Price Baking Powder Co.* v. *Fyfe*, 45 Fed. Rep. 799; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537 (March 2, 1891); *So-*

Argument for Respondent.

ciety Anonyme &c. v. *West Distilling Co.*, 43 Fed. Rep. 416; *Selchow* v. *Baker*, 93 N. Y. 53, overruling *Fetridge* v. *Wells*, cited by appellants; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431; *Metzler* v. *Wood*, 8 Ch. Div. 606; *Alexander* v. *Morse*, 14 R. I. 153; *S. C.*, 51 Am. Rep. 369; *Chappal* v. *Sheard*, 2 Kay & J. 117; *Chappal* v. *Davidson*, 2 Kay & J. 123; *Clark Thread Co.* v. *Armitage*, 74 Fed. Rep. 936; *Comstock* v. *White*, 18 How. Pr. 421; *Bloch* v. *Standard*, 95 Fed. Rep. 978; *Hoxie* v. *Chaney*, 143 Massachusetts, 592; *Curtis* v. *Bryan*, 36 How. Pr. 333; *Dole* v. *Smithsen*, 12 Abbott's Pr. 237; *Dickson's Crucible Co.* v. *Guggenheim*, 2 Brewster, 321; *Electro-Silicon Co.* v. *Hazard*, 29 Hun, 369; *Edelsten* v. *Vick*, 68 Jr. 7; *Feder* v. *Benkert*, 70 Fed. Rep. 613; *Holloway* v. *Holloway*, 13 Beavan, 209; *Keasby* v. *Brooklyn Chemical Works*, 142 N. Y. 467; *Lee* v. *Haley*, L. R. 1 Ch. Div. 155; *Marshall* v. *Ross*, 8 Eq. 651; *Pillsbury* v. *Pillsbury*, 64 Fed. Rep. 841; *Sen Sen* v. *Britton*, 1891, Ch. 692; *Shaver* v. *Heller &c. Co.*, 108 Fed. Rep. 821.

All the authorities are agreed that if complainant can make anything like a satisfactory explanation of a seemingly false statement on his labels, and in his advertisements, he will not be turned out of court. *Centaur Co.* v. *Robinson*, 91 Fed. Rep. 881; *Centaur Co.* v. *Neathery*, 91 Fed. Rep. 893. The following English cases were cited as based on the theory that the defendant was using a name for a fraudulent purpose, viz., to sell his goods as the goods of the plaintiff (the trademark name of the case is given and not the names of the parties): "*Glenfield Starch*," L. R. 5 H. L. 508; "*Stone Ale*," 4 Ch. Div. 35, 50; "*Guinea Coal*," 5 Ch. App. Cas. 155; "*Anatolia Licorice*," 10 Jr. N. S. 40; De Gex, J. & S. 380; "*Ethiopian*," 10 Jr. 106; "*London Conveyance Co.*," 2 Keen, 213; "*Camel Hair Belting*," 1896, App. Cas. 199; "*Yorkshire Relish*," L. R. Ch. Div. 1895, vol. 3, 449; "*Club Soda*," 1896, App. Cas. 225. In *Levy* v. *Walker*, 10 Ch. Div. 436, the rule is laid down: "You must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent to the world that your business is my business, and therefore deprive me, by a fraudulent misstatement of yours of the profits of the business which would otherwise come to

me." The following American cases also cited: "*Akron Cement*," 51 N. Y. 192; "*Extra Dry*," 56 Fed. Rep. 830; "*St. Louis Lager Beer*," 24 Fed. Rep. 149; "*St. Louis White Lead*," 25 Fed. Rep. 125, and 39 Fed. Rep. 492; "*Nerve Food*," 32 Fed. Rep. 205; "*Singer Machine*," 163 U. S. 169; "*Minneapolis Flour*," 86 Fed. Rep. 608; "*German Sweet Chocolate*," 68 California, 68; "*Sliced Animals*," 93 N. Y. 53; "*Bromo-Caffeine*," 142 N. Y. 467; "*Congress Springs*," 45 N. Y. 291; "*Bethesda Mineral Water*," 42 Wisconsin, 118; "*Blue Licks Mineral Water*," 41 S. W. Rep. 21; "*Chicago Waists*," 83 Fed. Rep. 213; "*Red Cross Plasters*," 82 Fed. Rep. 662; "*Baker's Chocolate*," 80 Fed. Rep. 889; "*Canadian Club Whiskey*," 85 Fed. Rep. 776; "*Plymouth Gin*," 88 Fed. Rep. 693; "*Dyspepsia Tablets*," 91 Fed. Rep. 243; "*Carrom*," 106 Fed. Rep. 168; "*Celery Compound*," 106 Fed. Rep. 77; "*Queen Quality*," 105 Fed. Rep. 375; "*Health Food*," 104 Fed. Rep. 141; "*Gold Dust*," 102 Fed. Rep. 327; "*Oxford Bible*," 101 Fed. Rep. 442, also citing and distinguishing *Stuart* v. *F. G. Stewart Co.*, 91 Fed. Rep. 243; *Garrett* v. *Garrett*, 78 Fed. Rep. 472; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537. As to false representations citing *Koehler* v. *Sanders*, 127 N. Y. 74; *Thompson* v. *Montgomery*, 41 Ch. Div. 35; *Coats* v. *Thread Co.*, 149 U. S. 562; *Johnston* v. *Ewing*, L. R. 7 App. Cas. 219; *Manufacturing Co.* v. *Loog*, 18 Ch. Div. 412, *Wotherspoon* v. *Currie*, L. R. 5 H. L. 517; *Lever* v. *Goodwin*, 36 Ch. Div. 1, and other cases cited in "*Extra Dry*" case, 56 Fed. Rep. 830; *Collins Co.* v. *Brown*, 3 Kay & Johnson, 423; and citing *California Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. Rep. 296; *Rawlinson* v. *Brainerd*, 59 N. Y. Supplement, 830; *Bass* v. *Feigenspan*, 96 Fed. Rep. 206, that a manufacturer may adopt as a trade mark a new combination of words which up to that time had no significance attached to them in the trade in which they are used . . . although they may be suggestive of the general nature of the article to which they are applied.

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

Opinion of the Court.

The courts below concluded, upon the evidence, that the defendants sold a medical preparation named, marked and packed, in imitation of the complainant's medicine, for the purpose and with the design and intent of deceiving purchasers and inducing them to buy defendants' preparation instead of the complainant's. We see no reason to dissent from that conclusion, and if there were no other questions in the case, we should be ready to affirm the decree, awarding a perpetual injunction and an account of the profits and gains derived from such unfair and dishonest practices.

Another ground, however, is urged against the complainant's right to invoke the aid of a court of equity, in that the California Fig Syrup Company, the complainant, has so fraudulently represented to the public the nature of its medical preparation that it is not entitled to equitable relief.

Some courts have gone so far as to hold that courts of equity will not interfere by injunction in controversies between rival manufacturers and dealers in so-called quack medicines. *Fowle* v. *Spear*, Circuit Court of the United States for the Eastern District of Pennsylvania, Pennsylvania Law Journal, vol. 7, p. 176; *Heath* v. *Wright*, 3 Wall. Jr. 141; *Fetridge* v. *Wells*, 4 Abb. Pr. 144.

It may be said, in support of such a view, that most, if not all, the States of this Union have enactments forbidding and making penal the practice of medicine by persons who have not gone through a course of appropriate study, and obtained a license from a board of examiners; and there is similar legislation in respect to pharmacists. And it would seem to be inconsistent, and to tend to defeat such salutary laws, if medical preparations, often and usually containing powerful and poisonous drugs, are permitted to be widely advertised and sold to all who are willing to purchase. Laws might properly be passed limiting and controlling such traffic by restraining retail dealers from selling such medical preparations, except when prescribed by regular medical practitioners.

But we think that, in the absence of such legislation, courts cannot declare dealing in such preparations to be illegal, nor the articles themselves to be not entitled, as property, to the protection of the law.

We find, however, more solidity in the contention, on behalf of the appellants, that when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained.

Among the cases cited to sustain this contention are the following:

In *Connell* v. *Reed*, 128 Massachusetts, 477, the plaintiff sought to establish the exclusive right to the words "East Indian," as applied to his remedy and the court, through Gray, C. J., said:

"The conclusive answer to this suit is . . . that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public."

In *Siegert* v. *Abbott*, 61 Maryland, 276, where the subject matter of the trade mark was "Angostura Bitters," which purported to have been prepared by Dr. Siegert, at Angostura, Trinidad, and where it appeared that Dr. Siegert was dead, and had never lived at Angostura, the bill was dismissed, the court saying: "It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade mark or labels."

In *Alden* v. *Gross*, 25 Mo. App. 123, a trade mark was claimed in the words "Fruit Vinegar," and the court said:

"The vinegar thus branded was not manufactured out of fruit, in the plain, ordinary, usual sense of that term, but out of low wines distilled from cereals, and fruit enters into its composition only to a very insignificant extent. . . . It would be a novel application of the rule governing the subject of trade marks, if one who manufactures vinegar out of cereals could appropriate for the article thus manufactured the word 'Fruit,' and thereby exclude another from using the word as descriptive of an article, which is, in point of fact, manufactured out of fruit. . . . But whether the word 'Fruit,' in this connection, is purely indicative of the character or quality of the article or not, the plaintiffs' exclusive claim to it must fail on the further ground, that the use of the word, in that connection, is clearly deceptive."

In *Prince Manufacturing Company* v. *Prince's Metallic Paint*, 135 N. Y. 24, an injunction to protect a trade mark was refused, by reason of a false representation as to the place from which the ore was obtained, and the Court of Appeals used the following language:

"Any material misrepresentation in a label or trade mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. . . . And, although the false article is as good as the true one, 'the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce.'"

English cases are to the same effect. Thus in *Pidding* v. *How*, 8 Simons, 477, where it appeared that the plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture," but, as he had made false statements to the public, as to the teas, of which his mixture was composed, and as to the mode in which they were procured, the court refused to restrain the defendant from selling tea under the same name, and said:

"As between the plaintiff and the defendant, the course pursued by the defendant has not been a proper one; but it is a

clear rule, laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth. And, as the plaintiff, in this case, has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that, unless he establish his title at law, the court cannot interfere on his behalf."

The English case of *Leather Cloth Co.* v. *American Leather Cloth Co.* is a leading one on this subject and in which the nature of false representations that will defeat the right of the owner of a trade mark to protection in equity was much considered.

A bill, asking for an injunction against defendants who were charged with using stamps and trade marks, so similar to those of the complainant as to deceive purchasers, was sustained by Vice Chancellor Wood, who granted the injunction prayed for. 1 Hem. & Miller's Reports, 271. On appeal the decree of the Vice Chancellor was reversed by the Lord Chancellor, and the complainant's bill was dismissed. 4 De Gex, J. & S. 137.

The conclusions reached by Lord Chancellor Westbury were that there is a right of property in a trade mark, name or symbol in connection with a particular manufacture or vendible commodity, but that where the owner of such a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark or in the business connected with it be himself guilty of any false or misleading representation. In considering what constitutes a material false representation, the Chancellor observed that he could not receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it; that if there be a wilful false statement, he would not stop to inquire whether it be too gross to mislead.

This decision was affirmed by the House of Lords. 11 H. L. Cas. 523. In that tribunal, in the several opinions of the law lords, the views of the Lord Chancellor as to the effect of false representations were approved, but it was thought that, independently of that question, the plaintiff was not entitled to an

injunction, because the rival or antagonistic trade mark of the defendants did not sufficiently resemble that of the plaintiff's as to be calculated to deceive the public.

In *Fetridge* v. *Wells*, 13 How. Pr. 385, the plaintiff sold a soap under the name of "Balm of a Thousand Flowers," and in denying the plaintiff's right to the exclusive use of these words as a trade mark, Judge Duer said:

"I am fully convinced that the name 'Balm of a Thousand Flowers' was invented, and is now used to convey to the minds of purchasers the assurance that the highly scented liquid to which the name is given is, in truth, an extract or distillation from flowers, and therefore not merely an innocent, but a pleasant and salutary preparation. Not only is this the meaning that the words used naturally suggest; but in my opinion it is that which they actually and plainly express, and were designed to convey. . . . Let it not be said, that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious, and perhaps fatal consequences. . . . Those who come into a court of equity seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must be free themselves from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

In *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, the case of *Fetridge* v. *Wells* was cited with approval, and likewise the English cases of *Pidding* v. *How*, 8 Simons, 477, and *The Leather Cloth Company* v. *The American Leather Company*, 4 De Gex, J. & S. 137. In *Manhattan Medicine Co.* v. *Wood*,

the complainant claimed to be the owner of a patent medicine and of a trade mark to distinguish it. The medicine was manufactured by the complainant in New York; the trade mark declared that it was manufactured by another person in Massachusetts. The Circuit Court of the United States for the District of Maine, per Mr. Justice Clifford, held that the complainant, owing to false statements in his trade mark, was entitled to no relief against a person using the same trade mark in Maine, and dismissed the bill. On appeal this decree was affirmed, this court saying: "A court of equity will extend no aid to sustain a claim to a trade mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine."

In *Clotworthy* v. *Schepp*, 42 Fed. Rep. 62, the right to a trade mark was claimed in the word "Puddine," in connection with the words "Rose" and "Vanilla," but Circuit Judge Lacombe refused an injunction, and in his opinion said: "The complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation 'fruit' puddine. In nine different places on his package this word 'fruit' is repeated, as descriptive of the article, and a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by defendant, the substantial accuracy of which is not disputed, discloses the fact that his 'puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color; it contains no fruit in any form."

Krauss v. *Peebles' Sons Co.*, 58 Fed. Rep. 585, was a case in which it was shown that the liquor sold as "Pepper Whisky" was in fact a mixture of Pepper whisky and other whiskies, and an injunction to prevent infringement was refused by Circuit Judge Taft, who, in his opinion, said: "To bottle such a mixture, and sell it, under the trade label and caution above

referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade mark thus fraudulently used."

And this doctrine of the English and American cases above referred to has been applied in the Federal Circuit Courts and Circuit Courts of Appeals in cases in which the California Syrup Company, the complainant in the present case, was a party.

In the Circuit Court of the United States for the District of Massachusetts, March 6, 1895, the California Fig Syrup Company, the complainant in the present case, filed a bill against Kate Gardiner Putnam and others to restrain the infringement of the plaintiff's trade mark. The facts of the case were thus stated by Circuit Judge Colt in his opinion, reported in 66 Fed. Rep. 750:

"The plaintiff is the proprietor and manufacturer of a liquid laxative compound called 'Syrup of Figs.' The defendants manufacture and sell a laxative medicine which they term 'Fig Syrup.' . . . There is no evidence that the defendants have imitated the plaintiff's labels or packages except in this particular. If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject of a trade mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of a syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words, as applied to this compound, are not descriptive, but purely fanciful, and therefore constitute a valid trade mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed a 'Syrup of Senna,' if the words were intended to be descriptive of the article. But, assuming this is not a syrup of figs, we are met with the inquiry whether these words, as applied to this preparation are not deceptive. The label on every bottle reads as follows: 'Syrup of Figs. The California Liquid Fruit Remedy. Gentle and Effective.' On the sides of each bottle are blown the words 'Syrup of Figs,'

and on the back the words 'California Fig Syrup Co., San Francisco, Cal.' On the face of every package is a picture of a branch of a fig tree with the hanging fruit, surrounded with the words 'California Fig Syrup, San Francisco, Cal.;' and beneath this the words: 'Syrup of Figs presents in the most elegant form the laxative and nutritious juice of the figs of California.' . . . Thus we see that the leading representation on the labels, packages, and in the advertisements of this preparation is that it is a laxative fruit syrup made from the juice of the California fig. . . . The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade marks is based will not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

Accordingly, the Circuit Court dismissed the bill with costs. On appeal to the Circuit Court of Appeals for the First Circuit the decree of the Circuit Court was affirmed.

In the Circuit Court of the United States for the Eastern District of Michigan, April 1, 1895, the California Fig Syrup Company filed a bill, seeking to restrain Frederick Stearns & Company from infringing complainant's trade mark. The court declined to grant an injunction and dismissed the bill with costs, holding that the words "Syrup of Figs" or "Fig Syrup," if descriptive of a syrup, one of the characteristic ingredients of which is the juice of the fig, cannot be sustained as a valid trade mark or trade name, and that, under the facts of the case, the use of the name "Syrup of Figs, in connection with a descrip-

tion of the preparation as a fruit remedy, nature's pleasant laxative," applied to a compound, whose active ingredient is senna, and containing but a small proportion of fig juice, which has no considerable laxative properties, is deceptive and deprives one so using it of any claim to equitable relief.

On appeal to the Circuit Court of Appeals of the Sixth Circuit the decree of the Circuit Court was affirmed. 73 Fed. Rep. 812. In his opinion Circuit Judge Taft, after stating that the term "Syrup of Figs," if intended to describe the character of the article concerned, could not be used as a trade mark, proceeded to say :

"But the second ground presented, and that upon which the court below rested its decision, prevents the complainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true, it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit. It is well settled that if a person wishes his trade mark property to be protected by a court of equity, he must come into court with clean hands, and if it appears that the trade mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the Supreme Court of the United States. *Medicine Co.* v.

Wood, 108 U. S. 218; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De Gex, J. & S. 137. . . .

"The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined."

The counsel of the appellee in the present case do not contend that the courts of the Second and Sixth Circuits were wrong in denying the complainant any relief upon the cases as presented in those courts. They do contend that those cases were argued upon a wrong theory by the counsel of the complainant. The language of the brief in this regard is as follows:

"Here was where complainant made a mistake. Acting under advice of able counsel, it claimed the name 'Syrup Figs' to be a technical *trade mark*, when all that was necessary to claim was that it constituted a *trade name.* Able counsel in the Second and Sixth Circuits pressed injunction suits against infringers on the theory that complainant had a trade mark in the name, and that the statement on the cartons and bottles was immaterial. He did not address himself to showing that the name 'Syrup of Figs' came to be honestly and properly applied to the product as largely descriptive of the ingredients of the medicine. He was so afraid of ruining his case as a case of trade marks, by showing that it was descriptive, that he did not prove what was proved in the case now at bar, viz., that figs were at the time the name was given an important part of the composition."

We are not much impressed with the force of this attempted distinction. Even if it were true that, at the time the medicine in question was first made and put upon the market, the juice of figs was so largely used as one of the ingredients, as to have warranted the adoption of the name "Syrup of Figs" as descriptive of the nature of the medicine, that would be no justification

for continuing the use of the term after the manufacturers and vendors of the medicine ceased to use fig juice as a material ingredient. Even if the term was honestly applied in the first instance, as descriptive, it would none the less be deceptive and misleading when, as is shown in the present case, it ceased to be a truthful statement of the nature of the compound. Nor are we disposed to concede that, under the evidence in the present case, the term "Syrup of Figs" or "Fig Syrup" was properly used as descriptive of the nature of the medicine when it was first made. Then, as now, the operative laxative element was senna, and the addition of fig juice was, at the best, experimental, and apparently was intended to attract the patronage of the public by holding out the name of the medicine as "Syrup of Figs."

However that may be, it is now admitted that the use of figs was found to be deleterious, and their use, as a substantial or material ingredient, was abandoned. The following extracts are taken from the testimony of the inventor of the medicine now made and sold by the California Fig Syrup Company:

"During the year 1878 I made many experiments with the idea of producing a pleasant, effective, liquid laxative, having observed that many people dislike to take pills, oils and other disagreeable medicines; and, after many experiments and study of laxatives in general, came to the conclusion that senna was the best general laxative known, but that the preparations then on the market were either weak in effect or griping in their nature, and I thought that if I could make a liquid preparation of senna which would be really pleasant to the taste and free from griping qualities that it would answer the purpose. And at that time I also thought that certain other medicinal agents should be combined with the senna, and some of those medicinal agents were not very pleasant to the taste. And I thought of figs as a fruit that would afford me a considerable quantity of sugar and mucilaginous substance to counteract the unpleasant taste of the medicinal agents. And I used figs freely in my experiments for that purpose. As I progressed with my experiments I found or determined as a result of my experiments and studies that a uniformity and stability of product were of great im-

portance, and that the fig substance was not conducive to those qualities, and that it had a strong tendency to ferment, and therefore it would be better to use a small quantity. I also found that those medicinal agents which were unpleasant to the taste were better adapted to special cases than to general use, and concluded to omit them, and therefore did not need as large a quantity of fig substance as formerly. As finally prepared I had a new and original compound, of which the fig syrup formed a very small but pleasant part, although not an essential part of the combination; that is, I might have used an equal quantity of honey, or some other substance, instead of the fig substance, without changing the character and effect of the combination. . . . I desired to give a name which would be new and original to distinguish my product from all the laxative medicines, and which would be pleasantly suggestive, and, after thinking over a number of names, I decided to use the name 'Syrup of Figs.' I knew that I was not using the name generically, because figs did not give character and effect to the combination."

On cross examination this witness further stated that "we still use figs when we might use some other pleasant substance, because we first started to use figs; and the fig substance, while it is used, is not an essential part of the compound or what I would call an essential part of the compound. That is, not a part of the compound which gives to it its distinctive aromatic and medicinal qualities."

That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars, that the medical properties of their compound were derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public. Such publications went only to giving information to wholesale dealers. The company by the use of the terms of its so-called trade mark on its bottles, wrappers and cartons continued to appeal to the consumers, out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit.

Opinion of the Court.

The bill in the present case contains the following allegations:

"Your orator further states that this laxative medical compound, or preparation, made and put up as aforesaid by your orator, has always been marked, named and called by your orator 'Syrup of Figs,' being advertised by your orator under that name, the name 'Syrup of Figs' being printed or otherwise marked upon every bottle of this preparation made and sold by your orator—this name being also printed upon the boxes, packages or wrappers in which the bottles of this preparation are packed for shipment and sale; that it has been the practice of your orator to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form; that in all instances, not only the bottle which contains this preparation, but the box or carton which contains the bottles of this preparation, is marked with the words 'Syrup of Figs' and also contains printed matter stating that this preparation is a medical laxative preparation, and also giving a general idea of its uses and purposes. . . . Your orator further states that it and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation or medicine in the manner illustrated by Exhibits "A" and "B"—that is to say, in an oblong, rectangular box or carton, with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton and on the border within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words 'Fig Syrup Company,' or 'California Fig Syrup Company,' and below which appear, in larger letters, the words 'Syrup of Figs.'"

Upon such allegations and the admissions of the complainant's principal witness, some of which are hereinbefore quoted, and upon the entire evidence in the case, and in the light of the authorities cited by the counsel of the respective parties, our conclusions are that the name "Syrup of Figs" does not, in fact, properly designate or describe the preparation made and sold by the California Fig Syrup Company, so as to be

Syllabus.

susceptible of appropriation as a trade mark, and that the marks and names, used upon the bottles containing complainant's preparation, and upon the cartons and wrappers containing the bottles, are so plainly deceptive as to deprive the complainant company of a right to a remedy by way of an injunction by a court of equity.

Accordingly, the decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.

MR. JUSTICE MCKENNA dissented.

CHADWICK *v.* KELLEY.

ERROR TO SUPREME COURT OF THE STATE OF LOUISIANA.

No. 63. Argued November 3, 1902.—Decided January 5, 1903.

The statutes of Louisiana and the ordinances of the city of New Orleans which provide and regulate the method for paving streets at the cost of the owners of abutting lots, as such statutes and ordinances have been construed by the Supreme Court of Louisiana, are not obnoxious, under the facts of this case to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Where an ordinance of the city of New Orleans and specification for the paving of a street require the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers, a resident citizen of New Orleans, who is not one of the laborers, excluded by the ordinance from employment and who does not occupy any representative relation to them, cannot have a lien on his property for his *pro rata* share of the improvements invalidated on the ground that citizens of Louisiana and of each and every State are deprived of their privileges and immunities under article IV, section 2, of, and the Fourteenth Amendment to, the Constitution of the United States.

If a person owning property affected by the assessment for the work done under such ordinance wishes to raise such question on the ground that the ordinance is prejudicial to his property rights because confining the right to labor to resident citizens increases the cost of the work he must raise the question in time to stay the work *in limine*.

Statement of the Case.

The serious duty of condemning state legislation as unconstitutional and void cannot be thrown upon this court except at the suit of parties directly and certainly affected thereby.

In April, 1897, John M. Kelley filed his petition in the Civil District Court for the parish of Orleans against Edmund H. Chadwick, to enforce payment of a lien on a certain square of ground in the city of New Orleans, created and arising out of a contract between one A. J. Christopher and said city for paving Hagan avenue. The petition alleged due completion of the work, an assignment or transfer by Christopher, of all his rights and claims under the contract, to the petitioner, and a liability of Chadwick for the amount of $638.80, with interest thereon from September 24, 1896; and also alleged that for the payment of said sum he had by law a lien and pledge upon said property.

Chadwick answered this petition, wherein he pleaded the general issue and certain special pleas, in one of which he denied that his property was benefited by the paving, and alleged that, if it was so benefited, he could only be made to pay the amount of benefit to an increased value of property, and that no personal judgment should be rendered against him. He also filed, in September, 1899, a supplemental answer in which, among other things, he alleged that the ordinance under which the work was done required the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work, thus depriving the citizens of the State and of each and every State of the privileges and immunities of citizens in the several States, secured to them by the Constitution of the United States, which, by the second section of its fourth article, provides that the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States; and he also alleged that the ordinance was likewise illegal and unconstitutional because it imposed a liability on the property owner, irrespective of the question whether or not his property was benefited or damaged by the pavement; and he alleged that the paving of the street in front of his property had been of no benefit to it, and that the rendition of any judgment against him would be taking his private property for public purposes,

contrary to the constitution of the State of Louisiana and to that of the United States.

Evidence was taken, and the cause was so proceeded in that on March 5, 1900, judgment was rendered against the defendant, Chadwick, in the sum of $638.80, with interest from September 24, 1896, with costs of suit, with recognition of plaintiff's lien and privilege for the payment thereof on the said property, the same to be sold and the proceeds to be applied to the payment of plaintiff's claim.

A suspensive appeal was thereupon allowed to the Supreme Court of Louisiana, and that court, on February 4, 1901, affirmed the judgment of the trial court, 104 Louisiana, 719, and subsequently allowed a writ of error to bring the cause to this court.

Mr. George L. Bright for plaintiff in error.

No brief for the defendant in error.

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

In this record, Chadwick, the plaintiff in error, complains of the judgment of the Supreme Court of Louisiana in two particulars: First, in upholding as valid the statutes of Louisiana and the ordinances of the city of New Orleans, which provide and regulate the method for the paving of streets at the cost of the owners of abutting lots; and, second, in upholding as valid the ordinance of the council of the city of New Orleans, which provides that, in all the contracts let by the city for public works, of any kind and nature, the contractor shall not employ any other but *bona fide* resident citizens of the city as laborers on such public works.

Of course, this court is restricted to a consideration of these questions in their Federal aspect.

The brief of the counsel of the plaintiff in error contends that, by the statutes of the State of Louisiana, the property owner is made to pay the cost of the improvement irrespective of the

question of benefit, is made personally responsible for the cost of the improvement, although it may largely exceed, not only the benefit to his property, but the value thereof, and his property is made subject to a lien to secure the payment.

So far as it is complained that by the statutes the property owner is made personally responsible for the cost of the improvement, we learn from the opinions of the Supreme Court in the present case and in the case of *Barber Asphalt Company* v. *Watt*, reported in 51 La. Ann. 1345, that "for the sum assessed against their property no personal liability attaches to the abutting owners beyond the value of the property affected, and that the proceeding is purely one *in rem*, acting on the property benefited and none other," and that "the property owner's proportion of the cost of paving a street should be determined by ascertaining the entire cost of the work assessable to the property fronting thereon, and apportioning the same to said property in proportion to foot frontage."

This construction of the state statutes by the Supreme Court of the State must, of course, in a case like the present, be accepted by us; and we have only to consider, in this branch of the case, whether the statutes of Louisiana, so construed, which provide and regulate a method of improving and paving streets in the city of New Orleans, and apportioning the cost thereof by assessment upon the abutting property, are obnoxious, under the facts of the present case, to the provisions of the Fourteenth Amendment to the Constitution of the United States.

We do not feel constrained to enter at large upon a subject which has received such frequent and recent consideration by this court. It is, perhaps, sufficient to say that we do not perceive in the statutes of Louisiana, as construed and applied in this case by the Supreme Court of that State, any provisions which we must condemn as being in disregard of the constitutional rights of the plaintiff in error. In view of our decisions, we certainly cannot say that, as matter of law, a state statute which makes the cost of paving a street in a city assessable upon the abutting properties and a lien thereon, is unconstitutional. *Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Spencer* v. *Merchant*, 125 U.

S. 345; *Bauman* v. *Ross*, 167 U. S. 548; *Parsons* v. *District of Columbia*, 170 U. S. 45; *Wight* v. *Davidson*, 181 U. S. 371; *French* v. *Barber Asphalt Company*, 181 U. S. 324.

In the opinion of the Supreme Court of Louisiana, which we find in this record, it is said:

"There can be no question, and in fact it is conceded, that by Act No. 119 of 1886, and by that act as amended by Act No. 142, of 1894, the council of the city of New Orleans was authorized 'in its discretion to provide for the paving or banqueting of any street or portion thereof, at the expense of the whole city, and to thereupon force, impose and collect of the front proprietors of lots fronting on said street, a special assessment in proportion to frontage of three quarters of the cost of said improvement,' and that by said acts it was enacted that such local assessment should have a first privilege, superior to vendor's privilege and all other privileges and mortgages.

"The constitutionality of those acts is not attacked directly, but the exercise by the city of authority, under the powers so granted, is called in question as being illegal, and unconstitutional. . . . It is too late to question the right of the general assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself or authorize some political body to order, special assessments to be made, within the district, for the purpose of meeting the cost and expenses of such works. *George* v. *Sheriff*, 45 La. Ann. 1232. . . . It is true that in some instances almost the whole benefit accrues to a few, but there can be no universal rule of justice upon which such assessments can be made. An apportionment of the cost that would be just in one case, would be oppressive in another. For this reason, the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, rests in the legislature or some political body to which it has delegated that authority. . . . The city has simply exercised its unquestionable right and power of paving an existing public street in the interest of the special local public benefit, and demanded of owners of property abutting and fronting on the street that they contribute to the cost of the improvement in a manner and form,

and to an extent fixed by the general assembly. The object of the paving of the street was to benefit parties owning property upon it by the improvement of the access to their properties. It is not pretended that this particular purpose was not accomplished even as to appellant's property. It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners, that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate. . . . The general assembly has, in Act No. 119 of 1886, conferred upon the common council the right and power by a two thirds vote to constitute any particular street which it proposes to pave, a special taxing district for the purpose of meeting the cost of making such paving. It has exercised this right and power in the matter of the paving of Hagan avenue. Having done so, the legislature itself has designated how, in what proportion and by what standard this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard, a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof."

We think these views are consonant with the great weight of authority, both state and Federal. As expressed by Cooley in his work on Taxation, 1st ed. page 429:

"The matter is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. . . . With the wisdom or unwisdom of special assessments when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

No such case is presented by the facts in the present case as would justify an intervention by the Federal courts with a system of special assessments prescribed by the legislature and approved by the courts of a State.

Because the ordinance and specifications, under which the paving in this case was done, require the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work, it is contended, on behalf on the plaintiff in error, that thereby citizens of the State of Louisiana, and of each and every State and the inhabitants thereof, are deprived of their privileges and immunities under article 4, sec. 2, and under the Fourteenth Amendment to the Constitution of the United States. It is said that such an ordinance deprives every person, not a *bona fide* resident of the city of New Orleans, of the right to labor on the contemplated improvements, and also is prejudicial to the property owners, because, by restricting the number of workmen, the price of the work is increased.

Such questions are of the gravest possible importance, and, if and when actually presented, would demand most careful consideration; but we are not now called upon to determine them.

In so far as the provisions of the city ordinance may be claimed to affect the rights and privileges of citizens of Louisiana and of the other States, the plaintiff in error is in no position to raise the question. It is not alleged, nor does it appear, that he is one of the laborers excluded by the ordinance from employment, or that he occupies any representative relation to them. Apparently he is one of the preferred class of resident citizens of the city of New Orleans.

It is further argued that the ordinance is prejudicial to the property rights of the plaintiff in error, because by confining the right to labor on works of municipal improvement to resident citizens, the cost of such works might thus be increased.

But we think such a consequence is too far-fetched and uncertain on which to base judicial action. The plaintiff in error did not raise such a question in time to stay the work *in limine*. He awaited the completion of the work, and until his property had received the benefits, whatever they were, of the improvement. Nor did he, on the trial, adduce any evidence from which the court might have found that the actual cost in the present case was increased by the operation of the ordinance. Possibly the effect of the ordinance in preferring the labor of

resident citizens might tend to increase the cost of the work, or it might have the opposite effect by inducing outside laborers to become resident citizens. But, as we have said, such conjectural results are too remote and uncertain to furnish materials for judicial determination. The serious duty of condemning state legislation as unconstitutional and void cannot be thrown upon this court, except at the suit of parties directly and certainly affected thereby.

The judgment of the Supreme Court of Louisiana is

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

MANLEY *v.* PARK.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 120. Argued December 17, 1902.—Decided January 5, 1903.

The construction given by the Supreme Court of Kansas to the Kansas statutes holding that real estate situated in that State, the title to which was vested in a non-resident executor, to whom letters testamentary had been issued by a court of another jurisdiction, may be attached and sold in an action of debt against the non-resident executor, is binding on this court. And, treating the statutes as having such import as a decision upon a matter of local law, this court must determine whether as so construed they violate the Federal right involved.

A domestic judgment of a state court entered after the defendant had appeared generally and whose validity it would have been the duty of this court to uphold on direct proceedings to obtain a reversal thereof, should be treated by courts of the United States so far as it relates to Federal questions which existed at the commencement of the action, as valid between the parties to the judgment, and if no claim to the protection of the Constitution of the United States was set up in any form in the proceedings had in the state court prior to judgment, such protection cannot be invoked for the first time in this court to annul the judgment on the ground that it is absolutely void and of no effect under the Constitution of the United States.

A Federal defence which cannot be availed of unless raised before judgment is not efficacious, when it has not been raised at the proper time, to avoid the judgment when rendered.

Statement of the Case.

RICHARD A. PARK was plaintiff in the original action, brought in the District Court of Atchison County, Kansas, against William H. Risk, executor of the estate of George Manley, deceased. It was alleged in the petition, in substance, that the decedent was at the time of his death the owner of stock of the par value of $27,500, in a Kansas corporation, known as the Kansas Trust & Banking Company; that said corporation, subsequent to the death of Manley, became indebted to plaintiff; that the corporation was insolvent and had no property from which such indebtedness could be realized; that the defendant, as executor of the estate of Manley, became seized and possessed of all the property of the decedent within the State of Kansas, including the shares of stock referred to, and, by reason of a contractual liability imposed on the stockholders of said corporation, defendant was liable to plaintiff for the indebtedness in question. There was filed with the petition an affidavit for attachment, because of the non-residence of the defendant, and after the return of the summons an attachment was levied on certain real estate in Atchison County, Kansas, "as the property of said defendant William H. Risk, executor of the estate of George Manley, deceased." Publication of notice of the pendency of the action was made, as required by laws of Kansas. Within the time limited for answering the defendant appeared generally by filing a demurrer to the petition on the grounds of a want of jurisdiction over the person of the defendant and the subject of the action, because several causes of action were improperly joined, and because the petition did not state facts sufficient to constitute a cause of action. Thereafter, Reuben A. Manley, successor to William H. Risk, as executor and trustee of the estate of George Manley, deceased, was substituted as defendant in the stead of Risk. An answer was thereupon filed, in which most of the material averments of the petition were admitted, such as the ownership by George Manley in his lifetime of the stock in question; the execution of his last will and testament; its admission to probate and the grant of letters testamentary to Risk and to his successor by a New Jersey orphans' court; that Risk and his successor "became seized and possessed of all the property of the late George Manley, de-

ceased, lying and being situated in the State of Kansas," and that the substituted defendant (Reuben M. Manley) "became and is now a stockholder of the said, The Kansas Trust & Banking Company, and as such executor of said estate is the owner and holder of said shares of stock of said corporation, amounting to the sum of $27,500." Separate defences were interposed to defeat recovery, such as that plaintiff had not reduced his claim against the Kansas corporation to judgment, that there was a defect of parties plaintiff, that a special fund created by the Kansas corporation for the payment of the indebtedness in question existed, and should first be exhausted, and that various actions were pending in which recovery was sought by judgment creditors of said Kansas corporation, upon the liability of defendant as a stockholder in said corporation.

Issue was joined by the filing of a reply, the cause was tried by the court, judgment for the amount claimed was rendered against the defendant, and the attached real estate was ordered sold. The cause was taken to the Supreme Court of Kansas, and that court dismissed the petition in error because of an informality in the proceedings and without passing on the merits. 61 Kansas, 857. After the mandate had been filed in the lower court separate motions were made on behalf of defendant, to set aside the judgment and to withdraw the order for the sale of the attached property. The same grounds were assigned in support of each motion, and the claim of the protection of the Constitution of the United States was embodied in the third ground, by the assertion that a statute of Kansas, upon which the judgment complained of was based, violated the first and second sections of the fourth article of and the provisions of the Fourteenth Amendment to the Constitution of the United States. The motions were overruled, and the "decision and judgment" was subsequently affirmed by the Supreme Court of Kansas. 62 Kansas, 553. By writ of error the cause was then brought to this court. The original defendant in error having died, Anna O. Park has been substituted as defendant in error.

Mr. L. F. Bird for plaintiff in error. *Mr. C. F. Hutchings* was with him on the brief.

Mr. J. F. Tufts for defendant in error. *Mr. Horace M. Jackson* was with him on the brief.

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

A motion has been made to dismiss the writ of error upon the ground that no Federal question is presented by the record, it being claimed that the decision and judgment of the Supreme Court of Kansas sought to be reviewed was based solely upon a consideration of local statutes and the determination of a question of general law, viz., the effect as *res judicata* of a judgment of a court of Kansas. But as the claim of the benefit of the Constitution of the United States was specially made in the motions and was passed upon adversely to the moving party, it follows that a Federal question exists in this record, and the motion to dismiss is therefore overruled. *Missouri, Kansas &c. Ry. Co.* v. *Elliott*, 184 U. S. 530, 534.

The specifications of error now relied upon are thus stated in the brief of counsel for plaintiff in error:

"First. Under the constitution and laws of the State of Kansas, an executor, resident in the State of Kansas, could be sued in a District Court of the State, but the property in his charge could not be attached, nor sold on execution.

"Second. Under the constitution and statutes of the State of Kansas, no authority exists for attaching the property in charge of a non-resident executor.

"Third. Section 203 of the executors' and administrators' act, par. 2989, Gen. Stat. Kansas, 1889, as construed and upheld in this case, is in violation of sec. 2, art. 4, of the Constitution of the United States, in that it does not accord to the plaintiff in error and his predecessor, citizens of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas. Sec. 2, art. 4, Const. U. S.

"Fourth. Sec. 203 of the executors' and administrators' act, par. 2989, Gen. Stat. Kansas, 1889, as construed and upheld in this case, is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges

of the plaintiff in error and his predecessor, citizens of the United States, and their immunity from suit by attachment, and deprives them of their property without due process of law, and denies them the equal protection of the laws.

"Fifth. The right of the plaintiff in error, and his predecessor, citizens of the State of New Jersey, to act as executors of the estate of George Manley, deceased, is a privilege, and the exemption of an executor, not a resident in the State of Kansas, from suits by attachment, is an immunity which is guaranteed by sec. 2, art. 4, Constitution of the United States, and the same were denied by the decision of the Supreme Court of Kansas in this case."

The first and second propositions, it is manifest, simply invite a consideration of the constitution and laws of the State of Kansas; and, consequently, the construction adopted by the Supreme Court of Kansas of the pertinent provisions of such constitution and laws, is binding upon this court as a decision upon a matter of purely local law, not presenting a Federal question. We must accept then as undeniable the ruling of the highest court of Kansas, that under the constitution and statutes of Kansas real estate situated in that State, the title to which was vested in a non-resident executor, to whom letters testamentary had been issued by a court of another jurisdiction, might be attached and sold, in an action of debt against the non-resident executor.

The remaining propositions assail the validity, under the Constitution of the United States, of the statute of Kansas, par. 2989, Gen. Stat. Kansas, 1889; sec. 147, ch. 107, Gen. Stat. Kansas, 1897, as thus construed by the Supreme Court of Kansas. The section in question upon which the judgment complained of was based is as follows:

"An executor or administrator duly appointed in any other State or country may sue or be sued in any court in this State, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

This section was held to authorize an attachment of property in an action against a non-resident executor, precisely as in ordinary actions against non-residents.

Now, the claimed nullity of the judgment assailed was based upon the alleged invalidity of the Kansas statute above quoted, as respected the Constitution of the United States, in this, that as an executor resident in Kansas possessed the privilege or immunity of not being subject to suit by attachment of property, a like privilege or immunity within the State of Kansas was vested by the Constitution of the United States in executors who were not residents of Kansas, and the refusal of the State of Kansas to accord such privilege or immunity to a non-resident executor and the subjecting him to the operation of attachment laws, deprived the foreign executor of his property without due process of law and denied him the equal protection of the laws. But, it is obvious, we think, under the circumstances disclosed in this record, that the protection of the Constitution of the United States could not be successfully invoked to annul the judgment here complained of, on the theory that such judgment was absolutely void and of no effect under the Constitution of the United States. This results from the consideration that no claim to the protection of the Constitution of the United States was set up in any form in the proceedings had in the state court which resulted in the judgment complained of, and for such reason, if that judgment had been brought to this court for review, it would have been its duty —having in mind the provisions of section 709 of the Revised Statutes—to affirm the judgment and recognize its binding force, because no Federal question was raised. A domestic judgment of a state court whose validity it would have been the duty of this court to uphold, on direct proceedings to obtain a reversal of such judgment, manifestly should be treated by courts of the United States, so far as relates to Federal questions which existed at the time the action was commenced in which the judgment was rendered, as valid between the parties to such judgment. We could not hold to the contrary without saying that a Federal defence which could not be availed of unless raised before judgment was yet efficacious, although not raised, to avoid the judgment when rendered. This would necessarily declare a plain contradiction in terms. As the authority conferred by Kansas upon her courts was to set aside

Syllabus.

void judgments, provisions of the Constitution of the United States which would have been available if pleaded or otherwise presented in the state courts as a defence in the proceedings in the original action to defeat the recovery of a valid judgment, cannot, when the opportunity has not been availed of and the judgment has become a finality, be resorted to as establishing that in fact the judgment possessed no binding force or efficacy whatever.

Judgment affirmed.

LONE WOLF *v.* HITCHCOCK.

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

No. 275. Argued October 23, 1902.—Decided January 5, 1903.

The provisions in article 12 of the Medicine Lodge treaty of 1867 with the Kiowa and Comanche Indians to the effect that no treaty for the cession of any part of the reservation therein described, which may be held in common, shall be of any force or validity as against the Indians unless executed and signed by at least three fourths of all the adult male Indians occupying the same, cannot be adjudged to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act if the assent of three fourths of all the male Indians could not be obtained. Congress has always exercised plenary authority over the tribal relations of the Indians and the power has always been deemed a political one not subject to be controlled by the courts.

In view of the legislative power possessed by Congress over treaties with the Indians, and Indian tribal property, even if a subsequent agreement or treaty purporting to be signed by three fourths of all the male Indians was not signed and amendments to such subsequent treaty were not submitted to the Indians, as all these matters were solely within the domain of the legislative authority, the action of Congress is conclusive upon the courts.

As the act of June 6, 1900, as to the disposition of these lands was enacted at a time when the tribal relations between the confederated tribes of the Kiowas, Comanches and Apaches still existed, and that statute and the statutes

supplementary thereto, dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit, such legislation was constitutional and this court will presume that Congress acted in perfect good faith and exercised its best judgment in the premises, and as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of such legislation.

In 1867 a treaty was concluded with the Kiowa and Comanche tribes of Indians, and such other friendly tribes as might be united with them, setting apart a reservation for the use of such Indians. By a separate treaty the Apache tribe of Indians was incorporated with the two former-named, and became entitled to share in the benefits of the reservation. 15 Stat. 581, 589.

The first named treaty is usually called the Medicine Lodge treaty. By the sixth article thereof it was provided that heads of families might select a tract of land within the reservation, not exceeding 320 acres in extent, which should thereafter cease to be held in common, and should be for the exclusive possession of the Indian making the selection, so long as he or his family might continue to cultivate the land. The twelfth article of the treaty was as follows:

"Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article III (VI) of this treaty."

The three tribes settled under the treaties upon the described land. On October 6, 1892, 456 male adult members of the confederated tribes signed, with three commissioners representing the United States, an agreement concerning the reservation. The Indian agent, in a certificate appended to the agreement, represented that there were then 562 male adults in the three tribes. Senate Ex. Doc. No. 27, 52d Congress, second session,

page 17. Four hundred and fifty-six male adults therefore constituted more than three fourths of the certified number of total male adults in the three tribes. In form the agreement was a proposed treaty, the terms of which, in substance, provided for a surrender to the United States of the rights of the tribes in the reservation, for allotments out of such lands to the Indians in severalty, the fee simple title to be conveyed to the allottees or their heirs after the expiration of twenty-five years; and the payment or setting apart for the benefit of the tribes of two million dollars as the consideration for the surplus of land over and above the allotments which might be made to the Indians. It was provided that sundry named friends of the Indians (among such persons being the Indian agent and an army officer) "should each be entitled to all the benefits, in land only, conferred under this agreement, the same as if members of said tribes." Eliminating 350,000 acres of mountainous land, the quantity of surplus lands, suitable for farming and grazing purposes was estimated at 2,150,000 acres. Concerning the payment to be made for these surplus lands, the commission, in their report to the President announcing the termination of the negotiations, said (Senate Ex. Doc. No. 17, second session, 52d Congress):

"In this connection it is proper to add that the commission agreed with the Indians to incorporate the following in their report, which is now done:

"The Indians upon this reservation seem to believe (but whether from an exercise of their own judgment or from the advice of others the commission cannot determine) that their surplus land is worth two and one half million dollars, and Congress may be induced to give them that much for it. Therefore, in compliance with their request, we report that they desire to be heard through an attorney and a delegation to Washington upon that question, the agreement signed, however, to be effective upon ratification, no matter what Congress may do with their appeal for the extra half million dollars."

In transmitting the agreement to the Secretary of the Interior, the Commissioner of Indian Affairs said:

"The price paid, while considerably in excess of that paid

to the Cheyennes and Arapahoes, seems to be fair and reasonable, both to the government and the Indians, the land being doubtless of better quality than that in the Cheyenne and Arapahoe reservation."

Attention was directed to the provision in the agreement in favor of the Indian agent and an army officer, and it was suggested that to permit them to avail thereof would establish a bad precedent.

Soon after the signing of the foregoing agreement it was claimed by the Indians that their assent had been obtained by fraudulent misrepresentations of its terms by the interpreters, and it was asserted that the agreement should not be held binding upon the tribes because three fourths of the adult male members had not assented thereto, as was required by the twelfth article of the Medicine Lodge treaty.

Obviously, in consequence of the policy embodied in section 2079 of the Revised Statutes, departing from the former custom of dealing with Indian affairs by treaty and providing for legislative action on such subjects, various bills were introduced in both Houses of Congress designed to give legal effect to the agreement made by the Indians in 1892. These bills were referred to the proper committees, and before such committees the Indians presented their objections to the propriety of giving effect to the agreement. (H. R. Doc. No. 431, 55th Congress, second session.) In 1898 the Committee on Indian Affairs of the House of Representatives unanimously reported a bill for the execution of the agreement made with the Indians. The report of the committee recited that a favorable conclusion had been reached by the committee "after the fullest hearings from delegations of the Indian tribes and all parties at interest." (H. R. Doc. No. 419, first session, 56th Congress, p. 5.)

The bill thus reported did not exactly conform to the agreement as signed by the Indians. It modified the agreement by changing the time for making the allotments, and it also provided that the proceeds of the surplus lands remaining after allotments to the Indians should be held to await the judicial decision of a claim asserted by the Choctaw and Chickasaw

tribes of Indians to the surplus lands. This claim was based upon a treaty made in 1866, by which the two tribes ceded the reservation in question, it being contended that the lands were impressed with a trust in favor of the ceding tribes, and that whenever the reservation was abandoned, so much of it as was not allotted to the confederated Indians of the Comanche, Kiowa and Apache tribes reverted to the Choctaws and Chickasaws.

The bill just referred to passed the House of Representatives on May 16, 1898. (31st Cong. Rec. p. 4947.) When the bill reached the Senate that body, on January 25, 1899, adopted a resolution calling upon the Secretary of the Interior for information as to whether the signatures attached to the agreement comprised three fourths of the male adults of the tribes. In response the Secretary of the Interior informed the Senate, under date of January 28, 1899, that the records of the department "failed to show a census of these Indians for the year 1892," but that "from a roll used in making a payment to them in January and February, 1893, it appeared that there were 725 males over eighteen years of age, of whom 639 were twenty-one years and over." The Secretary further called attention to the fact that by the agreement of 1892 a right of selection was conferred upon each member of the tribes over eighteen years of age, and observed:

"If 18 years and over be held to be the legal age of those who were authorized to sign the agreement, the number of persons who actually signed was 87 less than three fourths of the adult male membership of the tribes; and if 21 years be held to be the minimum age, then 23 less than three fourths signed the agreement. In either event, less than three fourths of the male adults appear to have so signed."

With this information before it the bill was favorably reported by the Committee on Indian Affairs of the Senate, but did not pass that body.

At the first session of the following Congress (the Fifty-sixth) bills were introduced in both the Senate and House of Representatives substantially like that which has just been noticed. (Senate, 1352; H. R. 905.)

In the meanwhile, about October, 1899, the Indians had, at a general council at which 571 male adults of the tribes purported to be present, protested against the execution of the provisions of the agreement of 1892, and adopted a memorial to Congress, praying that that body should not give effect to the agreement. This memorial was forwarded to the Secretary of the Interior by the Commissioner of Indian Affairs with lengthy comments, pointing out the fact that the Indians claimed that their signatures to the agreement had been procured by fraud and that the legal number of Indians had not signed the agreement, and that the previous bills and bills then pending contemplated modification of the agreement in important particulars without the consent of the Indians. This communication from the Commissioner of Indian Affairs, together with the memorial of the Indians, were transmitted by the Secretary of the Interior to Congress. (Senate Doc. No. 76; H. R. Doc. No. 333; first session, Fifty-sixth Congress.) Attention was called to the fact that although by the agreement of October 6, 1892, one half of each allotment was contemplated to be agricultural land, there was only sufficient agricultural land in the entire reservation to average thirty acres per Indian. After setting out the charges of fraud and complaints respecting the proposed amendments designed to be made to the agreement, as above stated, particular complaint was made of the provision in the agreement of 1892 as to allotments in severalty among the Indians of lands for agricultural purposes. After reciting that the tribal lands were not adapted to such purposes, but were suitable for grazing, the memorial proceeded as follows:

"We submit that the provision for lands to be allotted to us under this treaty are insufficient, because it is evident we cannot, on account of the climate of our section, which renders the maturity of crops uncertain, become a successful farming community; that we, or whoever else occupies these lands, will have to depend upon the cattle industry for revenue and support. And we therefore pray, if we cannot be granted the privilege of keeping our reservation under the treaty made with us in 1868, and known as the Medicine Lodge treaty, that au-

thority be granted for the consideration of a new treaty that will make the allowance of land to be allotted to us sufficient for us to graze upon it enough stock cattle, the increase from which we can market for support of ourselves and families."

With the papers just referred to before it, the House Committee on Indian Affairs, in February, 1900, favorably reported a bill to give effect to the agreement of 1892.

On January 19, 1900, an act was passed by the Senate, entitled "An act to ratify an agreement made with the Indians of the Fort Hall Indian reservation in Idaho, and making an appropriation to carry the same into effect." In February, 1900, the House Committee on Indian Affairs, having before it the memorial of the Indians transmitted by the Secretary of the Interior, and also having for consideration the Senate bill just alluded to, reported that bill back to the House favorably, with certain amendments. (H. R. Doc. No. 419, 56th Congress, first session.) One of such amendments consisted in adding to the bill in question, as section 6, a provision to execute the agreement made with the Kiowa, Comanche and Apache Indians in 1892. Although the bill thus reported embodied the execution of the agreement last referred to, the title of the bill was not changed, and consequently referred only to the execution of the agreement made with the Indians of the Fort Hall reservation in Idaho. The provisions thus embodied in section 6 of the bill in question substantially conformed to those contained in the bill which had previously passed the House, except that the previous enactment on this subject was changed so as to do away with the necessity for making to each Indian one half of his allotment in agricultural land and the other half in grazing land. In addition a clause was inserted in the bill providing for the setting apart of a large amount of grazing land to be used in common by the Indians. The provision in question was as follows:

"That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands, to be

selected by the Secretary of the Interior, either in one or more tracts as will best subserve the interest of said Indians."

The provision of the agreement in favor of the Indian agent and army officer was also eliminated.

The bill, moreover, exempted the money consideration for the surplus lands from all claims for Indian depredations, and expressly provided that in the event the claim of the Choctaws and Chickasaws was ultimately sustained, the consideration referred to should be subject to the further action of Congress. In this bill as in previous ones provision was made for allotments to the Indians, the opening of the surplus land for settlement, etc. The bill became a law by concurrence of the Senate in the amendments adopted by the House as just stated.

Thereafter, by acts approved on January 4, 1901, 31 Stat. 727, c. 8; March 3, 1901, 31 Stat. 1078, c. 832, and March 3, 1901, 31 Stat. 1093, c. 846, authority was given to extend the time for making allotments and opening of the surplus land for settlement for a period not exceeding eight months from December 6, 1900; appropriations were made for surveys in connection with allotments and setting apart of grazing lands; and authority was conferred to establish counties and county seats, townsites, etc., and proclaim the surplus lands open for settlement by white people.

On June 6, 1901, a bill was filed on the equity side of the Supreme Court of the District of Columbia, wherein Lone Wolf (one of the appellants herein) was named as complainant, suing for himself as well as for all other members of the confederated tribes of the Kiowa, Comanche and Apache Indians, residing in the Territory of Oklahoma. The present appellees (the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office) were made respondents to the bill. Subsequently, by an amendment to the bill, members of the Kiowa, Comanche and Apache tribes were joined with Lone Wolf as parties complainant.

The bill recited the establishing and occupancy of the reservation in Oklahoma by the confederated tribes of Kiowas, Comanches and Apaches, the signing of the agreement of October 6, 1892, and the subsequent proceedings which have been detailed,

culminating in the passage of the act of June 6, 1900, and the acts of Congress supplementary to said act. In substance it was further charged in the bill that the agreement had not been signed as required by the Medicine Lodge treaty, that is, by three fourths of the male adult members of the tribe, and that the signatures thereto had been obtained by fraudulent misrepresentations and concealment, similar to those recited in the memorial signed at the 1899 council. In addition to the grievance previously stated in the memorial, the charge was made that the interpreters falsely represented, when the said treaty was being considered by the Indians, that the treaty provided "for the sale of their surplus lands at some time in the future at the price of $2.50 per acre;" whereas, in truth and in fact, "by the terms of said treaty, only $1.00 an acre is allowed for said surplus lands," which sum, it was charged, was an amount far below the real value of said lands. It was also averred that portions of the signed agreement had been changed by Congress without submitting such changes to the Indians for their consideration. Based upon the foregoing allegations, it was alleged that so much of said act of Congress of June 6, 1900, and so much of said acts supplementary thereto and amendatory thereof as provided for the taking effect of said agreement, the allotment of certain lands mentioned therein to members of said Indian tribes, the surveying, laying out, and platting townsites and locating county seats on said lands, and the ceding to the United States and the opening to settlement by white men of two million acres of said lands, were enacted in violation of the property rights of the said Kiowa, Comanche and Apache Indians, and if carried into effect would deprive said Indians of their lands without due process of law, and that said parts of said acts were contrary to the Constitution of the United States, and were void, and conferred no right, power or duty upon the respondents to do or perform any of the acts or things enjoined or required by the acts of Congress in question. Alleging the intention of the respondents to carry into effect the aforesaid claimed unconstitutional and void acts, and asking discovery by answers to interrogatories propounded to the respondents, the allowance of a temporary restraining order, and a final decree

awarding a perpetual injunction was prayed, to restrain the commission by the respondents of the alleged unlawful acts by them threatened to be done. General relief was also prayed.

On January 6, 1901, a rule to show cause why a temporary injunction should not be granted was issued. In response to this rule an affidavit of the Secretary of the Interior was filed, in which in substance it was averred that the complainant (Lone Wolf) and his wife and daughter had selected allotments under the act of June 6, 1900, and the same had been approved by the Secretary of the Interior and that all other members of the tribes, excepting twelve, had also accepted and retained allotments in severalty, and that the greater part thereof had been approved before the bringing of this suit. It was also averred that the 480,000 acres of grazing land provided to be set apart, in the act of June 6, 1900, for the use by the Indians in common, had been so set apart prior to the institution of the suit, "with the approval of a council composed of chiefs and headmen of said Indians." Thereupon an affidavit verified by Lone Wolf was filed, in which in effect he denied that he had accepted an allotment of lands under the act of June 6, 1900, and the acts supplementary to and amendatory thereof. Thereafter, on June 17, 1901, leave was given to amend the bill and the same was amended, as heretofore stated, by adding additional parties complainant and by providing a substituted first paragraph of the bill, in which was set forth, among other things, that the three tribes, at a general council held on June 7, 1901, had voted to institute all legal and other proceedings necessary to be taken, to prevent the carrying into effect of the legislation complained of.

The Supreme Court of the District on June 21, 1901, denied the application for a temporary injunction. The cause was thereafter submitted to the court on a demurrer to the bill as amended. The demurrer was sustained, and the complainants electing not to plead further, on June 26, 1901, a decree was entered in favor of the respondents. An appeal was thereupon taken to the Court of Appeals of the District. While this appeal was pending, the President issued a proclamation, dated July 4, 1901, (32 Stat. Appx. Proclamations, 11,) in which it was

ordered that the surplus lands ceded by the Comanche, Kiowa and Apache and other tribes of Indians should be opened to entry and settlement on August 6, 1901. Among other things, it was recited in the proclamation that all the conditions required by law to be performed prior to the opening of the lands to settlement and entry had been performed. It was also therein recited that, in pursuance of the act of Congress ratifying the agreement, allotments of land in severalty had been regularly made to each member of the Comanche, Kiowa and Apache tribes of Indians; the lands occupied by religious societies or other organizations for religious or educational work among the Indians had been regularly allotted and confirmed to such societies and organizations, respectively; and the Secretary of the Interior, out of the lands ceded by the agreement, had regularly selected and set aside for the use in common for said Comanche, Kiowa and Apache tribes of Indians, four hundred and eighty thousand acres of grazing lands.

The Court of Appeals (without passing on a motion which had been made to dismiss the appeal) affirmed the decree of the court below, and overruled a motion for reargument. 19 App. D. C. 315. An appeal was allowed, and the decree of affirmance is now here for review.

Mr. William M. Springer and *Mr. Hampton L. Carson* for appellants.

Mr. Assistant Attorney General Van Devanter for appellee.

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

By the sixth article of the first of the two treaties referred to in the preceding statement, proclaimed on August 25, 1868, 15 Stat. 581, it was provided that heads of families of the tribes affected by the treaty might select, within the reservation, a tract of land of not exceeding 320 acres in extent, which should thereafter cease to be held in common, and should be for the exclusive possession of the Indian making the selection,

so long as he or his family might continue to cultivate the land. The twelfth article reads as follows:

"Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article III (VI) of this treaty."

The appellants base their right to relief on the proposition that by the effect of the article just quoted the confederated tribes of Kiowas, Comanches and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be divested by Congress in any other mode than that specified in the said twelfth article, and that as a result of the said stipulation the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.

The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.

Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. *Johnson* v. *McIntosh*, (1823) 8 Wheat. 543, 574;

Cherokee Nation v. *Georgia*, (1831) 5 Pet. 1, 48; *Worcester* v. *Georgia*, (1832) 6 Pet. 515, 581; *United States* v. *Cook*, (1873) 19 Wall. 591, 592; *Leavenworth &c. R. R. Co.* v. *United States*, (1875) 92 U. S. 733, 755; *Beecher* v. *Wetherby*, (1877) 95 U. S. 517, 525. But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected States or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians. Thus, in *Beecher* v. *Wetherby*, 95 U. S. 517, discussing the claim that there had been a prior reservation of land by treaty to the use of a certain tribe of Indians, the court said (p. 525):

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians."

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the

Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U. S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas* v. *Gay*, 169 U. S. 264, 270; *Ward* v. *Race Horse*, 163 U. S. 504, 511; *Spalding* v. *Chandler*, 160 U. S. 394, 405; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616.

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. In *United States* v. *Kagama*, (1885) 118 U. S. 375, speaking of the Indians, the court said (p. 382):

"After an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in § 2079 of the Revised Statutes: 'No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.'"

In upholding the validity of an act of Congress which conferred jurisdiction upon the courts of the United States for certain crimes committed on an Indian reservation within a State, the court said (p. 383):

"It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. 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. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

* * * * * * * *

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, and *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483.

In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment, that the requisite three fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action

of the Indians, since all these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts.

The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

The motion to dismiss does not challenge jurisdiction over the subject matter. Without expressly referring to the propositions of fact upon which it proceeds, suffice it to say that we think it need not be further adverted to, since, for the reasons previously given and the nature of the controversy, we think the decree below should be

Affirmed.

Mr. Justice Harlan concurs in the result.

TELLURIDE POWER TRANSMISSION COMPANY *v.* RIO GRANDE WESTERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 72. Argued November 10, 1902.—Decided January 5, 1903.

It is sufficient answer to a claim that a statute of Utah amounts to a deprivation of the rights under the Fourteenth Amendment that it appears for the first time in the petition for a writ of error from this court and that the claim of invalidity was not raised in the District Court, nor assigned as a ground of error on the appeal to the Supreme Court of the State, and that that court did not pass upon the action of the District Court in view of the unconstitutionality of the statute.

Where the Supreme Court of Utah has construed the statutes and constitution of Utah to the effect that a foreign corporation had no existence as a corporation in the State, and could acquire, therefore, no rights as such, and that an individual connected with the corporation had no independent rights in the premises, these conclusions do not involve the decision of Federal questions, but only the meaning and effect of local statutes and a finding of fact, neither of which is reviewable by this court.

Whatever rights the plaintiff in error in this action may have had under § 2339, Revised Statutes of the United States, depended upon questions of fact and of local law, which are not reviewable by this court.

Where the state court refuses to remove a cause to the Circuit Court and afterwards on filing the record in the Circuit Court that court remands the cause to the state court, if there was any error in the ruling of the state court it becomes wholly immaterial. *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S 556.

This is a suit to condemn land in the exercise of the right of eminent domain, under the laws of Utah, and was brought in the District Court of the Fourth Judicial District of that State. The complainant in the suit, defendant in error here, was a corporation of Utah. The plaintiff in error was a Colorado corporation. Ferguson and Holbrook were citizens of Utah; Nunn was a citizen of Colorado. The bill alleged the corporate character of the complainant, and the necessity of the land for the use of the railroad. The route of the road was set out, and that it would pass over a tract of unsurveyed

lands of the United States which could not be accurately described, but which, when surveyed, would proximately be parts of the S.W. ¼ of section 27, W. ½ of S.W. ¼ of 26, N.E. ¼ of the S.W. ¼ section 26, and N.W. ¼ of the S.E. ¼ of section 26, T. 5, S. R. 3, east Salt Lake meridian, and lying in Provo Cañon, and along and near Provo River. That prior to plaintiff's survey Ferguson had or claimed some possessory right by occupation of said land or some part thereof, but on account of the land being unsurveyed the number of acres claimed by Ferguson could not be given, but the lands he claimed to occupy, it was alleged on information and belief, commenced at a fence between them and lands below and southeasterly, occupied by A. L. Murphy, and extends northeasterly up the cañon and river, a distance of about 4800 feet, to a point which by estimation would be the northeast corner of the northwest quarter of the southeast quarter of section twenty-six, when the land should be surveyed. It was alleged that the line of the railroad was on and over said lands, and that plaintiff had appropriated for railroad purposes a strip of land two hundred feet wide, containing twenty-two acres, more or less: that such strip was necessary for the construction and operation of the road. A map of the line of road was attached to the bill.

The following were the allegations of the bill as to the other defendants:

"And on information and belief the plaintiff alleges that the defendants The Telluride Power Transmission Company, L. L. Nunn and L. Holbrook assert and claim some interest in or to said land appropriated by the plaintiff, or in the possessory right to the same or to some easement therein.

"That the defendants are the only persons and parties in possession of said land or any part thereto, or claiming any right or title therein or thereto, so far as is known to the plaintiff.

"And the plaintiff alleges that it cannot contract for the purchase of said tract of land required for its railroad as aforesaid. That the defendant W. W. Ferguson refuses to sell, alleging that he has contracted to sell to the other defendants

or some of them; that the other defendants refuse to sell the same or any easement therein or possessory right thereto on the pretence that they want said land and propose to flow the same for power purposes. And on information and belief the plaintiff alleges that the claimed interest of the defendant Holbrook, if any, is held by him as trustee for the defendants, The Telluride Power Transmission Company and L. L. Nunn."

The prayer was for the ascertainment of the extent of occupation by defendants and their damages and the condemnation of a right of way of one hundred feet wide on each side of the center line of plaintiff's survey, on and over the land occupied by defendants, or any of them, and for general relief.

The Telluride Power Transmission Company and the defendant Nunn petitioned for the removal of the cause to the Circuit Court of the United States for the District of Utah on the ground of separable controversy. The petition alleged that they were citizens and residents of Colorado, and the plaintiff was a resident and citizen of Utah; that Holbrook had no interest in the controversy, and that Ferguson had contracted to sell to them the lands involved. The petition was denied. Subsequently said corporation and Nunn filed a certified transcript of the proceedings in the Circuit Court of the United States for the District of Utah, but on motion of plaintiff's attorney the cause was remanded to the District Court of the State. The order remanding was made on the 29th of March, 1897, and a copy thereof filed in the District Court, April 29, 1898, the day the trial commenced.

In that court the defendants answered—Ferguson separately, the other defendants uniting. The answers need not be quoted. It is enough to say that they put in issue the allegations of the bill as to the organization and existence of the plaintiff corporation, its authority to build a railroad up Provo Cañon, the survey of its line in March, 1896, and its location. It was alleged "that certain persons claiming to be the agents of said alleged plaintiff had, during the summer and fall of 1896, run uncertain and irregular lines up said Provo Cañon, cut brush and made slight and unimportant excavations, which, from their character, gave no evidence of any purpose or design upon the

part of any person to survey or construct any line of railroad;" and that such line "passed over and into certain tracts of unsurveyed land." Ferguson's location upon certain unsurveyed lands was alleged, with the view of obtaining title thereto as soon as the lands could be entered, and that he had erected improvements thereon and had contracted to sell the same to the Power Company and Nunn for the purpose of enabling them to "use the same for a reservoir upon which to store water for electrical power, manufacture and agricultural purposes."

It was alleged that the Power Company was a Colorado corporation and its stockholders citizens of the United States, and that it was organized among other things "for the purpose of acquiring by purchase, or otherwise, water rights, ways and power and to work, develop and utilize water rights, power, ways, mills, etc., for such business and enterprises as appertain to the same."

The adaptability of Provo Cañon for supplying and storing water was alleged, and the utility of furnishing light and electrical power and heat to neighboring industries. That said defendants have been engaged for years in acquiring water rights, and in the year 1894 entered Provo Cañon, and had extensive surveys made, and prosecuted the same with diligence; that the greater part of the lands in the cañon were unoccupied and unsurveyed, and of little or no value except for the purposes designed by the defendants; "that defendants began the construction of a flume and made the necessary excavations therefor in order to obtain power with which to aid in the construction of a large dam by which to reservoir and hold back the waters of said river for power and irrigation purposes; that said defendants made the necessary surveys for canals for the purposes aforesaid and surveyed a reservoir, and showed upon the surveys the contour of the line thereof, and prosecuted with due diligence the work necessary for the consummation of the enterprise entered upon; that in the winter and early spring of 1896 the said defendants vigorously prosecuted said work and expended large sums of money in the execution of said design and purpose; that long prior to 1896 in good faith they entered upon said public unsurveyed lands

of the United States with the design and specific purpose of constructing in said cañon at a point at or near what will be, when surveyed, as nearly as defendants can determine, the southwest quarter of the southeast quarter of section 27, township 5 south, range 3 east, a dam by which to reservoir and store said surplus waters of Provo River; that they surveyed said reservoir, extending the lines of survey up said river from said point to a point at or near the northeast corner of the northeast quarter of the southwest quarter of section 7, township 5 south, range 4 east, in Wasatch County, Utah; and said defendants have further located and surveyed the necessary canals connected with said reservoir for the purpose of carrying into effect the enterprise and business entered upon by them; that since the year 1894 as aforesaid, the said defendants have been in the actual possession and occupation of the land in said cañon between said points, and which is intended by them as a reservoir, and also other portions of the public domain lying west of said reservoir and in said cañon, except that the claim of defendant Ferguson, lying within said reservoir, has been occupied by said Ferguson as a residence, but defendants allege having paid said Ferguson a large sum of money and to have obtained a contract from him by which he covenants and agrees to convey all his interest in the premises so occupied by him to the said defendants."

The good faith of the defendants was alleged, and that their possession was open and notorious, and that they with like faith prosecuted their enterprise, and expended therein $50,000, and by reason of their dam they would be able to obtain more than 8000 horse power, which would be sufficient to supply said Utah County and the towns and cities therein with power for heating, lighting and manufacturing purposes, and would also be able to supply water for irrigation purposes.

The acts of the plaintiff were averred as follows:

"Defendants further aver that said plaintiff some time in the summer of 1896 wrongfully, and for the purpose of annoying the said defendants and interfering with their project and enterprise, came into Provo Cañon and ran irregular, indefinite and devious lines through a portion of said cañon, pretending

that it was the purpose to establish a railroad therein, and defendants allege that said lines so run were so irregular and uncertain, so shifting and changing, as to indicate no such purpose; that in two or three points in said cañon various persons claiming to represent plaintiff made slight excavations, but the character of the same was such as to indicate no purpose to construct a railroad or to perform intelligently and with a fixed or settled purpose any work or enterprise.

"Defendants allege upon information and belief that said plaintiff has no purpose or design to construct any railroad, but that what has been done has been with a view to annoy defendants and to prevent said defendants from constructing their reservoir and canals and obtaining electrical power for the purpose aforesaid, and for the purpose of preventing any legitimate railroad undertaking from being consummated, if the operation of a line through said cañon was essential.

"Defendants allege that the construction of a railroad along the bottom of said cañon would be destructive of their enterprise and reservoir and power, and would prevent them from carrying out the work in which they have been engaged long prior to the spasmodic, uncertain and *mala fides* entry of said plaintiff into said cañon, and in which they are still engaged."

It was alleged that plaintiff knew of the intention and character of defendants' work, and to permit it to condemn the land and to deprive defendants of its possession would be a "grievous wrong and fraud upon their rights."

It was averred that Holbrook had no interest in the controversy.

The allegations of defendants were not only set up in their answers but were also made the subject of cross bills.

A jury was empaneled, and under the instructions of the court they were confined to the consideration of compensation and damages. They returned a verdict assessing the value of the strip of land taken by the railroad at $575; damages to the remaining land, $500; cost of fencing, $525.30, and cost of cattle guards, $42.53. Benefits were assessed at nothing.

There were many instructions asked by defendants which the court refused. They also objected to the instructions which

the court gave. Subsequently the court rendered its judgment, in which it found and adjudged as follows:

"This action having come on for hearing before the court, and a jury empaneled to assess compensation and damages, on the 18th day of April, 1898, and having been heard on that and the succeeding day, it is now found and determined that the plaintiff is a railroad corporation as alleged in the complaint and with a franchise to construct and operate lines of railway and telegraph as alleged, including a franchise to construct a line of railroad and telegraph on and over lands described in the complaint and sought to be condemned.

"That the plaintiff filed a copy of its articles of incorporation and due proof of its organization with the Secretary of the Interior and the same were duly approved by the Secretary on the 27th day of May, 1890, under the act of Congress of March 3, 1875, granting the right of way to railroad companies.

"That the lands sought to be condemned and the adjoining lands are unsurveyed public lands of the United States, and at the time of the beginning of the suit were occupied by William W. Ferguson, who has since died.

"That the plaintiff on the 8th day of July, 1896, completed the survey and location of its line of railroad on and over the lands sought to be condemned and hereinafter described.

"That the said defendant L. Holbrook has disclaimed any interest in the lands.

"That neither on or before, or since the 8th day of July, 1896, has the defendants The Telluride Power Transmission Company and L. L. Nunn or either of them had any possession of the lands sought to be condemned, or by appropriation or otherwise any right to raise the waters of Provo River so as to flow the same or any part thereof, or any right to the said lands or possession thereof as part of a reservoir site, and to raise the waters of said river so as to flow the same would be an unreasonable use of said waters and the public lands and easements in the cañon adjacent to said river.

"And it is now adjudged by the court:

"That the use to which the land sought to be acquired by plaintiff is to be applied in the construction and operation of a

line of railroad and telegraph for which the lands are to be used for a right of way, and that it is a public use authorized by law; and that the taking and condemnation thereof is necessary to such use. That said lands have not already been appropriated to any other public use.

"That none of the defendants by pleadings or otherwise is seeking condemnation of said lands for a reservoir or other public use, and the lands cannot be used for both as a reservoir site as claimed and a railroad, and there is no common use either public or private to be adjusted."

The judgment then recited the findings of the jury and directed the money to be paid into court for subsequent distribution among those who should be entitled thereto. This judgment was afterwards set aside, at the request of defendants, to enable them to present findings, which they subsequently did. The court, however, refused to find as requested, and reinstated its former judgment and findings. The findings requested presented the allegations of the answers as established by the evidence, and also presented, as established, the feasibility of building the railroad upon lines which would not interfere with the projected works of the defendants.

The plaintiff paid into court the award of the jury, and a final order of condemnation was made. The case was taken to the Supreme Court of the State, and the judgment of condemnation was there affirmed. 23 Utah, 22. The Chief Justice of the State allowed this writ of error.

On appeal to the Supreme Court of the State there were eighty-three assignments of error, two of which were based on rulings in regard to the jury and forty-five of which were based upon instructions to the jury or refusals to instruct the jury. The rest of the assignments except three were based on the findings, and refusals to find, as requested by defendants. The last three assignments were as follows:

"81. The court erred in denying defendants' petition to remove said cause to the Federal court.

"82. The court erred in assuming to retain jurisdiction over said cause and proceeding to try the same after the filing of the petition on the part of the defendants to remove said cause

to the Circuit Court of the United States for the District of Utah.

"83. The court erred in holding and deciding that it had jurisdiction to hear, try and determine said cause."

In the petition for writ of error it was alleged that errors were committed by the Supreme Court of Utah, in that in "the final judgment and decision of the Supreme Court of the State of Utah the said court erred in holding and deciding and determining that these defendants, both citizens of the State of Colorado, one a corporation existing under the laws of the said State of Colorado and the other a natural person, did not have the authority or the right to locate and appropriate public lands of the United States upon the Provo River flowing through said public lands of the United States for the purpose of maintaining a dam with which to generate power to create electricity, and such decision was contrary to the protection afforded these defendants by the Fourteenth Amendment of the Constitution of the United States. The decision likewise violated the rights of the said defendants under section 2, article 4, of the Constitution of the United States: 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'

"And the petitioners further say that in the final judgment and decree of the said Supreme Court of the State of Utah and of the District Court of the Fourth Judicial District in and for the county of Utah, State of Utah, a decision was had against a right and privilege of these defendants claimed under a statute of the United States, which right and privilege was specially set up and claimed by these said defendants in said cause. That by the answer in said cause the defendants allege that they had the right and authority from the United States and were exercising it to erect a dam in Provo Cañon for the purpose of creating power to transmit electricity. That said right and authority existed under the mining laws of the United States originally enacted in 1868 and amended in 1872, Revised Statutes, section 2339, and the said right was denied by the said plaintiff and the said District Court of the Fourth Judicial District, and the said Supreme Court of Utah on appeal held

Counsel for Parties.

that these defendants had no right to erect such dam on the public unsurveyed lands of the United States.

"And the petitioners further say that the said Fourth Judicial District Court in and for the county of Utah, State of Utah, and the said Supreme Court of the State of Utah in affirming the said decision on appeal, have decided against the right of these defendants existing under the statute of the United States to remove the said cause from the said state court above named to the United States court, which claim was exercised duly by the petition and bond filed in due time by these defendants in the Fourth Judicial District Court before the time expired for these said defendants to appear and answer to the suit brought against them by the said plaintiff in this cause."

In the assignments of error those grounds are repeated and errors are assigned upon the rulings on instructions by the District Court and the action of the Supreme Court in sustaining those rulings.

Section 2339, referred to in the assignments of error, is as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Mr. Henry P. Henderson for plaintiffs in error. *Mr. S. A. Bailey* and *Mr. Arthur Brown* were with him on the brief.

Mr. Joel F. Vaile for defendant in error. *Mr. R. Harkness* and *Mr. E. O. Wolcott* were with him on the brief.

Opinion of the Court.

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

The defendant in error has moved to dismiss the case for want of jurisdiction in this court. The essential issues of fact were decided against the plaintiffs in error, and the case, therefore, seems to be brought within the ruling in *Telluride Power Co.* v. *Rio Grande Western Railway Co.*, 175 U. S. 639. The corporations in this case were parties in that case and so were Nunn and Holbrook. The same public interests were in opposition, and the Power Company relied for rights in Provo Cañon on section 2339 of the Revised Statutes of the United States, as the company does in this case, and the rulings on those interests and rights constituted the vital questions in that case as they do in this. It was pointed out there that "in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff." And it was observed: "The question who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws and decisions, all of which were questions of state law."

After discussion it was also observed: "But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. These were local and not Federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of

local law, which are merely preliminary to, or the possible basis of, a Federal question."

Manifestly if the plaintiffs in error obtained no rights under section 2339 none could be taken from them. But a violation of the Fourteenth Amendment of the Constitution of the United States is claimed by both the Power Company and by Nunn, and the latter claims besides that he was denied the privileges to which he was entitled as a citizen of the United States.

The deprivation of the rights of the plaintiffs in error under the Fourteenth Amendment was accomplished, it is said, by the court's assuming to try without the assistance of the jury the questions of fact upon which those rights depended. In other words, that the District Court assumed to determine, and did determine, all conflicting or adverse claims to the property, and submitted only to the jury the questions of compensation and damages. This action, it is asserted, was contrary to the meaning of the statute of the State, or if not so, the statute is void.

With the latter objection only we are concerned, and it is enough to say in answer to it that the invalidity of the statute was not raised in the District Court, nor assigned as a ground of error on the appeal taken to the Supreme Court of the State. It appears for the first time in the petition for the writ of error from this court. Nor did the Supreme Court of the State pass upon the action of the District Court in view of its unconstitutionality. Indeed, it found it unnecessary to pass upon that action except in the most general way. The court said:

"The appellants assign many errors upon the refusal of the court to instruct the jury as requested, upon the instructions given to the jury, and upon the facts found by the court. Under the view taken these questions become unimportant as neither of the appellants were injured in their rights; nor were either entitled to any damages under the facts shown in this case. The instructions were, at least, as favorable to the appellants as they had a right to expect."

It is further urged that the decision of the Supreme Court deprived plaintiffs in error of their rights under the Constitu-

tion of the United States, and under section 2339 of the Revised Statutes, in holding, as it is claimed, that neither the Power Company nor Nunn had any authority or right to locate and appropriate public land of the United States upon the Provo River for the purpose of maintaining a dam to store water with which to generate power to create electricity.

The Supreme Court in its opinion referred to its decision in the former case between the parties, 16 Utah, 125; 175 U. S. 639, not, however, as conclusive, but "as authority, and as determining the law in this case, in so far as it decided the same questions involved in the present case," and the court stated that it had been decided in that case, among other things, "that the defendants (plaintiffs in error here) had not appropriated the land in dispute, and that neither of the defendants was in actual possession of the land when the plaintiff located his right of way, took possession and engaged in grading it."

Then passing upon the rights of the Power Company and Nunn, the court said:

"The record shows that the San Miguel Gold Mining Company was organized in Colorado, February 7, 1891, with a capital of $15,000,000, and was authorized to acquire by purchase, lease, or otherwise, mining property, together with water rights, power, ways, mills and mill sites; to develop, mine, work and utilize the same, and to carry on a general mining business. Its principal office is in Telluride, Colorado, and its principal business is to be done in Colorado, and its articles provide that part of its business may be done in Boston, Mass., and its principal office kept here. The stock is non-assessable, and no requirements for payments of subscription are incorporated in it. In February, 1896, an amendment of its articles was made and filed with the Secretary of State in Colorado changing the name of the company to the Telluride Power Transmission Company. Appellant Nunn was its manager.

"Section 427, p. 614, 1 Col. Stat. 1893, among other matters provides that, 'When said corporation shall be created under the laws of this State for the purpose of carrying on part of its business beyond the limits thereof, such certificate shall state that fact.' Subdivision 2 of this section provides that

the object for which the company is created shall be stated. Section 498 authorizes Colorado corporations authorized to do business out of the State, to accept the laws of the other States and there exercise its franchise.

"So it appears that the appellant company is a mining corporation organized in Colorado, without complying with the statute and with no other powers to do business as such in this State. Without complying with the constitution and laws of this State with respect to foreign corporations, it unlawfully assumes to appropriate both land and water within this State. This must be so, because under section 2, article 12, of the constitution of this State, no corporation in existence in this State when the constitution is adopted shall have the benefit of its laws, without filing with the Secretary of State an acceptance of the provisions of the constitution; and under section 6, no corporation organized out of the State shall be allowed to transact business in this State on conditions more favorable than those prescribed by law for similar corporations organized under the laws of the State. Under section 9, no corporation is allowed to do business in this State without having one or more places of business therein, with an agent upon whom process may be served, nor without first filing a certified copy of its articles of incorporation with the Secretary of State. Section 10 provides that no corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation.

"Section 2293, Comp. Laws, Utah, 1888, as amended in 1896, and sections 351 and 352, Revised Statutes 1898, expressly embody these provisions of the constitution, and prohibit foreign corporations from doing business in this State, unless they have complied with these requirements of the law; and any corporation failing to so comply with the provisions of the law is not entitled to the benefits of the law of this State relating to corporations.

"The appellant corporation did not comply with the laws of this State, and has no power to engage in its business of mining, or to acquire any water rights under the laws of this State. A corporation of Colorado coming into this State cannot bring

with it powers with which it is not endowed in Colorado. It can only have an existence under the express laws of the State where it is created, and can exercise no power which is not granted by its charter or some legislative act. The appellant corporation never filed with the Secretary of State of the State of Utah, a copy of its articles of incorporation, by either name under which it was incorporated, and never accepted the laws or constitution of Utah, nor has it appointed any agent or fixed any place of business within the State as required by law. The defendant corporation, therefore, is not entitled to the benefit of the laws of this State, with reference to corporations. *State* v. *So. Pac. Co.*, 28 So. Rep. 372; *Oregon Railway* v. *Oregonian Railway Co.*, 130 U. S. 1; *Barse Live Stock Co.* v. *Range Valley Cattle Co.*, 50 Pac. Rep. 630 (Utah).

"Under section 2339, Revised Statutes, even if priority of possession of the property in question was shown in the defendant corporation, still its right to locate and use the water or land is not recognized or acknowledged by the laws of this State, and it was not in a position to question the right of the plaintiff in the premises.

"5. Appellant Nunn was a resident of Colorado, the general manager, and in charge of the business of the defendant corporation, both in Colorado and Utah. The chief engineer, hydraulic engineer, and officers of the defendant corporation, including the president and attorneys, consulted with and acted with him with respect to the acts performed with reference to the appropriation of water and in making the improvements discussed by them at Hanging Rock, but no plan for a dam at Hanging Rock was ever actually made, and no dam was constructed there. Throughout the whole procedure the board of the defendant corporation was the controlling authority for, and with whom Nunn acted. If Nunn had any right, it was with reference to the smaller power located below. The dam at Hanging Rock was to be a larger power, and was talked about in the project, but it was not constructed, and the ownership, if in any one, was in the defendant company, which was incapable of acquiring such ownership.

"While the testimony is very uncertain, it sufficiently ap-

pears that whatever was done by Nunn in the appropriation of water, was done for the use and benefit of the defendant company, and he cannot be treated as a personal claimant and owner of the easement and right of way in controversy as against the right of way as acquired by respondent."

From this excerpt it appears that the Supreme Court construed the statutes and constitution of Utah, deciding that the Power Company had no existence as a corporation in the State, and could acquire, therefore, no rights as such, and "was not in a position to question the right of the plaintiff (defendant in error) in the premises." And no independent right was found in Nunn. What was done by him the court said was done "for the use and benefit of the defendant company." And it was decided that he was not "a personal claimant and owner of the right of way in controversy as against the right of way acquired by respondent (plaintiff in error)." These conclusions did not involve the decision of Federal questions. The first expressed the meaning and effect of local statutes. The second depended upon a finding of fact. Neither, therefore, is reviewable by us.

The whole controversy was and is as to the right to occupy Provo Cañon, the defendant in error claiming that right for a railroad, the plaintiffs in error claiming that right for a reservoir site, and this latter right plaintiffs in error claimed and claim under section 2339 of the Revised Statutes of the United States. That section was and is their reliance. They say in their brief, that they "do not claim to hold the land in controversy" under the alleged contract with Ferguson.

"They claim to have obtained title to it under section 2339 of the Revised Statutes of the United States by entering upon it and appropriating it as a reservoir site, and this contract (the contract with Ferguson) only amounted to a waiver of Ferguson's rights as a squatter in favor of plaintiffs in error."

But their rights under that section depended upon questions of fact and questions of local law. The questions of fact were found against plaintiff in error, and the questions of local law we cannot review.

A Federal question is asserted because of the ruling of the

District Court refusing to remove the case to the United States Circuit Court upon the petition of plaintiffs in error. But upon the denial of the application to remove they filed the record in the Circuit Court of the United States, and that court remanded the cause, and a copy of its order was filed in the District Court before the commencement of the trial. In substantially similar circumstances we held in *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, that if error there had been in the ruling of the state court it became wholly immaterial.

Writ of error dismissed.

AYRES *v.* POLSDORFER.

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

No. 89. Argued November 13, 1902.—Decided January 5, 1903.

When the jurisdiction of the Circuit Court of the United States is invoked solely on the ground of diversity of citizenship, two classes of cases can arise, one in which the questions expressed in section 5 of the Judiciary Act of 1891 appear in the course of the proceedings and one in which other Federal questions appear. Cases of the first class may be brought to this court directly or may be taken to the Circuit Court of Appeals; but if they are taken to the latter court they cannot then be brought here. Cases of the second class must be taken to the Circuit Court of Appeals and its judgment will be final. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 47, followed, and *Northern Pacific Railway Co.* v. *Amato*, 144 U. S. 471, distinguished.

EJECTMENT and trespass brought in the Circuit Court of the United States, Western Division of the Western District of Tennessee, for the recovery of lands and damages. Part of the land is an island in the Mississippi River. The declaration was in the usual form, and the ground of jurisdiction in the Circuit Court was diversity of citizenship, expressed as follows:

"The plaintiffs, who are citizens of the State of Indiana, residing in Evansville, therein, complain of the defendants, Joe

C. Marley, Thomas Price, E. J. Roy, T. A. Roy, L. L. Coleman and E. M. Ayres, who are citizens of the State of Tennessee, residing in the Western Division of the Western District thereof, in an action of trespass and ejectment."

The declaration alleged ownership in fee of the plaintiffs (defendants in error here) and their possession, and alleged the entry of the defendants as follows:

"And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the said October 1st, 1898, at the said county of Lauderdale, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do."

Judgment for the recovery of the land was prayed and $3000 damages.

Price pleaded not guilty. The plaintiff in error also pleaded not guilty, and "that plaintiff's action accrued more than seven years before suit brought." Against the other defendants no judgment was sought.

Upon the issues thus joined the jury found for the plaintiffs (defendants in error) as follows:

"That they find that the plaintiffs are the owners in fee and entitled to and in possession of the following lands, situated in Lauderdale County, Tennessee, to wit: . . ."

They also further found—

"That the plaintiffs are the owners in fee, and entitled to all the accretions and alluvion formed by the Mississippi River in front of the said three (3) tracts of land above described, the same being and constituting all the land added by accretion and alluvion to the river front, as such front of the said three tracts of land existed on the Mississippi River when the said tracts of land respectively were granted, and extending from and including all the accretions and alluvion in front thereof,

Counsel for Plaintiff in Error.

from the line on the river of the tract first mentioned above, furthest up stream.

* * * * * * * *

"As to the other land herein sued for not embraced in the above descriptions, the jury finds the plaintiffs are not entitled to the same."

Judgment was entered in accordance with the verdict. To this judgment plaintiff in error sued out a writ of error from the Circuit Court of Appeals of the Sixth Circuit, which was dismissed upon the motion of defendants in error, on the ground that there had been no summons and severance of the defendant Thomas Price. 105 Fed. Rep. 737. A petition for rehearing was filed but denied. This writ of error was then sued out.

The assignments of error are as follows:

"1. The court erred in dismissing the writ of error of petitioner upon the ground that the judgment was against two jointly, and that they did not join in the appeal.

"2. The court erred in dismissing the petition for rehearing made by this petitioner.

"In support of this assignment he submits herewith counsel's brief No. 2.

"3. The court erred in refusing to entertain jurisdiction of this cause and not reversing it upon the merits. And in support of this he refers to the assignment of error Record pp. 266, 273 and submits herewith his counsel's brief thereon No. 3.

"The ground of this application is that the record in this cause shows that petitioner claimed under muniments of title from the State of Arkansas and Polsdorfer and wife and also Price claimed under muniments of title from the State of Tennessee. In other words, petitioner claims that he has a right to the writ of error under the Constitution of the United States, article 3, section 2."

Mr. Thomas B. Turley and *Mr. J. B. Heiskell* for plaintiff in error. *Mr. C. W. Heiskell* was with them on the brief.

Mr. Wassell Randolph for defendants in error. *Mr. William M. Randolph* and *Mr. George Randolph* were with him on the brief.

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

A motion is made to dismiss on the ground that the judgment of the Circuit Court of Appeals was final, and therefore it is not reviewable by writ of error from this court.

Interpreting the Judiciary Act of 1891, we said, in *McLish* v. *Roff*, 141 U. S. 661, 666, that its purpose was to provide "for the distribution of the entire appellate jurisdiction of our national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, therein established, by designating the classes of cases in respect to which each of those two courts shall respectively have final jurisdiction."

But special questions arose. It was provided in section 6 that the judgments and decrees of the Circuit Court of Appeals should be final in all cases in which *jurisdiction* was dependent entirely upon diversity of citizenship. What jurisdiction was meant and what would be the effect if Federal questions should appear in the proceedings after the commencement of the case? The questions were answered in *Colorado Mining Co.* v. *Turck*, 150 U. S. 138.

In that case the jurisdiction of the Circuit Court was invoked on the ground of diversity of citizenship, but the defendant claimed to have set up in defence a Federal question arising under section 2322 of the Revised Statutes of the United States, and on that ground insisted that the judgment of the Circuit Court of Appeals in the case was not final. Rejecting the contention and dismissing the writ of error, this court held that before the defence under section 2322 of the Revised Statutes had been set up jurisdiction had "already attached and could not be affected by subsequent developments." Jurisdiction, it was said, "depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred." The same idea was expressed in sub-

sequent cases though in somewhat different language. But a distinction was not precisely made between the questions embraced in section 5 and other Federal questions. That distinction was presented in *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472.

The case was an action upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits. There was a demurrer to the petition, and it appeared from the opinion of the court that one of the points raised on the demurrer was that the act of the general assembly, under and by virtue of which the bonds were issued, contravened the Constitution of the United States, and therefore the bonds were void. The case came directly from the Circuit Court to this court. A motion was made to dismiss for want of jurisdiction. The motion was denied, notwithstanding the petition in the Circuit Court showed that the parties were citizens of different States and stated no other grounds of jurisdiction. If nothing more appeared, it was said, bearing upon jurisdiction, "it would be held that this court was without authority to review the judgment of the Circuit Court." But as we have seen, the claim had been made in the Circuit Court by the defendant that the statute of Ohio, by the authority of which the bonds were issued, was in contravention of the Constitution of the United States. It was contended that such claim made by the defendant was not sufficient to give this court jurisdiction, upon a writ of error, to review the final judgment of the Circuit Court sustaining such claim. It was answered, "such an interpretation of the fifth section is not justified by its words. Our right of review by the express words of the statute extends to 'any case' of the kind specified in the fifth section." And this view was affirmed in *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. 290.

In *Robinson* v. *Caldwell*, 165 U. S. 359, it has been decided that "it was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals."

This was affirmed in *Loeb* v. *Columbia Township Trustees.* It was there observed that the plaintiff in that action could have carried the case to the Circuit Court of Appeals, but had he done so, " he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the Circuit Court."

Therefore when the jurisdiction of the Circuit Court is invoked solely on the ground of diversity of citizenship two classes of cases can arise, one in which the questions expressed in section 5 appear in the course of the proceedings and one in which other Federal questions appear. Cases of the first class may be brought to this court directly or may be taken to the Circuit Court of Appeals. But if taken to the latter court they cannot then be brought here. Cases of the second class must be taken to the Circuit Court of Appeals and its judgment will be final. The case at bar falls under one or under the other of those classes.

The declaration was ejectment and trespass in the form used in the local practice. The only ground of jurisdiction was that the plaintiffs were citizens of the State of Indiana, and the defendants were citizens of the State of Tennessee. The answers were simply traverses in statutory form of the wrongs alleged in the declaration. The plaintiffs in the case recovered, and the plaintiff in error here carried the case to the Circuit Court of Appeals. The Federal question arose in the course of the proceedings in the Circuit Court, and is claimed to have been and to be based on grants of lands from different States, the conflict arising between grants from the State of Tennessee to defendants in error and to Price, under which they respectively claimed title, and a tax deed introduced in evidence by plaintiff in error, which was made by the officials of Mississippi County, Arkansas, and under which deed he claimed title. Granting, for argument's sake, there was an opposition of grants within the meaning of the provision of the Constitution defining the judicial power of the United States, it would seem to bring the case within the doctrine of *Loeb* v. *Columbia Township Trustees*, both as to the question raised and the manner of its review, and the plaintiff in error, having sued out a writ of error from

the Circuit Court of Appeals, cannot now come to this court upon another. The plaintiff in error, however, denies that this consequence results from *Loeb* v. *Columbia Township Trustees*, and insists that the principle of the case justifies the present writ of error. The argument is that, when a Federal question not embraced in section 5 is disclosed by defendant's plea, or by subsequent proceedings, and there is judgment against the defendant, if he be denied the right to carry the case from the Circuit Court of Appeals to this court, the "result would be contrary to the principle laid down in *Loeb* v. *Columbia Township Trustees*." And it is insisted "there are cases of Federal jurisdiction which are not embraced under section 5 of the act of 1891, in which the judgment or decree of the Circuit Court of Appeals is not final under section 6 of said act;" and *Northern Pacific Railway Co.* v. *Amato*, 144 U. S. 465, 471, and *Union Pacific Railway Co.* v. *Harris*, 158 U. S. 326, are cited as examples. It is said that "in these [those] cases the declaration or complaints disclosed that the original jurisdiction of the Circuit Court was invoked on account of diverse citizenship, but they further disclosed that the defendants were corporations organized under the laws of the United States." It is then asked:

"Suppose a ground of Federal jurisdiction not embraced in section 5 of the act of 1891, and in which the judgment or decree of the Circuit Court of Appeals is not conclusive, is first disclosed by defendant's plea, or by subsequent proceedings, in a case in which the original jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, or on one of the other grounds in which the decision of the Circuit Court of Appeals is final. If, in such case, there was a judgment against the defendant, and he carried the case by writ of error or appeal to the Circuit Court of Appeals, and judgment was there rendered against him, and he then sought to bring the case to this court by writ of error or appeal, how would it stand in this court?"

Answering the question, counsel say if the doctrine of *Mining Co.* v. *Turck* be enforced, and the writ of error dismissed, the result would be that "wherever a case involved two grounds

of Federal jurisdiction, neither of which is embraced in section 5 of the act of 1891, and as to one of which the judgment or decree of the Circuit Court of Appeals is final, and as to the other is not final, then the plaintiff suing in the Circuit Court can, by invoking its jurisdiction solely on the ground as to which the judgment or decree of the Circuit Court of Appeals will be final, deprive the defendant of the right given him to carry the case from the Circuit Court of Appeals to this court by writ of error or appeal. Such a result would be contrary to the principle laid down in *Loeb* v. *Columbia Township Trustees*, *supra*, which case, it will be seen, discountenances the idea that one party can, by the method or way in which he brings his suit, deprive the other of a right of review by this court."

We have quoted at length from counsel to exhibit their contention in full.

The contention has been answered by that which we have already said. Besides, counsel are wrong in their premises. *Northern Pacific Railway Co.* v. *Amato* and *Union Pacific Railway Co.* v. *Harris* were not cases in which the jurisdiction was invoked on the grounds of diversity of citizenship. The first was brought in a state court and removed to the Circuit Court of the United States, on the ground that being a case against a corporation created by Congress, the suit arose under a law of the United States. The other case was brought in the Circuit Court of the United States and the Federal character of the corporation, following previous authority, was held to have constituted a ground of jurisdiction independent of the citizenship of the parties. We questioned the consistency of the reasoning upon which the conclusion was based, but recognized and yielded to authority, and we assigned the case to that class of cases which was not dependent solely upon diversity of citizenship.

Loeb v. *Columbia Township Trustees* does not hold broadly that the plaintiff, "by the method or way in which he brings his suit," can "deprive the other of a right to review by this court." It only denies the right of review of the merits in this court and in the Circuit Court of Appeals, and the limitation is

reasonable considering the purpose of the statute. Its purpose was undoubtedly to hasten the results of litigation and to relieve this court of its burden of cases. This could only be accomplished through the medium of another appellate tribunal. And of what cases it should have jurisdiction and its relation to this court, were naturally expressed in general language. Interpretation, as we have said, was soon demanded and responded to, and the appellate power of this court and that of the Circuit Court of Appeals definitely assigned. If the assignment leaves some cases unreviewable by this court, it, by that very effect, fulfills the purpose of the act of 1891. Against the assignment reasons of course may be urged, and counsel has seen and forcefully presented them.

Another argument is used by plaintiff in error to bring this case within *Northern Pacific Railway Co.* v. *Amato*, *Union Pacific Railway Co.* v. *Harris*, and *Loeb* v. *Columbia Township*. It is, that the Federal question raised, to wit, the claim of grants under different States, does not involve the construction or application of the Constitution of the United States, and therefore is not within that clause of section 5 which provides for appeal or writ of error direct to this court. To so hold, it is claimed, would make all the other divisions of section 5 but nominal, and make all the cases arising under them involve the construction of the Constitution of the United States. That, it is claimed, was not the purpose of the section, "upon the familiar principle that the enumeration of six particular classes is a limitation upon the scope and effect of each particular class."

That clause, therefore, it is finally said, does not embrace the cases included in the other clauses. And extending the argument, it is further said:

"It does not embrace cases of diverse citizenship, nor cases between citizens of the United States and aliens, nor patent cases, nor revenue cases, in which the United States is a party, nor criminal cases involving a crime less than capital or infamous, nor admiralty cases, for all these cases are provided for in section 6 of said act.

"The Constitution of the United States gives the courts of

the United States jurisdiction in cases between citizens of different States, and between citizens of the same State, claiming lands under grants from different States.

"If 'the construction or application of the Constitution of the United States,' as used in section 5 of the act of 1891, does not embrace cases between citizens of different States, upon what ground can it be said to embrace cases between citizens of the same State claiming under grants of different States?

* * * * * * * *

"Parties claiming under grants from different States are allowed to come into the Federal court in order to obtain an impartial trial. The question as to the validity of the grants we may say never depended upon any construction of the Constitution of the United States. Hence it is, we insist, that not being enumerated specifically in section 5 of the act of 1891, cases of parties claiming under grants of different States are not embraced therein, nor are they embraced in the classes of cases enumerated in section 6 of the act of 1891, in which the judgment and decree of the Circuit Court of Appeals is final. If we are right in this the result is that the writ of error should be maintained, it being sufficient under the case of *Loeb* v. *Columbia Township Trustees* that the question appears definitely elsewhere in the record."

The contention seems to be opposed to the assignments of error. The third assignment of error is "that the record in this cause shows that petitioner claimed under muniments of title from the State of Arkansas and Polsdorfer and wife and also Price claimed under muniments of title from the State of Tennessee. In other words, petitioner claims that he has a right to the writ of error under the Constitution of the United States, article 3, section 2."

But we may pass that, as we are not called upon to concede or deny that a case in which conflicting grants from different States to citizens of different States appear is one arising under the Constitution of the United States. If it be such a case it should be brought here directly from the Circuit Court, and *Loeb* v. *Columbia Township Trustees* applies. If it be not such a case, the other cases which we have cited apply. There is

nothing to the contrary in *Northern Pacific Railway Co.* v. *Amato* or *Union Pacific Railway Co.* v. *Harris.* In such cases it always appears at the outset that one of the parties is a Federal corporation.

The final contention of plaintiff in error is that the principle of *Mining Co.* v. *Turck*, and kindred cases, is based "to a great extent on the doctrine that the act of 1891 was not intended to give a party, defeated in the Circuit Court, the right to have his case determined upon its merits both in this court and in the Circuit Court of Appeals." And that "plaintiff in error has had no trial on the merits in the Circuit Court of Appeals or in this court." This is claimed because the Circuit Court of Appeals dismissed the case on the ground that Price, who was a defendant in the Circuit Court, was not made a party to the writ of error, nor as to him had there been summons and severance.

That the ruling was error we are not called upon to say. Granting it to have been error, we are powerless to review it. The expression as to the determination of a case "upon its merits" was used in distinction to the review of a question of jurisdiction, strictly so-called—the right of the Circuit Court to entertain the case at all. As to such questions, other rules apply than those we have expressed in this opinion. It was not intended to decide that the Circuit Court of Appeals must hear the case on the merits in the broad sense of that expression, disregarding every error committed in seeking a review by that court. Nor was it intended to deprive that court of the power to determine whether the conditions of its right to review the case had been properly observed.

It follows that the writ of error must be dismissed.

Apparently apprehending this result, plaintiff in error applied at the hearing on motion and petition filed October 9, 1902, for the writ of certiorari as under section 6 of the act of March 3, 1891.

Judgment was entered below December 7, 1900, and petition for rehearing denied February 23, 1901. This writ of error was brought April 15, 1901, and the record filed here and the cause docketed April 29, 1901.

Statement of the Case.

In these circumstances we must decline to entertain the application.

Motion for certiorari denied. Writ of error dismissed.

PAGE *v.* EDMUNDS.

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

No. 100. Argued November 13, 1902.—Decided January 5, 1903.

1. A seat or membership in the Philadelphia Stock Exchange belonging to a person adjudicated a bankrupt is property which the bankrupt could have transferred within the meaning of subdivision 5 of section 70 of the bankruptcy act of 1898, and it therefore passes to the trustee in bankruptcy of the owner.
2. There is nothing in the bankruptcy act or the statutes of Pennsylvania, as the latter have been construed by the highest courts of that State, exempting such seat from sale by the trustee in bankruptcy.

THE appellant is a resident of Philadelphia, Pa., and has been a member of the Philadelphia Stock Exchange in good standing since the year 1880. On the 16th of November, 1899, he was adjudged a voluntary bankrupt in the District Court for the Eastern District of Pennsylvania, and the cause was referred to Alfred Driver, Esq., referee in bankruptcy. In the schedules attached to his petition the appellant did not include as an asset of his estate his membership in the stock exchange. His trustee in bankruptcy caused the membership to be appraised, and petitioned the referee for an order to sell the same. The petition was heard before the referee, who, after hearing, filed his report containing a summary as follows:

"The said Page was adjudicated a bankrupt upon his own petition on November 16, 1899. Upon his examination he stated that he is a member of the Philadelphia Stock Exchange; that he bought his seat in 1880, paying for it at that time about $5500; that when a member wishes to dispose of

his seat he hunts up somebody who wants to buy and sells it to him; that seats are always salable; that the last price paid of which he heard was $8500; that he could sell his seat at any time to any one who wanted to buy it; that the buyer takes it with the understanding that he will be elected a member; otherwise it is no sale; that he could sell his seat without the approval and concurrence of the other members; that he did not include the seat as an asset in his schedules because from his understanding of the matter he did not consider it an asset; that in the event of his death there would be paid to his wife $5000 out of the gratuity fund, and that she would get said sum and the seat; that if he should sell the seat the gratuity or insurance would go with the seat.

"The trustee upon this evidence of the bankrupt caused the seat in the stock exchange to be appraised, and the apraisers have reported its value to be $8000.

"The secretary of the stock exchange testified that the bankrupt had no unsettled contracts with or claims against him by any member of the exchange. The Philadelphia Stock Exchange is an unincorporated association. The constitution and by-laws were offered in evidence. The articles of the constitution which relate to membership and the transfer of membership are as follows:

"Article 5.

"SEC. 4. A committee on admissions, consisting of five members, to which all applications for membership, transfer of membership and readmissions of suspended members, shall be referred. It shall be its duty to inquire into the general standing of the applicant, and make a report thereon to the governing committee within one month of the presentation of the application. Until the committee makes a report favorable to the admission of the applicant, he shall not be voted for as a member, unless upon the written application of seven (7) members of the governing committee to the president, made within five (5) days after the committee's report has been presented; in which case the governing committee may, by a two thirds vote, reverse the report of the committee, and such reversal

shall have the same effect as if the committee's report had originally been favorable. If a report be favorable, the name of the candidate shall be posted in the stock exchange, and notice given that a ballot will be taken at the next stated meeting of the governing committee in order that every member of the exchange may have an opportunity of objecting to the candidate's election; such objection shall be in writing to the president of the governing committee.

"The election of candidates for membership shall be held by the governing committee, but no election shall be valid unless at least eighteen (18) ballots be cast; and, if five (5) ballots be cast against a candidate, he shall be declared not elected.

"Article 11.

"SEC. 1. The number of members shall be limited to two hundred and thirty (230).

"SEC. 4. Any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the stock exchange, for transactions arising in or relating to the business of banker or a stock or exchange broker; but, where the arbitration committee shall determine that any claims or contracts exist, the governing committee may, except in cases of insolvency, refuse to permit the membership to be sold, until such claims or contracts are, in its opinion, satisfactorily settled.

"The proceeds of the membership, if sold, shall, after deducting all charges due to the exchange, to be determined, in cases of controversy, by the arbitration committee—belong to its owner's creditors in the exchange, in proportion to the amount of their respective claims, determined by the arbitration committee, as hereinbefore provided in section 5, article V, and be paid accordingly; and the remainder, if any, shall be paid to the owner.

"SEC. 5. When a member dies, his membership shall, within one year thereafter, be sold or transferred; if, however, he be indebted to any member of the stock exchange, then, on the written request of two thirds of the creditors in interest, said membership shall be sold, at the discretion of the committee

on admissions, and the proceeds thereof, after deducting all charges due to the exchange, to be determined in case of controversy by the arbitration committee, shall be paid to its owner's creditors who are members of the exchange, in proportion to the amount of their respective claims, determined as hereinbefore provided in section 5, article V, as to disputes between living members; and the remainder, if any, shall be paid to the legal representative of the deceased.

"The membership of a deceased member shall be liable for all dues and assessments which may be made by the exchange from the day of his death until such time his membership is transferred.

"SEC. 8. Membership in the exchange shall, *ipso facto*, terminate in either of the following cases:

"1. Fraud in any transaction arising out of the member's business as a banker or broker.

"2. Conviction, by a jury, of any infamous offence or felony. And the commission of the offence shall be ascertained in each case, after notice and opportunity for hearing by a vote of two thirds present (being a majority of the whole number) of the governing committee.

"3. Suspension from the stock exchange for any cause, and inability for one year thereafter to comply with the constitution, by-laws and rules as to eligibility for reinstatement.

"SEC. 9. Upon such termination of membership, the said membership shall be sold, at the discretion of the governing committee, and the proceeds, after deducting all charges due the exchange and all debts due to creditors in the exchange—which amounts shall be determined by the arbitration committee—shall be paid to the expelled member, his heirs or assigns.

"Article 12.

"SEC. 6. Any member who shall be declared a bankrupt shall, *ipso facto*, be suspended from the stock exchange; but a suspended member, presenting a certificate of discharge under the United States bankrupt law, becomes eligible under the rules for reinstating suspended members.

Counsel for Parties.

"SEC. 7. If any suspended member fails to settle with all his creditors within six months from the time of his suspension, his membership may be disposed of by the committee on admissions, and must be sold at the end of twelve months; and the proceeds, after deducting all charges due to the exchange, to be determined, in cases of controversy, by the arbitration committee—shall belong and be paid to his creditors in the exchange in accordance with section 3.

"SEC. 11. The proceeds arising from the sale of the membership of an insolvent shall be divided *pro rata* by the arbitration committee among the creditors recorded, as in section 3, and if any balance remain it shall be paid over to the insolvent.

"The by-laws contain no provision relating to membership or transfer of membership."

As a conclusion from these facts and from the bankrupt law, the referee on March 7, 1900, "ordered that the trustee sell at public auction the seat or membership of Edward D. Page, the bankrupt, and all his right and interest therein, subject to the constitution and by-laws of the Philadelphia Stock Exchange regulating membership therein."

The appellant petitioned for a review of the referee's order by the District Court, averring error in the order in that the petitioner was advised and believed that his membership in the Philadelphia Stock Exchange was not property within the meaning of the bankrupt act of July 1, 1898, nor was it an asset of his estate which could be sold by his trustee in bankruptcy.

On June 19, 1900, the District Court approved the order of sale made by the referee and directed it to be executed. The matter was then taken for review to the Circuit Court of Appeals, which court confirmed the order of the District Court. This appeal was thereupon taken.

Mr. George W. Jacobs for appellant.

Mr. Henry La Barre Jayne and *Mr. Henry R. Edmunds* for appellee.

Opinion of the Court.

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

The case presented by the record is a simple one and does not call for elaborate discussion. Indeed, it has been virtually ruled by this court. *Hyde* v. *Woods*, 94 U. S. 523, 525; *Sparhawk* v. *Yerkes*, 142 U. S. 1.

Section 70 of the bankrupt act of 1898 provides that the trustee shall be vested with:

"The title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt, to all . . .

"(3.) Powers which he might have exercised for his own benefit, . . .

"(5.) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process."

This section, and that which provides for exemptions of property, constitute the elements to be considered.

Section 6 of the bankrupt act provides as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

1. Was the seat in the stock exchange property which could have been by any means transferred *or* which might have been levied upon and sold under judicial process? If the seat was subject to either manner of disposition, it passed to the trustee of the appellant's estate.

We think it could have been transferred within the meaning of the statute. The appellant could have sold his membership, the purchaser taking it subject to election by the exchange, and some other conditions. It had decided value. The appellant paid for it in 1880, $5500, and he testified that the last price he had heard paid for a seat was $8500. One or the other of these sums, or, at any rate, some sum, was the value of the seat. It was property and substantial property to the extent of some

amount, notwithstanding the contingencies to which it was subject. In other words, the buyer took the risk of the contingencies. And they seem to be capable of estimation. The appellant once estimated them and paid $5500 for the seat in controversy; another buyer estimated them and paid $8500 for a seat. A thing having such vendible value must be regarded as property, and as it could have been transferred by some means by appellant (one of the conditions expressed in section 70) it passed to and vested in his trustee. Whether it was subject to levy and sale by judicial process we need not consider except incidentally in discussing the next contention.

2. To sustain the claim of exemption under the state law, and therefore under the bankrupt act, appellant relies upon the decisions of the Supreme Court of the State of Pennsylvania. If those decisions are interpretations of the state statute, we must yield to their authority. If they are declarations of general law —mere definitions of property—we may dispute their conclusions if their reasoning does not persuade.

Two cases are cited by appellant: *Thompson* v. *Adams*, 93 Penn. St. 55, and *Pancoast* v. *Gowen*, 93 Penn. St. 66.

In *Thompson* v. *Adams* the following facts were presented (we quote from appellant's brief):

"Thompson furnished to Richards the money with which to purchase a membership seat in the Philadelphia Stock Exchange. Richards subsequently died indebted to sundry members of the exchange and his seat was sold by it under its rules, to satisfy these claims, which were in excess of and exhausted the proceeds realized. Thompson sued Adams *et al.*, trading as the Philadelphia Stock Exchange, to recover the proceeds of the seat in the treasurer's hands, claiming to be the equitable owner of the seat, as against the creditors of Richards in the exchange."

The entire opinion of the court was as follows:

"The constitution and articles of a voluntary association, such as the Philadelphia board of brokers, are law as to the members. The plaintiff below was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he was the equitable owner of the seat, and

had title to what was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger, unknown to the association. The members give credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in this regulation. The seat is not property in the eye of the law, it could not be seized in execution for the debts of the members. It is the mere creation of the board, and, of course, was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it."

It is manifest that the court did not rest its decision upon the exemption of the property under a statute of the State. It asserted simply the rights of the members of the club, under its constitution, to be preferred in the payments of their claims. It is true, the court said, "the seat is not property, in the eye of the law; it could not be seized in execution for debts of its members." This language is not very clear. It is not certain whether the learned court intended to say that the seat was not property at all, or not property because it could not be seized in execution for debts. If the former, we cannot concur. The facts of this case demonstrate the contrary. If the latter, it does not affect the pending controversy. The power of the appellant to transfer it was sufficient to vest it in his trustee.

"The case of *Pancoast* v. *Gowen*," (we quote again from appellant's brief,) involved "an attachment against the Philadelphia Stock Exchange, sought by a creditor of a member in good standing, to compel the sale of his seat in satisfaction of a judgment debt, which was refused on appeal to the Supreme Court, after an exhaustive examination by the court of the exchange rules." The opinion was as follows:

"A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately, a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under

a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce, nor is it within either the words or the spirit of the act of June 16, 1836, sec. 35, Pamph. L. 767, providing for attachment on judgment. Whether the proceeds of the sale of the seat in the hands of the treasurer of the board, and payable to the defendant, according to the regulations and by-laws of the board, could be thus reached is an entirely different question. This, and no more, is what we understand to have been decided by the Supreme Court of the United States, in *Hyde* v. *Woods*, 4 Otto, 525, where Mr. Justice Miller says, 'If there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee, in bankruptcy."

There is an absence in the latter case, as there was in the other, of any purpose to construe a statute, and the test of property is the same as in the other case—liability to be levied upon and sold under a *fi. fa.* An attempt to enforce such a levy and sale was made in both actions to the exclusion of the rights of other members of the association. The attempt was properly defeated. Undoubtedly the seat in the board "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it."

We expressed that limitation in *Hyde* v. *Woods*, 94 U. S. 525, but we decided nevertheless that a seat was property, and that if upon its sale any balance was left after paying the debts due to the members of the board, that balance could be recovered by the assignee in bankruptcy. This was not denied by the Supreme Court of Pennsylvania, and it may be that the court only intended to declare the priority of board creditors over general creditors. If so, the decision expresses no rule with which we need take issue or which is relevant to the pending controversy. Nor indeed if the case may be construed more broadly. The bankrupt act of 1898 has made its own rule. For the same reason it is not necessary to review the cases cited from other jurisdictions. Whatever is in them favorable to appellant's contention was based upon the inability that the respective courts found in the law to transfer a title which could be insisted upon and enjoyed against the consent of the

association. But that consequence, in our judgment, affects the value of a seat in a stock board, not its existence as property. The contingencies which may defeat or affect its title, or its enjoyment will be reflected in its price, and if, notwithstanding them, a seat has a vendible value of from $5000 to $8000, it would seem that the law should have some process to reach it for the benefit of creditors. And the bankrupt act supplies the process. The trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey. And the statute is something more than another mode of transferring property *in invitum*. It is a gift of privileges and expresses the conditions upon which they are conferred.

To establish the exemption of the seat under the state law counsel quotes the provisions of the local insolvent law of June 16, 1836, P. L. 729, as follows:

"That every insolvent shall be entitled to retain all such articles as may by law be exempted from levy and sale, upon execution." (Sec. 35, par. 5.)

"Every such debtor shall be entitled, notwithstanding his assignment, in conformity with this act, to retain for the use of himself and his family all such articles as are or may be by law exempted from levy or sale on any execution, or from distress for rent, and the property in such articles, shall not pass to his trustees." (Sec. 38.)

It is argued that the Supreme Court of the State, having decided that a seat in the stock board is not subject to levy and sale under execution, it becomes under those provisions property exempt from debts under the state law, and exempt therefore under section 6 of the national bankrupt act.

But there is nothing in the opinion of the court which intimates an intention to construe the statute of 1836 or that the decision would give to the statute the effect asserted. If such had been the intention no question would have been reserved or mentioned of the right of general creditors to resort to the proceeds of the sale of a seat after board creditors should be paid. Not only the seat but the proceeds of its sale would be exempt.

Another answer is urged to the contention. By the act of April 9, 1849, P. L. 533, sec. 1, it is enacted: "In lieu of the property now exempt by law from levy and sale on execution, issued upon any judgment obtained upon contract and distress for rent, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all bibles and school books in use in the family, (which shall remain exempted as heretofore,) *and no more*, owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent."

Judgment affirmed.

OTIS *v.* PARKER.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 4. Argued December 11, 12, 1902.—Decided January 5, 1903.

The provision in article IV, section 26 of the constitution of California providing that "all contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction," is not contrary to the first section of the Fourteenth Amendment of the Constitution of the United States, so far as it relates to sales on margins.

THE case is stated in the opinion of the court.

Mr. John G. Johnson for plaintiffs in error. *Mr. Edmund Tauszky* was with him on the brief.

Mr. Joseph Hutchinson for defendant in error. *Mr. John H. Miller* was with him on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action in three counts, for money had and received,

for money paid and promised to be repaid, and for margins paid to the defendants as stock brokers on contracts to buy and sell mining stocks, respectively. The answers to the first two counts are general denials and other matters now immaterial. The answer to the third count, beside a general denial, sets up that the count is based upon a provision in article IV, section 26, of the constitution of California, and that that provision is contrary to the first section of the Fourteenth Amendment of the Constitution of the United States. It appears by the record that the only cause of action was that stated specifically in the third count, and that the defendants interposed the constitutional objection at the trial and that it was overruled. The plaintiff had a general verdict on all three counts. The case was taken from the Superior to the Supreme Court of California on appeal, and the judgment of the Superior Court was affirmed, with an immaterial modification. It now is brought here by a writ of error to the Supreme Court of the State.

We must take it as established that the plaintiff did enter into transactions prohibited by the constitution of California, and that he had a right to his judgment under that constitution if the clause relied upon is not contrary to the Constitution of the United States. There is no question that the parties were subject to the provisions of the latter Constitution, and no doubt that the question whether it invalidated the state constitution necessarily was passed upon, and was answered in the negative by the state court. 130 California, 322.

The provision of the state constitution is as follows: "All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." There was some suggestion that these words might be narrowed by construction to contracts not contemplating a *bona fide* acquisition of the stock, but intended to cover only a wager or contemplated settlement of differences. Of course, if they were construed in that sense there would be no doubt of their validity. *Booth* v. *Illinois*, 184 U. S. 425. But while the Supreme Court of California says

in this case that it "will always see that legitimate business transactions are not brought under the ban," in the same sentence it leaves open the hypothesis that the provision "fails to distinguish between *bona fide* contracts and gambling contracts," and sustains it as a proper police regulation, even if it does fail as supposed. Therefore it may be held hereafter that ordinary contracts for the sale of stocks on margin are not legitimate transactions, and it would not be safe for us to take the words in any other than their literal meaning, or to assume in advance of a decision that they will be taken in a narrow sense. In this case the jury were instructed broadly to find for the plaintiff if he had paid any money to the defendants as a margin for the purchase of stock of a corporation, and this instruction was sustained.

The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the Fourteenth Amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws.

It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133, 137. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable lati-

tude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth* v. *Illinois*, 184 U. S. 425, 429. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized States. See *Ballock* v. *State*, 73 Maryland, 1.

We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a

much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. *Cashman* v. *Root*, 89 California, 373, 382, 383. If at that time the provision of the constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in *Booth* v. *Illinois*, 184 U. S. 425, 431, we are unwilling to declare the judgment to have been wholly without foundation.

With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining State, and mines offer the most striking temptations to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand, as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no farther in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. We cannot say that treating stocks

of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws.

Judgment affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

DIAMOND GLUE COMPANY *v.* UNITED STATES GLUE COMPANY.

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

No. 119. Argued December 16, 17, 1902.—Decided January 5, 1903.

A statute of Wisconsin enacted prior to June 25, 1898, but which was to go into operation on September 1, 1898, requiring foreign corporations to file a copy of their charter with the Secretary of State and to pay a small fee as a condition for doing business there does not impair the obligation of a contract made on June 25, 1898, by a foreign corporation to do business in Wisconsin after September 1, 1898.

The statute as applied to this case does not interfere unlawfully with interstate commerce, notwithstanding the fact that the business was the production of glue which naturally would be sold outside the State.

The statute originally included foreign partnerships as well as corporations. *Held* that the provision as to partnerships was separable and if invalid for any reason did not affect the remainder of the act.

THE facts are stated in the opinion of the court.

Mr. Edgar A. Bancroft for plaintiff in error. *Mr. Samuel Adams*, *Mr. Franklin D. Locke* and *Mr. George H. Noyes* were with him on the brief.

Mr. Charles Quarles for defendant in error. *Mr. J. V. Quarles* and *Mr. George Lines* were with him on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a written contract alleging a breach

and claiming damages. It was brought in the United States Circuit Court for the Eastern District of Wisconsin by an Illinois corporation against a Wisconsin corporation. On June 25, 1898, the date when the contract was made, a law had been enacted in Wisconsin, to go into operation later, on September 1, 1898, requiring corporations incorporated elsewhere to file a copy of their charter with the Secretary of State, and to pay a small fee as a condition of doing business there. Wisconsin Stat. 1898, §§ 1770*b*, 4978. This it was admitted that the plaintiff had not done, and the defendant set up that the contract was a contract to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. The judge sustained this defence, and the plaintiff excepted, contending that the statute did not and could not constitutionally affect its rights under the contract in question. 103 Fed. Rep. 838. It brings the case here by a writ of error.

The contract was one by which it was agreed that the plaintiff should supervise the plans for a glue factory to be built by the defendant on a site to be selected within sixty days; that it should have the management of the manufacturing in the same and should operate it for the defendant; that its officers should give the factory such personal supervision as might be necessary, and give the defendant in the management and operation of the factory the benefit of their experience and of the plaintiff's; that the plaintiff should furnish and keep the defendant supplied with a superintendent; that it should control, handle and sell the entire output of the factory; that it should refrain from manufacturing hide or calf glues at any of its own factories; and that it should guarantee payment on all sales made by it and should receive certain commissions for its services. The contract was to run for five years from the time that the plant was finished and began work. It was understood that the proposed factory was to be in Wisconsin. A site was selected near Milwaukee, and in a little over a year from the date of the contract, on July 25 or 26, 1899, the plant was built and put in operation.

The section of the Wisconsin statutes relied on by the de-

fendant, stated more at length, forbade corporations organized otherwise than under the laws of that State to transact business in the State until they should have filed a copy of their charter with the Secretary of State, which act, by the same statute, constituted the Secretary of State the attorney of the corporation for the service of process. A failure to comply with any of the provisions of the section subjected the corporation to a fine. It was provided further that every contract made by such corporation affecting the personal liability thereof or relating to property within the State before compliance with the section should be wholly void on its behalf, but should be enforceable against it. A fee of twenty-five dollars was to be paid for filing the charter. See *Ashland Lumber Company* v. *Detroit Salt Co.*, 89 N. W. Rep. 904.

According to the undisputed testimony of the plaintiff's vice president, who executed the contract, the instrument was signed in Wisconsin, and at all events, if it was executed with a view to the carrying on of business in that State by the plaintiff, the law of Wisconsin must be applied. *London Assurance* v. *Companhia de Moagens do Barreiro*, 167 U. S. 149, 160, 161; *Graves* v. *Johnson*, 156 Massachusetts, 211. There is no controversy on this point. But it is said that the contract did not contemplate the carrying on of business by the plaintiff in Wisconsin, that at most it is ambiguous, and that practically it was construed in accordance with the plaintiff's contention. The declaration is on the contract, and by that the plaintiff must stand or fall. We see no ambiguity in its terms. The plaintiff was to have the management of the manufacturing, was to operate the factory, or at least to assist in operating it, and to keep it supplied with a superintendent. It did assist in operating by its officers and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain. It called for a carrying on of business in Wisconsin by the plaintiff at a time when to carry it on without filing a copy of the plaintiff's charter was forbidden by the laws of the State. See *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, 611. The only complaint of the plaintiff is that the defendant refused to perform

that contract when the plaintiff had filed no copy of its charter and when the performance was forbidden by the law. It is said, to be sure, that the part refused by the defendant was a different and lawful portion. But the contract was an entire contract, as both parties agree, and therefore whatever the defendant had in mind, if it was justified by the law, in refusing to perform a material part, it was justified in refusing to perform any portion. See *McMullen* v. *Hoffman*, 174 U. S. 639. It is alleged to have declared the contract at an end. We may add that it is not a question of election but of the legality of performance, and therefore the justification could not be waived.

It hardly could be contended that the contract was illegal, on the ground just stated, when it was made. If indeed it had contemplated the plaintiff's going on without complying with the statute, it would have raised a question which we need not discuss. But it must be taken to have contemplated legal action, and if filing a copy of its charter was a condition precedent of the plaintiff's right to carry out its undertakings, then a promise might be implied on its part to take the necessary steps. But if, when the time came, the plaintiff did not take those steps, the defendant had the legal right to refuse to go on, whether its right be put on the ground of the plaintiff's breach of its implied undertaking or of the illegality of the proposed continuance of the work. The plaintiff contends, however, as we have said, that the statute did not and could not apply to the performance of the contract in suit. It will be remembered that while enacted before the contract was made, it did not go into effect until afterwards, although before the time when the factory was or could have been built in the ordinary course of business. It is said that if the statute is taken to govern the present contract it impairs the obligation of that contract, and encounters the United States Constitution, Article I, section 10. It is assumed that to allow the statute any operation upon the contract is to give it a retroactive effect, and it is said that for that reason also plaintiff is not barred.

A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract.

The suggestion needing discussion is whether the statute impairs the obligation of the contract. We are of opinion that it is not open to that objection. We leave on one side the question how the obligation of a contract can be impaired by a law enacted before the contract was made. *Pinney* v. *Nelson*, 183 U. S. 144, 147. Again, we need not consider in its full breadth whether or how far, notwithstanding *Security Savings & Loan Association* v. *Elbert*, 153 Indiana, 198, a corporation, by making a contract reaching years into the future, can exonerate itself from all police or license laws, on the ground that by indirection they make performance of the contract more difficult to an infinitesimal degree. Compare *Curtis* v. *Whitney*, 13 Wall. 68, 71; *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227, 241. We shall advert to parallel considerations in connection with the alleged interference with commerce between the States. The prohibition in this case is not absolute but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee. It is merely incident to a regulation which, but for the contract, unquestionably would be proper, and which is familiar in the laws of the States. It can be avoided by compliance with the regulation. We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made. But we rest our decision upon the narrower ground of the foregoing considerations taken in connection with what we are about to say.

The suspension clause of § 4978 was of immediate operation, and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction of the statute and after the statute should have gone into effect, they did so with notice that, if nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the Constitution by the Wisconsin law. Statements made with a

different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all. *Stine* v. *Bennett*, 13 Minnesota, 153, 157; *Smith* v. *Morrison*, 22 Pick. 430, 432; *Ford* v. *Chicago Milk Shippers' Association*, 155 Illinois, 166, 181.

It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the State or not. The foundation of the commerce outside the State was doing business within it. The superintendence and manufacture had to come before the sale. The small requirements of this act before allowing the plaintiff to do business in the State, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13; *Hopkins* v. *United States*, 171 U. S. 578, 592, 594. The interference with the regulation of commerce between the States is more remote than when a bridge between two States, or the franchise of a domestic corporation created with the intent to carry on such commerce, is taxed. See *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 622, 623; *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91, 119, 125, 126. In modern societies every part is related so organically to every other, that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made. See further

Kidd v. *Pearson*, 128 U. S. 1, 21; *Coe* v. *Errol*, 116 U. S. 517, 525, 527; *Tredway* v. *Riley*, 32 Nebraska, 495.

Yet another objection to the statute remains to be mentioned. At the date of the contract the section applied to partnerships as well as to corporations. It is argued that the act, so far as it applied to the former, was contrary to art. 2, section 4, of the Constitution of the United States, and to the Fourteenth Amendment, and therefore was invalid throughout. We shall not consider the validity of the law as applied to unincorporated associations, because, in our opinion, the application of the provision to corporations was severable from and independent of its application to partnerships, so that even if in the latter aspect the section was bad, it remained unaffected and valid so far as this case is concerned. The independence seems to us obvious on reading the statute, and is emphasized by the fact that the next year after the enactment, before the completion of the factory, partnerships were struck out of the act. Laws of 1899, c. 351, § 27. We are of opinion that the ruling of the Circuit Court was right, and that the judgment should be affirmed.

Judgment affirmed.

HANLEY *v.* KANSAS CITY SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 131. Argued December 18, 1902.—Decided January 5, 1903.

The transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Kansas, over respondent's railroad by way of Spiro in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two miles is in Arkansas and sixty-four in the Indian Territory, is interstate commerce, and is under the regulation of Congress, free from interference by the State of Arkansas; a railway company operating such a line can maintain an action for equitable relief restraining the state railroad commissioners from fixing and enforc-

ing rates between points within the State, when the transportation is partly without the State and under the conditions above stated.

Lehigh Valley Railroad Co. v. *Pennsylvania*, 145 U. S. 192, distinguished as applying to *taxation* on freight received on merchandise transported from one point to another within the same State by a route partly through another State and not to the *regulation* of such transportation.

THE case is stated in the opinion of the court.

Mr. Charles E. Warner for appellants. *Messrs. Winchester & Martin* were on the brief.

Mr. Gardner Lathrop for appellee. *Mr. Max Pam*, *Mr. Thomas R. Morrow* and *Mr. James B. Read* were with him on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought in the Circuit Court by a railway company incorporated under the laws of Missouri, against the railroad commissioners of Arkansas, seeking an injunction against their fixing and enforcing certain rates, as we shall explain. The bill was demurred to for want of equity, the demurrer was overruled, and a decree was entered for the plaintiff. The defendants bring the case here by appeal. 106 Fed. Rep. 353.

The plaintiff owns a road running through several States and Territories. The road after leaving Missouri runs for twenty-eight miles and a fraction through Arkansas to the dividing line between that State and the Indian Territory, then nearly one hundred and twenty-eight miles in the Territory, and then over one hundred and seventeen miles in Arkansas again to Texas. There is also a branch line running from Fort Smith, in Arkansas, to Spiro, in the Indian Territory, about a mile of which is in the State and fifteen in the Territory, and there are other branches. Goods were shipped from Fort Smith by way of Spiro and the road in the Indian Territory to Grannis, in Arkansas, on a through bill of lading, the total distance being a little more than fifty-two miles in Arkansas and nearly sixty-four in the Indian Territory. For this the railroad company charged a sum in excess of the rate fixed by the railroad com-

missioners, and was summoned before them under the state law. The commissioners decided that the company was liable to a penalty under the state statute, assert their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the State through the Indian Territory or Texas, and intend to enforce compliance with these rates. The only question argued and the only one that we shall discuss is whether the action of the commissioners is within the power of a State, or whether it is bad as interfering with the power of Congress to regulate commerce among the several States and with the Indian tribes. *Smyth* v. *Ames*, 169 U. S. 466, 517.

It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States, *Stoutenburgh* v. *Hennick*, 129 U. S. 141; and the distinction hardly is important, since the appellants are asserting similar authority where the loop beyond the state boundary runs through Texas. We may as well add, in this connection, that the present railroad gets the authority for its line in the Indian Territory, through a predecessor in title, from an act of Congress of 1893, c. 169, 27 Stat. 487, and that, by that act, Congress "reserves the right to regulate the charges for freight and passengers on said railroad . . . until a state government shall be authorized to fix and regulate the cost," etc.; "but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State."

It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce. See also the act of February 4, 1887, c. 104, § 1, 24 Stat. 379; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, and *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557. Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not.

No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Hall* v. *De Cuir*, 95 U. S. 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.

It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, *Lord* v. *Steamship Co.*, 102 U. S. 541, and is not subject to regulation by the State, *Pacific Coast Steamship Co.* v. *Railroad Commissioners*, 9 Sawyer, 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. "To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State." 9 Sawyer, 258. Decisions in point are *State* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 40 Minnesota, 267; *Sternberger* v. *Cape Fear &*

Yadkin Valley Railroad Co., 29 So. Car. 510. See also *Milk Producers' Protective Association* v. *Delaware, Lackawanna & Western Railroad Co.*, 7 Interstate Commerce Rep. 92, 160, 161.

There are some later state decisions contrary to those last cited. *Campbell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 86 Iowa, 587; *Seawell* v. *Kansas City, Ft. Scott & Memphis Railroad Co.*, 119 Missouri, 222; *Railroad Commissioners* v. *Western Union Telegraph Co.*, 113 No. Car. 213. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the State." 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole.

We are of opinion that the language which we have quoted from Mr. Justice Field is correct, and that the decree of the Circuit Court should be affirmed.

Decree affirmed.

CALDWELL *v.* NORTH CAROLINA.

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

No. 54. Argued October 22, 1902.—Decided January 12, 1903.

An ordinance passed by the board of aldermen of the city of Greensboro, North Carolina, in pursuance of powers conferred by the legislature of the State, that every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face in the city of Greensboro, whether an order for the same shall have been previously taken or not, shall pay a license tax of ten dollars for each year, is an attempt to interfere with, and to regulate commerce, and as such is invalid as to an agent of a corporation residing out of the State.

Where a portrait company, carrying on business in one State obtains orders through an agent in another State for pictures and frames, the fact that in filling the orders it ships the pictures and frames in separate packages, for convenience in packing and handling, to its own agent, who places the pictures in their proper places or frames and delivers them to the persons ordering them, does not deprive the transaction of its character of interstate commerce or take it out of the salutary protection of the commerce clause of the Federal Constitution.

At June term, 1900, of the Superior Court of Guilford County, State of North Carolina, E. M. Caldwell was tried before a court and jury for an alleged offence in having engaged in the business of delivering pictures without having first obtained a license so to do. The jury found a special verdict as follows:

"The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

"That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

"'Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

"'That every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order

for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year.

"'Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offence.'

"That neither the defendant, The Chicago Portrait Company, nor any of the employés of the Chicago Portrait Company, have paid the city any license tax.

"If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty.

"That on the — day of ———, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employés of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

"That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

"The defendant had been engaged in this work two days when arrested;

"That section 57 of the charter of the city of Greensboro, N. C., is as follows:

"'That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which taxed, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be re-

covered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

"'21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year.'"

Upon this special verdict the court adjudged that defendant was guilty, and sentenced him to pay a fine of twenty dollars and costs of the action. From this judgment the defendant appealed to the Supreme Court of North Carolina. That court, Faircloth, C. J., and Clark, J., dissenting, on February 19, 1901, affirmed the judgment of the Superior Court, 127 N. C. 521; and thereupon the cause was brought to this court by a writ of error allowed by the Chief Justice of the Supreme Court of North Carolina.

Mr. Charles M. Stedman for plaintiff in error. *Mr. W. R. Plum* was with him on the brief.

Mr. Alfred M. Scales for defendant in error.

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

It might fairly be contended that, upon the facts found by the special verdict, the defendant was not guilty of engaging in the business of delivering pictures without a license, within the purview of the ordinance in question. But as the Supreme Court of North Carolina has held otherwise we must accept that conclusion as a question of construction belonging to that court. Our task is to determine whether the ordinance, as so construed, is invalid as an attempt to interfere with and to regulate interstate commerce, and can be speedily performed, for

we think the case falls within previous decisions of this court on this subject.

Such decisions are numerous, but we do not deem it necessary to refer to but a few of them.

The subject was elaborately considered in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. The case was brought here on a writ of error to the Supreme Court of Tennessee, which had held valid a statute of that State, by which it was enacted that "all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months." Robbins, the plaintiff in error, was a citizen and resident of the city of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati without having procured a license. In his discussion of the case Mr. Justice Bradley stated the following principles, as already established by this court: The Constitution of the United States, having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, health and comfort of persons and the protection of property, and imposes taxes upon persons residing within the State or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other

employment or business exercised under authority of the Constitution and laws of the United States; and imposes taxes upon all property within the State, mingled with and forming part of the great mass of property therein; but that, in making such internal regulations, a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce.

Upon these established principles the conclusion was reached that the state statute in question was invalid, and the following observations are pertinent to the question before us:

"It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such undoubtedly was one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and

protection of its own citizens we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes which led to it.

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."

Asher v. *Texas*, 128 U. S. 129, was a case where a state statute required from "every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax," and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another State. The same doctrine was held in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an act of the legislative assembly, of the District of Columbia.

In *Lyng* v. *Michigan*, 135 U. S. 161, the general proposition was repeated:

"We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Crutcher* v. *Kentucky*, 141 U. S. 47, an act of the State of Kentucky, which forbade the agent of an express company, not incorporated by the laws of that State, from carrying on busi-

ness without first obtaining a license from the State, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, said:

"The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

In *Brennan* v. *Titusville*, 153 U. S. 289, was again presented the question of the validity of an ordinance providing "That all persons canvassing or soliciting, within the city of Titusville, orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the treasurer therefor certain sums, according to the time for which said licenses shall be granted," and also prescribing a penalty for failing to procure such license. An agreed statement of facts showed that Shepard was a manufacturer of picture frames and maker of portraits, residing in Chicago in the State of Illinois, of which State he was a citizen, and in which State he had his manufactory and place of business; that in the prosecution of his business he employed agents, who, under his directions, solicited orders for pictures and picture frames in the State of Pennsylvania and in other States of the Union, by going personally to residents and citizens of said State of Pennsylvania and other States, and exhibiting samples of his pictures and frames, going, when necessary, from house to house; that Brennan was an agent of the said Shepard, employed by him to travel and solicit orders for pictures and

frames, upon a salary; that upon receiving orders for pictures and picture frames, the agents of Shepard forwarded the same to him at Chicago, where the goods were made, and from there shipped to the purchasers in Titusville by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shepard at Chicago; that Brennan, the agent employed by Shepard, was engaged in conducting the business in the manner stated, at the time of his arrest, and acting solely for Shepard.

Upon such a state of facts, and upon a review of the cases, this court held it was not bound by the decision of the highest court of the State in which such a tax was authorized and imposed that such a tax was an exercise of the police power, and not of the taxing power; and that the ordinance in question imposed a tax upon interstate commerce, and was therefore void. To the argument that no discrimination was made in the ordinance between domestic and foreign drummers, the court said:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

The last case we shall cite is the recent one of *Stockard* v. *Morgan*, 185 U. S. 27, where was considered the validity of a statute of the State of Tennessee providing for the collection of a privilege tax on the occupation of merchandise brokers.

By agreement of the parties two questions only were argued in the state court: (1) whether or not the complainants, who had filed a bill to restrain the collection of the tax, were merchandise brokers and subject by the statute to tax as such; (2) whether or not their business constituted interstate commerce, and therefore was beyond the reach of the State's taxing power. The state Supreme Court held that the complainants, as merchandise brokers, were within the meaning of the statute, and that the tax was a valid one under the Constitution of the United States.

This court, though recognizing that it was obliged to accept the construction put upon the statute by the state court, reversed the judgment of that court in respect to the nature of the commerce as interstate. In the opinion of the court, delivered by Mr. Justice Peckham, the principal cases, beginning with *Brown* v. *Maryland*, 12 Wheat. 419, and ending with *Brennan* v. *Titusville*, were again reviewed, and the conclusions there reached were affirmed.

The state Supreme Court endeavored to distinguish the present case from that of *Brennan* v. *Titusville*, in the following observations:

"The defendant insists that *Brennan* v. *Titusville* is directly in point—is, in every essential fact, this case—and should control the opinion of the court on this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case, the goods were shipped directly to the purchaser. In this case, they were shipped by the Chicago company to itself in the city of Greensboro; and when they reached Greensboro, the defendant as the agent of the Chicago company received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of *Brennan* v. *Titusville*, and we

should hold, as it was held there, that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago—the railroad being deemed to be the agent of the consignee, and *Brennan* v. *Titusville* would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to themselves, 'The Chicago Portrait Company,' in Greensboro. This being so no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax, for which its own citizens would be liable. It seems to us that it could not."

We are not persuaded by this reasoning. It seems to proceed upon two propositions—first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro.

But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the State or on the purchaser within the State. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State. It is too plain for argument that the supposed in-

complete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and "placing the pictures in their proper places," (the language of the verdict,) meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

Transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.

It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and

municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation.

Upon principle and authority, therefore, we conclude that the judgment of the Supreme Court of North Carolina should be and is

Reversed, and the cause is remanded to that court to take further proceedings not inconsistent with this opinion.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 13, 1902, TO JANUARY 18, 1903.

No. 55. GEORGE TSUKAMOTO, APPELLANT, *v.* JOHN LACKMANN ET AL. Appeal from the Circuit Court of the United States for the Northern District of California. Submitted October 16, 1902. Decided October 20, 1902. *Per Curiam.* Final order affirmed with costs, on the authority of *Minnesota* v. *Brundage*, 180 U. S. 499; *Markuson* v. *Boucher*, 175 U. S. 184, and cases cited. *Mr. James G. Maguire* for the appellant. *Mr. Thomas D. Riordan* for the appellees.

No. 255. WILLIAM B. BROWN, APPELLANT, *v.* JOHN H. DRAIN, STREET SUPERINTENDENT, ETC., ET AL. Appeal from the Circuit Court of the United States for the Southern District of California. Motions to dismiss or affirm submitted October 14, 1902. Decided October 20, 1902. *Per Curiam.* Decree affirmed with costs, on the authority of *Spies* v. *Illinois*, 123 U. S. 131; *Richardson* v. *Railroad Company*, 169 U. S. 128; *Walston* v. *Nevin*, 128 U. S. 578; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *French* v. *Asphalt Company*, 181 U. S. 324; *King* v. *Portland*, 184 U. S. 61. (Mr. Justice Harlan took no part in the disposition of this case.) *Mr. Joseph H. Call* for the appellant. *Mr. Albert H. Crutcher* for the appellees.

No. 349. BANK OF IRON GATE, PLAINTIFF IN ERROR, *v.* MAGGIE A. BRADY, EXECUTRIX, ETC. In error to the Circuit Court of the United States for the Eastern District of Virginia. Submitted October 14, 1902. Decided October 20, 1902. *Per Curiam.* Judgment affirmed with costs, on the authority of *Veazie Bank* v. *Fenno*, 8 Wall. 533. *Mr. William L. Royall* for the plaintiff in error. *Mr. Solicitor General Richards* for the defendant in error.

No. 394. INDIANA POWER COMPANY, PLAINTIFF IN ERROR, *v.* ST. JOSEPH AND ELKHART POWER COMPANY. In error to the Supreme Court of the State of Indiana. Motions to dismiss or affirm submitted October 14, 1902. Decided October 20, 1902. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Pim* v. *St. Louis*, 165 U. S. 273; *Cook County* v. *Dock Company*, 138 U. S. 635; *Dewey* v. *Des Moines*, 173 U. S. 193, 200; *Mining Company* v. *McFadden*, 180 U. S. 535. *Mr. Frank F. Reed* and *Mr. Ferdinand Winter* for the plaintiff in error. *Mr. Charles Francis Carusi* for the defendant in error.

Nos. 328, 329 and 330. CHARLES T. CARNAHAN, PLAINTIFF IN ERROR, *v.* P. K. CONNOLLY. In error to the Court of Appeals of the State of Colorado. Motion to dismiss submitted October 20, 1902. Decided October 27, 1902. *Per Curiam.* Writs of error dismissed for want of jurisdiction on the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Harrison* v. *Morton*, 171 U. S. 38; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148, and other cases; and see *Carnahan* v. *Connolly*, 68 Pac. Rep. 836. *Mr. Charles J. Hughes, Jr.*, for the plaintiff in error. *Mr. C. S. Thomas*, *Mr. W. H. Bryant* and *Mr. H. H. Lee* for the defendant in error.

No. 60. WILLIAM A. CALVERT, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR, *v.* SOUTHERN RAILWAY COMPANY. In error to the Circuit Court of the United States for the District of South Carolina. Argued October 31, 1902. Decided November 3, 1902. *Per Curiam.* Judgment affirmed, with costs, on the authority of *St. Louis and San Francisco Railway Company* v. *James*, 161 U. S. 545; and see *Calvert* v. *Southern Railway Company*, 64 S. C. 143; 41 S. E. Rep. 963. *Mr. William N. Graydon* for the plaintiff in error. *Mr. George E. Hamilton* and *Mr. Fairfax Harrison* for the defendant in error.

No. 15. CLARENCE E. COLLINS, PLAINTIFF IN ERROR, *v.* STATE

OF NEW HAMPSHIRE. In error to the Supreme Court of the State of New Hampshire. Argued and submitted January 7 and 8, 1902. Restored to docket for reargument January 20, 1902. Reargued April 17, 1902; November 10, 1902. Judgment affirmed, with costs, by an equally divided court. *Mr. Wm. D. Guthrie* and *Mr. A. H. Veeder* for the plaintiff in error. *Mr. Edwin G. Eastman* for the defendant in error.

No. 361. ELIZA A. WALL, PLAINTIFF IN ERROR, *v.* OLD COLONY TRUST COMPANY ET AL. In error to the Supreme Judicial Court of the State of Massachusetts. Motions to dismiss or affirm submitted November 3, 1902. Decided November 10, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Eustis* v. *Bolles*, 150 U. S. 361; and see *Wall* v. *Old Colony Trust Company*, 174 Massachusetts, 340; 177 Massachusetts, 275. *Mr. L. L. Scaife* for the plaintiff in error. *Mr. Felix Rackemann*, *Mr. Moorfield Story*, *Mr. Ezra R. Thayer*, *Mr. J. L. Thorndike* and *Mr. L. S. Dabney* for the defendants in error.

No. 91. MARTHA E. SMITH ET AL., PLAINTIFFS IN ERROR, *v.* EDWARD F. BROWN, RECEIVER, ETC. In error to the United States Circuit Court of Appeals for the Eighth Circuit. Argued and submitted November 13, 1902. Decided November 17, 1902. *Per Curiam.* Judgment affirmed, with costs, on the authority of *Studebaker* v. *Perry*, 184 U. S. 258; *McDonald* v. *Thompson*, 184 U. S. 71; *United States* v. *Knox*, 102 U. S. 422, (see case below, *Deweese* v. *Smith*, 106 Fed. Rep. 438,) and case remanded to the Circuit Court of the United States for the Western District of Missouri. *Mr. Wm. M. Williams* for the plaintiffs in error. *Mr. William S. Shirk* for the defendant in error.

No. 400. DISTRICT OF COLUMBIA, APPELLANT, *v.* ELIAS E. BARNES. Appeal from the Court of Claims. Motion to dis-

miss. Submitted November 17, 1902. Decided December 8, 1902. *Per Curiam.* Appeal dismissed. Act of June 6, 1900, 31 Stat. c. 789, p. 572; *Gordon* v. *United States*, 117 U. S. 697; 2 Wall. 561; *District of Columbia* v. *Eslin*, 183 U. S. 62, 65. *Mr. Solicitor General Richards* and *Mr. Robert A. Howard* for the appellant. *Mr. John C. Fay* for the appellee.

No. 438. Ferdinand Siegel et al., Appellants, *v.* S. L. Swarts, Trustee. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss. Submitted December 1, 1902. Decided December 8, 1902. *Per Curiam.* Appeal dismissed for the want of jurisdiction, on the authority of *Bogy* v. *Daugherty*, 184 U. S. 696; *Haseltine* v. *Central Bank*, 183 U. S. 130; *Keystone Manganese and Iron Company* v. *Martin*, 132 U. S. 91. *Mr. Edward C. Eliot* for the appellants. *Mr. David Goldsmith* for the appellee.

No. 374. George F. Harding, Appellant, *v.* John S. Hart et al. Appeal from the United States Circuit Court of Appeals for the Seventh Circuit. Motion to dismiss. Submitted December 1, 1902. Decided December 15, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. 290, 294, and cases cited; *Rouse* v. *Letcher*, 156 U. S. 47, and see *Harding* v. *Hart*, 186 U. S. 483. *Mr. A. A. Hoehling, Jr.*, for the appellant. *Mr. Frederic Ullman* and *Mr. D. J. Schuyler* for the appellees.

No. 128. Chicago, Burlington and Quincy Railroad Company, Plaintiff in Error, *v.* Kate G. Wolfe, Administratrix, etc. In error to the Supreme Court of the State of Nebraska. Argued December 17, 1902. Decided December 22, 1902. *Per Curiam.* Judgment affirmed with costs, on the authority of *Chicago, Rock Island &c. Railroad Company* v. *Zernecke*, 183 U. S. 582. *Mr. J. W. Deweese* and *Mr. Charles F. Manderson*

for the plaintiff in error. *Mr. T. J. Mahoney* for the defendant in error.

No. 156. N. T. Cook, Plaintiff in Error, *v.* State of Tennessee. In error to the Supreme Court of the State of Tennessee. Motion to dismiss. Submitted January 5, 1903. Decided January 12, 1903. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Haseltine* v. *Savings Bank of Springfield, Mo.*, 183 U. S. 130; *Bogy* v. *Daugherty*, 184 U. S. 696. *Mr. E. W. Ross* for the plaintiff in error. *Mr. Charles T. Cates, Jr.*, for the defendant in error.

No. 162. Annie Wright Seminary, Plaintiff in Error, *v.* City of Tacoma. In error to the Supreme Court of the State of Washington. Submitted December 22, 1902. Decided January 12, 1903. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Gillis* v. *Stinchfield*, 159 U. S. 658; *Pittsburgh Company* v. *Cleveland Company*, 178 U. S. 279; *Speed* v. *McCarthy*, 181 U. S. 269, 275. See case below, 23 Washington, 109. *Mr. John F. Shafroth* for the plaintiff in error. *Mr. David A. Gourick* for the defendant in error.

Decisions on Petitions for Writs of Certiorari.

From October 13, 1902, to January 18, 1903.

No. 342. Allegheny Oil Company et al., Petitioners, *v.* Hiram A. Snyder et al. October 20, 1902. Petition for a writ of certiorari to United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. S. Schoyer, Jr.*, for the petitioners. *Mr. Edward McSweeney* and *Mr. D. A. Hollingsworth* for the respondents.

Decisions on Petitions for Writs of Certiorari.

No. 399. BOSTON FRUIT COMPANY, PETITIONER, *v.* A. G. HALL ET AL. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. J. L. Thorndike* and *Mr. Charles Theodore Russell* for the petitioner. *Mr. J. Parker Kirlin* for the respondents.

No. 408. PACIFIC COAST COMPANY, PETITIONER, *v.* W. H. REYNOLDS ET AL. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George W. Towle, Jr.*, and *Mr. Thomas B. Reed* for the petitioner. No appearance for the respondents.

No. 439. GUARANTEE COMPANY OF NORTH AMERICA, PETITIONER, *v.* PHENIX INSURANCE COMPANY OF BROOKLYN, N. Y. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren Switzler* for the petitioner. *Mr. H. C. Brome* for the respondent.

No. 442. SWAIN P. CHICK ET AL., PETITIONERS, *v.* ALLEN C. FULLER ET AL. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William J. Manning* and *Mr. James H. Barnard* for the petitioners. *Mr. Charles H. Aldrich* and *Mr. Frank F. Reed* for the respondents.

No. 453. CHICAGO AND ERIE RAILROAD COMPANY, PETITIONER, *v.* WILLIAM N. SHAW. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. W. H. H. Miller* and *Mr. W. O. Johnson* for the petitioner. *Mr. James C. McShane* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 455. LONDON, PARIS AND AMERICAN BANK, LIMITED, PETITIONER, *v.* ROSALIE AARONSTEIN, EXECUTRIX, ETC. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis Marshall* and *Mr. Henry Ach* for the petitioner. *Mr. Simon C. Scheeline* for the respondent.

No. 463. ADAH S. HORMAN, PETITIONER, *v.* UNITED STATES. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. M. Rulison* for the petitioner. *Mr. Solicitor General Richards* for the respondent.

No. 464. BURLINGTON TRUST COMPANY ET AL., PETITIONERS, *v.* SILAS PORTER ET AL. October 20, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. B. P. Waggener*, *Mr. O. H. Dean*, *Mr. O. L. Miller* and *Mr. Frank Hagerman* for the petitioners. No appearance for the respondents.

No. 452. RUBBER TIRE WHEEL COMPANY ET AL., PETITIONERS, *v.* GOODYEAR TIRE AND RUBBER COMPANY ET AL. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Hoke Smith*, *Mr. Frederic P. Fish* and *Mr. John R. Bennett* for the petitioners. *Mr. Edmund Wetmore* and *Mr. H. A. Toulmin* for the respondents.

No. 454. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* JOHN R. CRAIG, ADMINISTRATOR, ETC. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Fairfax Harrison* for the petitioner. *Mr. James E. McDonald* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 465. CORNELIUS J. MCNAMARA ET AL., PETITIONERS, *v.* HOME LAND AND CATTLE COMPANY ET AL. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George R. Peck*, *Mr. John S. Miller*, *Mr. Merritt Starr* and *Mr. H. G. McIntire* for the petitioners. *Mr. W. E. Cullen*, *Mr. E. C. Day* and *Mr. F. C. Sharp* for the respondents.

No. 468. PERKINS COUNTY, NEBRASKA, PETITIONER, *v.* E. D. GRAFF. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. H. McGowan* and *Mr. Charles F. Manderson* for the petitioner. *Mr. J. M. Johnson* for the respondent.

No. 469. UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONER, *v.* OMAHA BUILDING AND CONSTRUCTION COMPANY ET AL. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. G. McGilton* for the petitioner. *Mr. H. C. Brome* for the respondents.

No. 473. BOARD OF COUNTY COMMISSIONERS OF KEARNY COUNTY, KANSAS, PETITIONER, *v.* L. VANDRISS. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. P. Jetmore* for the petitioner. No appearance for the respondent.

No. 474. CHICAGO HOUSE WRECKING COMPANY, PETITIONER, *v.* OTTO C. BIRNEY. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. M. Woolworth* and *Mr. Wm. D. McHugh* for the petitioner. *Mr. Charles J. Greene* and *Mr. Ralph W. Breckenridge* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 466. NORTHERN PACIFIC RAILWAY COMPANY, PETITIONER, *v.* LOUISE H. ADAMS ET AL. October 27, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. C. W. Bunn* for the petitioner. *Mr. C. S. Voorhees* and *Mr. R. H. Voorhees* for the respondents.

No. 437. JOHN M. PERKINS, PETITIONER, *v.* ANDREW B. HENDRYX ET AL. November 3, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. John M. Perkins pro se.* *Mr. Charles M. Reed* and *Mr. L. L. Scaife* for the respondents.

No. 445. SILAS F. KING, PETITIONER, *v.* J. O. BENDER. November 3, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. C. Campbell*, *Mr. W. H. Metson* and *Mr. William A. Maury* for the petitioner. *Mr. J. O. Bender pro se.*

No. 467. PECK BROTHERS COMPANY OF ILLINOIS, PETITIONER, *v.* PECK BROS. & CO. OF CONNECTICUT. November 3, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry D. Coghlan* and *Mr. Joseph A. O'Donnell* for the petitioner. *Mr. E. A. Otis* for the respondents.

No. 472. RURAL INDEPENDENT SCHOOL DISTRICT OF ALLISON ET AL., PETITIONERS, *v.* ELEANOR G. FAIRFIELD. November 3, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. R. M. Wright* for the petitioners. *Mr. R. H. Brown* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 476. Minnesota Moline Plow Company et al., Petitioners, *v.* Dowagiac Manufacturing Company. November 3, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles M. Peck* and *Mr. Lysander Hill* for the petitioners. *Mr. George A. Prevost*, *Mr. J. H. Whitaker* and *Mr. Fred L. Chappell* for the respondent.

No. 371. Charles P. Chisolm et al., Petitioners, *v.* Zachariah Johnson. November 10, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Griggs* and *Mr. Gustav Bissing* for the petitioners. *Mr. Robert S. Taylor* for the respondent.

No. 434. J. Haseltine Carstairs et al., Petitioners, *v.* American Bonding and Trust Company of Baltimore City. November 10, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Joseph DeF. Junkin* for the petitioners. *Mr. Francis B. Bracken* for the respondent.

No. 481. Adam Foerster et al., Petitioners, *v.* United States. November 10, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joel W. West* for the petitioners. *Mr. Solicitor General Richards* for the respondent.

No. 483. W. A. Moore, Petitioner, *v.* James H. Parker et al. November 10, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry J. Haynsworth* for the petitioner. *Mr. Fairfax Harrison* for the respondents.

Decisions on Petitions for Writs of Certiorari.

No. 488. ALBERT G. ROPES, ETC., PETITIONER, *v.* CLYDE STEAMSHIP COMPANY ET AL. November 17, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry W. Goodrich* for the petitioner. *Mr. Henry Galbraith Ward* for the respondents.

No. 496. PHENIX INSURANCE COMPANY OF BROOKLYN, N. Y., PETITIONER, *v.* SIMEON F. LEONARD. November 17, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. D. J. Schuyler* for the petitioner. *Mr. Henry W. Magee* and *Mr. Myron H. Beach* for the respondent.

No. 497. ORIENT INSURANCE COMPANY OF HARTFORD, CONN., PETITIONER, *v.* SIMEON F. LEONARD. November 17, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. D. J. Schuyler* for the petitioner. *Mr. Henry W. Magee* and *Mr. Myron H. Beach* for the respondent.

No. 500. BELLEVILLE AND SOUTHERN ILLINOIS RAILROAD COMPANY, PETITIONER, *v.* CITIZENS' SAVINGS AND LOAN ASSOCIATION ET AL. November 17, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles W. Thomas* for the petitioner. *Mr. Edward Cunningham, Jr.*, for the respondents.

No. 508. CHRISTOPHER C. CRABB ET AL., PETITIONERS, *v.* JOHN JAY HARVEY WILLIAMS. December 1, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. T. A. Moran* and *Mr. Levy Mayer* for the petitioners. *Mr. Frank Crozier* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 338. ERNEST WILKINSON, PETITIONER, *v.* WILLIAM DUNLAP OWENS, ADMINISTRATOR, ETC. December 8, 1902. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Samuel Maddox* for the petitioner. *Mr. Clarence R. Wilson* for the respondent.

No. 460. MART H. ROYSTON, TRUSTEE, ET AL., PETITIONERS, *v.* ROBERT WEIS. December 8, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter Gresham* for the petitioners. *Mr. James B. Stubbs* for the respondent.

No. 461. LAWRENCE & CO. ET AL., PETITIONERS, *v.* ALBERT WEIS. December 8, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter Gresham* for the petitioners. *Mr. James B. Stubbs* for the respondent.

No. 495. AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER, *v.* HENRY W. BALLMAN ET AL. December 8, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry C. Willcox*, *Mr. Eben Richards* and *Mr. Jarvis W. Mason* for the petitioner. *Mr. Clinton Rowell* and *Mr. Joseph S. Laurie* for the respondents.

No. 501. LANYON ZINC COMPANY ET AL., PETITIONERS, *v.* HORACE F. BROWN ET AL. December 8, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Albert H. Walker* for the petitioners. *Mr. Philip C. Dyrenforth* for the respondents.

No. 130. FRANK SEAMAN, PETITIONER, *v.* BERLINER GRAMOPHONE COMPANY. December 12, 1902. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Fourth Circuit dismissed on authority of counsel for petitioner. *Mr. Philip Mauro* for the petitioner. *Mr. Marshall McCormick* for the respondent.

No. 176. WALTER A. CUNNINGHAM ET AL., PETITIONERS, *v.* METROPOLITAN LUMBER COMPANY. December 15, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. F. O. Clark* for the petitioners. *Mr. B. J. Brown* and *Mr. D. H. Ball* for the respondent.

No. 470. W. G. EADS BROKERAGE COMPANY, PETITIONER, *v.* CITY OF FORT SCOTT, KANSAS. December 15, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. F. Garver* for the petitioner. No appearance for the respondent.

No. 513. LENA M. SLATER ET AL., PETITIONERS, *v.* MEXICAN NATIONAL RAILROAD COMPANY. December 15, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Mason Williams* for the petitioners. No appearance for the respondent.

No. 451. WILLIAM GRAY BROOKS, PETITIONER, *v.* CHARLES H. PRATT, ADMINISTRATOR, ETC., ET AL. December 22, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William Gray Brooks pro se.* *Mr. J. L. Thorndike* for the respondents.

No. 484. LOFTUS CUDDY ET AL., PETITIONERS, *v.* PERCIVAL W. CLEMENT, RECEIVER, ETC., ET AL. December 22, 1902. Petition for a writ of certiorari to the United States Circuit Court of Ap-

peals for the First Circuit denied. *Mr. Harvey D. Goulder*, *Mr. S. H. Holding* and *Mr. F. S. Masten* for the petitioners. *Mr. Louis Hasbrouck*, *Mr. M. H. Cardozo* and *Mr. B. N. Cardozo* for the respondents.

No. 509. Bankers' Mutual Casualty Company, Petitioner, *v.* Minneapolis, St. Paul and Sault Ste. Marie Railway Company. December 22, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Horatio F. Dale* and *Mr. William Connor* for the petitioner. No appearance for the respondent.

No. 520. Fred. C. Kilham, Administrator, etc., Petitioner, *v.* William J. Wilson. December 22, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. R. T. McNeal* and *Mr. E. T. Wells* for the petitioner. No appearance for the respondent.

No. 522. National Glass Company et al., Petitioners, *v.* Bryce Brothers Company et al. December 22, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John G. Johnson*, *Mr. Wm. L. Pierce* and *Mr. James K. Bakewell* for the petitioners. *Mr. J. Snowden Bell* and *Mr. Francis T. Chambers* for the respondents.

No. 523. United States Fidelity and Guaranty Company, Petitioner, *v.* D. D. Muir, as Receiver, etc. December 22, 1902. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Isidor Rayner* and *Mr. J. Kemp Bartlett* for the petitioner. *Mr. Joel C. Baker* for the respondent.

Decisions on Petitions for Writs of Certiorari.

No. 185. RHODE ISLAND LOCOMOTIVE WORKS, PETITIONER, *v.* CONTINENTAL TRUST COMPANY. January 5, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas Emery* and *Mr. John Ford* for the petitioner. No appearance for the respondent.

No. 517. GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, PETITIONER, *v.* BENJAMIN F. JONES ET AL. January 5, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. John E. Sater* for the petitioner. *Mr. Talfourd P. Linn* for the respondents.

No. 529. CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, PETITIONER, *v.* GLENCOVE GRANITE COMPANY. January 5, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry M. Hoyt* for the petitioner. *Mr. Horace L. Cheyney* and *Mr. LaRoy S. Gove* for the respondent.

No 521. CHARLES L. RAWSON ET AL., PETITIONERS, *v.* WESTERN SAND BLAST COMPANY ET AL. January 12, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. (The Chief Justice took no part in the decision of this petition.) *Mr. James H. Raymond* and *Mr. Otto R. Barnett* for the petitioners. No appearance for the respondents.

No. 536. WILLIAM WHITE, JR., PETITIONER, *v.* PEERLESS RUBBER MANUFACTURING COMPANY. January 12, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George H. Christy* for the petitioner. *Mr. Livingston Gifford* for the respondent.

Cases Disposed of Without Consideration by the Court.

No. 544. Baltimore and Ohio Railroad Company et al., Petitioners, *v.* Wabash Railroad Company. January 12, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. W. H. H. Miller*, *Mr. Hugh L. Bond, Jr.*, and *Mr. J. H. Collins* for the petitioners. *Mr. Addison C. Harris* and *Mr. Wells H. Blodgett* for the respondent.

Cases Disposed of Without Consideration by the Court.

From October 13, 1902, to January 18, 1903.

Nos. 253 and 254. Sun Life Insurance Company of America, Plaintiff in Error, *v.* Albert McCabe. In error to the County Court of Dallas County, Texas. October 14, 1902. Dismissed with costs, on motion of *Mr. Maurice E. Locke* for the plaintiff in error. *Mr. Maurice E. Locke* for the plaintiff in error. No appearance for the defendant in error.

No. 71. City of Austin, Plaintiff in Error, *v.* E. C. Bartholomew et al., Receivers. In error to the Circuit Court of the United States for the Western District of Texas. October 14, 1902. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. S. R. Fisher* for the plaintiff in error. No appearance for the defendants in error.

No. 112. People of the State of New York *ex rel.* Cayadutta Plank Road Company, Plaintiff in Error, *v.* Curtis S. Cummings, Mayor, et al. In error to the Supreme Court of the State of New York. October 14, 1902. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Harwood Dudley* for the plaintiff in error. No appearance for the defendants in error.

Cases Disposed of Without Consideration by the Court.

No. 245. O. E. Cope, Appellant, *v.* Landa H. Braden. Appeal from the Supreme Court of the Territory of Oklahoma. October 14, 1902. Dismissed with costs, on motion of counsel for appellant. *Mr. Horace Speed* for the appellant. No appearance for the appellee.

No. 6. Glucose Sugar Refining Company, Plaintiff in Error, *v.* George F. Harding et al. In error to the Supreme Court of the State of Illinois. October 14, 1902. Dismissed with costs, pursuant to the 10th rule. *Mr. John P. Wilson*, *Mr. Thomas A. Moran* and *Mr. John J. Herrick* for the plaintiff in error. No appearance for the defendants in error.

No. 3. Manchester Fire Assurance Company of Manchester, England, et al., Appellants, *v.* John Herriott, Treasurer of the State of Iowa, et al. Appeal from the Circuit Court of the United States for the Southern District of Iowa. October 14, 1902. Dismissed per stipulation, on motion of *Mr. C. W. Mullan* for the appellees. *Mr. A. H. McVey* and *Mr. Wm. Allen Butler* for the appellants. *Mr. Milton Remley* and *Mr. Charles W. Mullan* for the appellees.

No. 25. Scottish Union and National Insurance Company of Edinburgh, Scotland, and London, England, Plaintiffs in Error, *v.* John Herriott, etc. In error to the Supreme Court of the State of Iowa. October 14, 1902. Dismissed per stipulation, on motion of *Mr. C. W. Mullan* for the defendant in error. *Mr. A. H. McVey* for the plaintiff in error. *Mr. Charles W. Mullan* for the defendant in error.

No. 475. Harold Crowley, Appellant, *v.* United States. Appeal from the District Court of the United States for the District of Porto Rico. October 20, 1902. Docketed and dis-

missed, on motion of *Mr. Assistant Attorney General Hoyt* for the appellee. No one opposing.

No. 129. New Orleans and Washington Packet Company, Appellant, *v.* Railroad Commission of Louisiana. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. October 20, 1902. Dismissed, each party to pay its own costs, per stipulation. *Mr. J. D. Rouse* for the appellant. *Mr. Walter Guion* for the appellee.

No. 164. George A. Blinn, Jr., et al., Appellants, *v.* Dan Jenkins et al. Appeal from the Circuit Court of the United States for the Northern District of Alabama. October 20, 1902. Dismissed with costs, per stipulation. *Mr. James L. Tanner* for the appellants. *Mr. J. W. Smith* for the appellees.

No. 334. Henry Thomas, Petitioner, *v.* Interstate Building and Loan Association. On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. October 21, 1902. Dismissed on motion of *Mr. Thomas H. Clark* for the petitioner. *Mr. James B. Stubbs* and *Mr. Thomas H. Clark* for the petitioner. No appearance for the respondent.

No. 485. Du Shen Tau et al., Appellants, *v.* United States; No. 486. Lee Chin Ching, Appellant, *v.* United States; and No. 487. Moy Yee Tai et al., Appellants, *v.* United States. Appeals from the District Court of the United States for the Northern District of New York. October 27, 1902. Docketed and dismissed, on motion of *Mr. Solicitor General Richards* for the appellee. No one opposing.

No. 133. Southern Pacific Railroad Company, Plaintiff in Error, *v.* Frank A. Wood et al. In error to the Supreme

Court of the State of California. November 3, 1902. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Maxwell Evarts* for the plaintiff in error. No appearance for the defendants in error.

No. 134. SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* FREDERICK B. JACK ET AL. In error to the Supreme Court of the State of California. November 3, 1902. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Maxwell Evarts* for the plaintiff in error. No appearance for the defendants in error.

No. 5. RAILROAD EQUIPMENT COMPANY, APPELLANT, *v.* SOUTHERN RAILWAY COMPANY ET AL. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. November 6, 1902. Dismissed with costs, per stipulation. *Mr. Tully R. Cormick*, *Mr. Wager Swayne* and *Mr. Alex. C. King* for the appellant. *Mr. Francis Lynde Stetson*, *Mr. Leon Jourolmon* and *Mr. W. A. Henderson* for the appellees.

No. 503. RICHARD C. KETCHUM, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the Circuit Court of the United States for the Eastern District of Texas. November 10, 1902. Docketed and dismissed, on motion of *Mr. Solicitor General Richards* for the defendant in error. No one opposing.

No. 99. OWEN MCCANN, ETC., PLAINTIFF IN ERROR, *v.* COMMONWEALTH OF PENNSYLVANIA FOR USE OF LEVI WELLS, DAIRY AND FOOD COMMISSIONER. In error to the Supreme Court of the State of Pennsylvania. November 13, 1902. Dismissed with costs, pursuant to the 10th rule. *Mr. Simon R. Huss* for the plaintiff in error. *Mr. John P. Elkins* for the defendant in error.

Cases Disposed of Without Consideration by the Court.

No. 110. WILLIAM K. VANDERBILT ET AL., TRUSTEES ET AL., PLAINTIFFS IN ERROR, *v.* BIRD S. COLER, COMPTROLLER, ETC. In error to the Surrogate's Court of New York County, State of New York. December 1, 1902. Dismissed, per stipulation. *Mr. Chandler P. Anderson* for the plaintiffs in error. *Mr. Jabish Holmes, Jr.*, for the defendant in error.

No. 114. TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE R. L. WHITE. In error to the United States Circuit Court of Appeals for the Fifth Circuit. December 3, 1902. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. John F. Dillon*, *Mr. W. S. Pierce* and *Mr. D. D. Duncan* for the plaintiff in error. *Mr. John L. Sheppard* for the defendant in error.

No. 7. AUGUSTUS BURGDORF ET AL., PLAINTIFFS IN ERROR, *v.* UNITED STATES TO THE USE OF THE VERMONT MARBLE COMPANY. In error to the Court of Appeals of the District of Columbia. December 11, 1902. Dismissed with costs, on motion of *Mr. William G. Johnson* for the plaintiffs in error. *Mr. J. J. Darlington*, *Mr. Calderon Carlisle* and *Mr. William G. Johnson* for the plaintiffs in error. *Mr. John B. Cotton* for the defendant in error.

No. 401. ELIAS F. BARNES, APPELLANT, *v.* DISTRICT OF COLUMBIA. Appeal from the Court of Claims. December 15, 1902. Dismissed on motion of *Mr. John C. Fay* for the appellant. *Mr. John C. Fay* and *Mr. John W. Douglass* for the appellant. *The Attorney General* for the appellee.

No. 287. GEORGE B. ROMMEL ET AL., APPELLANTS, *v.* COUNTY COURT OF BARBOUR COUNTY ET AL. Appeal from the Circuit Court of the United States for the Northern District of West Virginia. December 15, 1902. Dismissed, clerk's costs to be

paid by appellants, per stipulation of counsel. *Mr. John H. Holt* and *Mr. Melville D. Post* for the appellants. *Mr. Alston G. Dayton* for the appellees.

Cases Dismissed in Vacation.

No. 365. LEE LING ET AL., APPELLANTS, *v.* THE UNITED STATES; No. 366. SAY ON ET AL., APPELLANTS, *v.* THE UNITED STATES; No. 367. KING DUNG, APPELLANT, *v.* THE UNITED STATES; and No. 368. YEE TOY ET AL., APPELLANTS, *v.* THE UNITED STATES. Appeals from the District Court of the United States for the Northern District of New York. June 25, 1902. Docketed and dismissed on motion of the Attorney General. No one opposing.

No. 411. LEE AH YIN, APPELLANT, *v.* THE UNITED STATES. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. October 9, 1902. Dismissed pursuant to the 28th rule. *Mr. Franklin H. Mackey* for the appellant. *The Attorney General* for the appellee.

INDEX.

ACTS OF CONGRESS.

See STATUTES, B.

ACTIONS.

See APPEAL AND WRIT OF ERROR, 5;
COURTS, 3.

ALASKA.

See APPEAL AND WRIT OF ERROR, 5;
COURTS, 2.

ANIMALS.

See ANIMAL INDUSTRY ACT;
CONSTITUTIONAL LAW, 6, 7;
INTERSTATE COMMERCE, 1, 2.

ANIMAL INDUSTRY ACT.

The act of Congress of May 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, does not cover the whole subject of the transportation of live stock from one State to another. The statute of Colorado of March 21, 1885, relating to the introduction of infectious or contagious diseases among the cattle and horses of that State, relates to matters not covered by the Animal Industry Act of Congress, and is not in violation of the Constitution of the United States. *Reid* v. *Colorado*, 137.

APPEAL AND WRIT OF ERROR.

1. One convicted in a state court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United State, must ordinarily first take his case to the highest court of the State in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error. *Reid* v. *Jones*, 153.
2. The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court and recognized by the legislation of Congress from the foundation of the Government. *Elliott* v. *Toeppner*, 327.
3. Judgments and decrees of the Circuit Court of Appeals in all cases arising under the patent laws and under the criminal laws are made

ASSIGNMENT FOR CREDITORS.

1. The question whether a general assignment for the benefit of creditors is rendered invalid by reason of a provision that the "preferred creditors shall accept their dividends in full satisfaction and discharge of their respective claims" is one determinable by the local law of the jurisdiction from which the question arises. *Robinson & Co.* v. *Belt*, 41.
2. Under the laws of Arkansas, made applicable to the Indian Territory, a stipulation for a release in a general assignment, which is made only as a condition of preference, does not invalidate the instrument. *Ib.*

BANKRUPTCY.

The question whether under section 67*f* of the bankruptcy act of 1898 where a final decree recovered within four months of the petition, but which was based on a judgment creditors' bill in equity filed long prior thereto, the creditor had a lien on the assets involved in the action which was superior to the title of the trustee in bankruptcy, or whether (as was held by the District Court) section 67*f* prevented the complainant from acquiring any benefit from the lien, or the fund attached except through the trustee in bankruptcy *pro rata* with other creditors. *Held*, that while the lien created by a judgment creditors' bill is contingent in the sense that it may possibly be defeated by the event of the suit, it is in itself, and so long as it exists, a charge, a specific lien, on the assets, not subject to being divested save by payment of the judgment sought to be collected, and a judgment or decree in enforcement of an otherwise valid preëxisting lien is not the judgment denounced by the bankruptcy statute which is plainly confined to judgments creating liens. *Metcalf* v. *Barker*, 165.

2. When a judgment creditor files his bill in equity long prior to the bankruptcy of the defendant, thereby obtaining a lien on specific assets, and diligently prosecutes it to a final judgment, he acquires a lien on the property of the bankrupts which is superior to the title of the trustee, and a District Court of the United States does not have jurisdiction to make an order in bankruptcy proceedings against the defendants enjoining them from enforcing such lien. *Ib.*
3. Where a judgment creditor filed a bill in a state court to set aside a conveyance made by a person, who during the pendency of the action and years after its commencement is adjudged a bankrupt, and to apply the proceeds of the property affected towards the payment of the debt, the state court acquires such complete jurisdiction and control over the bankrupt and his property that jurisdiction is not divested by proceedings in bankruptcy, and it is the duty of the state court to proceed to final decree notwithstanding the adjudication in bankruptcy,

BONDS.

BOUNTY.

When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process or in whatever manner or under whatever name it is disguised, it is a bounty upon exportation. As under the laws and regulations of Russia, the Russian exporter of sugar obtains from his government a certificate solely because of such exportation, which certificate is salable and has an actual value in the open market, the government of Russia does secure to the exporter from that country, as the inevitable result of such action, a money reward or gratuity whenever he exports sugar from Russia, and which is in effect a bounty upon the export of sugar which subjects such sugar, upon its importation into the United States, to an additional duty equal to the entire amount of such bounty under the act of Congress of July 24, 1897, 30 Stat. 205. *Downs* v. *United States*, 496.

BURDEN OF PROOF.

See TAX SALE.

CASES DISTINGUISHED.

1. *Garrett* v. *Weinberg*, 54 S. C. 127, distinguished from *Raub* v. *Carpenter*, 159.
2. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, distinguished from *Mobile Transportation Co.* v. *Mobile*, 479.
3. *Lehigh Valley R. R. Co.* v. *Pennsylvania*, 145 U. S. 192, distinguished from *Hanley* v. *Kansas City Southern Ry. Co.*, 617.
4. *Northern Pacific Ry. Co.* v. *Amato*, 144 U. S. 471, distinguished from *Ayres* v. *Polsdorfer*, 585.
5. *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, distinguished from *Kansas City Suburban Belt Ry. Co.* v. *Herman*, 63.

CASES FOLLOWED.

1. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, followed in *Macfarland* v. *Brown*, 239.
2. *Bryan* v. *Brasius*, 162 U. S. 414, followed in *Romig* v. *Gillett*, 111.
3. *Hagar* v. *Reclamation District*, 111 U. S. 701, followed in *Turpin* v. *Lemon*, 51.
4. *In re Oteiza*, 136 U. S. 330, followed in *Grin* v. *Shine*, 181.
5. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 47, followed in *Ayres* v. *Polsdorfer*, 585.
6. *Marriott* v. *Brune*, 9 How. 619, followed in *Lawder* v. *Stone*, 281.
7. *Smoot* v. *Rittenhouse*, decided January 10, 1876, followed in *Fidelity & Deposit Co.* v. *United States*, 315.
8. *Spies* v. *Illinois*, 123 U. S. 131, followed in *Jacobi* v. *Alabama*, 133.
9. *Wassum* v. *Feeney*, 121 Mass. 93, cited in *Kohl* v. *Lehlback*, 160 U. S. 293, 301, followed in *Raub* v. *Carpenter*, 159.

CERTIORARI.

Where a case has been improperly brought to this court by writ of error, it is within the powers of the court conferred by the judiciary act of

CLAIMS.

See COURT OF CLAIMS;
INTERSTATE COMMERCE COMMISSION.

COMMERCE.

See INTERSTATE COMMERCE.

CONGRESS.

See ANIMAL INDUSTRY ACT;
APPEAL AND WRIT OF ERROR, 2;
BANKRUPTCY, 6;
COURT OF CLAIMS, 1;
COURTS, 9;
INDIANS, 3, 5, 6, 7, 8;
INTERSTATE COMMERCE, 1, 2, 4;
LEGISLATION, 1, 2;
STATUTES, B.

CONSTITUTIONAL LAW.

1. Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court; while it has been held that notice must be given to the owner at some stage of proceedings for condemnation or imposition of special taxes, it has also been held that laws for assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary (Mr. Justice Field's definition of "due process of law" in *Hagar* v. *Reclamation District*, 111 U. S. 701, followed), and the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the state laws requires notice to the taxpayers and is in conformity with natural justice. *Turpin* v. *Lemon*, 51.
2. A statute of Wisconsin enacted prior to June 25, 1898, but which was to go into operation on September 1, 1898, requiring foreign corporations to file a copy of their charter with the Secretary of State and to pay a small fee as a condition for doing business there does not impair the obligation of a contract made on June 25, 1898, by a foreign corporation to do business in Wisconsin after September 1, 1898. *Diamond Glue Co.* v. *United States Glue Co.*, 611.
3. A ruling by a state court in a criminal case in which it was held that an objection as to non-compliance with a statute requiring the jury to be placed in charge of a sworn officer was not made in time and was to be deemed as waived, was but an adjudication simply of a question of criminal and local law and did not impair the constitutional guaranty that no State shall deprive any person of liberty without due process of law. *Dreyer* v. *Illinois*, 71.
4. The decision of the state court sustaining the Indeterminate Sentence Act of Illinois of 1899, did not infringe the constitutional guaranty of

CONTRACT.

1. Where members contributed property to a society under an agreement that the value thereof was to be refunded on withdrawal from membership, and by a subsequent agreement it was provided that each individual was to be considered as having finally and irrevocably parted with all his former contributions, and on withdrawing should not be entitled to demand an account thereof as a matter of right, but it should be left altogether to the discretion of the superintendent to decide whether any, and if any, what, allowance should be made to such member or his representatives as a donation, in an action by descendants of members long since retired from the society, for the distribution of the property and assets of the society on the ground that it had ceased to exist and that its assets should revert to the heirs of the original contributors: *Held* that the facts do not show that there was any dissolution of the society; that the relations of the members and the society were fixed by contract; that the plaintiffs could not have other rights than their ancestors had; that no trust was created by the agreement of 1836, and under its terms when the plaintiffs' ancestors (who had not contributed any property) died or withdrew from the society their rights were fixed by the terms of that agreement; the members who died left no rights to their representatives, and had no rights which they could transmit to the plaintiffs. *Schwartz* v. *Duss*, 8.
2. When a Maryland corporation, chartered in 1827, and possessing certain immunities from taxation, which under the then constitution might have been irrepealable, becomes merged with other corporations in an entirly new corporation possessing new rights and franchises created after the adoption of the constitution of 1850, under which the legislature has power to alter and repeal charters of, and laws creating, corporations, the right of exemption, if it ever passed to the new corporation, is subject to the right of repeal, and hence is not protected from repeal by the contract clause of the Federal Constitution. *Northern Central Ry. Co.* v. *Maryland*, 258.
3. An act of the legislature compromising litigation between the State and such new corporation arising from the claim of the latter that it was exempt from taxation under the immunities at one time possessed by one of its constituent corporations, and fixing a rate of taxation to be paid annually thereafter by the new corporation, cannot be regarded as a legislative contract granting an irrepealable right forbidden by the then existing constitution of the State. If, therefore, the legislature subsequently passes another act fixing a higher rate of taxation, and the highest court of the State decides that such act repeals the former act and subjects the corporation to the higher rate of taxation, the

CRIMINAL LAW.

CUSTOMS DUTIES.

1. Section 23 of the Customs Administrative Act of June 10, 1890, permitting importers to abandon imported articles to the United States and be relieved from the payment of duties thereon, provided the portion so abandoned amounts to at least ten per cent of the total value or quantity of the invoice, does not apply to a cargo of fruit, a portion whereof (which is less than ten per cent) decays on the voyage becoming utterly worthless, and necessarily dumped overboard under the sanitary regulations of the port after arrival of the vessel. *Lawder* v. *Stone*, 281.
2. It would be unequitable and presumably not within the intention of Congress to assess duty upon articles which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay or other natural causes,

EXPERT TESTIMONY.

See EVIDENCE, 1.

EXTRADITION.

1. It is a sufficient compliance with the provisions of section 5270 of the Revised Statutes if the commissioner before whom the warrant requires the person arrested to appear has been specifically authorized to act in extradition proceedings on the same day the warrant is issued, and the oath to the complaint need not necessarily be taken before a commissioner specially authorized to act in extradition proceedings; but the judge issuing the warrant may act upon a complaint sworn to before a United States commissioner authorized generally to take affidavits. *Grin* v. *Shine*, 181.
2. A district judge issuing a warrant of arrest in extradition proceedings need not make the warrant returnable before himself, but may make it returnable directly before a commissioner who upon the same day is specially designated to act in extradition proceedings. *Ib.*
3. A complaint in extradition need not set forth the crime with the particularity of an indictment. It is sufficient if it apprises the party of the crime with which he is charged. Such complaint is not defective because it does not use the word "fraudulently" in referring to the defendant's action in embezzling the money intrusted to him as the word "embezzle" implies a fraudulent intent. *Ib.*
4. Under section 5270 of the Revised Statutes the complaint in extradition proceedings may be made by any person acting under authority of the demanding government having knowledge of the facts. The accused, however, can only be surrendered upon the requisition made by the foreign government through the diplomatic agent or superior consular officer, and this may be made entirely independently of the proceeding before the magistrate, and the certificate of the Secretary of State that such demand has been made does not have to be produced before the warrant can be issued. *Ib.*

See EVIDENCE, 2, 3;
JURISDICTION, 10;
TREATIES, 2, 3.

FEDERAL QUESTION.

See JURISDICTION, 3, 4, 6, 7, 8, 11, 14, 17, 19, 20.

HABEAS CORPUS.

See EVIDENCE, 2.

HAWAII.

See JURISDICTION, 11, 13.

IMPORTS.

See CUSTOMS DUTIES, 1, 2, 3.

INDIANS.

1. In an action brought by the Cherokee Nation to enjoin the Secretary of the Interior from leasing oil lands held for the benefit of said Nation under section 13 of the act of Congress approved June 20, 1898, it is not necessary to join as parties defendants the persons or corporations to whom the Secretary proposes to make the leases. *Cherokee Nation* v. *Hitchcock*, 294.
2. The act of Congress entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June 28, 1898, which by section 13 thereof gives the Secretary of the Interior exclusive power over oil, coal, asphalt and other minerals in said Territory, and authorizes him to make leases of oil, coal, asphalt and other minerals under certain prescribed conditions, the royalties and rents to be paid into the Treasury of the United States to the credit of the tribe to which they belong, is, notwithstanding the provisions of the treaties with the Cherokee Nation, a valid exercise of power vested in Congress and fully authorizes the Secretary of the Interior to make such leases in the manner prescribed in the act. *Ib.*
3. This court has already (*Stephens* v. *Cherokee Nation*, 174 U. S. 445) sustained the validity of the act of Congress of June 28, 1898, and the precedent of co-relative legislation, wherein the United States practically assumed the full control over the Cherokees, as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal properties. That decision necessarily involves the further holding that Congress is vested with authority to adopt measures to make the tribal property productive and secure therefrom an income for the benefit of the tribe. *Ib.*
4. Under the treaties with, and patents issued to, the Cherokee Nation, whatever of title has been conveyed has been to the Cherokees as a Nation. And no title to any land is in any of the individuals although held by the tribe for the common use and equal benefit of all the members. *Ib.*
5. This court is not concerned with the question whether the act of June 28, 1898, is wise or will operate beneficially to the interest of the Cherokees, as the power which exists in Congress to administer upon, and guard, the tribal property is political and administrative in its nature, and the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts. *Ib.*
6. The provisions in article 12 of the Medicine Lodge treaty of 1867 with the Kiowa and Comanche Indians to the effect that no treaty for the cession of any part of the reservation therein described, which may be held in common, shall be of any force or validity as against the Indians unless executed and signed by at least three fourths of all the adult male Indians occupying the same, cannot be adjudged to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and

INTERSTATE COMMERCE.

JURY.

JURY TRIAL.

The rule of the supreme court of the District of Columbia (73) providing that a plaintiff in an action *ex contractu* who files a sufficient affidavit and serves the defendant with copies thereof and of the declaration is entitled to judgment in the absence of an affidavit by the defendant sufficient to offset same, does not deprive a defendant who files a plea in bar and demands a trial by jury, but who also fails to file the affidavit of defence required by the rule, of a right to a trial by jury, but simply prescribes the means of making an issue in regard to which, if the same be made as prescribed, the right of trial by jury accrues. *Fidelity and Deposit Co.* v. *United States*, 315.

See BANKRUPTCY, 4.

LAND GRANTS.

All the lands below high water mark of the Mobile River having passed to Alabama on her admission to the Union in 1819, there was nothing left upon which a patent of the United States dated in 1836, could operate, and the person claiming to hold land below high water mark under said patent has no vested interest in such land, which would require compensation or proceedings in eminent domain on the part of the State to take such lands. *Transportation Co.* v. *Mobile*, 479.

LEGISLATION.

1. The principle is universal that legislation, whether by Congress or by a State, must be taken to be valid, unless the contrary is made clearly to appear. *Reid* v. *Colorado*, 137.
2. When Congress enacted the Customs Administrative Act of 1890, it must be presumed to have possessed knowledge of the decisions of this court and the consistent application made of the doctrine of those decisions by the officials charged with the execution of the tariff laws, and in the light of this fact it would require a clear expression by Congress of its intention to adopt a contrary policy before a court would be justified in holding that such was the purpose of the legislative branch of the government. *Lawder* v. *Stone*, 281.

See CONSTITUTIONAL LAW, 10;
INDIANS, 2, 3, 5, 6, 7, 8;
JURISDICTION, 18.

LIMITATION OF ACTIONS.

See COURTS, 3, 4.

LOCAL LAW.

See ASSIGNMENT FOR CREDITORS;
CONSTITUTIONAL LAW, 3, 8, 14, 15;
COURTS, 6;
EMBEZZLEMENT;
INSURANCE, 1;
INTERSTATE COMMERCE, 3, 5;
JURISDICTION, 15, 19;
POLICE POWER OF STATE;
TAX SALE, 1.

MORTGAGE.

A mortgagee who enters into possession, not forcibly but peacefully and

SHIPPING.

Where the charter party of a vessel bound with a cargo of sugar from Java, to a port in the United States provides that the vessel should discharge at New York, Boston, Philadelphia or Baltimore "or so near the port of discharge as she may safely get and deliver the same, always afloat, in a customary place, and manner, in such dock, as directed by charterers, agreeably to bills of lading," and also provides "all goods to be brought to and taken from alongside of the ship always afloat at said charterers' risk and expense, who may direct the same at the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding," and the vessel has three steel masts built up solidly from the bottom to the top and so riveted that there is no way of taking them down and the mainmast requires one hundred and forty-five feet of clear space to pass under any obstruction, which is more than the height at dead low water of the Brooklyn Bridge over the East River, charterers have no right to order the vessel to discharge at a dock above the Brooklyn Bridge; and if the vessel discharges by lighterage from the most convenient place below the bridge, the charterers must pay the expense of lighterage from the vessel to the dock. Under the above conditions it is not a just exercise of the right given to the charterers by the charter party to select a dock in getting to which the vessel could not always be afloat or to which she could not safely get. Under such circumstances the vessel is not obliged to sail around Long Island and thus reach the dock above the bridge by coming through Long Island Sound and Hell Gate. *Mencke* v. *Cargo of Java Sugar*, 248.

STARE DECISIS.

See COURTS, 10.

STATES.

See BONDS;
POLICE POWERS OF STATES;
TAXATION.

STATUTES.

A. IN GENERAL.

1. There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience. *Bird* v. *United States*, 118.
2. The validity of a Wisconsin statute in respect of regulating the transaction of business of a foreign corporation within the State by conditions precedent, is not effected by the invalidity of a provision relating to partnerships where such provision is separable and its invalidity without effect upon the remainder of the act. *Diamond Glue Co.* v. *United States Glue Co.*, 611.

B. STATUTES OF THE UNITED STATES.

C. STATUTES OF THE STATES AND TERRITORIES.

SURVEYS.

TAXATION.

TAX SALE.

The statutes of West Virginia in regard to the sale of land for unpaid taxes require certain proceedings to be taken by the sheriff, but do not require the sheriff to show in his return that he has complied with these requirements; the statutes also make the deed given by the sheriff *prima facie* evidence that the material facts therein recited are true. *Held* that the effect of these statutes is to change the burden of proof which rested at common law upon the purchaser at a tax sale to show the regularity of all proceedings prior to the deed and to cast it upon the party who contests the sale. *Turpin* v. *Lemon*, 51.

TERRITORIAL LAWS.

1. Under the Act of Congress of May 2, 1890, the laws of Arkansas respecting assignments for the benefit of creditors, as well as the statute of frauds, are extended and put in force in the Indian Territory. In adopting these laws the courts of the Indian Territory are bound to respect the decisions of the Supreme Court of Arkansas interpreting them. *Robinson & Co.* v. *Belt*, 41.
2. Under §§ 3950, 3951 and 3955 of the statutes of Oklahoma where a judgment of foreclosure and sale of land in Oklahoma Territory is based upon service of the summons by publication, the facts tending to show the exercise of due diligence in attempting to serve the defendant within the Territory must be disclosed in the affidavit on which the order for service by publication is based. *Romig* v. *Gillett*, 111.
3. But where a publication has been made, approved by the court and a decree entered thereon, and the mortgagee put in possession thereunder, the mortgage not having been paid, and the mortgagee has improved the property, § 4498 of the statutes of Oklahoma will protect the mortgagee in possession, and equitable principles must control the measure of relief to which the defendant is entitled, and while she will be given the right to appear, plead and make such defence as under the facts and principles of equity she is entitled to, the possession of the mortgagee will not be disturbed in advance of such defence. *Ib.*

TRADE MARK.

When the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark or in his advertisements and business, be himself guilty of any false or misleading representation, and if he makes any material false