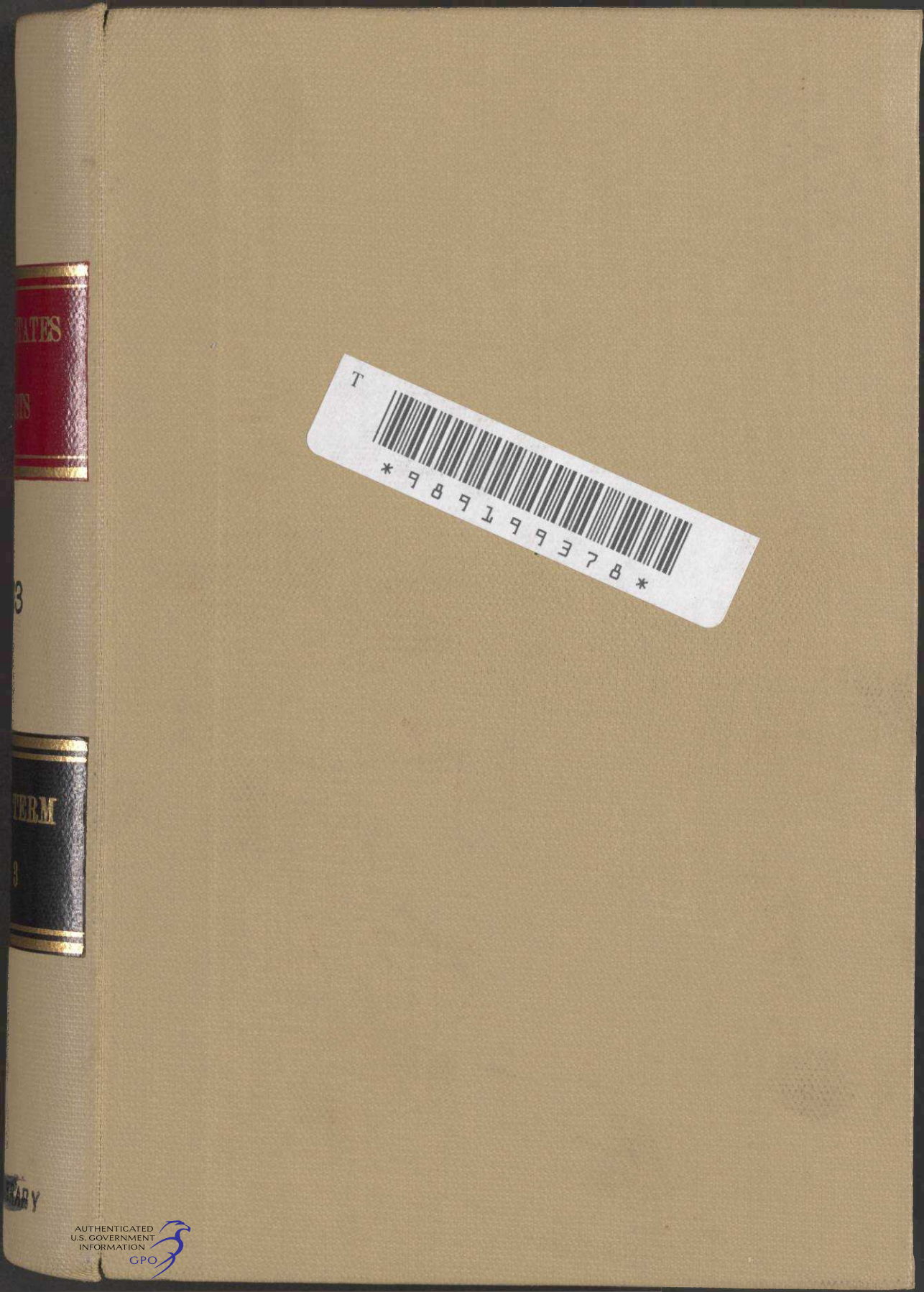
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UNITED STATES REPORTS

VOLUME 193

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1903

CHARLES HENRY BUTLER

REPORTER

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1904

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.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.

PHILANDER CHASE KNOX, Attorney General.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CITED IN OPINIONS.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1903.

UNITED STATES *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 145. Argued January 5, 1904.—Decided February 23, 1904.

The act of July 2, 1864, granting lands to the Northern Pacific Railroad Company did not take any lands out of the disposition of Congress until the line of the road was definitely located by maps duly required by the act, and it has been decided by this court that the Perham map of 1865 even if valid as a map of general route did not operate as a reservation.

When Congress by resolution of May 31, 1870, made an additional grant to the Northern Pacific Railroad Company for a branch road to Puget Sound *via* the valley of the Columbia, the United States still had full title not reserved, granted, sold or otherwise appropriated to the lands of the new grant which fell within the lines of the former grant and on completion of the branch road the railroad company was entitled to a patent for such over-lap of said lands as it had earned. *United States* v. *Oregon & Cal. R. R. Co.*, 176 U. S. 28, followed.

THIS was a suit brought by the United States against the Northern Pacific Railroad Company and the Northern Pacific Railway Company to cancel patents issued in May, 1895, by the United States to the railroad company, to whose rights the railway company had succeeded. The lands are situated in the State of Washington, north of Portland, in the State of Oregon. The case was heard in the Circuit Court on facts stipulated and the bill dismissed, whereupon it was carried to the Circuit Court of Appeals for the Ninth Circuit, and that

court certified to this court certain questions on which it desired instructions. The whole record and cause were then required to be sent up for consideration.

Mr. Charles W. Russell, Special Assistant Attorney General, for the United States:

The facts differ from those in the *Oregon and California Case*, 176 U. S. 28, for in this case there is no overlap but a peculiar single scheme concerning one road and one grantee. Every granting act is a separate law, and its intent is to be separately inquired into. The government is equitably entitled to some quadrangle as falling within the grant of 1864. Congress expected in 1870 that one whole road would be built, and had no expectation that a failure would occur at any particular point. The maps of 1865–1870, sufficiently identified the grant of 1864 as between grantor and grantee to exclude the lands from the grant of 1870.

The railroad company is estopped. What is not clearly granted belongs to the government and must not be patented away. Doubt must make the grant fail. *United States* v. *Southern Pacific*, 146 U. S. 598.

Under the resolution of 1870, no grant was made of any lands except those free from claims or rights at the time of definite location. See *Northern Pacific R. R.* v. *Musser-Sauntry Co.*, 168 U. S. 608; *Northern Pacific R. R.* v. *Sanders*, 166 U. S. 620; *Newhall* v. *Sanger*, 92 U. S. 761; *Southern Pacific* v. *United States*, 189 U. S. 447. The Perham map was the general route of the main line; the withdrawal requested thereon constituted a claim. If this claim existed under the grant of 1864, the new grant did not embrace these claimed lands. *United States* v. *Northern Pacific Ry.*, 152 U. S. 294; *Northern Pacific Ry.* v. *DeLacey*, 174 U. S. 628; *Sioux City R. R.* v. *United States*, 151 U. S. 349, distinguished.

After withdrawal and general route map substantial rights to particular lands vest, there is no longer a float, the lands cease to be public and are not intended to pass under the usual language in subsequent grants.

Float is not a statutory word, but is a mere convenient

phrase to signify something floating or in the air. The idea may have originated in the old case of *Rutherford* v. *Green*, 2 Wheat. 196, in which the grant to General Green of a quantity of lands in Ohio was held to pass the title *in præsenti*, but required identification of the lands to make it apply to particular lands. In the earliest railroad cases in which we find the word "float," *Railroad Co.* v. *Fremont County*, 9 Wall. 89, 94; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Schulenburg* v. *Harriman*, 21 Wall. 44; *Leavenworth &c. R. R. Co.* v. *United States*, 92 U. S. 733; *Missouri, K. &c. R. R. Co.* v. *Kansas Pacific*, 97 U. S. 491; *R. R. Co.* v. *Baldwin*, 103 U. S. 426; *Grinnell* v. *R. R. Co.*, 103 U. S. 739; *Van Wyck* v. *Knevals*, 106 U. S. 360; *St. Paul R. R.* v. *Winona*, 112 U. S. 720, the grant was made and the line of the road was to be "definitely fixed," without always saying how. The court said that there was a float until this definite fixing.

And see also *Newhall* v. *Sanger*, *supra*; *Shiver* v. *United States*, 159 U. S. 633. As to effect of the filing a general map, see besides cases already cited, *Kansas Pacific* v. *Dunmeyer*, 113 U. S. 629; *Walden* v. *Knevals*, 114 U. S. 373; *Wisconsin Central R. R.* v. *Price County*, 133 U. S. 496; *St. P. & Pacific* v. *Northern Pacific*, 139 U. S. 1; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 245; *Sioux City Land Co.* v. *Griffey*, 143 U. S. 32; *The Buttz Case*, 119 U. S. 604.

When the grant of 1870 was definitely located the grant of 1864 was not a float, but an effective grant of particular lands. Cases *supra*, and *Menotti* v. *Dillon*, 167 U. S. 703.

The rights granted and vested under the act of 1864 were forfeited in such a way as to benefit the Government and not to cause the enlargement of other grants.

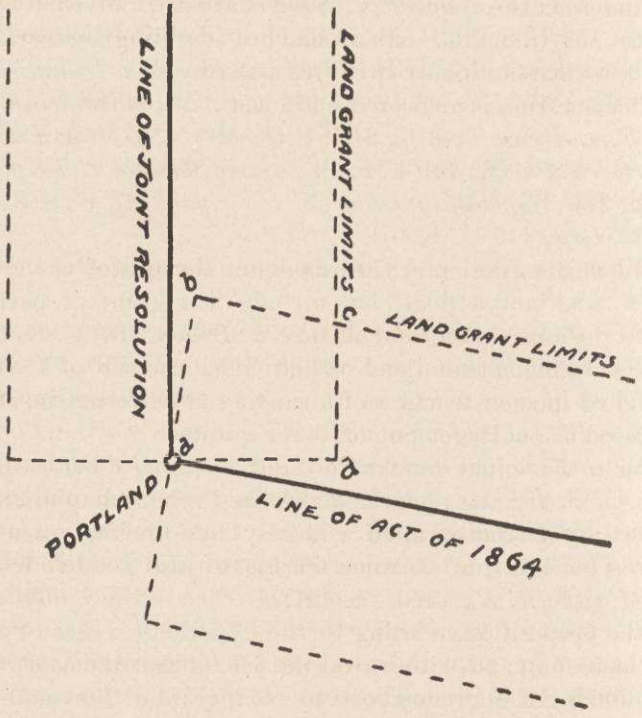
As to the actual decision in the *Oregon and California* case, 176 U. S. 28, the remarks about the Perham map are accompanied by a remark upon a merely hypothetical case which should not overrule other decisions. See also *Doherty* v. *Northern Pacific R. R.*, 177 U. S. 421.

The proposition, relating to the hypothetical case of a good Perham map and withdrawal in 1865, is that the court would, in allowing the Oregon road to get a grant at Portland by the

grant of 1866, be overruling the general doctrine, so well settled, that a doubt is fatal to the grantee. "Silence is negation and a doubt is fatal to the claim." *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 1; *Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S. 429; *Leavenworth R. R.* v. *United States*, 92 U. S. 740; *Dubuque and Pac. R. R. Co.* v. *Litchfield*, 23 How. 66, 88; *Matter of Northern Pacific R. R. Co.*, and see 31 Land Decision 34, and cases there cited.

Mr. Charles W. Bunn for appellees:

The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the additional grant of 1870. For that reason the two grants overlapped north of Portland as illustrated in the following diagram:



The "overlap" in the foregoing diagram is the area included within lines ab, bc, cd and da. It contains the lands in suit.

The question being, whether these lands were, on May 31, 1870, reserved or appropriated by virtue of the grant of July 2, 1864, or by virtue of any map filed or act taken under the grant, so that they did not pass under it, it is to be noted that the *grant itself* did not reserve the lands.

The *settled* construction of this grant is that it did not reserve or appropriate any land, or take it out of the disposing power of Congress, until the line of road was *definitely* located by map filed as the act requires. *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620, 634, 636; *Menotti* v. *Dillon*, 167 U. S. 703, 720; *United States* v. *Oregon, etc., R. Co.*, 176 U. S. 28, 43; *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S. 108, 119.

Therefore the inquiry is further narrowed to whether the line from Wallula to Portland had been definitely located when the Joint Resolution of 1870 was passed.

This question is answered in the negative by the *Oregon and California* case, 176 U. S. 28; *Doherty* v. *Northern Pacific R. R.*, 177 U. S. 421, 432; *Wisconsin Central R. R.* v. *Forsythe*, 159 U. S. 46.

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

By the act of Congress of July 2, 1864, 13 Stat. 365, c. 217, a grant was made to the Northern Pacific Railroad Company in aid of the construction of a railway from Lake Superior to some point on Puget Sound, with a branch *via* the Columbia River to a point at or near Portland, Oregon, of lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

On May 31, 1870, Congress passed a joint resolution making an additional grant to the same company for the location and

construction of "its main road to some point on Puget Sound *via* the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." 16 Stat. 378.

The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the joint resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap.

But the line down the Columbia from Wallula to Portland was never built and the grant was forfeited September 29, 1890, 26 Stat. 496, c. 1040, while the line from Portland to Puget Sound and east across the Cascade Mountains was built and the grants earned.

Holding that the lands in the overlap passed to the company under the resolution of 1870, the Interior Department patented those in question to the railroad company, but afterwards, and on July 18, 1895, it was held that the lands did not pass under that grant, because at its date they were reserved or appropriated under the grant of 1864 to the same company. 21 L. D. 57.

That grant did not in terms reserve the lands, and the question would seem to be whether the line down the Columbia from Wallula to Portland had been definitely located May 31, 1870, since it is settled that the act of 1864 did not take any lands out of the power of disposition of Congress until the line of road was definitely located by maps duly filed as required. *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620; *United States* v. *Oregon & California R. R. Co.*, 176 U. S. 28. The argument that the topography of the country between Wallula and Portland was such that the lands necessarily fell within the boundaries of that grant is without merit, for it cannot be assumed that Congress intended itself to definitely locate that part of the line in view of the language used and the settled law on the subject.

And it does not appear that any portion of the line from Wallula to Portland was ever definitely located, but it does

appear that the line from Portland to Puget Sound was definitely located under the resolution of May 31, 1870, in part September 13, 1873, and the remainder September 22, 1882; that the road was completed as located, and was accepted by the government.

It is true that, March 6, 1865, Josiah Perham, then president of the Northern Pacific Company, transmitted to the Secretary of the Interior a map of the general line of the road, which the Secretary transmitted to the Commissioner of the General Land Office, with the recommendation that the lands along the line indicated be withdrawn. But the Commissioner protested against the acceptance of the map, and his letter to the Secretary, giving his reasons, bears an endorsement in pencil to the effect that the refusal to accept was sustained by the Secretary.

The by-laws of the company showed no authority in its president to locate the line, and its records, up to May 18, 1865, showed no action conferring such authority. No withdrawals were made under the alleged map.

In *United States* v. *Oregon & California R. R. Co.*, *supra*, it was held that if the Perham map were valid as a map of general route, it did not operate as a reservation, and in *Doherty* v. *Northern Pacific Railway Company*, 177 U. S. 421, it was referred to as if not constituting a location even of the general route. It was not authorized by the company, was not accepted by the Department, and was practically worthless.

It is also true that on July 30, 1870, two maps of general route were transmitted to the Secretary, one of them showing a line extending from the mouth of the Montreal River, Wisconsin, to a point at the mouth of the Walla Walla River in Washington; and the other from the mouth of the Walla Walla, extending down the valley of the Columbia River to a point near Portland, and thence northerly to a point on Puget Sound. Withdrawals along the route so designated were directed, and so far as the line from Portland to Puget Sound was concerned the withdrawals must have been under the resolution. And the lands in suit are opposite to that part of the line.

The Circuit Court of Appeals in its certificate states that it appears to that court "that the case presents issues and facts identical with those which were involved in the case of the *United States* v. *The Oregon & California Railroad Company*, decided by the Supreme Court of the United States and reported in 176 U. S. 28, with this difference, that the defendant, the Northern Pacific Railroad Company, is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to, unless the fact that the Northern Pacific Railroad Company, by reason of being the grantee of both said land grants, is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864."

The contention in the case thus referred to was that the lands there in controversy, which had been patented to the Oregon and California Railroad Company, were reserved and appropriated for the benefit of the Northern Pacific Railroad Company under the act of July 2, 1864, and by reason of the filing of the Perham map. By the act of July 25, 1866, Congress made a grant of lands in aid of the construction of a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California. That grant was in the usual terms employed in such acts. Subsequently the benefit of the grant as to that part of the road to be constructed in Oregon was conferred upon the Oregon Central Railroad Company. The lands in dispute, whether place or indemnity, were within the limits of the grant of 1866. The entire line of road of the Oregon and California Railroad Company, which was the successor of the Oregon Central Railroad Company, was fully constructed and duly accepted by the president, and at the time the suit was begun was being operated and had been continuously operated by that company. The Oregon company filed its map of definite location in 1870, and it was accepted by the Land Department. There was no withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Portland, nor was

there any definite location or construction of its road opposite to the lands in suit. The forfeiture act was passed September 29, 1890. It was held that nothing in the act of 1864 stood in the way of Congress subsequently granting to other railroad corporations the privilege of earning any lands that might be embraced within the general route of the Northern Pacific Railroad; and that, as the grant contained in that act did not include any lands that had been reserved or appropriated at the time the line of the Northern Pacific Railroad was definitely fixed, which it had not been at the time the act of July 25, 1866, was passed, or when the line of the Oregon company was definitely located; as the lands in dispute were within the limits of the grant contained in the act of 1866, and the road of the Oregon railroad was definitely fixed at least as early as January 29, 1870, the Northern Pacific Railroad Company having done nothing prior to the latter date, except to file the Perham map of 1865, which map was not one of definite location and was not accepted; and as, prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there was no escape from the conclusion that the lands were lawfully earned by the Oregon company and were rightfully patented to it.

We do not think the fact that the Northern Pacific Company was the grantee in both grants limits the force of this decision. The resolution of 1870 and the act of July 2, 1864, were *in pari materia*, and no reason is perceived for holding that the act operated to exclude from the subsequent grant by the resolution.

In *Wisconsin Central Railroad Company* v. *Forsythe*, 159 U. S. 46, two grants had been made to the State of Wisconsin, in 1856 and 1864, for the benefit of two railroad companies, and there had been a withdrawal of indemnity lands of the one grant, which conflicted with the subsequent place grant, and we held that as both grants were to the State, although one grant had been conferred on one company, and the other on another, the lands in dispute were not excepted from the later grant; and Mr. Justice Brewer, speaking for the court, said: "For whose

benefit was the withdrawal of the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: we do not know whether, along the line of road, when you finally locate it, there will be six alternate sections free from any preëmption or other claim, and, therefore, so situated that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of nine miles on either side that within those nine miles you may select whatever lands may be necessary to make the full quota of six sections per mile. When Congress, by a subsequent act, makes a new and absolute grant to the same grantee of lands thus held by the Government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands?"

As to the maps of general route of July 30, 1870, they were filed two months after the date of the resolution, were not maps of definite location, and included the line authorized by the resolution. These lands were opposite to part of that line, and all the unappropriated odd sections so situated, within the prescribed limits, were granted.

The decree of the Circuit Court is *Affirmed.*

MR. JUSTICE MCKENNA took no part in the decision of this case.

CARSTAIRS *v.* COCHRAN.

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

No. 122. Argued January 13, 14, 1904.—Decided February 23, 1904.

That a statute does not conflict with the constitution of a State is settled by the decision of its highest court.

A State may tax private property having a *situs* within its territorial limits and may require the party in possession of the property to pay the taxes thereon.

Distilled spirits in bonded warehouses may be taxed and the warehouseman

required to pay the tax notwithstanding the Federal statute under which they are stored permits them to remain in bond for several years and there is no provision in the state law for the recovery of interest on the taxes paid thereunder, and negotiable receipts have been issued for the goods.

By Chap. 704 of the Laws of Maryland, 1892, as amended by chap. 320, Laws, 1900, the general assembly of that State provided for the assessment and collection of taxes on liquors in bonded warehouses within the State. The proprietors of such warehouses were required to pay the taxes and given a lien on the property therefor. This legislation was sustained by the Court of Appeals of the State, 95 Md. 488, to review whose judgment this writ of error was sued out.

Mr. D. K. Este Fisher, with whom *Mr. W. Cabell Bruce* was on the brief, for plaintiff in error:

As to the jurisdiction: The highest court of the State decided against plaintiff in error as to constitutionality of statute, *Chapman* v. *Goodnow*, 123 U. S. 548; the point was made in both courts that the act was not unconstitutional and it appears in the briefs. *N. Y. C. & H. R. R. Co.* v. *New York*, 186 U. S. 273.

It is not necessary that the Constitution of the United States should be expressly named or referred to in the record. It is sufficient if the record shows that a constitutional question was involved—that the plaintiff in error relied upon a right guaranteed by that instrument. *Wilson* v. *The Blackbird &c.*, 2 Peters, 250; *Satterlee* v. *Matthewson*, 2 Peters, 409; *Beer Co.* v. *Massachusetts*, 97 U. S. 29; *Furman* v. *Nichol*, 8 Wall. 56; *Crowell* v. *Randall*, 10 Peters, 166; *Tregea* v. *Modesto &c.*, 164 U. S. 185; *Craig* v. *Missouri*, 4 Pet. 410; *Bells Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 236; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 417; *Lewis* v. *Emigrant &c.*, 1 Fed. Rep. 668.

Every system of law provides that every man shall be protected in the enjoyment of his property, and that it shall not be taken from him without just compensation. The earliest constitutions, in Magna Charta, guarantee that no freeman

shall be disseized of his freehold but "by the judgment of his peers or by the law of the land." 10 Am. & Eng. Ency. of Law (2d ed.), 290.

It is clearly not within the scope of the legislative power to give to a law the effect of taking from one man his property and giving it to another. *Thistle* v. *Frostberg Coal Co.*, 10 Maryland, 144; *Hartman* v. *Greenhow*, 102 U. S. 684; *Camp* v. *Rogers*, 44 Connecticut, 291.

The act of 1892, ch. 704, violates the fundamental principle of the right of persons to be secure in the possession and enjoyment of their property if the act is to be considered as applicable to spirits belonging to others in bonded warehouses of the distiller. The court took the contrary view in *Monticello Distilling Co.* v. *Baltimore*, 90 Maryland, 416, and *Kemp* v. *Fowble*, 92 Maryland, 8, because the act, though requiring the distiller or warehouseman to pay the taxes of other persons unknown to them, gives a lien upon the spirits for the payments so made.

The warehouseman, however, cannot enforce the lien because there is a certificate, the title paper of ownership of the spirits, in the hands of some one unknown, stating upon its face, over the signature of the warehouseman, that the spirits are in the warehouse, to be delivered to the bearer of it on presentation, as to which see §§ 1 and 6, art. 14, Code of Public Laws of Maryland.

The attempt to enforce the lien before the owner of the spirits produced the warehouse receipts would, therefore, necessitate a breach of faith and contract on the part of the warehouseman and subject him to a fine and imprisonment in the penitentiary, unless the act of 1892 could be considered as relieving the warehouseman from these penalties and authorizing him to ignore his warehouse receipts and to withdraw the spirits at any time to enforce the lien. But the act does not so provide. It could not authorize a breach of contract.

The lien also cannot be enforced because no spirits are permitted by the United States to leave the warehouse until the Government tax of $1.10 per gallon has been paid. So that even if he had the warehouse certificate he would be obliged

to pay an enormous tax to the Government in order to collect the smaller tax he pays the State and county or city. Art. 81, §§ 138, 141, Code of Public General Laws of Maryland.

There is a great difference between that case and this. The warehouseman has no funds of the owner of the spirits out of which he can pay the tax, but must pay it out of his own funds, whereas the stockholder is the owner of an undivided interest in all the corporate property and assets.

The corporation is also the creature of the State. *New Orleans* v. *Houston*, 119 U. S. 265, distinguished. In *Commonwealth* v. *Gaines*, 80 Kentucky, 489; and *Commonwealth* v. *Taylor*, 101 Kentucky, 327, the statutes were similar but the constitutional questions were not raised.

While the distiller might frame his contracts to meet the provisions of this act, a tax statute which imposes upon a contracting party the necessity of abandoning the usual mode of conducting his business and burdening his contracts with such stipulations cannot be within the constitutional powers of the legislature. It is an unreasonable interference with the freedom of contract. *People* v. *Budd*, 117 N. Y. 15; *Frisbie* v. *United States*, 157 U. S. 165.

Mr. O. I. Yellott and *Mr. D. G. McIntosh* for defendant in error:

As to jurisdiction: The record does not disclose a case in which a Federal question was involved at the trial in the state court. To sustain the writ the record must show that such question not only might have been, but actually was, raised and decided adversely to the plaintiffs in error. *Gray* v. *Coan*, 154 U. S. 589; *Kansas E. & B. Association* v. *Kansas*, 120 U. S. 103; *Sayward* v. *Denny*, 158 U. S. 180; *Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *Mallott* v. *North Carolina*, 181 U. S. 589; *England* v. *Gebhardt*, 112 U. S. 504; *Chapin* v. *Fye*, 179 U. S. 129; *Kipley* v. *Illinois*, 170 U. S. 182; *Miller* v. *Cornwall*, 168 U. S. 131; *Levy* v. *San Francisco &c.*, 167 U. S. 175; *Bolln* v. *Nebraska*, 176 U. S. 90.

It must also appear of record that the Federal question was specially, or specifically, set up, or claimed in the state court,

at the proper time and in the proper way. *Ex parte Spies*, 123 U. S. 131; *French* v. *Hopkins*, 124 U. S. 524; *Chappel* v. *Bradshaw*, 128 U. S. 132; *Chicago & N. W. R. R.* v. *Chicago*, 164 U. S. 454; *Clark* v. *McDade*, 165 U. S. 168; *Erie R. Co.* v. *Prudy*, 185 U. S. 148; *N. Y. C. & H. R. R. Co.* v. *New York*, 186 U. S. 269.

A Federal question cannot be raised for the first time, after final decision in the state court for the purpose of supporting a writ of error. *Scudder* v. *Coler*, 175 U. S. 32; *California National Bank* v. *Thomas*, 171 U. S. 441; *England* v. *Gebhardt*, 112 U. S. 504.

This court will not declare a state law void on account of its collision with a state constitution or bill of rights, it not being a case embraced in the Judiciary Act. *Medberry* v. *Ohio*, 24 Howard, 413; *Salamon* v. *Graham*, 15 Wallace, 208.

When the decree of a state court turns upon its construction of a state statute, and not upon its constitutionality, this court will not take jurisdiction. It is the peculiar province and privilege of the state court to construe statutes of its own State. *Commercial Bank* v. *Buckingham*, 5 Howard, 317; *Adam* v. *Preston*, 22 Howard, 473; *Lent* v. *Tilson*, 140 U. S. 316; *Striker* v. *Goodwin*, 123 U. S. 527; *Morley* v. *Lake Shore, etc.*, 146 U. S. 162.

A question of state law alone does not present a Federal question so as to give this court jurisdiction over a state judgment. *Hoyt* v. *Thompson*, 1 Black, 518; *Congdon* v. *Goodman*, 2 Black, 574; *Serial* v. *Haskell*, 14 Wallace, 12; *United States* v. *Thompson*, 93 U. S. 586; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, distinguished.

As to the merits: The highest court of the State has declared for the third time that the law itself did not infringe any constitutional right. *Monticello Co.* v. *Baltimore*, 90 Maryland, 416; *Fowble* v. *Kemp*, 92 Maryland, 630; *Carstairs* v. *Cochran*, 95 Maryland, 488.

A similar statute has been sustained in Kentucky. *Commonwealth* v. *Gains*, 80 Kentucky, 481.

If the contention of the plaintiff in error prevails and the Maryland statute be declared unconstitutional, the effect will

be to exempt from taxation a large amount of property which peculiarly invites and enjoys the protection of law. But protection implies taxation and the two are reciprocal.

Distilled spirits are goods and commodities and form a proper subject for taxation; and a State has the power to tax all property having a situs within its territorial limits. *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Fichlen* v. *Shelby Co. Tax District*, 145 U. S. 1; *P. & S. C. Co.* v. *Bates*, 156 U. S. 577; *Myers & Housman* v. *Baltimore*, 83 Maryland, 385; *Hopkins* v. *Baker*, 78 Maryland, 363; *Howell* v. *State*, 3 Gill, 23.

Having the power, it becomes the duty of the State to impose taxes so that they bear equally upon all persons, and this can only be done by subjecting to taxation all property not legally exempt. Art. 15, Decl. of Rights, Const. of Maryland; and such is the rule, approved alike by economists and jurists. Adam Smith's Wealth of Nations, Bk. 5, ch. 2, pt. 2, page 651; Vattel, Law of Nations, Bk. 1, ch. 20, sec. 240; Cooley's Constitutional Limitations (6th ed.), ch. 14, page 607; *People* v. *New York City*, 76 N. Y. 64.

It is for the law-making power to determine all questions of discretion or policy in ordering and apportioning taxes, and to make all necessary rules and regulations, and decide upon the mode by which the taxes shall be collected. Cases *supra* and Story on Conflict of Laws, § 550. *Jennings* v. *Coal Ridge Imp. Co.*, 147 U. S. 147.

The construction given by the Maryland court in 90 Maryland, 416, 92 Maryland, 630, and 95 Maryland, 488, to the act of 1892, chapter 704, providing for the collection of taxes on distilled spirits, is in entire harmony with its previous rulings upon similar questions. *U. S. Electric Power & Light Co.* v. *State*, 79 Maryland, 63; *Casualty Ins. Co. Case*, 82 Maryland, 564; *Am. Coal Co.* v. *County Commissioners*, 59 Maryland, 194; *Nevada Bank* v. *Sedgwick*, 104 U. S. 111. The most recent decision in Maryland is the case of *Corry* v. *Baltimore*, 96 Maryland, 310. The views expressed by the court in that case were held to be in harmony with the following Federal decisions: *New Orleans* v. *Stempel*, 175 U. S. 309; *Savings &*

Loan Society v. *Multnomah County*, 169 U. S. 421; *McCulloch* v. *Maryland*, 4 Wheaton, 316; *Coe* v. *Errol*, 116 U. S. 517; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 111; *Kirtland* v. *Hotchkiss*, 141 U. S. 591; *Bristol* v. *Washington Co.*, 177 U. S. 139.

Mr. Justice Brewer delivered the opinion of the court.

That the statutes in question do not conflict with the Constitution of Maryland is settled by the decision of its highest court. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 566; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200.

A State has the undoubted power to tax private property having a situs within its territorial limits, and may require the party in possession of the property to pay the taxes thereon. "Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319. "Statutes sometimes provide that tangible personal property shall be assessed wherever in the State it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the State or not." 1 Cooley on Taxation, 3d ed., p. 653. See also *Coe* v. *Errol*, 116 U. S. 517; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 123; *Pullman's Car Company* v. *Pennsylvania*, 141 U. S. 18; *Ficklin* v. *Shelby County*, 145 U. S. 1, 22; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 427; *New Orleans* v. *Stempel*, 175 U. S. 309; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461.

That under Federal legislation distilled spirits may be left in a warehouse for several years, that there is no specific provision in the statutes in question giving to the proprietor who pays the taxes a right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been is-

sued, do not affect the question of the power of the State. The State is under no obligation to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein, but it is their business, if they wish further protection than the lien given by the statute, to make their contracts accordingly.

We see no error in the judgment of the Court of Appeals, and it is

Affirmed.

GRAND RAPIDS AND INDIANA RAILWAY COMPANY *v.* OSBORN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 61. Argued November 6, 1903.—Decided February 23, 1904.

Where the determination by the state court of an alleged ground of estoppel embodied in the ground of demurrer to an answer necessarily involves a consideration of the claim set up in the answer of a contract protected by the Constitution of the United States, a Federal question arises on the record which gives this court jurisdiction.

Provisions in the railway law of Michigan of 1873, for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract within the impairment clause of the Constitution of the United States. *New York* v. *Cook*, 148 U. S. 397.

Purchasers of a railroad, not having any right to demand to be incorporated under the laws of a State, but voluntarily accepting the privileges and benefits of an incorporation law, are bound by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporation.

THIS is a writ of error to review a judgment of the Supreme Court of the State of Michigan, which affirmed an order of the Circuit Court of Kent County, Michigan, awarding a peremptory writ of mandamus. By the writ the plaintiff in error was, in effect, commanded to reduce its rates for the transportation of passengers over its lines of railroad from

three cents per mile to two and one-half cents per mile, as required by an act of the legislature of Michigan known as Act 202 of the session of 1889.

The Grand Rapids and Indiana Railroad Company was the original owner of the road in question. That company was incorporated under the laws of Michigan and Indiana in 1870, and its line of railroad was constructed and put into operation before January 1, 1873. It also owned and operated in Michigan a number of short branch lines and several leased lines; and its mileage in Michigan exceeded three hundred miles. During the period between the incorporation of the company and the construction of its road, railroad companies which were operating in Michigan were authorized to regulate the tolls and compensation to be paid for the transportation in that State of persons and their baggage, but the charge which might be made for such transportation was limited to three cents per mile on roads over twenty-five miles in length. The Michigan statutes also contained provisions authorizing the execution of mortgages and the issue of bonds by railroad corporations. By Act 198, of the session of 1873, the laws relating to railroads were revised, and such revision with amendments is still in force. Compiled Laws of Michigan, 1897, c. 164, pp. 1937–2000. It was therein provided that corporations organized under a prior general railroad law "shall be deemed and taken to be organizations under this act." By subdivision ninth of section 9 of article II the maximum charge which railroad corporations might make for the transportation of passengers and their ordinary baggage on roads exceeding twenty-five miles in length was fixed at three cents per mile. Power was also conferred upon railroad companies to borrow money, issue bonds or other obligations therefor, and to mortgage their corporate property and franchises, and the income thereof, or any part thereof, as security. Section 2 of article I of the act was as follows:

"In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed, or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall

be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; and such corporation, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by virtue of a declaration or certificate of the purchasers at the sale under said mortgage or trust deed, which shall set forth the description of the property sold, and the date of the deed under which it was sold, or the decree of the proper court, if it shall have been sold by virtue of a decree of any court, and with such description of the parties to the deed or suit as may identify the one or the other, or both; the time of the sale, and the name of the officer who sold the same; and also the purchasers, and the amount paid, and the stockholders to whom stock is to be issued, and the amount of the capital stock and the name of the new corporation, and such other statements as may be found requisite to make definite the corporation whose property may have been sold, and the property sold, as well as the extents and rights and property of the new company; which said certificate or declaration shall be signed by all of the said purchasers and shall be addressed to the Secretary of State; and being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject, and a certified copy of the said certificate or declaration shall be *prima facie* evidence of the due organization of said company."

There was also a general provision that the act might be altered, amended or repealed, but that such alteration, amendment or repeal "shall not affect the rights of property or companies organized under it."

In 1884 the Grand Rapids and Indiana *Railroad* Company executed a second mortgage upon its railroad property to

secure an issue of three million dollars of bonds. While this mortgage was in force, and in the year 1889, subdivision ninth of section 9 of article II of the general railroad law of 1873—the section containing an enumeration of powers conferred upon railroad corporations—was amended to read as follows:

"Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz: for a distance not exceeding five miles, three cents per mile; for all other distances, for all companies, the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies, the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile, as hereinbefore provided: *Provided*, That roads in the Upper Peninsula which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads re-

porting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile. . . ."

The mortgage of 1884 was foreclosed; and, in 1896, under decrees of Circuit Courts of the United States, the property covered by such mortgage was sold to John C. Sims, subject to a prior mortgage securing a large issue of outstanding bonds. Sims and his associates subsequently executed the certificate authorized by and complied with all the requirements mentioned in section 2 of article I of the general railroad law of 1873 aforesaid, and by virtue thereof the plaintiff in error came into existence and took control of the railroad property in question. It continued to exact a charge for the transportation of passengers and their ordinary baggage of three cents per mile.

In a statutory report made in 1891 by the plaintiff in error to the commissioner of railroads of Michigan it was represented that the gross earnings in Michigan of the passenger trains on its lines of railroad exceeded $2,000 per mile of road operated. Thereupon said commissioner notified plaintiff in error to reduce its rates on passenger traffic to two and one-half cents per mile for distances exceeding five miles. The order not being obeyed, a proceeding in mandamus was instituted to compel compliance. In its answer to the rule to show cause the company specially set up the claim that, so far as it was concerned, the statute was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and also violated the commerce clause of the Constitution of the United States. It recited the cost to the plaintiff in error of the property indirectly acquired by it under the foreclosure, the amount of outstanding capital stock, the bonded indebtedness of the road and the annual interest on such bonded debt; and represented that the income from passenger traffic which would be received if it put in force the reduced rates would leave but a trifling surplus after deduction of reasonable operating expenses, interest on debt and other fixed charges. It was also averred in support of the charge that the act was repugnant to the commerce clause of the Constitution of the United States, that the gross receipts from passenger traffic in Michigan forming the basis of the

proposed reduction in rates included receipts from interstate traffic, and that if such interstate traffic receipts were included the gross receipts would be less than $2,000 per mile, and hence the reduced rates would not be enforcible.

On the hearing of the order to show cause it was contended on behalf of the relator that the railroad company, by incorporating under the law which embodied the provisions complained of, thereby entered into a contract with the State to carry passengers at the rate fixed in the statute. By leave a demurrer was filed to the answer, the single ground stated in support thereof being the following:

"That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated."

The Circuit Court sustained the demurrer, and awarded a peremptory mandamus commanding the railway company to "forthwith and hereafter issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles." The record by writ of certiorari was removed to the Supreme Court of Michigan. In that court leave was given to add to the demurrer the following additional ground, viz: "2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section 9 of article II of that law, said provision in regard to rates being one of the conditions of the existence of respondent." Waiving a decision of the first ground of demurrer, the order awarding a peremptory writ of mandamus was affirmed upon the second ground just recited. 130 Michigan,

248. By writ of error the judgment of affirmance has been brought here for review.

Mr. Thomas J. O'Brien, with whom *Mr. James H. Campbell* was on the brief, for plaintiff in error:

The rate in question is unreasonable as matter of fact. It is admitted by the demurrer to the answer. *Covington & Lexington T. R. Co.* v. *Sanford*, 164 U. S. 578, 592.

The enforcement of that rate upon the plaintiff in error would deprive it of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment, section 1. *Chicago, Mil. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Minneapolis Eastern R. Co.* v. *Minnesota*, 134 U. S. 467; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, and the cases following it in 154 U. S.; *Smyth* v. *Ames*, 169 U. S. 466; *L. S. & Mich. S. R. Co.* v. *Smith*, 173 U. S. 684; *Chicago, Mil. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339.

The statute prescribing maximum rates of passenger fares as construed by the Supreme Court of that State is repugnant to the Fourteenth Amendment. *Wellman case*, 83 Michigan, 592; *Wabash case*, 123 Michigan, 669; *S. C.*, 126 Michigan, 113, held that the legislature is the final and exclusive judge of what are reasonable rates and that the reasonableness of rates fixed by statute is not open to review or inquiry in the courts. The law is that reasonableness of rates prescribed by statute is one for judicial determination. *C. M. & St. Paul R. Co.* v. *Minnesota*, 134 U. S. 418, 457; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 397; *St. L. & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 657; *Smyth* v. *Ames*, 169 U. S. 466, 527.

The method of establishing rates, undertaken by the Michigan statute, has all the features of the Minnesota plan, for which the latter was condemned, and to a more objectionable degree. The Michigan statute neither contemplates nor allows any inquiry regarding the reasonableness of the rates.

The statute violates the commerce clause of the Constitution and attempts to regulate interstate commerce. In esti-

mating earnings interstate fares earned are included. *Commissioner* v. *Wabash R. Co.*, 126 Michigan, 113.

It is not competent to consider interstate business in determining the reasonableness of statutory rates for local fares, and it is much less competent to actually include interstate earnings, or any part of them, in the computation which is the basis of the local rate to be charged. *Louisville & Nashville R. Co.* v. *Eubank*, 184 U. S. 27; *Wabash &c. R. Co.* v. *Illinois*, 118 U. S. 527; *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617; *Fargo* v. *Michigan*, 121 U. S. 230; *Lyng* v. *Michigan*, 135 U. S. 161; *Phila. & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, and cases cited; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

A state statute, requiring the payment of a license fee for the privilege of doing business in the State by a corporation engaged in interstate business, and at the same time in local business within the State, is invalid; the exaction of a license fee is a tax on the occupation, and therefore on the business; the fact that part of the business is internal to the State does not remove the difficulty, because the tax affects the whole business, interstate and local, without discrimination. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 204.

Provisions in a state law, which impose upon foreign corporations conditions which are in conflict with the constitution, cannot be enforced against a corporation which avails itself of the law, even after the enactment of such a provision. *Barrow* v. *Burnside*, 126 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

Rights under the Constitution of the United States, and objections to the constitutionality of the statute, were expressly and in due time asserted, and the effect of the judgment was to deny those rights and overrule the objections. This court has jurisdiction to review the judgment, although the state court did not, in express terms, pass upon the Federal constitutionality of the law. *Andrews* v. *Andrews*, 188 U. S. 14; *Detroit, Ft. Wayne &c. R. Co.* v. *Osborn*, 189 U. S. 383;

Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574; *Consolidated Coal Co* v. *Illinois*, 185 U. S. 203; *Home Ins. Co.* v. *Morse*, 20 Wall. 445.

Mr. Horace M. Oren, with whom *Mr. Charles A. Blair*, Attorney General of the State of Michigan was on the brief, for defendant in error.

The provisions of the Fourteenth Amendment authorize no interference with the operation of rates or schedules established by railway charters or incorporation laws in cases where the corporation complaining accepted the charter or voluntarily organized under the act establishing the rate or schedule. *San Diego, L. & T. Co.* v. *National City*, 74 Fed. Rep. 79; *Dow* v. *Electric Co.*, 31 Atl. Rep. 22; *S. C.*, 116 U. S. 489; *Pitkin* v. *Springfield*, 112 Massachusetts, 509; *Deverson* v. *Railroad Company*, 58 N. H. 129, 131, and cases cited; *Dodge* v. *Stickney*, 61 N. H. 607, 610; *People* v. *Murray*, 5 Hill, 468, 472.

The provision for the graduation of rates of fare by the per mile passenger earnings of roads subject to the act, is not violative of the provision of the Constitution of the United States, which inhibits a State from denying to any person within its jurisdiction the equal protection of the laws. The classification is not arbitrary, unjust or unreasonable, and its operation does not result in unequal privileges to different corporations that in justice should be on the same basis. *Magoun* v. *Ill. Trust & S. Bank*, 170 U. S. 283.

The classification made in the act, by fixing a graduated rate, based upon earnings per mile, has been held valid. *Chicago & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S. 339; 83 Michigan, 606, and see also *Railroad Company* v. *Iowa*, 94 U. S. 155; *Dow* v. *Biedelman*, 125 U. S. 680; *Clark* v. *Titusville*, 183 U. S. 329.

Nor is the commerce clause of the United States Constitution infringed by the provisions of the state law for the adjustment of passenger rates.

As incident to the power to create corporations to engage in interstate commerce, the State has authority in the charter

or by the terms of the incorporation acts to prescribe the terms and conditions upon which such commerce shall be engaged in. *Camden & Amboy R. & T. Co.* v. *Briggs*, 22 N. J. L. 623, 651; *Railroad Company* v. *Maryland*, 21 Wallace, 456, 473; *Cov. & Cin. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 223.

A purchaser of a railroad on foreclosure who incorporates under the general railroad law of Michigan must be held to have done so voluntarily, and a corporation thus created is bound to conform to the schedule of fares therein provided the same is a company incorporated thereunder to construct and operate a new road.

A corporation is subject to, and cannot question the validity of, the statute under which it has been voluntarily incorporated. *Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 503, 512, 513 (161 U. S. 703); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 409, 411; *Ashley* v. *Ryan*, 153 U. S. 436, 443.

The statute, fixing the maximum rate of charge, is not unconstitutional because declared by the state Supreme Court to be conclusive upon the courts and to allow no judicial investigation as to the reasonableness of the rates fixed.

The cases on brief of plaintiff in error are inapplicable. See *Venice* v. *Murdock*, 92 U. S. 494; *Genoa* v. *Woodruff*, 92 U. S. 502; *Michigan Central R. Co.* v. *Myrick*, 107 U. S. 102; *Clark* v. *Bever*, 139 U. S. 96; *Norton* v. *Shelby County*, 118 U. S. 425.

The statute is not void by reason of not providing for a judicial investigation as to reasonableness of rates fixed. *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391; *San Diego L., etc., Co.* v. *National City*, 174 U. S. 739; *St. L. & San Fran. R. Co.* v. *Gill*, 156 U. S. 649.

As to the right to be a corporation, see *Meyer* v. *Johnson*, 53 Alabama, 237, 325; *Eldridge* v. *Smith*, 34 Vermont, 484, 489.

It was not intended that the reorganized company should have any franchise rights or powers or privileges which did not have their source in, or which were not held pursuant to, the act under which the reorganizing company was incorporated.

The right to invoke the protection of the Fourteenth Amendment of the Constitution of the United States is not a franchise or right originating in laws permitting incorporation, and hence cannot be claimed to have been assigned or transferred by the operation of such laws. *Ches. & Ohio Ry. Co.* v. *Miller*, 114 U. S. 181; *Wilson* v. *Gaines*, 103 U. S. 417; *Ala. & Vicksburg Ry. Co.* v. *Odeneal*, 73 Mississippi, 34, 39.

The judgment of the Supreme Court of Michigan was not based upon any Federal question and this court is without jurisdiction to review it. *Clay* v. *Smith*, 3 Peters, 411; *Beaupré* v. *Noyes*, 138 U. S. 397; *Eustis* v. *Bolles*, 150 U. S. 361.

The court passed not upon questions of a Federal or general commercial character, but upon questions of purely local Michigan law, involving the construction of the state statute and the application of the principles of the Michigan common law. The decision of a state court, upon questions of this character, is conclusive and binding upon this court. *Luther* v. *Borden*, 7 How. 40; *Bucher* v. *Cheshire R. Co.*, 125 U. S. 555; *Pittsburg, etc., R. Co.* v. *Backus*, 154 U. S. 421; *McElvaine* v. *Brush*, 142 U. S. 155; *Millers' Exrs.* v. *Swann*, 150 U. S. 132; *Nor. Cen. Railway Co.* v. *Maryland*, 187 U. S. 258, 261.

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

A jurisdictional question which was raised by the defendant in error requires first to be disposed of. It was objected that the judgment of the Supreme Court of Michigan in the case at bar was not based upon a Federal question, and hence this court is, it is urged, without jurisdiction to entertain this writ of error. The objection, however, is not well founded. It is plain from the averments of the answer of the railroad company to the petition in mandamus that the company relied upon the provisions of the general railroad law of 1873, authorizing the incorporation of the purchasers of a railroad after sale in the foreclosure proceedings, as constituting a contract protected by the Constitution of the United States. The determination of the alleged estoppel embodied in the ground

of demurrer to the answer of the railroad company, and which was sustained by the Supreme Court of Michigan, necessarily involved a consideration of this claim of a contract right, protected from impairment by the Constitution of the United States. In substance, if not in express terms, such question was passed upon by the court below. A Federal question which gives this court jurisdiction therefore arises on the record.

That the section of the general railroad law of 1873, making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract protected by the Constitution of the United States, is concluded by the decision in *People ex rel. Schurz* v. *Cook*, 148 U. S. 397. There the purchasers of railroad property in the State of New York under a sale upon foreclosure of a mortgage sought to escape the payment of an incorporation fee laid by the authority of certain statutes of the State of New York enacted after the execution of the mortgage. The claim was made that the statutes of the State of New York authorizing the purchasers of railroads sold upon foreclosure to incorporate, which were in force when the mortgage was executed, constituted a contract between the State of New York and the bondholders and their privies, and that the enforcement of the subsequent statute providing for the payment of an incorporation fee violated the obligation of the alleged contract. The Court of Appeals of New York held to the contrary, and its judgment was affirmed by this court. In the course of the opinion of this court it was said (p. 410):

"The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the State, after the act of 1886 was passed and went into effect. There is no provision of the law under which they made their purchase requiring them to become incorporated, but desiring corporate capacity, they demanded the grant of a new charter under which to exercise the franchises so acquired, without compliance with the law of the State existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a

claim. The provisions of that act do not constitute a contract on the part of the State with either the corporations, or the mortgagees, bondholders or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a *new corporation*, is subject to the laws of the State existing or in force at the time of such reorganization and the grant of a new charter of incorporation. *Memphis &c. Railroad Co.* v. *Commissioners*, 112 U. S. 609."

It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the State was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels* v. *Tearney*, 102 U. S. 415, and cases cited. That a railroad corporation may contract with a municipality or with a State to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated conditions and repudiate performance of the latter at will. Whether if a condition in a statute is couched in ambiguous language and is susceptible of two constructions, as it is claimed is the case before us in respect to the basis upon which the gross receipts per mile of operated road were to be calculated, a construction should be

adopted which will not render the condition repugnant to the Constitution of the United States, we need not determine. The statute in question, in its entirety, has been construed by the Supreme Court of Michigan and held valid, and its decision as to the proper interpretation of the language of the act in respect to the mode of ascertaining the gross receipts per mile does not render the statute repugnant to the Constitution of the United States, within the ruling recently made by this court in *Wisconsin & Michigan Railway Company* v. *Powers*, 191 U. S. 379.

Judgment affirmed.

CINCINNATI STREET RAILWAY COMPANY *v.* SNELL.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 124. Argued January 14, 1904.—Decided February 23, 1904.

The Fourteenth Amendment safeguards fundamental rights and not the mere form which a State may see proper to designate for their enforcement and protection; and where such rights are equally protected and preserved they cannot be said to be denied because of the forum in which the State deems it best to provide for a trial.

The mere direction of a state law that the venue of a cause under given circumstances shall be transferred does not violate the equal protection of the laws where the laws are equally administered in both forums.

Section 5030, Revised Statutes of Ohio, providing for a change of venue under certain conditions, where a corporation having more than fifty stockholders is a party, is not repugnant to the provisions of the Fourteenth Amendment.

THE facts are stated in the opinion of the court.

Mr. John W. Warrington, with whom *Mr. E. W. Kittredge* was on the brief, for plaintiff in error:

Corporations are persons within the meaning of the Fourteenth Amendment. *Smyth* v. *Ames*, 169 U. S. 466, 522. Plaintiff in error is a domestic corporation and was, therefore, entitled in the court, where this suit was brought, to privileges equal to those of its adversary, touching the right to change

of venue, unless at least the corporation was eliminated in this regard from the category of natural persons through some rational and not arbitrary statutory classification. *Blake* v. *McClung*, 172 U. S. 239, 260; *Cotting* v. *Kansas City Stock Yard Co.*, 183 U. S. 79; *State* v. *Haun*, 51 Kansas, 146.

If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, Colo. & S. F.* v. *Ellis*, 165 U. S. 150, 153, 161; *Chicago &c. R. R. Co.* v. *Moss*, 60 Mississippi, 641.

The present statute cannot be confounded with state legislation limiting the right of trial by jury as to the whole number of a natural and distinct class, *Walker* v. *Sauvinet*, 92 U. S. 90; or with a statute prohibiting all foreign corporations violating the enactment from doing business within the State, *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; or with a state law vesting in the courts power to change the place of trial as to all persons alike who are prosecuted for criminal violations. *Gut* v. *The State*, 9 Wall. 35; nor upheld under the right of States to establish police regulations, *Railway Co.* v. *Matthews*, 174 U. S. 96; or to classify the subjects of taxation, *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Billings* v. *Illinois*, 188 U. S. 97; or to classify the contracts of certain corporations, like insurance companies, *Fid. Mut. Life Association* v. *Mettler*, 185 U. S. 308, 326.

This court is not concluded by the opinion of the Supreme Court of the State. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366; *Atchison, Topeka &c. R. R.* v. *Matthews*, 174 U. S. 96, at 100.

Mr. John W. Wolfe, with whom *Mr. Thomas L. Michie* was on the brief, for defendant in error:

Section 5033, Rev. Stat. Ohio is not unconstitutional. It does not impose a penalty nor is it class legislation but merely furnishes a rule applicable to all parties similarly situated, and coming within the terms of its provision, by which to guarantee to everyone a fair trial free from all local influences.

There is no presumption that one court created by the laws of the State of Ohio will not give just as fair a trial as any other court in the same State. This court has always leaned to the construction of state statutes by the courts of last resort of the State.

In determining whether the legislature in a particular enactment has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. *Sweet* v. *Rechel*, 159 U. S. 380, 392; *Pressler* v. *Illinois*, 116 U. S. 252, 269.

The Fourteenth Amendment does not enlarge the privileges or immunities of a citizen of the United States, but furnishes a guaranty for existing privileges and immunities and prohibits the State from abridging them. *Bradwell* v. *The State*, 16 Wall. 130; *In re Lockwood, Petitioner*, 154 U. S. 116.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversity in these respects may exist in two States separated by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. *Missouri* v. *Lewis*, 101 U. S. 22, 31. There is no constitutional objection to legislation that is special in its character. *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 205, 209; *Missouri Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Minn. R. Co.* v. *Beckwith*, 129 U. S. 26; *Minn. & St. L. Ry.* v. *Emmons*, 149 U. S. 364; *St. Louis & San Fran. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Hayes* v. *Missouri*, 120 U. S. 68; *Bell's Gap Ry. Co.* v. *Pennsylvania*, 134 U. S. 237; *Atchison, Topeka & Santa Fé R. R. Co.* v. *Mathews*, 174 U. S. 96. See also *Waters-Pierce Oil Company* v. *Texas*, 177 U. S. 28.

The States may regulate trials in their own way. *Walker* v. *Sauvinet*, 92 U. S. 90; *Gut* v. *The State*, 9 Wall. 35; *N. Y. & R. R. Co.* v. *New York*, 165 U. S. 628.

Mr. Justice White delivered the opinion of the court.

Snell, the defendant in error, sued the railway company, the plaintiff in error, in the Common Pleas Court of Hamilton

County, Ohio, to recover for alleged personal injuries. Availing of a section of the Ohio statutes, Snell moved that the cause be transferred for trial to the Court of Common Pleas of an adjoining county, and reserved an exception to a denial of such request. The trial resulted in a verdict in favor of the railway company.

Error was prosecuted by Snell to the Circuit Court of Hamilton County, and the judgment being affirmed in that court the case was taken to the Supreme Court of Ohio. The error complained of was the refusal of the trial court to grant a transfer of the cause. The railway company insisted in both courts that the transfer had been rightly refused on technical grounds, and because the state statute upon which the transfer was asked was repugnant to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Ohio decided that under the state statute the court should have transferred the cause and that the statute which required this transfer was not repugnant to the Fourteenth Amendment. 60 Ohio St. 256. The case was then brought to this court by the railway company and was dismissed because the judgment of the Supreme Court of the State was not final. *Cincinnati Street Railway Company* v. *Snell*, 179 U. S. 395. The cause thereupon proceeded in the state court and was transferred from Hamilton County to the Common Pleas Court of an adjoining county, where a trial was had, which resulted in a verdict and judgment in favor of Snell. The railway company prosecuted error to the Circuit Court of the county, and, failing to secure a reversal in that tribunal, carried the case to the Supreme Court of Ohio, by which court the judgment of the trial court was affirmed. In all the courts the railway company reiterated its contention concerning the repugnancy to the Constitution of the United States of the statute providing for the transfer of the cause, and its claims on this subject were expressly overruled. This writ of error was thereupon allowed.

Section 5030 of the Revised Statutes of Ohio, upon which the application for the transfer of the cause was allowed, is as follows:

"When a corporation having more than fifty stockholders is a party in action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

The Supreme Court of Ohio, in disposing of the objection that the statute was repuguant to the equal protection and the due process clauses of the Fourteenth Amendment, among other things, said:

"We are unable to adopt that view. It has never been regarded as essential to the validity of remedial procedure that it should be applicable in all of its provisions to all persons or parties, alike. Different situations and conditions often render appropriate and necessary different provisions, the necessity or propriety of which rests largely in the legislative discretion.

* * * * * * * *

"Generally, actions against individuals must be brought in the county where the defendant resides or may be personally served with process; and generally, actions against corporations are required to be brought in the county in which the corporation is situate, or has its principal office or place of business, or an office or agent; while insurance companies may be sued in any county where the cause of action or any part of it arose, a mining corporation in any county in which it owns or operates a mine, and a railroad company in any county into which the road runs. Of a like nature are regulations for changes of venue. They are designed to secure to parties a fair and impartial trial of their causes, which is the ultimate and highest purpose of judicial proceeding; and the extent to which such regulations may go, for the accomplishment of that purpose, is addressed to a sound legislative discretion, in view of the nature of the case to be provided for, and the probable conditions likely to arise."

And in further commenting upon the effect of the remedy

which the statute afforded upon the substantial rights of the parties, the court observed:

"In neither case, however, is any party deprived of the equal protection of the law, for each is assured of a fair trial, with equal opportunities to establish and enforce his rights; nor is the remedy by due course of law denied, because in the forum to which the cause is removed, the trial is conducted in the same way, under the same mode of procedure, as in that from which it was changed, with all remedial rights of the parties unimpaired. The only complaint is that the trial will be attended with some inconvenience and additional expense; but in that respect both parties are equally affected, and must necessarily be so in any change of venue for any cause; and the objection is, we think, insufficient to annul a statute, otherwise unobjectionable, which, in the legislative estimation, was demanded in order to secure the impartial administration of justice."

None of the errors assigned or arguments advanced to sustain them pretend that any unequal law governed the trial of the cause in the courts below or that the result of such trial was a denial of the equal protection of the laws. The sole contention is that the equal protection of the laws was denied because an equal opportunity was not afforded to secure a transfer of the cause from the court in which it was originally brought to the court in which it was ultimately tried. Thus, it is argued that the plaintiff Snell under the statute was given the right to have the cause transferred whilst a like right was not conferred on the corporation; that the existence of prejudice justifying the transfer was made by the statute to depend upon the domicil and number of stockholders in the corporation, while no equivalent right was given the corporation growing out of any prejudice which might have existed against the corporation, it being moreover asserted that the causes stated in the statute as basis for the transfer furnish no just ground for the classification made by the statute. The entire ground, therefore, relied on to show that the statute is repugnant to the Fourteenth Amendment rests upon the assumption that such amendment not only secures that the

rights and obligations of persons shall be measured by equal laws, but also that the provisions of the amendment control the States in the creation of courts and in the provisions made for the trial of causes in the courts which are created.

This proposition, however, was long since decided to be untenable. *Missouri* v. *Lewis*, 101 U. S. 22; *Chappel Chemical & Fertilizer Company* v. *Sulphur Mines Company*, 172 U. S. 474. In the first of these cases it was directly held that the Fourteenth Amendment did not operate to deprive the several States of the complete power to create such courts as were deemed essential, and to endow them with such jurisdiction as was considered appropriate. This being true, it follows, as the lesser is contained in the greater power, that the state law which authorized under enumerated circumstances and conditions the transfer of the cause from one court to another, was equally unaffected by the provisions of the Fourteenth Amendment. But conceding, *arguendo*, the contrary, this case is without merit.

As previously shown, the Supreme Court of the State of Ohio pointed out in its opinion that the rights of the parties were governed in the court to which the case was transferred by the same law and the same rules which would have prevailed had the case been tried in the court in which it was originally brought. And this has not been challenged either by the assignments of error or any of the arguments made to sustain them. The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the Fourteenth Amendment, only because the State has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condi-

tion where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

It follows that the mere direction of the state law that a cause under given circumstances shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guarantee of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails. In *Iowa Central Railway Company* v. *Iowa*, 160 U. S. 389, 393, this court said:

"But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another."

And the same principle was reiterated in *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557, 569, and in *Wilson* v. *North Carolina*, 169 U. S. 586. It was further expressed in *Williams* v. *Eggleston*, 170 U. S. 304, and in *Louisville & Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230. The cases decided in this court which are relied upon at bar to sustain the contrary contention are not apposite. They are *Gulf, Colorado & Santa Fé Railroad Company* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, and *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540. Each of these cases involved determining whether

the provisions of particular state laws were so unequal in their operation upon the rights of parties as to engender the inequality prohibited by the Fourteenth Amendment. None of the cases, therefore, lends support to the proposition upon which this case depends; that is, that although there has been no denial of the equal protection of the laws, nevertheless such denial must be held to exist only because the State has seen fit to direct under particular conditions a trial of a cause in one forum instead of in another, when in both forums equal laws are applicable and an equal administration of justice obtained.

Affirmed.

MONTAGUE & COMPANY *v.* LOWRY.

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

No. 46. Submitted October 27, 1903.—Decided February 23, 1904.

An association was formed in California by manufacturers of, and dealers in, tiles, mantels and grates; the dealers agreed not to purchase materials from manufacturers who were not members and not to sell unset tiles to any one other than members for less than list prices which were fifty per cent higher than the prices to members; the manufacturers, who were residents of States other than California agreed not to sell to any one other than members; violations of the agreement rendered the member subject to forfeiture of membership. Membership in the association was prescribed by rules and dependent on conditions, one of which was the carrying of at least $3,000 worth of stock, and whether applicants were admitted was a matter for the arbitrary decision of the association. In an action by a firm of dealers in tiles, mantels and grates, in San Francisco, whose members had never been asked to join the association and who had never applied for admission therein, and which did not always carry $3,000 worth of stock, to recover damages under § 7 of the Anti-Trust Act of July 2, 1890—

Held that although the sales of unset tiles were within the State of California and although such sales constituted a very small portion of the trade involved, agreement of manufacturers without the State not to sell to any one but members was part of a scheme which included the enhancement of the price of unset tiles by the dealers within the State and that the whole thing was so bound together that the transactions within the State were inseparable and became a part of a purpose which when carried out amounted to, and was, a combination in restraint of interstate trade and

commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, followed; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604, distinguished.

Held that the association constituted and amounted to an agreement or combination in restraint of trade within the meaning of the act of July 2, 1890, and that the parties aggrieved were entitled to recover threefold the damages found by the jury.

Held that the amount of attorney's fees allowed as costs under the act is within the discretion of the trial court and as such discretion is reasonably exercised this court will not disturb the amount awarded.

THIS action was brought under section 7 of the act of July 2, 1890, 26 Stat. 209; 3 Comp. Stat. 3202, commonly called the Anti-Trust Act. The section reads as follows:

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Plaintiffs in error (defendants below) seek to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, 115 Fed. Rep. 27, affirming a judgment for plaintiffs, entered in the Circuit Court for the Northern District of California, upon a verdict of a jury. 106 Fed. Rep. 38.

It appeared in evidence on the trial in the United States Circuit Court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in the city of San Francisco in the State of California, and dealing in tiles, mantels and grates, and that The Tile, Mantel and Grate Association of California, and the officers and members thereof, had since, on or about the—day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San José in the State of California, and such organization was also composed of the manufacturers of tiles, mantels

and grates, who were residents of other States, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the State of California. There were no manufacturers of tiles within the State of California, and all the defendants who were residents of that State and who were also dealers in tiles, in the prosecution of their business, procured the tiles from outside the State of California and from among those manufacturers who were made defendants herein. The manufacturers and dealers were thus engaged in the prosecution of a business which, with reference to the sales of tiles, amounted to commerce between the States. Under these circumstances the dealers in tiles, living in San Franciso, or within a radius of 200 miles thereof, and being some of the defendants in this action, together with the Eastern manufacturers of tiles, who are named as defendants herein, formed an association called The Tile, Mantel and Grate Association of California. The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fireplace fixtures and mantels in San Francisco and vicinity, (within a radius of 200 miles,) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution, article I, section 1, it was provided that any individual, corporation or firm engaged in or contemplating engaging in the tile, mantel or grate business in San Francisco, or within a radius of 200 miles thereof, (not manufacturers,) having an established business and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws govern-

ing the association. The initiation fee was, for active members, $25, and for non-resident members $10, and each active member of the association was to pay $10 per year as dues, but no dues were charged against non-residents.

An executive committee was to be appointed, whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join, if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of $3,000.

The by-laws, after providing for the settlement of disputes between the members and their customers, by reason of liens, foreclosure proceedings, etc., enacted as follows, in article III:

"SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel and Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tiles were sold by a member to any one not a member, they were sold at the list prices so adopted, which

were more than fifty per cent higher than when sold to a member of the association.

The plaintiffs had established a profitable business and were competing with all the defendants, who were dealers and engaged in the business of purchasing and selling tiles, grates and mantels in San Francisco prior to the formation of this association. The plaintiffs had also before that time been accustomed to purchase all their tiles from tile manufacturers in Eastern States, (who were also named as parties defendants in this action,) and all of those manufacturers subsequently joined the association. The plaintiffs were not members of the association and had never been, and had never applied for membership therein and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tiles from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than fifty per cent over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tiles from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying $3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for $500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble that sum, together with what the trial court decided to be a reasonable attorney's fee, was entered for the plaintiffs.

Mr. William M. Pierson for plaintiffs in error :

The association is not obnoxious to the provisions of the Sherman Anti-Trust Act.

This case can be distinguished from the *Trans-Missouri Case*, 166 U. S. 290, and the *Joint Traffic Case*, 171 U. S. 505. So far as the transactions between the dealers and the manufacturers are concerned, the association fixes no tariff or prices whatever; and it must be observed generally that the association itself does no business. It is lawful for a man to decline to work for another man or class of men, or to do business with another man or class of men, as he sees fit; and what is lawful for one man to do in this regard, several men may agree to act jointly in doing, and may make express and simultaneous declaration of their purpose. The lawfulness of a provision as between dealers and manufacturers, such as is contained in the constitution and by-laws of the plaintiffs in error, is impliedly recognized in the *Hopkins Case*, 171 U. S. 578, and is aptly recognized and approved in the *Anderson Case*, 171 U. S. 604. See also *U. S.* v. *Greenhut*, 51 Fed. Rep. 205; *In re Greene*, 52 Fed. Rep. 104; *U. S.* v. *Nelson*, 52 Fed. Rep. 646; *Dueber Mfg. Co.* v. *Howard Co.*, 55 Fed. Rep. 851; *S. C.*, 14 C. C. A. 14; *Gibbs* v. *McNealy*, 102 Fed. Rep. 594; *Steamship Co.* v. *McGregor*, L. R. 23 Q. B. 598; *Bohn* v. *Hollis*, 54 Minnesota, 223.

Within these authorities and on a view of the constitution and by-laws of the association in question, it will appear that the provisions touching transactions between dealers and manufacturers are not obnoxious to the act of Congress, and it will appear further that the association in question has none of the elements of a monopoly. Indeed, the object of the association is said to be to unite all acceptable dealers and all American manufacturers.

An association cannot be in restraint of trade when its doors are open to all in the trade, and it fixes no prices whatever. The only limitation was to have established homes with $3,000 worth of stock.

The transactions in unset tiles at list prices are local transactions, intra-state transactions, in no respect taking on the quality of interstate commerce and being purely local, are not within the purview of the act. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211. Assuming, however, for argu-

ment, the transactions in unset tiles to be along the line of interstate commerce,—they are so trifling, incidental and remote in their bearing upon interstate trade and commerce as to be what mathematicians call negligible quantities which may be left out of consideration without impairing the general result. *Trans-Missouri case*, the *Joint Traffic case*, and *Hopkins case*, *supra*.

The attorney fee allowed was excessive. Plaintiffs below asked for $10,000 damages and were only allowed $500 and the fee is out of proportion.

Mr. J. C. Campbell for defendant in error:

The Tile, Mantel and Grate Association of California is a combination declared to be illegal by the act of July 2, 1890, for it is in restraint of trade or commerce among the several States, and was formed to and does monopolize such trade or commerce. *United States* v. *Freight Association*, 166 U. S. 290, 323; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241, 244; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *United States* v. *Coal Dealers Association*, 85 Fed. Rep. 252; *Hopkins* v. *United States*, 171 U. S. 578, and see p. 597; *Anderson* v. *United States*, 171 U. S. 604, distinguished.

The counsel fee was fair and reasonable.

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

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called Anti-Trust Act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The non-

member dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the manufacturers or to any San Francisco dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member as already stated.

The plaintiffs endeavored in vain to procure tiles for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several States refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tiles to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tiles is, as we have said, not only narrowed but the prices charged by the San Francisco dealers for the unset tiles to those not members of the association are more than doubled. It is urged that the sale of unset tiles, provided for in the seventh section of the by-laws, is a transaction wholly within the State of California and is not in any event a violation of the act of Congress which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as

one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tiles is so small in San Francisco as to be a negligible quantity; that it does not amount to one per cent of the business of the dealers in tiles in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tiles from the manufacturers are shut out by reason of the association and their non-membership therein from purchasing their tiles from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tiles would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had so applied, was one to be arbi-

trarily determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable the applicants would not be admitted, and whether they were or not, was a matter for the arbitrary decision of the association. Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution, because they did not always carry stock worth $3,000, which by section 1 of article I, was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by any one who would not come up to the condition. The case stands, therefore, that the plaintiffs had not been asked to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tiles as they had been accustomed to do before the association was formed.

The consequences of non-membership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tiles were enhanced so far as plaintiffs were concerned, and how by means of this combination interstate commerce was affected.

The purchase and sale of tiles between the manufacturers in one State and dealers therein in California was interstate commerce within the *Addyston Pipe case*, 175 U. S. 211. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article,

which was an article of commerce between the States. *United States* v. *E. C. Knight Company*, 156 U. S. 1, did not therefore cover it. It is not brought within either *Hopkins* v. *United States*, 171 U. S. 578, or *Anderson* v. *United States*, 171 U. S. 604. In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject matter of the agreement did not directly relate to, embrace or act upon interstate commerce, for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it.

There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the rendition of the verdict the plaintiffs below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum therefor, from which it appeared that it would be from $750 to $1,000. The trial court awarded to the plaintiffs $750. The verdict being only for $500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused.

The judgment is

Affirmed.

AMERICAN BOOK COMPANY *v.* THE STATE OF KANSAS *ex rel.* NICHOLS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 126. Argued January 15, 18, 1904.—Decided February 23, 1904.

It is the duty of this court to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions of law.

When it appears either on the record, or by extrinsic evidence, that the judgment sought to be reviewed has, pending the appeal, and without fault of the defendant in error, been complied with, this court will not proceed to final judgment but will dismiss the appeal or writ of error.

THE facts are stated in the opinion of the court.

Mr. W. H. Rossington, with whom *Mr. Charles Blood Smith* and *Mr. Clifford Histed* were on the brief, for plaintiff in error.

Mr. A. B. Quinton and *Mr. G. C. Clemens*, with whom *Mr. C. C. Coleman*, Attorney General of the State of Kansas, and *Mr. Otis E. Hungate* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a proceeding in *quo warranto*, brought in the Supreme Court of the State of Kansas by the county attorney of Shawnee County of said State to oust defendant in error from doing business in the State, and to declare void certain contracts entered into by the defendant in error with the State Text Book Commission.

A preliminary injunction was granted restraining plaintiff in error from entering into any contract with any person in the State and from furnishing school books to its agents in the State.

Passing finally on the relief prayed for, the Supreme Court, awarding judgment, said:

"The plaintiff cannot, in this action, have an annulment of the contract already made. It may be that there are equitable circumstances forbidding the cancellation of such contract. It may be that compliance with the law by the defendant hereafter will retroactively validate the contract, in the event that it should now be invalid. However, independently of such consideration, we do not have jurisdiction over that branch of the case. Our jurisdiction is in *quo warranto* alone. A grant of that jurisdiction does not authorize the joinder to a cause of action for ouster of another one for the annulment of a contract, merely because the subject matter of the latter possesses incidental connection with the subject matter of the former.

"The defendant will be ousted of its claimed rights to do business in this State until it complies with the requirements of the law, but the prayer of the petition for the annulment of the contract will be denied."

Plaintiff in error is a New Jersey corporation engaged in the publishing and selling of school books, and the charge of the defendant in error is that plaintiff in error was doing business in the State without having complied with the laws of the State in regard to foreign corporations.

The laws of the State require a foreign corporation, as a condition of the right to do business in the State, to make an application to the Charter Board of the State to do such business and to file a certified copy of its charter or articles of incorporation, and to furnish certain information to such board. The statute also required the payment of a charter fee graduated upon the amount of the capital stock of the corporation. Ch. 10, Laws, 1898; Gen. Stat. 1901.

The court held that plaintiff in error had "complied, although irregularly, informally and out of time, with the law, except as to section two of chapter ten of the laws of 1898," and the requirements of that section were necessary to give plaintiff in error "the status of a foreign corporation authorized to do business" in the State.

The defence of plaintiff in error was, and its contention is

here, that its business was solely that of interstate commerce, and that the statute of Kansas alleged to have been violated could have no application to such business, and the court had no power to exclude plaintiff in error from transacting interstate commerce in the State. It was and is further contended that plaintiff in error had entered into contracts with certain persons and corporations in the State for the sale and delivery of its publications, which contracts were still in force and effect, and under which plaintiff in error had incurred liability; and if the statutes be construed as applicable to it they would impair the obligations of those contracts and be in violation of section ten of article one of the Constitution of the United States.

A motion is made to dismiss on the ground that the judgment of the Supreme Court has been complied with. The compliance is not denied, but it is attempted to be justified on the ground that plaintiff in error had only to the fifteenth of September "to supply the wants of the public schools in Kansas with the books it had contracted to deliver, and under the stress of this public necessity, and under the sanction and penalties of its contract, it felt coerced to make a payment aforesaid (the charter fee) and otherwise to comply with the statute as interpreted by the Supreme Court in the case at bar."

It is also urged that another suit has been brought by the same law officer of the State in the name of the State, in the District Court of Shawnee County, which suit is pending in the Supreme Court on appeal from the ruling of the District Court denying a temporary injunction, and that it is contended by the State the judgment of the Supreme Court in the case at bar was an adjudication of a non-compliance of plaintiff in error with the statutes of the State. And, it is alleged, that the same defences were made as in the case at bar. It is hence contended that "there still exists a controversy, undetermined and unsettled," involving the right of the State to enforce the statute against a corporation engaged in interstate commerce.

The motion to dismiss must be granted. We said in *Mills* v. *Green*, 109 U. S. 651:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that, when pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

The principle was discussed at some length and many illustrations of its enforcement were given. It has had illustration since. *New Orleans Flour Inspectors* v. *Glover*, 160 U. S. 170; *Codlin* v. *Kohlhausen*, 181 U. S. 151.

The case at bar is certainly within the principle. The judgment has been complied with. It makes no difference that plaintiff in error "felt coerced" into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. After compliance there is nothing to litigate.

It is further urged that another suit has been brought and, as decisive of its issues or some of its issues, the judgment in the case at bar is pleaded. But that suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over and is limited by the conditions of the case now before us.

Writ of error dismissed.

MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY *v.* STATE OF MINNESOTA *ex rel.* THE RAILROAD AND WAREHOUSE COMMISSION.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 138. Argued January 21, 1904.—Decided February 23, 1904.

Where the constitutionality of a state statute is directly attacked in the answer, the Federal question has been so raised in the court below that it will be considered on the merits and the motion to dismiss denied.

To establish stations at proper places is the proper duty of a railroad company, and it is within the power of the States to make it *prima facie* a duty of the companies to establish them at all villages and boroughs on their respective lines.

Chapter 270, April 13, 1901, General Laws of Minnesota, requiring the erection and maintenance of depots by railroad companies on the order of the Railroad and Warehouse Commission under the conditions therein stated in that act, does not deny a railroad company the right to reasonably manage or control property or arbitrarily take its property without its consent, or without compensation or due process of law, and is not repugnant to the Constitution of the United States.

When the highest court of a State affirms a judgment although by a divided court it constitutes an affirmance of the finding of the trial court which then, like the verdict of a jury, is conclusive as to the facts upon this court.

THE facts are stated in the opinion of the court.

Mr. Albert E. Clarke for plaintiff in error:

The Supreme Court of the State, by a decision which has not been overruled, modified or criticised, has once decided upon the merits against the attempt to compel the plaintiff in error to establish and maintain a station at Emmons. In the former proceeding the relator attempted to justify its order for the establishment of the station, under two statutes, viz: (1) Under the section 388, Gen. Stat. of 1894, and (2) under chapter 94, Gen. Laws of 1897; the former defines the powers and duties of the general railroad and warehouse commission. It undoubtedly confers ample power and authority upon that body, to require the establishment and maintenance of stations, in

proper cases, and the court so held; but also held that this was not a proper case.

Chapter 94, Gen. Laws of 1897, was held not to apply as it relates to villages and boroughs and Emmons is neither. 76 Minnesota, 474.

In order to find support for the order under sec. 388, Gen. Stat. 1894, the relator must show a reasonable public necessity for the station; and in determining whether such necessity exists, regard must be had to the interests "not only of the particular locality, but also of the public at large, and of the railroad company." Every argument which can be made in support of the order is answered by the opinion upon the former trial. 76 Minnesota, 475.

The fact that Norman Station is in Iowa was held not to be entitled to any weight.

The decision above cited is the law of the case.

The relator has attempted to obtain a new trial of issues once adjudicated, by having the same plaintiff bring a second suit against the same defendant, in the same court, upon the same cause of action, and, ignoring the proceedings and adjudication formerly had, proceed to try the case over again. The decision of the state Supreme Court, above cited, is still the law of the State, but the reasons advanced in support of a different conclusion, are the minor and insignificant increases in the population and business of Emmons.

The decision of the state court now under review is an affirmance of the judgment of the District Court, by a divided Supreme Court. Such an affirmance does not overrule the actual decision. To give it that effect would be to hold that the District Court might thus overrule the Supreme Court. An affirmance by a divided court does not operate to settle the principles of law involved or have the effect of an opinion or decision. *Etting* v. *Bank of the United States,* 11 Wheat. 78; *Benton* v. *Woolsey,* 12 Pet. 27; *Holmes* v. *Jennison,* 14 Pet. 540; *In re Griel,* 171 Pa. St. 412; *Lessieur* v. *Price,* 12 How. 59; *Hanifan* v. *Armitage,* 117 Fed. Rep. 845.

It is only where the evidence is substantially different upon the second trial, that the case is not controlled by the first decision. Comparison of the records shows no important difference in the situation.

The right of the plaintiff in error to change its line in accordance with the proposed plan, submitted in evidence, is conferred by section 2750 of the General Statutes of 1894. That the proposed change would be for the public interest is manifest; that it should not be prevented, by the establishment of this station, is equally manifest.

Any change in the line, whereby the company is enabled to maintain the line at less expense, or operate it with greater safety and convenience and more economy, is, necessarily, a benefit to the public. *Fletcher* v. *Railway Company*, 67 Minnesota, 345.

Neither section 388, General Statutes of 1894, or chapter 270, General Statutes of 1901, is valid, when it is sought to apply its provisions to the facts in this case. The act is a police regulation and justifiable only when exercised to establish reasonable and wholesome ordinances not repugnant to the Constitution. Cooley's Const. Lim. (5th ed.) 707, 713; and § 577; Black's Const. Prohib. §§ 62, 64.

The power of the legislature, as well as of the courts, is limited to the requirements of the community. When property is taken unnecessarily and without reason, the taking is not due process of law. That the taking is under form of law, does not render the act less a violation of the Constitution. *Railway Company* v. *Chicago*, 166 U. S. 226; *Railway Company* v. *Nebraska*, 164 U. S. 403; Cooley's Const. Limitations (5th ed.), 435 (*356); *County of San Mateo* v. *Ry. Co.*, 13 Fed. Rep. 722; *Foule* v. *Mann*, 53 Iowa, 42.

Chapter 270, General Laws of 1901, is void upon its face. It is a mandatory statute, providing for no hearing; no judicial determination as to whether or not the station is necessary.

It does not make the establishment and maintenance of the proposed station, dependent upon the reasonableness of the

requirement, or the necessity for the station. It is not due process of law. Its enforcement takes the appellant's property, without due process of law, and deprives it of the equal protection of the laws, and is therefore violative of the Fourteenth Amendment. *Railroad Company* v. *Minnesota,* 134 U. S. 418; *Bank* v. *Sharp,* 6 How. 327.

The construction placed upon the act of 1901, by the state Supreme Court, has practically invalidated it. By the language of the act itself, no room is left for judicial determination as to the necessity for the station, when demanded by the inhabitants of an incorporated village.

Mr. Howard H. Dunn, with whom *Mr. W. B. Douglas,* Attorney General of the State of Minnesota, and *Mr. Lafayette French* were on the brief, for defendant in error:

The writ of error should be dismissed for want of jurisdiction, as no Federal question is necessarily involved in the judgment of the court below, or if there is a Federal question involved in the judgment the decision of the court below is so clearly right that the writ of error should be dismissed or the judgment affirmed.

No Federal question is necessarily involved in the judgment of the court below.

The construction of this statute by the Supreme Court of Minnesota could not deprive the railroad company proceeded against of its property without due process of law; nor did its construction raise a Federal question. *Phœnix Ins. Co.* v. *Gardner,* 11 Wall. 204. The construction given to a statute of a State, by the highest judicial tribunal of such State, is regarded as a part of the statute and is binding upon the courts of the United States; as to the proper construction of a statute, and as to what should be regarded as among its terms no Federal question can arise. *Morley* v. *Lake Shore Ry. Co.,* 146 U. S. 162.

The plaintiff in error has no interest to assert that General Laws of 1901, chapter 270, is unconstitutional because it might

be construed so as to cause it to violate the Constitution. Its right is limited solely to the inquiry whether in the case which it presents, the effect of applying the statute is to deprive it of its constitutional rights. *Castello* v. *McConnico*, 168 U. S. 674.

As the decision of the Supreme Court of Minnesota was upon a question not of a Federal character, and one broad enough to sustain the judgment, the writ of error should be dismissed. *Miller's Exec.* v. *Schwan*, 150 U. S. 132; *Morrow* v. *Brinkley*, 129 U. S. 178; *Hall* v. *Akers*, 132 U. S. 554; *New Orleans Water Works* v. *Louisiana*, 185 U. S. 336; *Railway Co.* v. *Fitzgerald*, 136 U. S. 556; *California Powder Works* v. *Davis*, 151 U. S. 389.

The holding of the state court, that the plaintiff in error did not overcome the *prima facie* case arising by virtue of the statute, does not present a Federal question; this court will not reëxamine the evidence to ascertain whether the evidence justified this finding of the court below. *Egan* v. *Hart*, 165 U. S. 188; *Eustis* v. *Bolles*, 150 U. S. 361; *Beatty* v. *Benton*, 135 U. S. 244.

If there is a Federal question involved in the judgment the decision of the court below is so clearly right that the writ of error should be dismissed or the judgment affirmed. *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; *N. Y. & N. E. R. R. Co.* v. *Woodruff*, 153 U. S. 689; *Chicago, etc., Ry. Co.* v. *Nebraska*, 170 U. S. 74.

Subject to the authority of Congress within the sphere of its rightful powers, and subject to any restriction imposed by the Constitution, the legislature of each State possesses full power to enact police regulations of railways. Cases *supra* and *Gladson* v. *Minnesota*, 166 U. S. 427; *Charlotte, etc., R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, 296. As to authority of railway commissions to act in regard to depots and waiting rooms, see *State &c.* v. *M. & St. L. R. R. Co.*, 76 Minnesota, 469; *State* v. *Chicago &c. R. R. Co.*, 12 S. Dak. 305.

In many jurisdictions statutory regulations as to the estab-

lishment and erection of depots at proper places along the route of the road have been sustained as a proper exercise of police power. *Commonwealth* v. *Eastern R. R. Co.*, 103 Massachusetts, 254; *R. R. Commissioners* v. *Portland, etc., R. R. Co.*, 63 Maine, 269; *State* v. *New Haven R. R. Co.*, 37 Connecticut, 153; *State* v. *Wabash, etc., R. R. Co.*, 83 Missouri, 144; *San Antonio, etc., R. R. Co.* v. *State*, 79 Texas, 264; *State* v. *Kansas City, etc., R. R. Co.*, 32 Fed. Rep. 722.

The requirement of the plaintiff in error to build and maintain a depot or station house at the village of Emmons was a reasonable exercise of the power of regulation in favor of the interest and for the accommodation of the public.

A railroad company cannot, in consideration of a tax voted to aid in its construction, bind itself to build a station or depot at a particular point without reference to a change of population or the demand of business or the accommodation of the public, in the matter of transportation and travel, and plead that and its close proximity as a justification for not building and maintaining a depot where public necessity reasonably requires one to be maintained in order to accommodate the public in the matter of transportation and travel.

The number and location of the depots so as to constitute reasonable depot facilities vary with the changes and amount of population and business. A contract to leave a certain distance along the line of road destitute of depots is in contravention of public policy. *St. Joseph & Denver R. R. Co.* v. *Ryan*, 11 Kansas, 602; *Marsh* v. *Railway Co.*, 64 Illinois, 414; *St. L., etc., R. R. Co.* v. *Mathers*, 71 Illinois, 592.

A railroad cannot refuse to obey the commands of the legislature when the public interest reasonably requires the building of a station house, because the company will entail an expense of $3,000. The statute provides the size, height and dimensions of a station house which is required to be built. Gen. Stat. 1894, § 2702; Gen. Stat. 1897, chap. 94, § 1; *M. L. & T. R. Co.* v. *R. R. Com.*, 109 Louisiana, 247.

The commission simply required the plaintiff in error to con-

struct its station of the size and dimensions which the statute requires shall be built under the circumstances.

The location of stations for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as of the railroad company, and its interest can be better determined by an administrative board intrusted by the legislature with that duty than by the ordinary judicial tribunal. *Steenerson* v. *G. N. Ry. Co.*, 69 Minnesota, 353, 376; *Nor. Pac. R. R. Co.* v. *Dustin*, 142 U. S. 492, 499.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a proceeding in mandamus to compel plaintiff in error to build and maintain a station house on the line of its road at the village of Emmons, in compliance with an order of the Railroad and Warehouse Commission of the State of Minnesota.

The order of the commission was made upon petition and upon hearing after due notice to plaintiff in error. The writ was granted by the District Court of Freeborn County, where the proceedings were commenced.

The railroad company in its answer attacks the statute under which the commission acted as follows:

"This respondent says further, that chapter 270, General Laws, 1901, approved April 13, 1901, which was enacted by the legislature of said State at its thirty-second session, which arbitrarily requires railroad carriers to provide freight and passenger rooms and depots at all villages and boroughs upon their respective roads, without regard to the necessity therefor and without regard to the location or situation of such village or boroughs, or to existing conditions, is unjust, unreasonable, contrary to public policy and void.

"It denies to the respondent the right to reasonably manage or control its own business; it takes its property without its consent.

"It takes the property of this respondent arbitrarily and un-

necessarily, for public use, without just compensation, and is, therefore, violative of the Fifth Amendment to the Constitution of the United States.

"It deprives the respondent of its property without due process of law, and denies it the equal protection of the laws, and thus violates the Fourteenth Amendment to the Constitution of the United States."

The Supreme Court of the State affirmed the judgment of the District Court, the members of the court equally dividing on the facts. 91 N. W. Rep. 465.

This is the second attempt of the village of Emmons to secure a depot. The first was unsuccessful, 76 Minnesota, 469, "wherein the facts are stated," the Supreme Court observed, and it further observed, passing on the case at bar:

"Mr. Associate Justice Lovely having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal, and the cause was necessarily argued and submitted to the four remaining members of the court. We assume that the Laws, 1901, chapter 270, which in express terms requires railway companies to build and maintain depots or station houses in all villages through which their roads may pass, is in itself valid legislation, and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this State located on railway lines are *prima facie* entitled to depots. The commissioners have the power to order the erection and maintenance of depot buildings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law. The change made by the statute of 1901 simply affects or shifts the burden of proof, for prior to its enactment the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while now a railway company appearing before the commissioners, or trying its case on appeal to the District Court, bears the burden of showing that such a requirement is not called for, and that

the building and maintenance of a depot in the village is unnecessary and unreasonable.

"But while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Mr. Chief Justice Start and Associate Justice Brown, are of the opinion that, from the evidence, it appears that there has since been a substantial growth in the village, a growth which makes an altogether different showing, and that the company did not overcome the *prima facie* case arising by virtue of the statute, and therefore that the judgment appealed from should be affirmed. Associate Justices Collins and Lewis are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered that the *prima facie* case made by the village has been wholly overcome by the defendant company.

"With this difference of opinion the judgment appealed from must be and hereby is affirmed."

The defendant in error contends by those observations the court only decided, following its former decision, 76 Minnesota, 469, that under chapter 6, section 388, General Statutes of 1894, the commission had the power to order the erection and maintenance of depots where public necessity or convenience reasonably required it to be done, and that the only change made by the act of 1901, was to shift the burden of proof from the municipality to the railroad company, and therefore the court, in deciding that the railroad company had not overcome the *prima facie* case arising from the statute, did not decide a Federal question.

It is difficult to deal with the motion on account of the uncertainty of the contentions of plaintiff in error. In its answer in the District Court it directly attacks the statute. In this court its contentions are not so sweeping and we are left in doubt by its opening and reply briefs whether the statute as construed by the Supreme Court is objected to or only its ap-

plication under the facts of the case. However, as the statute was directly attacked in the answer the motion to dismiss is denied, and we will consider whether the grounds of objection to the statute are substantial and sufficient.

1. The act of 1897 provided as follows:

"That all railroad corporations, or companies operating any railroads in this state, shall . . . provide at all villages and boroughs on their respective roads, depots with suitable waiting rooms for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight. . . . Such railroad corporations or companies shall at all such depots or stations stop their trains regularly as at other stations to receive and discharge passengers, and for at least one-half hour before the arrival and one-half hour after the arrival of any passenger train, cause their respective depots or waiting rooms to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid."

In its first opinion, 76 Minnesota, 469, the court held that the word "villages," in the act meant incorporated villages, and that Emmons was not incorporated. The court, however, proceeded further, and said:

"But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where public necessity or convenience reasonably requires it to be done. But this power is neither absolute nor arbitrary. The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large and of the railroad company itself, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railway company to provide a depot and passenger station at the place in question. Counsel for the relators admit this. The only evidence being the report of the commissioners themselves, we must refer to it to ascertain whether the facts therein stated reasonably justified their order requiring the railroad company to provide and

maintain a depot and station at Emmons. The statute provides that, 'Upon the trial of said cause [before the court, as in this case, to enforce the order of the commissioners] the findings of fact of said commission as set forth in its report shall be *prima facie* evidence of the matters therein stated.' G. S. 1894, § 399."

The court then reviewed the facts and decided that the order of the commission establishing a station at Emmons was unreasonable. The act was amended in 1901, and the court in the case at bar has decided, as we have seen, the amendment has only shifted the burden of proof. In other words, to quote from the opinion of the court, "incorporated villages within this state (Minnesota) located on railway lines are *prima facie* entitled to depots," and at a hearing before the commissioners and in the District Court the railroad has the burden of showing that the establishment of a depot is unreasonable and unnecessary.

The statute, as thus construed, does not transcend the power of the State. In other words, and meeting exactly the contention of plaintiff in error, the statute does not deny plaintiff in error the right to reasonably manage or control its property or arbitrarily take its property without its consent or without compensation or due process of law. *Wisconsin &c. R. R. Co.* v. *Jackson*, 179 U. S. 287. To establish stations at proper places is the first duty of a railroad company. The State can certainly provide for the enforcement of that duty. An incorporated village might be said to be such a place without an express declaration of the statute. To make it *prima facie* so by statute and to impose the burden of meeting the presumption thence arising certainly does not amount to an invasion of the rights of property or an unreasonable control of property. This seems to be conceded in the reply brief of plaintiff in error. Counsel say:

"The power of the State to require the construction and maintenance of stations at proper points is not questioned. We concede it. The power to require an unnecessary and wholly useless expenditure of money, in the construction and

maintenance of stations where they are not needed, is denied. That is the whole case."

And stating the decision of the court in 91 N. W. Rep. 465, counsel quotes as follows:

"The commissioners have the power to order the erection and maintenance of depot buildings, unless it is made to appear that such an order is so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law."

And counsel adds: "This is, of necessity, a Federal question."

Whether it is or not, and whether it is so dependent on the facts of the case as not to be open to our review, is the next ground to be considered.

2. The charge is that the property of plaintiff in error is taken without due process of law, but whether so taken is made to depend upon a question of fact, the requirement of "an unnecessary and wholly useless expenditure of money." It is well established that on error to a state court this court cannot reëxamine the evidence, and when the facts are found we are concluded by such finding. *Egan* v. *Hart,* 165 U. S. 188. But in the case at bar we are met by the circumstance that the Supreme Court equally divided on the question whether the facts distinguish this case from 76 Minnesota, 469. The plaintiff in error, therefore, contends that there has been no judgment of the Supreme Court on the facts and they are open to review here. The contention is not tenable. There is no statement of facts by the Supreme Court, and its decision, though by a divided court, constituted an affirmance of the finding of the District Court. The finding was as follows:

"That the respondent railroad company has no depot or station house whatever for the accommodation of the public upon its line of railroad at the village of Emmons, and that its line of road is the only railroad reaching such village.

"That there is a suitable location for a depot or station house upon respondent's right of way at the point referred to and described in the order of the board of railroad and ware-

house commissioners herein, which order is hereto attached. That it is necessary for the accommodation of the citizens of Emmons and vicinity, and the public at large, and public necessity requires that the respondent railroad company build and maintain a suitable station house at the said village of Emmons for the accommodation of the public transacting business with the respondent at that point."

The finding, like the verdict of a jury, is conclusive in this court. *Dower* v. *Richards*, 151 U. S. 658. It follows that the order of the Warehouse Commission was not an unreasonable requirement, and the judgment is

Affirmed.

AH HOW *alias* LOUIE AH HOW *v.* UNITED STATES.
CHU DO *alias* CHU GEE *v.* UNITED STATES.
LEW GUEY *v.* UNITED STATES.
YUNG LEE *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Nos. 307, 308, 309, 312. Argued January 12, 1904.—Decided February 23, 1904.

The act of April 29, 1902, c. 641, continuing all laws then in force "so far as the same are not inconsistent with treaty obligations," does not repeal § 3 of the act of May 5, 1892, putting the burden of proving their right to remain in this country, on Chinese arrested under the act. Neither does it repeal § 6 of the act requiring Chinese laborers who are entitled to remain in the United States to obtain a certificate of residence.

A written statement by a United States Commissioner that a Chinese person of a certain name was brought before him and was adjudged to have the right to remain in the United States by reason of being a citizen is not evidence of a judgment.

THE facts are stated in the opinion.

Mr. Terence J. McManus, with whom *Mr. Frank S. Black* and *Mr. Russell H. Landale* were on the brief, for appellants in these cases and also in Nos. 308, 309 and 312.

Direct appeals have been taken to this court upon the ground that treaty and constitutional questions were involved. *Chin Bak Kan* v. *United States*, 186 U. S. 193; *United States* v. *Gue Lim*, 176 U. S. 459; *United States* v. *Wong Kim Ark*, 169 U. S. 649. The treaty and constitutional questions were raised upon the preliminary hearing before the Commissioner.

These are the first cases which have come before this court in which a construction of the act of April 29, 1902, reënacting, extending and continuing all laws relating to the subject of Chinese exclusion, "so far as the same are not inconsistent with treaty obligations" is asked, and are the first cases which have come before this court since the *Fong Yue Ting Case*, 149 U. S. 698, in which a consideration of the registration provisions of the act of 1892, as amended by the act of 1893, is involved.

These are in no sense "entry cases." The defendants were not arrested while seeking entrance to the United States, nor shortly after effecting entrance. The complaints assumed that the defendants were residents during the registration period fixed by the acts of 1892 and 1893, and there was no testimony to controvert the fact of long years of residence in the United States. They are the first cases in this court since the *Fong Yue Ting* case, in which the defendants were at the time of arrest actually residing in the United States.

Section 3 of the act of 1892, placing the burden of proof on Chinese defendants and section 6 of the same act as amended by the act of 1893, in so far as it relates to the deportation of Chinese residents of the United States, have all been revoked or superseded by section 1 of the act of April 29, 1902, which (in providing for the reënactment of the Chinese exclusion laws only in so far as the same were not inconsistent with treaty obligations) assures to Chinese persons, *either permanently or temporarily residing in the United States* for the protection of their persons and property, all rights given by the laws of the United States to citizens of the most favored nation (article 4 of the treaty of 1894), the sections above mentioned being inconsistent with said treaty provision.

Earlier legislation on the subject of Chinese exclusion was concededly in violation of treaty obligations with China. *Chae Chang Ping* v. *United States*, 130 U. S. 581; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Fong Yue Ting* v. *United States*, 149 U. S. 697; *United States* v. *Gue Lim*, 176 U. S. 459, 464.

Even after judicial expression on this subject, Congress, with "malice aforethought," reënacted this legislation. Acts of May 5, 1892, and November 3, 1893. And see Sen. Doc. Rep. 776, part 2, pp. 44-97, 1902, referring to statutory violations of the treaty presented by John W. Foster for Chinese Minister.

A construction which seeks to effectuate treaty obligations should be sought rather than the contrary. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Gue Lim*, 176 U. S. 459, 465; *Whitney* v. *Robertson*, 124 U. S. 190, 194.

Section 3 of the act of 1892 is repealed to the extent of its repugnance, to wit, in so far as requiring Chinese residents of the United States to establish by affirmative proof, their right to remain here. See *Wood* v. *United States*, 16 Pet. 342, 363; *United States* v. *Tynan*, 11 Wall. 88; *South Carolina* v. *Stoll*, 17 Wall. 425.

There is a distinction between an alien who remains here and one who has left here and seeks to return. While here he is entitled to the benefit and guarantees of life, liberty and property secured by the Constitution to all persons of whatever race within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence are as fully protected by the supreme law of the land as if he were a naturalized citizen of the United States. But when he has voluntarily gone from the country and is beyond its jurisdiction, being an alien, he cannot reënter the United States in violation of the will of the Government, as expressed in enactments of the law-making power. *Lem Moon Sing* v. *United States*, 158 U. S. 547, 548; *United States* v. *Wong Kim Ark*, 169 U. S. 700.

The construction contended for is reasonable and just. It is not only within the spirit of the act of 1902 and the treaty

of 1894 but within the letter thereof. It is a much narrower construction of the act and treaty, than the construction of section 6 of the act of 1884 adopted in *Lau Ou Bew*, 144 U. S. 47. It is not as narrow as that in *United States* v. *Gue Lim*, 176 U. S. 467. As to due process of law and definitions applicable to this case, see *Davidson* v. *New Orleans*, 96 U. S. 97, 107; *Boyd* v. *United States*, 116 U. S. 616, 635. This clause cannot be given any wider scope. See *Wong Wing* v. *United States*, 163 U. S. 227.

The objection as to the sufficiency of these complaints is not affected by the decision in the case of *Chin Bak Kan*, 186 U. S. 193.

Neither the act of 1892, nor the act of 1893 amending it, required that Chinese persons who were merchants or who "were engaged in business rather than manual labor" should procure certificates of residence during the period when the registration provisions were in force. *Lee Kan* v. *United States*, 62 Fed. Rep. 914; *Pinn Kwan Case*, 100 Fed. Rep. 609, reviewing 94 Fed. Rep. 824.

The question is not whether the respondent is a merchant and so exempt from registration, but whether he is a laborer and so liable to deportation for want of registration. He does not appear to be a laborer within either common understanding or the statutory definition of the term. *United States* v. *Mark Ying* (a peddler), 76 Fed. Rep. 450.

If these defendants were engaged in business in 1894, rather than in manual labor, but since, through misfortune or other cause have become laborers, they are, nevertheless, not subject to these registration provisions. Treasury Dec. No. 14,542½, November 25, 1893.

As to those who were minors when the registration act was in force as to laborers, they should not be required to produce certificates. *United States* v. *Gue Lim*, 176 U. S. 462; *In re Tung*, 19 Fed. Rep. 184.

Bail should be allowed upon these appeals (*a*) under the statutes; (*b*) by virtue of numerous precedents; and (*c*) in the

exercise of the inherent power of the court. *Matter of Ah Tai*, decided November 16, 1903, in U. S. District Court for Massachusetts, and cases cited.

Mr. Max J. Kohler by leave of the court filed a brief in aid of appellants in these cases and in Nos. 308, 309 and 312, on behalf of the Chinese Charitable and Benevolent Association of New York:

These appeals are authorized by statute. *United States* v. *Gee Lee*, 50 Fed. Rep. 271; *United States* v. *Lee Seick*, 100 Fed. Rep. 398; *United States* v. *Pin Kwan*, 100 Fed. Rep. 609; *United States* v. *Ham Toy*, 120 Fed. Rep. 1022; *Wong Wing* v. *United States*, 163 U. S. 228, 269; *United States* v. *Mrs. Gue Lim*, 176 U. S. 459. *Chow Loy* v. *United States*, 112 Fed. Rep. 354, has been overruled by *Chin Bak Kan* v. *United States*, 186 U. S. 193.

Bail should be allowed pending the proceedings. Section 716, Rev. Stat., is sufficient for authority. See also §§ 765, 945, 1014, 1015, and rules 34 and 36 of this court. *Hudson* v. *Parker*, 156 U. S. 277, 285; *Unused Tag Case*, 21 Fed. Rep. 701, 706; *In re Chow Goo Pooi*, 25 Fed. Rep. 77; *Chinese Wife Case*, 21 Fed. Rep. 808; *United States* v. *Lee Yen Tai*, 108 Fed. Rep. 950; *United States* v. *Moy Yee Tai*, 109 Fed. Rep. 1. Section 5, act of 1882, and § 2, act of 1893, have no application to these cases. *In re Chin Yuen Sing*, 65 Fed. Rep. 788; *Chin Yuen Sing* v. *Kilbreth*, 163 U. S. 680; 22 Op. Atty. Gen. 340; *United States* v. *Lee Seick*, 100 Fed. Rep. 398; *In re Ny Look*, 56 Fed. Rep. 81; Treas. Dec. No. 13,996; Cong. Rec. 53d Cong. vol. 25, pt. II, p. 2444; *United States* v. *Chum Shang Yuen*, 57 Fed. Rep. 588.

The construction contended for by the Government would be imputing to Congress intention to work gross hardship in the matter of requiring imprisonment pending appeals inconsistent with its subordination of these statutes by the act of 1902, to Art. 4 of the treaty of 1894, conferring upon Chinese persons for the protection of their persons and property all the rights of the most favored nation, and besides would be of more

than doubtful constitutionality as involving imprisonment as distinguished from mere brief detention, incidental to deportation. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368; *In re Qwong Wo*, 13 Fed. Rep. 229, 233; *In re Ah Chong*, 2 Fed. Rep. 733, 737; *In re Parrot*, 1 Fed. Rep. 481, 498; *Wong Wing* v. *United States*, 163 U. S. 228; *United States* v. *Wong Dep Ken*, 57 Fed. Rep. 206; *In re Lintner*, 57 Fed. Rep. 587.

The statutes throwing the burden of proof on the Chinamen arrested are inconsistent with Art. 4 of the treaty of 1894, and with the amendments to the Federal Constitution. A later inconsistent statute supersedes a prior treaty. *Exclusion Cases*, 130 U. S. 598; *Li Sing* v. *United States*, 180 U. S. 486, 495; cases cited under last point and *Mrs. Gue Lim* v. *United States*, 176 U. S. 459, 465.

The registration provisions have been erroneously construed below as having required all persons not now proved to be merchants as defined in the act, to register as "laborers," as also persons who were minors, residing in the United States in 1892 having no occupation of their own, contrary to a reasonable construction and understanding of these laws, at least as given during the six months following November 3, 1893, during which alone registration was permitted.

As to provisions of registration of merchants and witnesses in regard thereto, see *Li Sing* v. *United States*, 180 U. S. 486; *United States* v. *Lee Seick*, 100 Fed. Rep. 398; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 726; *United States* v. *Sing Lee*, 71 Fed. Rep. 686; *United States* v. *Tyle*, 76 Fed. Rep. 318; *In re Chin Ark Wing*, 115 Fed. Rep. 412; Treas. Decs. 14,542½, 17,145, 18,666, 18,686.

As to who are merchants, see *United States* v. *Mark Ying*, 76 Fed. Rep. 450; *United States* v. *Chin Fee*, 94 Fed. Rep. 828; *In re Chu Roy*, 81 Fed. Rep. 826; *Wong Fong* v. *United States*, 77 Fed. Rep. 168; *In re Ho King*, 14 Fed. Rep. 724; *United States* v. *Gay*, 95 Fed. Rep. 226; 20 Op. 602, 324; 23 Op. 485; 24 Op. 132.

The minors should not have been deported. It was error

to exclude the certificate of United States Commissioner, the genuineness whereof was admitted and which was relied upon to show an adjudication made after due hearing in 1897, by a United States Commissioner to the effect that the defendant was a citizen of the United States by birth.

The Commissioner had jurisdiction to determine citizenship. *Chin Bak Kan* v. *United States*, 185 U. S. 193. The certificate was sufficient to establish *res judicata*. Treaty Dec. 22,572; *United States* v. *Chung Shee*, 76 Fed. Rep. 951, 956; *United States* v. *Luey Guey Auck*, 115 Fed. Rep. 252. Compare *United States* v. *Hills*, 124 Fed. Rep. 831; *Kirby* v. *United States*, 174 U. S. 47; *Sparf* v. *United States*, 156 U. S. 51, 56.

The principle of *res judicata* applies to determinations based upon jurisdiction, whether made in courts of record or not of record. *Gates* v. *Preston*, 41 N. Y. 13; *Reich* v. *Cochrane*, 151 N. Y. 122; *Mohr* v. *Maniere*, 17 Fed. Cas. No. 9695, affirmed 101 U. S. 416.

Congress has to provide methods by which the Commissioner's determination upon such issues can be proved. *United States* v. *Jones*, 134 U. S. 483; *Hoyne* v. *United States*, 38 Fed. Rep. 542; *Philips* v. *United States*, 33 Fed. Rep. 164; § 847, Rev. Stat; *United States* v. *McDermott*, 140 U. S. 151; *United States* v. *Julian*, 162 U. S. 324; *Southworth* v. *United States*, 151 U. S. 179. These certificates are frequently the only evidence obtainable. Treasury Dec. 8572, 11,606, at p. 1048; 14,375, 14,654, 17,237. As to the excuse of illness, the Commissioner has attempted to give this statute an unduly harsh and severe construction, to the effect that there must not have been a day during the statutory period during which illness, did not prevent registration. This is an unwarranted and oppressive construction of the statute, not sustained by the authorities. *United States* v. *Tye*, 70 Fed. Rep. 318; *In re Chin Ark Wing*, 115 Fed. Rep. 412; *Wong Fong* v. *United States*, 77 Fed. Rep. 168.

Chinese persons are entitled to a liberal construction of this statute with respect to time, because of the delay of the Govern-

ment in the matter of prescribing regulations and forms of certificates required by the act of 1893.

The complaints stated no cause of action. Accordingly, the general line of authority requiring complaints setting forth the facts establishing causes of action, is applicable here. *Rice* v. *Ames*, 180 U. S. 371; *Ex parte Hart*, 63 Fed. Rep. 249, 259; *Ex parte Laue*, 6 Fed. Rep. 34, 38; *United States* v. *Tureaud*, 20 Fed. Rep. 621; *United States* v. *Sapinkow*, 90 Fed. Rep. 654, 660; *West* v. *Cabell*, 153 U. S. 78.

The complaints should have been under oath. *Register* v. *Lee Lum*, 94 Fed. Rep. 343, 346; *Southworth* v. *United States*, 161 U. S. 639, 642.

These proceedings were all barred by the statute of limitations of five years, since more than five years have elapsed since registration was authorized and the defendants were shown to have been continuously resident within the United States for upwards of twenty years except Lew Guey, the holder of the McGettrick certificate.

If these proceedings are not criminal, they are at least *quasi* criminal within the meaning of § 1047, Rev. Stat.; *Boyd* v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *Johnson* v. *Donaldson*, 3 Fed. Rep. 22; *United States* v. *Irvine*, 98 U. S. 450; *Re Neilson*, 131 U. S. 126, 187; *Daly* v. *Brady*, 69 Fed. Rep. 285; *Bolles* v. *Outing Co.*, 175 U. S. 262; *United States* v. *Riley*, 88 Fed. Rep. 480. While *Chinese Exclusion* cases are not to be reviewed as criminal proceedings, they partake so far of the nature of criminal proceedings as to be governed by these provisions, applicable to proceedings for penalties and forfeitures. *Ex parte Sing*, 82 Fed. Rep. 22; *United States* v. *Wong Quong Wong*, 94 Fed. Rep. 832; *United States* v. *Jacobus*, Second Circuit, unreported, October, 1903.

Mr. Solicitor General Hoyt for the United States:

It is impossible to avoid the conclusion that the character of the testimony was for the most part perfunctory and formal; that it utterly failed to support with any conclusiveness

either the claim of merchant status or that of citizenship, and amply justified the commissioner's orders of deportation, and his finding as to the merchant claim that the proofs furnished did not clearly establish facts which would bring these persons within the statute as merchants.

The term "merchant," as it is used in Chinese exclusion legislation, has been clearly defined by the law and by the decisions of the courts. Section 2, act of Nov. 3, 1893; *In re Ah Yow*, 59 Fed. Rep. 561; *Lai Moy* v. *United States*, 77 Fed. Rep. 955; *Mar Bing Guey* v. *United States*, 97 Fed. Rep. 576, and has expressly been held not to include bookkeepers and paid assistants in a store. *United States* v. *Pin Kwan*, 100 Fed. Rep. 609; *Quock Ting* v. *United States*, 140 U. S. 417; *In re Louie You*, 97 Fed. Rep. 580; *United States* v. *Lee Huen*, 118 Fed. Rep. 458.

The points raised in these cases have been heretofore considered by the court and positively and conclusively determined. The court has held that the treaty of 1894 did not repeal existing law; that defects in complaint or pleading do not affect the authority of the commissioner or judge of the validity of the statute; that the adjudication of the judge or commissioner is final; that the court cannot properly reexamine facts already determined by two judgments below; that the policy of Chinese legislation is opposed to numerous appeals. *Fong Yue Ting* v. *United States*, 149 U. S. 729; *United States* v. *Lee Yen Tai*, 185 U. S. 213; *Chin Bak Kan* v. *United States*, 186 U. S. 193.

The contentions that the act of April 29, 1902, repeals by implication the laws of 1892 and 1893, and that the offense is barred by the operation of §§ 1046, 1047, Rev. Stat., are without merit. The language of the act of 1902 makes it evident that Congress considered the entire scheme of exclusion law, embracing the treaty, as forming one complete, harmonious and consistent whole. The act of 1902 is merely additional legislation on the subject, and there is nothing repugnant between that and former acts. Neither § 1046, which provides a limitation of five years for prosecutions under

the revenue and slave trade laws, nor § 1047, imposing the same limitation on suits or prosecutions for penalties or forfeitures, touches Chinese exclusion in the remotest way. But if the case were otherwise, it is sufficient to say that the offense is a continuing one; it is the gist of the subject that the Chinaman never had and has not now any right to be here.

Congress intended the determination of the rights of a Chinaman to be prompt and final in the lower tribunals. The statutory provisions as to bail in Chinese cases limit the discretion of courts and judges and forbid the taking of bail. Sec. 5, act of May 5, 1892; sec. 2, act of Nov. 3, 1893. The practice on the subject is conflicting, but it appears to tend to the refusal of bail. *In re Ah Kee*, 21 Fed. Rep. 701; *In re Chow Goo Pooi*, 25 Fed. Rep. 76; *In re Ah Moy*, 25 Fed. Rep. 808; *In re Chin Yuen Sing*, 65 Fed. Rep. 788; *Chan Gun* v. *United States*, 9 D. C. App. 290. So far as affirmative law goes, and disregarding, for the sake of argument, the clear prohibition in the statutes cited, the fact is that the Chinese case falls between the two categories of civil and criminal as used in the Revised Statutes respecting bail, §§ 945, 1014, 1015, and is unprovided for on that point.

No general or fundamental right of appeal exists here. Where Congress has given one appeal specifically, no further appeal is to be inferred or implied. *Railroad Company* v. *Grant*, 98 U. S. 398; *McKane* v. *Durston*, 153 U. S. 684; *Kohl* v. *Lehlback*, 160 U. S. 293.

The law defines a laborer and a merchant, and those claiming to be merchants must bring themselves clearly within the definition and conditions. A Chinese person, technically a minor, whose claim of citizenship is not established, who has been here for an uncertain time, and is found to be a laborer, cannot escape the result of that status merely because of his minority. In such cases the exceptions to the certificate requirements in the case of minor children of a domiciled merchant, are not applicable. *United States* v. *Mrs. Gue Lim*, 176 U. S. 459.

The claim of citizenship by birth is not to be conceded upon a mere assertion of the fact unaccompanied by corroborative incidents, circumstances or details. *Quock Ting* v. *United States*, 140 U. S. 417; *Chin Bak Kan* v. *United States, supra; In re Louie You*, 97 Fed. Rep. 580; *United States* v. *Lee Huen*, 118 Fed. Rep. 458; and it cannot be doubted that a United States Commissioner properly and finally passes upon the claim of birth in this country as well as upon all other facts. *Chin Bak Kan* v. *United States, supra.*

MR. JUSTICE HOLMES delivered the opinion of the court.

These are appeals from judgments of the United States District Court confirming decisions of a commissioner, and adjudging that the appellants be removed from the United States to China. *Chin Bak Kan* v. *United States*, 186 U. S. 193. The commissioner decided that each of the appellants was a Chinese laborer found without certificate of residence as required by law within the United States, and was not entitled to remain within the United States. The facts may be summed up as follows: The appellants were arrested in July, 1902, when working in laundries, they all having failed to produce certificates of residence when called upon to do so by the Chinese inspector. At the hearing before the commissioner they offered testimony of witnesses other than Chinese that they were residents of the United States on May 5, 1892. Ah How and Chu Do put in evidence that they were not laborers. Yung Lee offered evidence of illness, which he contended made him unable to procure his certificate. Chu Do offered parol evidence that he was born in the United States, and therefore was a citizen, and also that he was a minor during the time allowed by the statute for obtaining a certificate. Lew Guey offered similar evidence and a certificate of another United States commissioner of a hearing before him and an adjudication that Lew Guey had the right to remain in the United States by reason of being a citizen thereof. The United States offered no evidence beyond the facts stated above.

The ground of appeal common to all the cases is that §§ 3

and 6 of the act of May 5, 1892, 27 Stat. 25, have been repealed. By § 3 any Chinese person arrested under the provisions of the act shall be adjudged to be unlawfully within the United States, unless he shall establish by affirmative proof to the satisfaction of the judge or commissioner his right to remain. Of course, if the burden of proof was on the appellants, the commissioner and judge might not be satisfied by the affirmative evidence produced. We are not asked to review the finding of fact. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714, 715. But it is argued that this section is done away with by § 1 of the act of April 29, 1902, c. 641, 32 Stat. 176, continuing all laws then in force, "so far as the same are not inconsistent with treaty obligations." It is said that the section is inconsistent with Article 4 of the treaty of December 8, 1894, 28 Stat. 1210, agreeing that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. It is pointed out that the treaty of 1894 with Japan and the treaty of 1859 with Paraguay give the rights and privileges of native citizens to the subjects of those countries in access to the courts and in the defence of their rights, and it is said that the law as to the burden of proof cuts down those privileges and rights. The section has been upheld, however, by this court, since the treaty, and after the passage of the act. *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200; *United States* v. *Lee Yen Tai*, 185 U. S. 213. It is not repealed by the laws of 1902. The clause of the treaty had a different object, and in view of the difficulties encountered in such an investigation, it could not have been supposed to promise that special measures theretofore taken should not be continued in force for the purpose of ascertaining the very question whether the laborers were lawfully residing in the United States or not. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730. But it is enough to say that the treaty itself, in Article 5, expressly refers to the act of 1892 as

amended by the act of 1893, and states that the Chinese government will not object to the enforcement of those acts.

It follows still more clearly from the language of Article 5 of the treaty that § 6, as amended by the act of November, 3, 1893, 28 Stat. 7, remains in force. *Lee Lung* v. *Patterson*, 186 U. S. 168, 176, 177. That section requires Chinese laborers who are entitled to remain in the United States to obtain a certificate of residence from the collector of internal revenue of their district, or to be deported, subject to certain excuses. Article 5 of the treaty especially refers to the requirements of registration in the acts of 1892 and 1893, although, as we have said, it states that the enforcement of the acts as a whole will not be objected to. In one or two of the cases there was a suggestion below that § 6 of the act was unconstitutional, but that question was disposed of in *Fong Yue Ting* v. *United States*, 149 U. S. 698, and was not pressed.

The complaints are objected to as insufficient, because in addition to alleging that the appellants are laborers not entitled to remain in the United States without certificates, it adds the words "having come unlawfully into the United States without certificates," thus implying, it is said, that an unlawful coming into the United States could be legalized by obtaining a certificate. It is enough to say that such objections have been answered by *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729, and *Chin Bak Kan* v. *United States*, 186 U. S. 193, 199. In the former it was laid down that "no formal complaint or pleadings are required." That proposition is not affected by the later statutes. We do not mean to imply that there is anything in the objection if we should consider it on its merits.

As to the testimony that two of the appellants were merchants during the period of registration, all that appears is that the commissioner did not believe it. We cannot go outside the record of the specific case for the purpose of inquiring whether the decision was induced by some view of the law which may be open to argument. The same may be said as to the parol testimony as to the age of two of the appellants and their birth in this country. But we may add that it

by no means follows from the decision in *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, that the minor children of laborers, old enough to do work, are not required to have certificates. The language of the statute certainly is broad enough to include them and does not indicate a division by local laws with regard to coming of age. The principle applicable to the admission into this country of the wife and children of a certificated merchant is not the principle applicable to such a case. As to the certificate of the United States commissioner, offered by Lew Guey, it was merely a written statement by the commissioner that a person of that name was brought before him on the usual charge, and was adjudged to have the right to remain in the United States by reason of being a citizen. Apart from the possibility that the commissioner in the present hearing was not satisfied of the identity of the party, such a statement is not the certificate of evidence required by the act of 1892, and is not evidence of a judgment. *United States* v. *Lew Poy Dew*, 119 Fed. Rep. 786. The evidence that Yung Lee was disabled by sickness from obtaining a certificate did not satisfy the commissioner. We cannot say as matter of law that he was bound to be satisfied by the testimony of Yung Lee himself that he was so disabled.

We have assumed, for the purpose of decision, what does not clearly appear from the record, that the judge who tried the case on appeal tried it solely on the commissioner's report of evidence and heard no witnesses. Whether the fact could be assumed if the result would be a reversal of the judgment below, we need not decide. See *United States* v. *Lee Seick*, 100 Fed. Rep. 398, 399. There is no other question worthy of notice. We are asked to express an opinion as to the right of the appellants to give bail pending their appeal, but that now is a moot point. We agree with the Government, that these cases are covered by previous decisions of this court.

Judgment affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

LEIGH *v.* GREEN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 119. Argued January 13, 1904.—Decided February 23, 1904.

Where the claim that a state statute is unconstitutional is first made on a motion for rehearing in the highest court of the State, and the motion is entertained, and the Federal question decided against the contention of the plaintiff in error, the question is reviewable in this court. *Mallett* v. *North Carolina*, 181 U. S. 589.

Where the State seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, and the owner is unknown, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded," to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution.

The statute of Nebraska, Laws, 1875, February 19, p. 107, for the enforcement of liens for taxes by sale of the property is not repugnant to the due process clause of the Constitution because in certain cases it permits, under the provisions prescribed in the statute, a proceeding *in rem* against the land.

THE facts essential to the determination of this case are briefly summarized as follows: Irwin Davis was the owner of certain lands in Knox County, Nebraska. On the twenty-fourth day of November, 1880, an action was begun by Algernon S. Patrick against Davis, in the District Court of the county, and an attachment was issued and levied upon the lands. The case was afterwards removed to the Circuit Court of the United States for the District of Nebraska, on October 18, 1882, where on January 21, 1890, an order for the sale of the lands in question was made for the satisfaction of the judgment, and the same were sold on May 15, 1894, by the United States marshal to Lionel C. Burr. Burr afterwards conveyed the lands to Crawford and Peters. On June 23, 1894, Crawford and Peters conveyed the premises to Alvin L. Leigh, the plaintiff in error in the present case.

Pending said attachment proceedings, on December 28, 1882,

a deed was filed for record in the clerk's office of Knox County, purporting to convey the lands to Henry A. Root on October 8, 1880. Afterwards, on May 12, 1894, a decree was rendered in the District Court of Douglass County, Nebraska, in a cause wherein said Patrick was plaintiff and Davis and others were defendants, setting aside the deed from Davis to Root as fraudulent and void as against the said Patrick.

In 1891 actions were brought in the District Court of Knox County, wherein the Farmers' Loan and Trust Company was plaintiff and Henry A. Root and different subdivisions of the lands were defendants, for the foreclosure of certain tax liens, which actions, taken together, cover the lands in controversy in the present suit.

In the same year, 1891, decrees were entered in those cases, and orders made directing the sale of the lands for the satisfaction of the amounts found due by the decrees. In pursuance of said decrees the lands were sold by the sheriff to Henry S. Green, defendant in error in the present action. The deeds of conveyance were made and delivered to him by the sheriff. Plaintiff in error claims title because of the attachment proceedings, and defendant in error bases his claim to title upon the proceedings had for the foreclosure of the tax liens. This suit was brought by the plaintiff in error Leigh, in the District Court of Knox County, to quiet title to the lands in controversy.

In that court a decree was rendered in favor of the plaintiff in error Leigh, which decree was reversed by the Supreme Court of Nebraska, and the cause remanded with directions to render a decree in favor of the defendant Green.

This writ of error is prosecuted to review the judgment of the Supreme Court of Nebraska. 64 Nebraska, 533.

Mr. J. M. Woolworth and *Mr. W. D. McHugh* for plaintiff in error:

We admit the rule that the legislature may adopt the most summary, stringent and arbitrary administrative measures to compel the payment of taxes, and that the legislature may authorize the forfeiture of lands upon which taxes have been

assessed and levied but have not been paid when due, without notice to the owner of the assessments or the levy, or of his delinquency, or of the forfeiture. Rules protecting the property of the citizen against proceedings to divest him of his property without due process of law, are inappropriate to those intended to compel payment of taxes. But when the State goes into its courts and invokes their power, in order to aid and give effect to such administrative proceedings, another principle obtains. In doing so it abdicates its sovereignty and puts itself on the footing of any one of its subjects. The same principles and rules which govern private citizens when seeking redress of their grievances, in the judicial courts, governs the State when it becomes a suitor or consents to be sued. *United States* v. *Aredondo*, 6 Pet. 691, 734; *Mitchell* v. *United States*, 9 Pet. 711, 742; *Brent* v. *Bank of Washington*, 10 Pet. 596 (citing 2 Co. Inst. 573; 2 Ves. Sen. 296; Hard. 60, 460; 7 Co. Inst. 19; 6 Hard. 27, 170, 230, 502; 4 Co. Inst. 190); *Smoot's case*, 15 Wall. 36; *State* v. *Kennedy*, 60 Nebraska, 300; *New Orleans* v. *Citizens Bank*, 167 U. S. 371, and cases cited p. 399; *The Siren*, 7 Wall. 152. See also where this rule has been applied, *Clark* v. *Barnard*, 108 U. S. 436; *Burrs* v. *Arkansas*, 20 How. 271, 529; *Moore* v. *Tate*, 87 Tennessee, 725; *Greene* v. *State*, 73 California, 29; *People* v. *Stephens*, 71 N. Y. 527; *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519.

Questions relating to taxation and to proceedings to compel the payment of taxes, when brought within the judicial cognizance, are not exceptions to what has been said. All of the judgments, in which the rule has been laid down that the State may adopt whatever measures it sees fit to enforce taxes, were where the proceedings in question were administrative; in none of them was the rule applied to judicial process. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *New Orleans* v. *Citizens Bank*, 167 U. S. 371, 387.

This eliminates from the inquiry the circumstances that the defendant derives his rights from the State, which, if it were the party suing, would be subject to the rules governing

actions between private parties, and, that the action, judgment, sale and deed in the foreclosure proceedings were to enforce the payment of taxes.

As to the validity of the statute and the proceedings to foreclose the tax liens, the statute changes the form from actions *in personam*, to actions *in rem*, and, by applying the rule in the latter that all the world is a party to them, attempts to avoid the necessity of bringing in lienholders personally, but as to the nature of a proceeding *in rem*, see *Freeman* v. *Alderson*, 119 U. S. 185, from which it appears that "actions for the enforcement of mortgages and other liens" are not actions *in rem* strictly considered.

Our concern with the statute is not because it attempts to transfer actions to foreclose a tax lien from the class called *in personam* to that called *in rem*. The legislature undoubtedly may have the power to regulate the form of remedies. But what is radically wrong in this statute is that it attempts by the judgment and proceedings which it authorizes, to conclude parties who have no notice of them, although resident within the jurisdiction and accessible to process and known to the plaintiff, and knowledge of the interests is easily ascertainable. This cannot be done by the legislature simply changing the form of the action, thus evading the fundamental principle in the jurisprudence of all civilized peoples that no judgment is of any validity against one not a party to the action in which the judgment is rendered. *Tyler* v. *Court of Registration*, 175 Massachusetts, 71.

It is no answer to say that the notice published in the newspaper ran to "all persons interested" in the land, for the statute does not authorize or contemplate such notice, or any notice to any one but the owner of the fee; and, besides, if notice by publication were authorized by statute, it must, to be effective, run to the parties to be reached by it and not to all interested parties without naming them.

Mr. Edward P. Smith and *Mr. William R. Green* for defendant in error:

The constitutional requirements of due process of law re-

late to the remedy or means used and not to substantive law, and the complainant's property is not taken from him without due process of law if he is allowed a hearing at any time before the lien of the assessment becomes enforced. *Board* v. *Collins*, 46 Nebraska, 627; *C. B. & Q.* v. *State*, 47 Nebraska, 549.

It is sufficient if a notice is given which will enable the property owner to obtain a hearing before some tribunal and contest the validity and fairness of the taxes assessed against him. *Gillmore* v. *Hentig*, 33 Kansas, 405; *Board* v. *Collins*, 46 Nebraska, 427.

The notice is to be considered in connection with the provisions of the statute which the taxpayer is bound to know. *Lent* v. *Tillson*, 72 California, 404; *S. C.*, affirmed, 140 U. S. 316; *Kansas City* v. *Duncan*, 135 Missouri, 571; *Davis* v. *City*, 86 California, 37; *Ball* v. *Ridge Copper Co.*, 118 Michigan, 7.

The Constitution should be read into the statute with relation to notice. *Lent* v. *Tillson*, 14 Pac. Rep. 71; *Kentucky Tax Cases*, 115 U. S. 316; *Paulsen* v. *Portland*, 149 U. S. 30; *Gillmore* v. *Hentig*, 33 Kansas, 405.

It is not necessary to adopt the same procedure collecting taxes through the courts as in a strictly judicial proceeding. *Duluth* v. *Dibble*, 62 Minnesota, 18; *King* v. *Mullen*, 171 U. S. 404; *Murray* v. *Hoboken Land Co.*, 18 How. 272.

In regard to taxes it is the land and not the owner that owes the debt and an action *in rem* is proper. *Blavins* v. *Smith*, 13 L. R. A. 441; Cooley on Taxation, sec. 15; Blackwell on Tax Titles, sec. 954; *Jones* v. *Devine*, 8 Ohio St. 430; Freeman on Judgments, secs. 607, 1055; *Pritchard* v. *Madren*, 24 Kansas, 349; *Chancey* v. *Wass*, 35 Minnesota, 1; *Ball* v. *Ridge Copper Co.*, 118 Michigan, 7. As to judgment *in rem*, *Freeman* v. *Alderson*, 119 U. S. 185, distinguished. See *Woodruff* v. *Taylor*, 20 Vermont, 65.

It is immaterial that grantor of plaintiff in error was not made a party. Herman on Estoppel, sec. 296; Wells on Res Adjudicata, 507, citing *Monroe* v. *Douglas*, 4 Sandf. Ch. 182.

Nor is seizure necessary where the property is land within

the court's jurisdiction. *Hamilton* v. *Brown*, 161 U. S. 256. The owner if he desires can always appear as claimant. *Kentucky Tax Cases*, 115 U. S. 321.

If no personal defendants are necessary, it is not necessary to give any notice in actions strictly *in rem* to defendants by personal citation. While notice is necessary, within reasonable limits the legislature may prescribe the nature of such notice, and when notice is given in conformity with the legislative provisions, it affords everyone interested in the property due process of law. *Monroe* v. *Douglas*, 4 Sandf. Ch. 182; *De Freville* v. *Smalls*, 98 U. S. 525; *Woodruff* v. *Taylor*, 20 Vermont, 73; *In re Empire State Bank*, 18 N. Y. 199, 215; *Happy* v. *Mosher*, 48 N. Y. 313; *Campbell* v. *Evans*, 45 N. Y. 356; *Hogle* v. *Mott*, 62 Vermont, 255. See brief of authorities on this question, 50 L. R. A. 599.

It is only necessary in actions strictly *in rem* to serve notice on the *res*, and when notice is so served it is notice to the world. *Cross* v. *Armstrong*, 44 Ohio St. 624; *Branch Bank* v. *Hodges*, 12 Alabama, 118; Freeman on Judgments, § 606.

It was the duty of all parties interested in the land in controversy to watch for the proceedings provided for by the statute for the foreclosure of the lien, and interpose any objection they might have to the validity of the tax. *Francis* v. *Grote*, 14 Mo. App. 234; *Ball* v. *Ridge Copper Co.*, 118 Michigan, 7.

Every one knows that his property will be sold for taxes if the taxes are not paid; parties interested in the land are presumed to know the law, and that the sale under the provisions of the statute would be an absolute bar against them. *Davidson* v. *New Orleans*, 96 U. S. 97.

It was entirely immaterial whether plaintiff's grantor was a resident or non-resident. Case *supra*, and *Shepard* v. *Ware*, 46 Minnesota, 184; *S. C.*, 48 N. W. Rep. 773.

Where a statute can be construed in such a manner as to make it conform to the constitution, that construction ought to be given it. The Nebraska Supreme Court has passed upon the form of notice in this case and has held that it conformed to the provisions of the statute, and its construc-

tion is entitled to be followed by this court. It has twice, in the cases of *Carmen* v. *Harris*, 61 Nebraska, 40, and *Grant* v. *Bartholomew*, 57 Nebraska, 673, held that the action is one *in rem*.

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

A motion is made to dismiss because the claim of impairment of a right secured by the Fourteenth Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim heretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Be this as it may, the Supreme Court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. *Mallett* v. *North Carolina*, 181 U. S. 589.

The Federal question presented for our consideration is briefly this: Is the Nebraska statute under which the sale was made and under which the defendant in error claims title, in failing to make provision for service of notice of the pendency of the proceedings upon a lienholder, such as Patrick, a deprivation of property of the lienholder without due process of law within the protection of the Fourteenth Amendment?

The statutes of Nebraska under which the conveyances were made to the Farmers' Loan and Trust Company are given in the margin.[1]

[1] Sec. 1. That any person, persons or corporation having by virtue of any provisions of the tax or revenue laws of this State a lien upon any real property for taxes assessed thereon, may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose and costs of suit.

The evident purpose of section 4, where the owner of the land is unknown, is to permit a proceeding *in rem*, against the land itself, with a provision for service as in case of a non-resident. By section 6 it is provided that in cases where the

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SEC. 2. That any person, persons or corporation holding or possessing any certificate of purchase of any real estate, at public or private tax sale, or any tax deed, shall be deemed entitled to foreclose such lien under the provisions of this act, within any time not exceeding five years from the date of tax sale (not deed) upon which such lien is based; *And provided*, That the taking out of a tax deed shall in nowise interfere with the rights granted in this chapter.

SEC. 3. All petitions for foreclosure or satisfaction of any such tax lien shall be filed in the District Court in chancery, where the lands are situated.

SEC. 4. Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the District Courts, and where the owner of the land is not known the action may be brought against the land itself, but in such case the service must be as in the case of a non-resident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication.

SEC. 5. All sales of lands under this chapter, by decree of court, shall be made by a sheriff or other person authorized by the court, in the county where the premises or some part of them are situated.

SEC. 6. Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser, the same title that was vested in the defendant to the suit at time of the assessment of the tax or taxes against the same; and such deed shall be an entire bar against the defendant to such suit, and against all parties or heirs claiming under such defendants; and in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this section being to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles.

SEC. 7. The proceeds of every sale made under a decree, by virtue of this chapter, shall be applied to the discharge of the debt, adjudged by the court to be due and of the costs awarded, and if there be any surplus it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court.

SEC. 8. If such surplus, or any part thereof, shall remain in court, for the period of three months, without being applied for, the court may direct the same to be put out at interest, under the direction of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of the court; the party to whom said surplus shall be loaned to be designated by the court, and the sureties, upon which said money is loaned, to be approved by the judge.

SEC. 9. All lands sold by the sheriff by virtue of this act, shall be ap-

land itself is made defendant the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction. The object and intent of the action is defined to be "to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles."

The Supreme Court of Nebraska has held that the term "owner," as used in the fourth section, applies to the owner of the fee, and does not include a person holding a lien upon the premises. It is this section (4) and section 6 which are alleged to be in conflict with the Fourteenth Amendment. The argument for the appellant concedes that the State may adopt summary or even stringent measures for the collection of taxes so long as they are "administrative" in their character; and it is admitted that such proceedings will not divest the citizen of his property without due process of law, although had without notice of assessments or levy, or of his delinquency and the forfeiture of his lands. But the argument is, that when the State goes into court and invokes judicial power to give effect to a lien upon property, although created to secure the payment of taxes, the same principles and rules prevail which govern private citizens seeking judicial remedies, and require service on all interested parties within the jurisdiction. The right to levy and collect taxes has always been recognized as one of the supreme powers of the State, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen. Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exercise of power "as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims pre-

praised, advertised, and sold as upon execution and the title conferred by his deed shall be entitled to all the presumptions of any judicial sale.

SEC. 10. This act shall be construed as cumulative and not exclusive in respect to the remedy for enforcing liens, and collecting delinquent taxes, by sale of property or otherwise, in the cases herein provided for, and shall in nowise interfere with, alter, or amend the existing revenue laws of the State.

scribe for the classes to which the one in question belongs," it is due process of law. Cooley on Const. Lim. (7th ed.) 506.

The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized and not to amount to the taking of property without due process of law, as a seizure and sale of property upon warrant issued on ascertainment of the amount due by an administrative officer, *Murray* v. *Hoboken Land Co.*, 18 How. 272; the seizure and forfeiture of distilled spirits for the payment of the tax, *Henderson's Distilled Spirits*, 14 Wall. 44. The subject underwent a thorough examination in the case of *Davidson* v. *New Orleans*, 96 U. S. 97, in which Mr. Justice Miller, while recognizing the difficulty of defining satisfactorily due process of law in terms which shall apply to all cases, and the desirability of judicial determination upon each case as it arises, used this language: "That whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

In the present case, the argument is that, as the State has not seen fit to resort to the drastic remedy of summary sale of the land for delinquent taxes, but has created a lien in favor of a purchaser, at tax sale, after permitting two years to elapse in which the owner or lienholder may redeem the property, it has in authorizing a foreclosure without actual service, taken property without due process of law, because the proceedings and sale to satisfy the tax lien do not require all lienholders within the jurisdiction of the court to be served with process. If the State may proceed summarily, we see no reason why it may not resort to such judicial proceedings as are authorized

in this case. And if the State may do so, is the property owner injured by a transfer of such rights to the purchaser at the tax sale, who is invested with the authority of the State? In *Davidson* v. *New Orleans*, *supra*, the objection was made that the State could not delegate its power to a private corporation to do certain public work, and, by statute fix the price at which the work should be done. In that connection, speaking of the *Slaughter-House Cases*, 16 Wall. 36, Mr. Justice Miller said: "The right of a State to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us."

In the statute under consideration, for the purpose of collecting the public revenue, the State has provided for the enforcement of a lien by the purchaser at a tax sale, and authorized him to proceed against the land subject to the tax to enforce the right conferred by the State. The State has a right to adopt its own method of collecting its taxes, which can only be interfered with by Federal authority when necessary for the protection of rights guaranteed by the Federal Constitution. In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the State is in exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws. This fact should not be overlooked in determining the nature and extent of the powers to be exercised. "The process of taxation does 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 according to customary forms and established usages, or in subordination to the principles which underlie them." *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 239.

In authorizing the proceedings under the statute to enforce the lien of the purchaser, who has furnished the State its revenue in reliance upon the remedy given against the land assessed, the State is as much in the exercise of its sovereign power to collect the public revenues as it is in a direct pro-

ceeding to distrain property or subject it to sale in summary proceedings.

Nor is the remedy given in derogation of individual rights, as long recognized in proceedings *in rem*, when the Fourteenth Amendment was adopted. The statute undertakes to proceed *in rem*, by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure, if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in Cooley on Taxation (2d ed., 527): "Proceedings of this nature are not usually proceedings against parties; nor, in the case of lands or interests belonging to persons unknown, can they be. They are proceedings which have regard to the land itself, rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form." And see *Winona Land Co.* v. *Minnesota*, 159 U. S. 526.

Such being the character of the proceedings, and those interested having an opportunity to be heard upon application, the notice was in such form as was reasonably calculated to bring the same to the attention of those interested in the lands. In the present case the notice was in the form given in the margin.[1]

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[1] *Legal Notice.*

In the District Court of Knox County, Nebraska.

The Farmers' Loan and Trust Company, Plaintiff,
vs.
Henry A. Root and The Northwest Quarter of Section Twenty-two (22), Township Thirty-one (31), Range Three (3) West, of the 6th Principal Meridian, Defendants.

The State of Nebraska, Knox County, to the above-named defendants and all persons interested in said real estate:

You are hereby notified that the petition of plaintiff is now on file in the

This notice was to all persons interested in the property. The lienholder, the Nebraska court has held, may appear in court and set up his claim. The notice was good as against the world, and all that is necessary when the proceedings are *in rem*:

"Laws exist under which property is responsible for taxes imposed upon it. These same laws often authorize the obligation by them imposed upon the property, to be enforced by proceedings in which no service of process is required except upon such property. The judgment resulting from such a procedure is *in rem*, and satisfaction thereof is produced by an execution authorizing the sale of the property. The sale acts upon the property, and, in so acting, necessarily affects all claimants thereto." Freeman on Judgments, sec. 606.

When the proceedings are *in personam* the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross* v. *Armstrong*, 44 Ohio St. 613, 624. Where land is sought to be sold and is described in the notice a technical service upon it would add nothing to the procedure where the owner is unknown. The publication of notice which describes the land

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District Court of Knox County, Nebraska, wherein plaintiff claims that it purchased said real estate for taxes due thereon in the sum of twenty-four dollars and fifty-one cents at the tax sale held in said county on the 12th day of June, 1888; that under said sale it has paid subsequent taxes on said land as follows, to wit: on the 10th day of August, 1888, twenty-one dollars and seventy-nine cents, and on the 9th day of July, 1889, nineteen dollars and sixty-three cents, for which sum, with interest as provided by statute, plaintiff claims the first lien against said premises and asks the foreclosure thereof, and that the said property be sold to satisfy the amount due plaintiff, together with the further sum of ten per cent of said amount as attorney's fees and costs of suit. And you are further notified to appear and answer said petition on or before Monday, the 9th day of November, 1891, or the petition will be taken as true and judgment rendered accordingly.

Dated this 30th day of September, 1891.

FARMERS' LOAN AND TRUST COMPANY,
By M. J. SWEELEY, *Its Attorney.*

is certainly the equal in publicity of any seizure which can be made of it.

In *Tyler* v. *Judges of the Court of Registration*, 175 Massachusetts, 71, the Supreme Judicial Court of Massachusetts upheld as constitutional an act providing for registering and confirming titles to lands, in which the original registration deprived all persons, except the registered owner, of any interest in the land, and the act gave judicial powers to the recorder after the original registration, although not a judicial officer, and there was no provision for notice before registration of transfer or dealings subsequent to the original registration. The majority opinion was delivered by Mr. Justice Holmes, then chief justice of Massachusetts. In the course of the opinion, speaking of the Massachusetts Bill of Rights and the Fourteenth Amendment, he said: "Looked at either from the point of view of history or the necessary requirements of justice, a proceeding *in rem* dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the State or notice by name to those outside of it, and not encounter any provision of either constitution. Jurisdiction is secured by the power of the court over the *res*."

In *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559, it was held that notice by publication in proceedings to condemn land for railway purposes was sufficient notice to non-resident owners, and was due process of law as to such owners. So as to adjudications of titles of real estate within the limits of the State as against non-resident owners, brought in by publication only. *Arndt* v. *Griggs*, 134 U. S. 316, 327; *Hamilton* v. *Brown*, 161 U. S. 256, 274.

The principles applicable which may be deduced from the authorities we think lead to this result: Where the State seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may procede directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded," to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be

heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution.

In the case under consideration the notice was sufficiently clear as to the lands to be sold; the lienholders investigating the title could readily have seen in the public records that the taxes were unpaid and a lien outstanding, which, after two years, might be foreclosed, and the lands sold and by the laws of the State an indefeasible title given to the purchaser. Such lienholder had the right for two years to redeem, or, had he appeared in the foreclosure case, to set up his rights in the land. These proceedings arise in aid of the right and power of the State to collect the public revenue, and did not, in our opinion, abridge the right of the lienholder to the protection guaranteed by the Constitution against the taking of property without due process of law.

The judgment of the Supreme Court of Nebraska is

Affirmed.

JULIAN *v.* CENTRAL TRUST COMPANY.

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

No. 139. Argued January 21, 22, 1904.—Decided February 23, 1904.

While the decision of the highest court of a State is entitled to the highest respect and consideration from, it is not conclusive upon, this court in determining rights secured by a purchaser under a decree of foreclosure in a Federal court at a sale made prior to the rendition of such decision.

Under the laws of North Carolina, and the decisions of the highest court of that State rendered prior to 1894, there was nothing to prevent property of a railroad company sold under foreclosure passing to the purchaser free from any obligation for debts of the former owner arising thereafter, notwithstanding the purchaser was not a domestic railroad corporation.

Where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding § 720, Rev. Stat., restrain all proceedings in a state court which have the effect of defeating or impairing its jurisdiction.

A purchaser of property sold under a decree of foreclosure in a Federal court, in cases where the Federal court by its decree retains jurisdiction to settle all liens and claims upon the property and who is in possession of the property under an order confirming the sale, can maintain an action in the same court to restrain the holders of judgments obtained in the state courts against the former owner, in actions to which the purchaser was not a party, from levying upon and selling the property described in the decree of foreclosure and the order confirming the sale thereunder.

On May 2, 1894, a decree was entered in the Circuit Court of the United States for the Western District of North Carolina foreclosing a second mortgage of the Western North Carolina Railroad Company to the Central Trust Company of New York, trustee. The property was subject to a first mortgage to the same trustee, which was not in default. The decree provided:

"The purchaser or purchasers of the property herein decreed to be sold," the Western North Carolina Railroad and its franchises, "shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises, appertaining thereto, as fully and completely as the Western North Carolina Railroad now holds and enjoys, or has heretofore held and enjoyed the same;" and further, the said purchaser or purchasers "shall have and be entitled to hold the said railroad and property discharged of and from the lien of the mortgage foreclosed, in this suit, and from the claims of the parties to this suit or any of them, except the first consolidated mortgage of September 1, 1884."

In pursuance of this decree the Southern Railway Company, a corporation of the State of Virginia, became the purchaser. On August 22, 1894, the sale was confirmed, the decree of confirmation providing, among other things:

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge and deliver a proper deed of conveyance to the said Southern Railway Company, conveying to it, all and singular, the railroad, equipment, property and franchises so as aforesaid, sold under the decree

of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, or any one claiming by, under or through it, except the prior mortgage recited in such decree. Upon the delivery of such conveyance by the special master the said Southern Railway Company shall fully possess and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and to hold the same to it and its successors and assigns forever.

"On August 31, 1894, on exhibition of the deed executed and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said The Western North Carolina Railroad Company, by its proper officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad property and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court."

Afterwards the master conveyed to the Southern Railway Company—

"All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan County, to and through Statesville, in Iredell County, to Asheville, on or near the

French Broad River, in Buncombe County; thence along French Broad River to Paint Rock in Madison County, and also from said Asheville westward to the Tennessee River at or near the mouth of the Nantahala River, and thence westward to Murphy in Cherokee County; and all real estate now owned or acquired for the purpose of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad, and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with, issuing from or relating to the said above-described railroad.

"The foregoing properties, real, personal, choses in action and franchises, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company, executed September 2, 1884, and being sold in foreclosure of the same.

"A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 5th of May, 1894, to which reference is hereby made, together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said Western North Carolina Railroad Company, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The deed of purchase was duly recorded, and in August, 1894, the purchaser took possession of the railroad property

and has ever since been in possession of the road operating it as owner.

On March 20, 1897, Mrs. James, as administratrix of her deceased husband, W. A. James, brought an action in the Superior Court of Rowan County, North Carolina, against the Western North Carolina Railroad Company for damages for the wrongful killing of her husband. The Southern Railway Company was the employer of the deceased and he was killed in its service while acting as a locomotive engineer. In the trial court a judgment was rendered in favor of the railroad company. On appeal the judgment was reversed and the cause remanded to the Superior Court, with directions to enter a judgment for the damages assessed in favor of the administratrix. *James* v. *Railroad*, 121 N. Car. 523. Judgment was entered accordingly against the Western North Carolina Railroad Company for $15,000 on February 21, 1898.

On the same day that the James suit was begun, March 20, 1897, Fannie E. Howard, administratrix of her husband, John H. A. Howard, deceased, commenced an action in the Superior Court to recover of the Western North Carolina Railroad Company damages sustained in the death, by wrongful act, of her husband, who was killed at the same time with James, being a fireman in the employ of the Southern Railway Company, and recovered damages in the sum of five thousand dollars on February 21, 1898. To neither of these suits was the Southern Railway Company made a party defendant. After the recovery of these judgments, Mrs. James and Mrs. Howard caused executions to be issued from the Superior Court of Rowan County and placed the same in the hands of D. R. Julian, sheriff, who proceeded to levy the same upon the property as belonging to the Western North Carolina Railroad Company, to wit:

"The Western North Carolina Railroad Company, existing in the State of North Carolina, including its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining, belonging to, or in any wise connected therewith, or issuing out of and relating to the said The Western North Carolina Railroad Company, together

with all of its property in the State of North Carolina, and including its roadbed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures —the said railroad extending from the town of Salisbury through Statesville, Newtown, Hickory, Morganton, Marian, Asheville to Paint Rock in Madison County, and from Asheville westward by way of Waynesville to Murphy in Cherokee County—reference being had for a further description of said road and its property, rights and franchises to the charter of the said road and the amendments thereto enacted from time to time by the general assembly of North Carolina."

The sheriff advertised the property levied upon for sale, whereupon the Central Trust Company of New York and the Southern Railway Company filed a supplemental bill in the foreclosure proceeding, making the sheriff party defendant, seeking to quiet the title to the property and franchise purchased at the foreclosure sale and to enjoin the sale of the same to satisfy the judgments rendered in the state courts against the Western North Carolina Railroad Company. In the answer of the sheriff and of the administratrices of James and Howard issue was taken upon the right of the Circuit Court to entertain the bill or grant an injunction, and among other things it was averred:

"3. That these respondents deny the truth of the allegations contained in the third section of the supplemental bill of complaint, and while they admit that the Southern Railway Company took a deed from the master purporting to convey the said franchises and property subject to the lien of the first mortgage bonds theretofore issued by the said company, they aver that the Southern Railway Company, being at the time of said sale not a resident corporation of the State of North Carolina, and not subject to visitation of said State, but attempting to do business therein by comity, was not allowed or authorized by the laws of North Carolina to purchase, or hold, or operate the Western North Carolina Railroad, or to own its

franchise and property without becoming a domestic corporation, and that, by virtue of certain laws enacted by the legislature of North Carolina at its session of 1879, being chapter 10 of the Laws of 1879, reënacted in the Code of North Carolina as section 1255, no mortgage of the Western North Carolina Railroad Company, thereafter issued, had the legal effect of exempting the property or earnings of said company from execution for the satisfaction of any judgment obtained in the courts of said State against said company for torts thereafter committed by said company, its agents or employees, whereby any person should be killed, or any person or property injured, 'any clause or clauses in such mortgage to the contrary notwithstanding,' both the first mortgage bonds subject to which the sale of the franchise and property of said company purporting, under the decree referred to in the bill of complaint, to have been sold, and the second mortgage bonds, for default in payment of the interest on which the decree of foreclosure was entered, appear from said record (Exhibit A to said bill of complaint) to have been issued long after the enactment of said statute in the year 1871, and said statute, since its enactment in 1871, has been the law of the State of North Carolina, in contemplation of which all railroad companies created by and organized under the laws of said State have issued all mortgage bonds, the said statute, as these respondents are advised, informed and believe, having entered into and formed a part of every mortgage bond issued by any railroad corporation operating under the laws of North Carolina since its enactment in 1871.

"But these respondents deny the truth of the allegation 'that, at the time of their death (referring to the death of W. A. James and John H. A. Howard) the Western North Carolina Railroad Company had no interest in the Western North Carolina Railroad, or the franchises, nor had it any interest or estate in said railroad or franchise of any kind or nature whatsoever since the 22d day of August, 1894, the day the Southern Railway Company took possession of said railroad;' and these respondents aver that the Supreme Court of North Carolina, the highest appellate court of said State, held and ad-

judged, in the year A. D. 1898, in actions pending therein on appeal, and in which these respondents, respectively, were plaintiffs, and the said The Western North Carolina Railroad Company was defendant, that the said Western North Carolina Railroad Company was still an existing corporation, liable to be sued in the courts of said State, and that the said judgments in favor of these respondents, respectively, and against the Western North Carolina Railroad Company, constituted liens upon the franchise and property of the company, superior to the liens of the said first mortgage bonds or the said second mortgage bonds mentioned in the said foreclosure suit, and these respondents are advised, informed and believe that the courts of the United States are bound to follow and adopt the construction given by the highest appellate court of North Carolina in construing its own constitution and its own laws. And these respondents are advised, informed and believe that, though the Southern Railway Company had assumed the right to operate the Western North Carolina Railroad, and had employed the intestates of these respondents as engineer and fireman, when they were killed by the negligence of said Southern Railway Company, that the Supreme Court of North Carolina had held and adjudged in the said actions brought by these respondents against the Western North Carolina Railroad Company, and wherein they recovered the judgments in pursuance of which executions have issued, as alleged in the bill of complaint, that the said The Western North Carolina Railroad Company was answerable for the torts of the Southern Railway Company, and for any damages to its employés caused by the negligence of said Southern Railway Company in operating said railroad."

Upon hearing upon the bill, answer and testimony a decree was entered in favor of the Central Trust Company and the Southern Railway Company and an injunction granted against the proposed sale of the property levied upon. From this decree an appeal was taken to the Circuit Court of Appeals, from whose judgment affirming the decree of the Circuit Court, 115 Fed. Rep. 956, a writ of certiorari to this court was granted.

Mr. A. C. Avery and *Mr. Lee S. Overman*, with whom *Mr. C. A. Mountjoy* was on the brief, for plaintiffs in error.

Mr. Charles Price and *Mr. F. H. Busbee*, with whom *Mr. William A. Henderson* was on the brief, for defendants in error.

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

The title of the Southern Railway Company to the franchise and property of the Western North Carolina Railroad Company would seem to be plain, unless there is something in the North Carolina statutes or judicial determinations which prevents the foreclosure proceedings from having effect to pass the title. A railroad company in North Carolina has full authority to mortgage its franchises and property. Code of North Carolina, sec. 1957. This power was also given by the charter of the Western North Carolina Railroad Company. By the foreclosure proceedings, the title of the Western North Carolina Railroad Company to its franchise and property, except its mere right to be a corporation, was sold and the title confirmed in the purchaser. By the law of North Carolina the title to mortgaged premises is in the mortgagee. The Central Trust Company, the trustee under the first and second mortgages, was a party to the foreclosure proceedings. It is estopped to dispute the effect of the decree, sale and confirmation, clothing the Southern Railway Company with the full title to the property and franchise to operate a railroad which had theretofore belonged to the Western North Carolina Railroad Company. From this record and a consideration of the litigation that has arisen in the attempt to collect the James and Howard judgments, it is evident that a conflict exists between the views of the Federal courts and the Supreme Court of North Carolina, as to the effect of the foreclosure proceedings to relieve the property purchased at the sale from levy and execution to satisfy the James and Howard judgments. Such differences, always to be deprecated, should be approached

in a spirit of fairness and comity with a view to preventing conflicts of jurisdiction detrimental to the rights of parties and to the respect and authority due judicial tribunals. The decision relied upon as justifying the sheriff in the levy of execution and sale of the property formerly belonging to the Western North Carolina Railroad Company is *James* v. *Railroad Co.*, reported in 121 N. Car. 523, in which case it was held that the sale of the railroad company's property upon the foreclosure of the second mortgage did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which the property was operated. Further, that the sale under the decree in the Circuit Court of the United States foreclosing the second mortgage did not under secs. 697, 698 of the Code of North Carolina make the purchaser a domestic corporation, and that, in order to have the effect to dissolve the mortgagor corporation as provided in sec. 697 of the code, another corporation must be provided as contemplated in sec. 1936 of the code, to take its place and to assume and discharge the obligations to the public growing out of the franchise, and until that is done the old corporation will continue to exist. Speaking of secs. 697 and 698 of the North Carolina Code the learned judge, delivering the opinion, said:

"These sections were passed in 1872, and we think should be considered in connection with section 701, which was passed in 1879, and sections 1936 and 2005 referred to in section 701.

"If this be the correct reading of these sections of the code, it would seem that while section 697 does say that these facts, *ipso facto*, dissolved the corporation, another corporation must be provided, as in section 1936 of the code, to take its place before it is dissolved; that there must always be a corporation in existence liable to the public for the duties and obligations assumed by the grantee for the privileges conferred in the grant of the franchise and that the old corporation must continue to exist until this is done; and that when the new corporation is formed it will be a domestic corporation. It cannot be that the legislature ever intended, by this general legislation, to create a foreign corporation here, when it could

not do so by positive and direct enactment, 119 N. C. 918, Judge Dick's opinion in *Bradley* v. *Railroad*, published in the appendix. By this view of the case all the interests of the parties may be harmonized. The 'Southern,' the purchaser of the equity of redemption of the 'Western,' stands in the shoes of that company. The 'Southern' is in effect the mortgagor in its relations to the 'Central Trust Company of New York,' the mortgagee of the first mortgage, and being in possession of the road, its property and franchise, has the right to run and operate the same. But the old corporation, still in existence, is liable for damages caused by the maladministration of the 'Southern,' which it allows to run and operate the road. But the property of this road, which the 'Southern' is allowed to use, will be held liable to the public for damages. *Charlotte* v. *Railroad Co.*, 4 L. R. A. 135; *Brunswick Gas Co.* v. *United States Gas Co.*, 35 Am. St. Rep. 385, and note on page 390.

"It therefore follows that, in our opinion, the court below erred in its ruling upon the third issue. This ruling is reversed, and judgment should be entered for the plaintiff according to the verdict of the jury." *James* v. *Railroad Company*, 121 N. Car. 523, 528, 529.

This decision of the highest court of the State was made after the rights of the Southern Railway Company, whatever they may be, had accrued in the property and franchise of the Western North Carolina Railroad Company, and, while entitled to the highest respect and consideration, is not conclusive upon this court in determining the rights secured to the purchaser under the decree of foreclosure in the Federal court. *Burgess* v. *Seligman*, 107 U. S. 20.

If the North Carolina Supreme Court can be taken to have held that the property purchased by the Southern Railway Company at the judicial sale continued liable for debts thereafter accruing against the Western North Carolina Railroad Company, we are constrained to dissent from such conclusion. Under sec. 697, North Carolina Code, it is provided that the sale under a deed of trust or mortgage shall pass not only the works and property of a corporation and those ac-

quired after the mortgage and before the sale, but all other property of which it may be possessed at the time of the sale other than debts due it, and "upon such conveyance to the purchaser the said corporation shall, *ipso facto*, be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him, recorded in the same manner in which the conveyance shall be recorded." Section 698 provides that the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been or should have been performed by the first corporation, but for such sale and conveyance, save only that the corporation so created shall not be entitled to the debts due to the first corporation, and shall not be liable for any debts or claims against the first corporation which may not be expressly assumed in the contract of purchase; nor shall the property, franchise or profits of such new corporation be exempt from taxation. This, with other provisions of sec. 668, indicate an intention to clothe the purchaser with all the property of the old corporation, including the franchise to conduct and operate a railroad, freed from all debts or obligations of the old corporation.

But these sections, it is said in the *James* case, must be read in connection with sec. 701 and secs. 1936 and 2005, referred to in sec. 701. They are set forth in the margin.[1]

[1] SEC. 701. This chapter, unless otherwise declared herein, or in the chapter entitled railroads and telegraphs, shall apply to all corporations, whether created by special act of assembly, by letters of agreement under this chapter, or by the chapter entitled railroads and telegraphs. And this chapter and the chapter on railroads and telegraphs, so far as the same are applicable to railroad corporations, shall govern and control, anything in the special act of assembly to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter, and of the chapter entitled "Railroad and Telegraph Companies," intended to be repealed, shall be specially referred to by number, and as such specially repealed.

SEC. 1936. There shall be a board of six directors and a president of every corporation formed under this chapter to manage its affairs; and said directors and president shall be chosen annually by a majority of the

And it is said, as the result of these provisions that, unless the purchaser shall organize a new domestic corporation to take the place of the old corporation the property continues liable, though in the hands of the purchaser, upon a cause of action asserted against the old corporation for the conduct of the new owner, and this in actions to which the purchaser is not a party, and whose knowledge of the suit and judgment may come with the seizure of the property to satisfy the judgment. For, it is said, "there must always be a corporation in existence liable to the public for the duties and liabilities assumed by the grantee for the privileges conferred in the grant of the franchise." This reasoning, it seems to us, assumes that the franchise to operate the road did not pass by the sale,

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votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors and president each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law. Such purchaser or purchasers may associate with him or them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation with all the powers, privileges and franchises, and be subject to all the provisions of this chapter.

SEC. 2005. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation, and the property, franchise and profits of said new corporation shall be taxed as other like property, franchise and profits are rated.

unless such new domestic corporation is organized. As we have seen, the North Carolina statutes authorize the conveyance by mortgage of the property and the franchise to use and operate it. The decree of foreclosure undertakes to sell, and the confirmation to secure, the purchaser in the use and enjoyment of the property. The power given to mortgage the franchise of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed. *New Orleans &c. Railroad Co.* v. *Delamore*, 114 U. S. 501.

It is true the right to be a corporation is not sold. By the statute the corporation is declared to be dissolved by the sale, and under other sections of the North Carolina code its affairs are to be wound up. But the franchise to operate and use the property has passed at the sale, and must have done so to make the purchase of any value. This principle, recognizing the distinction between the mere right or franchise to be a corporation and the franchise of maintaining and operating the railroad, was distinctly pointed out by Mr. Justice Matthews in *Memphis R. R. Co.* v. *Commissioners*, 112 U. S. 609:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

It is true the sections of the North Carolina code herewith given clothe the purchaser with the right and privilege of organizing a corporation to operate the purchased property, but we find no requirement that he shall do so. The language of the last paragraph of sec. 1936 is "such purchaser or purchasers may associate with him or them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges and franchises, and be subject to all the provisions of this chapter." This confers a privilege, but does not prevent the purchaser from transferring the property to a company already formed and authorized to purchase and operate a railroad. *People* v. *Brooklyn &c. Ry. Co.*, 89 N. Y. 75.

The Southern Railway Company was authorized by its charter, among other things, to purchase or otherwise acquire the property of any railroad company organized under the laws of another State. We have been cited to no statute of the State of North Carolina forbidding the purchase of a railroad at foreclosure sale by a corporation of another State. It is said that the State requires a domestic corporation organized under and subject to its laws to become the purchaser of a railroad under the North Carolina statutes already cited. But the Southern Railway Company in purchasing a franchise granted by the State of North Carolina and undertaking to operate a railroad within the State, is subject to regulation by the law of the State. *Runyan* v. *Lessee of Coster*, 14 Peters, 122; *Christian Union* v. *Yount*, 101 U. S. 352, 354. This principle is not qualified because the right of removal of suits for diverse citizenship still exists, as was held in *Southern Railway Co.* v. *Allison*, 190 U. S. 326. It is urged that the Supreme Court of North Carolina, by a course of decisions antedating the mortgage and foreclosure, had established the rule of law contended for as to the continuing liability of a railway corporation, unless a domestic corporation is organized to own and operate the property. We have examined these cases and do not find such to be the case. The Supreme Court of North Carolina had held a lessor liable for the conduct and manage-

ment of the lessee, and in *Pierce* v. *North Carolina Railroad Co.*, 124 N. Car. 83, decided in March, 1899, that court said:

"The motion to dismiss the complaint and for judgment of nonsuit appears from brief of defendants' counsel to be intended to raise again the question whether the lessor company, The North Carolina Railroad Company, the defendant herein, is liable 'for all acts done by the lessee in the operation of the road,' as was held in *Logan* v. *Railroad*, 116 N. C. 940, but why the counsel should feel 'encouraged to believe' that 'this court will retire from the position it has taken upon the question,' we are not advised. We have perceived no lack of 'soundness of reasoning' therein. The decision in Logan's case was made after full deliberation and with full appreciation and careful discussion of the important principle now again called in question—and it was held that 'a railroad company cannot escape its responsibilty for negligence by leasing its road to another company, unless its charter or a subsequent act of the legislature specially exempts it from liability in such case'—and it was made in an action to which the appellant herein was the party raising the question. The same proposition has been heretofore laid down by Smith, C. J., in *Aycock* v. *Railroad*, 89 N. Car., at page 330, with cases there cited; and Logan's case upon this point has been expressly cited and sustained in *Tillett* v. *Railroad*, 118 N. Car., at page 1043; *James* v. *Railroad*, 121 N. Car., page 528; *Benton* v. *Railroad*, 122 N. Car. 1007, (decided May 24, last,) and *Norton* v. *Railroad*, same volume, at pages 936, 937."

In the last two cases this point was again held against the same corporation, which is the appellant in this case; the verdicts were for considerable sums, and in Norton's case the defendant was represented by the same counsel as in the present case.

But this is far from holding that in the case of a sale the corporate property shall remain liable for the debts of the old corporation in suits against it until a new domestic corporation is organized to take the place of the old one. The cases cited hold the lessor to a continued liability, notwithstanding a lease. In the case in hand the property and franchise have been sold,

and there is no contractual relation between the companies nor permissive operation of the road by the new company.

Nor can we see any room for the application of section 1255 of the North Carolina Code, making liens for judgments for torts superior to mortgages of incorporated companies. In this case the tort was committed after the judgment debtor had parted with all its property and there was nothing for such judgment to operate upon. *Jeffrey* v. *Moran*, 101 U. S. 285.

Objection is made to the right of the corporation to maintain this bill. To determine this question reference must be had to the attitude of the parties and the nature of the remedy sought. By the decree of the Circuit Court all the property of the Western North Carolina Railroad Company was ordered to be sold, and was conveyed and confirmed to the purchaser, the Southern Railway Company; it was placed in possession of the property and has operated it ever since. The judgments in controversy were obtained for acts committed more than two years after the confirmation of the sale and were rendered about four years after the court adjudicated a sale of all the property of the Western North Carolina Railroad company. To these actions the Southern Railway Company was not a party, yet it is sought to levy upon and sell the very property conveyed to it by the decree of the Federal court, and this upon the theory set up in the answer herein that the property is still liable for the debts of the Western North Carolina Railroad Company because of the failure to organize a domestic corporation to take its place after the sale. The return of the sheriff shows that he has levied upon all this property, said to be of the value of five millions of dollars, to pay these judgments of twenty thousand dollars.

It is not claimed that the Western North Carolina Railroad Company acquired the property by any new title, but in effect it is sought to annul the order and decree of the Federal court because it has not operated to transfer the title to the purchaser. Examining the decree under which this property was sold, we find certain provisions which are important in this connection. It is provided:

"The purchaser or purchasers at said sale shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy any and all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and the purchaser or purchasers, or their approved assigns, shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the right in respect to such appeals which the complainant Central Trust Company of New York would have in case such appeals had been taken by it. The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers having possession of such property which have not been or shall not be paid by said receivers and which shall be adjudged by the court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of the mortgage foreclosed in this suit.

"The court reserves the right to retake and resell said property in case of the failure or neglect of purchaser or purchasers, or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to payment of prior lien claims above mentioned within twenty days after service of a copy of such order upon said purchaser or purchasers, or his or their assigns."

And in the decree affirming the sale we find:

"Thereupon the court orders and decrees that the said report of the special master be spread at large upon the record and be in all things approved, and the sale made by him to the said Southern Railway Company, being all and singular the railroad, equipment, property and franchises of the Western

North Carolina Railroad Company as described in and by the decree of foreclosure entered in this cause on May 5, 1894, at and for the sum of five hundred thousand dollars ($500,000) by it bid, be and the same is in all things ratified, approved, confirmed and made absolute, subject, however, to all the mortgages, receivers' debts and preferential claims, and to all equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of the court to adjudge and declare what receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed or ought to be paid out of such proceeds of sale in preference to the bonds secured thereby. And this court expressly reserves for future adjudication, and power thereby to bind the property sold, all liens and claims and equities specified in and reserved by the said final decree of foreclosure so as aforesaid entered on May 5, 1894.

"And the court accepts the said Southern Railway Company as the purchaser of all and singular the railroad, property and franchises sold under the decree in this cause and holds it obligated as such purchaser to complete and fully pay its said bid and to comply with all the orders of the court heretofore entered, or hereafter from time to time to be entered by it obligatory on such purchaser. And the court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed to purchaser, if it fails or neglects fully to complete such purchase and comply with the orders of court in respect to the full payment and performance of its bid, or to pay into court in accordance with such decree of sale all such sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage of the Western North Carolina Railroad Company herein foreclosed."

It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser. It ac-

cepted the purchaser and thereby made it a party to the suit. *Blossom* v. *Railroad Co.*, 1 Wall. 655. The court reserved the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the Circuit Court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in the view of the state court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree. *Central Trust Co. of New York* v. *St. Louis, Arkansas &c., Railroad Co.*, 59 Fed. Rep. 385; *Fidelity Ins. Trust & Safe Deposit Co.* v. *Norfolk & W. R. R. Co.*, 88 Fed Rep. 815; *State Trust Co.* v. *Kansas City &c. R. R. Co.*, 110 Fed. Rep. 10.

In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon* v. *Terry*, 36 Fed. Rep. 337, per Mr. Justice Field; *French* v. *Hay*, 22 Wall. 250; *Deitzsch* v. *Huidekoper*, 103 U. S. 494.

Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal court by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court, and by the levy and sale to pay these judgments the title is charged with other liens established in another court in a proceeding to which the purchaser was not a party. The Federal court, in protecting the purchaser

under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.

In *Farmers' Loan & Trust Co.*, (original,) 129 U. S. 206, 213, Mr. Justice Miller said: "But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the right of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights may be appealed from, is well established by the decisions of this court."

We think this case belongs to the class instanced by the learned justice, and that the Circuit Court by the order made retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed. In such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill, irrespective of the citizenship of the parties. *Freeman* v. *Howe et al.*, 24 How. 450, 460. The authorities are collected in a note to sec. 97, vol. 1, of Bates on Federal Equity Procedure, and the doctrine thus summarized: "It would seem that the prevention of the conflict of authority between the state and Federal courts, and the protection and preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment

of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defence of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

While recognizing the weight which should be given to decisions of the Supreme Court of a State in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right and title conferred by authority of the decree of a Federal court, which may be virtually set aside and held for naught if the property awarded can be taken upon execution in suits to which the purchaser is not a party. It is conceded that the Federal right could be set up in the state court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal court had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us.

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.

UNITED STATES *v.* THE CHOCTAW NATION AND THE CHICKASAW NATION.

THE CHICKASAW FREEDMEN *v.* THE CHOCTAW NATION AND THE CHICKASAW NATION.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 322, 323. Argued January 26, 27, 1904.—Decided February 23, 1904.

The provisions of the treaty of July 10, 1866, between the United States and the Chickasaw and Choctaw Indians in regard to the Chickasaw freedmen were not complied with, either by the Indians who did not confer any rights on the freedmen, or by the United States which did not remove any of the freedmen from the territory of the Indians.

The freedmen were never adopted into the Chickasaw nation, or acquired any rights dependent on such adoption, and are not entitled to allotments in Choctaw and Chickasaw lands as members thereof; and not having removed from the territory are not entitled to any beneficial interest in the $300,000 fund referred to in the treaty, which in case they were not adopted into the Chickasaw nation was to be held in trust for such of the freedmen, and only such, as removed from the territory.

Under the subsequent agreement of 1902, and not independently thereof, the freedmen became entitled to land equal to forty acres of the average land of the Choctaws and Chickasaws, the Indians to be compensated therefor by the United States, Congress having by the agreement of 1902 provided for them in this manner in case it should be, as it is, determined in this case that they are not entitled otherwise to allotments in the Choctaw and Chickasaw lands.

THESE are cross appeals from a decree of the Court of Claims, entered in a suit brought under an agreement between the United States and the Choctaw and the Chickasaw Indians, made March 21, 1902, and ratified and affirmed by the act of July 1, 1902. 32 Stat. 641, 649.

The controversy is as to the relations of the Chickasaw freedmen to the Chickasaw Nation, and the rights of such freedmen, independent of such agreement, in the lands of the said Indian nations under the third article of the treaty of 1866, between the United States and the said nations, and un-

der any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

There is no dispute about the facts. They are substantially as follows: By treaty of October 20, 1832, the Chickasaw Indians ceded to the United States, for the purpose of sale, their land east of the Mississippi River, and later were permitted to migrate west of that river. By the treaty between the Choctaw and Chickasaw tribes of June 17, 1837, the Chickasaw tribe was permitted to occupy, with the Choctaw tribe, certain territory within the United States, the United States confirming the treaty, and such occupation by a treaty with the tribes June 22, 1855. By this treaty the lands were guaranteed "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole." By said treaty the said tribes leased to the United States "all that portion of their common territory west of the ninety-eighth degree of west longitude" for the settlement of the Wichita and other tribes of Indians. The leased territory was also to be opened to the settlement by Choctaws and Chickasaws. This is the "leased district" hereinafter referred to. The Choctaws and Chickasaws are separate nations. Upon the breaking out of the civil war they entered into relations with the Southern confederacy, and took up arms against the United States. On January 1, 1863, the President of the United States, in pursuance of the proclamation of September 22, 1862, issued a proclamation abolishing slavery.

The appellants in No. 323 are the survivors or descendants of the slaves held by the Chickasaw Nation and number about 9,066. The Creeks, Cherokees and Seminoles also rebelled against the United States, and on the tenth of September, 1865, a treaty was entered into at Fort Smith, Arkansas, between them, said Choctaws and Chickasaws and the United States, by which they and the said Choctaws and Chickasaws renewed their allegiance to the United States, and acknowledged themselves to be under the protection of the United States, and covenanted and agreed that thereafter they would in all things recognize the

government of the United States, which should exercise exclusive jurisdiction over them. The United States on its part promised to afford ample protection for the security of the persons and property of the respective nations or tribes. The treaty was ratified by the legislature of the Chickasaw Nation.

A treaty was concluded between the United States and the Choctaw and Chickasaw Indians, and proclaimed July 10, 1866. It provided, among other things, as follows:

"ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime, whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

"ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively, shall have made such laws, rules and regulations as may be necessary to give all the persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys and public domain claimed by or belonging to said nations, respectively; and also to give such persons who were residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately upon the enactment of such laws, rules and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the pro-

portion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from said nations, respectively. And should said laws, rules and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

The legislature of the Chickasaw Nation has taken action at various times in regard to the said Chickasaw freedman, as follows:

On November 9, 1866, the Chickasaw legislature passed an act declaring it to be the unanimous desire of the legislature that the United States hold the share of the Chickasaw Nation in the $300,000, stipulated for the cession of the "leased district," for the benefit of the Chickasaw freedmen and remove them beyond the limits of the Chickasaw Nation, according to the third article of the treaty of 1866.

In 1868 similar action was taken by the Chickasaw legislature, asking for the removal, by the United States, of the Chickasaw freedmen from the Chickasaw country.

January 10, 1873, the Chickasaw legislature passed an act by which the freedmen were declared to be adopted in conformity with the third article of the treaty of 1866. Certain conditions were expressed, and it was provided that the act

should "be in full force and effect from and after its approval by the proper authority of the United States."

That act was transmitted by the governor of the Chickasaw Nation, by letter of the same date, to the President of the United States, and was submitted by the Secretary of the Interior to the Speaker of the House of Representatives on February 10, 1873, with recommendation for appropriate legislation for extending the time for the execution of the third article of the treaty. The papers were referred to the Committee on Freedmen Affairs, but no action thereon was had at that time.

In October, 1876 or 1877, another act was passed, section 3 of which was as follows:

"SEC. 3. Be it further enacted, that the provisions contained in article 3 of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit, or passing such laws, rules and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the government of the United States that it is the wish of the legislature of the Chickasaw Nation that the government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866."

An act passed October 22, 1885, provided, *inter alia*, as follows:

"SEC. 1. Be it enacted by the legislature of the Chickasaw Nation, That the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the department at Washington of the action of the legislature in the premises.

"SEC. 2. Be it further enacted, That the governor is hereby

authorized and directed to appoint two competent and discreet men of good judgment and business qualifications to visit Washington city, D. C., during the next session of Congress and memorialize that body to provide a means of removal of the freedmen from the Chickasaw Nation to the country known as Ok la ho ma, in the Indian Territory, or to make some suitable disposition of the freedmen question, so that they be not forced upon us as equal citizens of the Chickasaw Nation."

Congress took no action until August 15, 1894, when it passed an act, section 18 of which provided—

"That the approval of Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation,' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly as set forth in a letter from the Secretary of the Interior transmitting to Congress a copy of the aforesaid Act contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session." 28 Stat. 286, 336.

Subsequently, April 23, 1897, an agreement was entered into between the United States and the Choctaw and Chickasaw tribes, which was ratified and confirmed by an act passed June 28, 1898, section 29 of which (30 Stat. 495, 505), provided as follows:

"That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes, so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands. . . .

"The lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

"That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of forty acres each shall be entitled

each to land equal in value to forty acres of the average land of the two nations."

These provisions relative to the freedmen are previously qualified as to their holdings of such lands by this clause in the statute, "to be selected, held and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress."

Then came the agreement of 1902. It provides for the allotment of land to each member of the Choctaw and Chickasaw tribes of three hundred and twenty acres and to each freedman "land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations."

The agreement provides also as follows:

"36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw Nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

"37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw Nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit."

"40. In the meantime the commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that

the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The agreement was ratified by the Choctaws and Chickasaws by elections September 25, 1902, and became effective on that date. The Court of Claims found the averments in the bill to be true, and found that the third article of the treaty of 1866 remained unaffected by any and all laws subsequently thereto enacted by the said Indian nations or by Congress independently of the agreement of March 2, 1902, and confirmed by act of Congress of July 1, 1902; that the Chickasaw Nation had not conferred the rights upon their freedmen as provided in said treaty or given to them forty acres of land as provided. And further found that none of the said freedmen elected to remove or were willing to remove from said nation, but they did and now do remain therein; that the United States only agreed to remove them if they were willing to be removed. And further, the freedmen, by not electing to remove from the nation and remaining therein, forfeited all benefit to the money mentioned in the treaty, "became in said nation upon the same footing as other citizens of the United States in said nation, and were entitled only to the rights and privileges of such citizens, and were not entitled to the forty acres of land mentioned and described" in said treaty. It was therefore

adjudged that, independently of said agreement, the relations of the freedmen to said nation were only those "of citizens of the United States residing in the said nation," and that the said freedmen, independently of said agreement and the aforesaid act of 1902, "have no rights in the lands of the Chickasaw Nation, nor are they, or any of them, under said article entitled to allotments in the lands of the said Chickasaw Nation. The decree concluded as follows:

"And it is further ordered that upon the coming in of the roll and appraisal to be made by the Dawes Commission, as referred to in the said statute, the defendants, the Choctaw and Chickasaw Nations, have leave to apply for an additional decree to be entered at the foot of this decree determining the amount which shall be paid and allowed by the United States to the said Choctaw and Chickasaw Nations, as directed by said statutes; and that the complainant, the United States, be at the same time heard in regard to such amount for which judgment shall be rendered against the United States."

Mr. Charles W. Needham for the Chickasaw Freedmen.

Mr. George A. Mansfield and *Mr. A. A Hoehling, Jr.*, for the Choctaw and Chickasaw Nations.

Mr. Assistant Attorney General Pradt for the United States.

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

Full quotations have necessarily been made from the statutes and agreements relied on and from the treaty of 1866, but the questions presented are, nevertheless, not complex.

The main, if not crucial, question is, were the freedmen adopted by the Chickasaw Nation as provided in the treaty? They were declared adopted by the act of 1873 upon certain conditions, but the act was only to have force and effect "from and after the approval by the proper authority of the United States." The United States did not approve until 1894. In the meantime, as early as 1876, the Chickasaws passed an act,

by which it was "declared to be the unanimous consent of the Chickasaw legislature" that the United States exercise the right given to it for the benefit of the freedmen by the treaty of 1866. Against the effect of this act several contentions are presented.

It is urged that the negroes became free by the emancipation proclamation and the Thirteenth Amendment to the Constitution of the United States, and acquired thereby all the rights of freemen. That may be granted, but what is its consequence? Certainly not to invest the freedmen with any rights in the property or to participate in the affairs of their former owners. For such rights we must look to the treaty and subsequent legislation and, to a certain extent, to the act which gave jurisdiction of this suit to the Court of Claims. We get no aid from the emancipation proclamation or the Thirteenth Amendment. Prominent, of course, in the inquiry is the act of adoption passed by the Chickasaw legislature in 1873. It responded, in the main, to the treaty of 1866, and if it had force in 1894, when it was approved by Congress, the adoption of the freedmen was made complete. Appellants so contend. They say the act of adoption "was complete in itself and a full exercise of the power possessed by that (Chickasaw) legislature." And, further, if the act were subject to repeal, it was not repealed. The act, it is contended, expressed a wish only and not a purpose, and left to the United States to "follow either of two courses." Counsel say: "It (the United States) could approve the act of adoption of 1873, but it could refuse to approve that act and remove the freedmen as requested by the act of 1876. The power of determining which course should be adopted rested wholly and exclusively with the United States." The argument is plausible, but we cannot assent to it. Besides, the act of 1876 does not stand alone. In 1885—nine years before Congress acted—another act was passed. Its terms were unmistakable. Its declaration was "that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever." The governor was requested to notify the department at Washington

of the action of the legislature, and was also directed to appoint two competent men to visit Washington and to memorialize Congress "to provide the means of the removal of the freedmen from the Chickasaw Nation to the country known as Oklahoma in the Indian Territory." These two acts must be construed to work a repeal of the act of adoption if it could be repealed by the Chickasaw Nation. The latter is denied, and we are brought to the last contention of appellants in regard to the question of adoption. The contention is that "Congress, by the act approved August 15, 1894, gave life and vitality to the Chickasaw act of January 10, 1873," that is, as we understand the contention, by mere power and disregarding whatever of convention there was in the treaty of 1866, and whatever of volition was given to the Indians, the United States peremptorily determined the rights of the freedmen in the lands and affairs of the Indians. Granting, without deciding, that Congress possessed such power, we are forced to believe its exercise, if intended, would have been explicit and direct, not left to be inferred by the approval of the act of 1873. That approval is, of course, an element in the controversy, but to give it the effect which appellants do is to make it practically the sole element, and reduces the case to the inquiry what Congress had willed, not what Congress had agreed to. The act of 1902 certainly contemplated and provided for a different inquiry, one that depended upon the agreements of the United States, not upon its power. And this view is supported by the opinion of the Secretary of the Interior expressed August 9, 1898, and which was presumably known to Congress when it passed the act of 1902. The opinion reviewed the treaty of 1866 and subsequent legislation, and interpreted section 18 of the act of 1894, which approved the act of adoption of 1873, as follows:

"The language of this provision is not such as would be appropriate to the enactment of original legislation, such as an adoption of the freedmen into the Chickasaw tribe by Congressional enactment, against the consent of the tribe. The terms employed harmonize better with a purpose to merely assent to, or sanction, an act of the tribal legislature supposed

to be awaiting assent, or sanction, by Congress. The words used are those of approval and acquiescence, and not those of creation or command."

The conclusion was deduced "that the Chickasaw freedmen are not members of that tribe, within the meaning of the provision of the agreement submitting the amended agreement to a vote of the male members of the tribe qualified to vote under tribal laws."

It follows from these views that the freedmen were not adopted into the Chickasaw tribe and necessarily did not acquire the rights dependent upon adoption. They make, however, a specific claim to be beneficiaries of the $300,000.

By the treaty, as we have seen, the United States was to hold that sum in trust for the Indians, to be paid to them upon their conferring certain rights upon the freedmen, and by giving the latter forty acres of land. If such rights were not conferred within two years from the ratification of the treaty the said sum should then be held in trust for said freedmen, and be held and used by the United States for the benefit of such freedmen as should remove from the territory, and the United States agreed to remove within ninety days from the expiration of said two years all such freedmen who should be willing to remove; those who remained or who should return after having been removed to have no benefit of said sum or any part thereof but should be upon the same footing as other citizens of the United States.

The treaty is clear. The Indian nations were to receive the $300,000 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer those rights, that sum was to be held in trust for all such freedmen, and only such freedmen, as should remove from the territory. The treaty was not complied with either by the Indians or the United States. No rights were conferred upon the freedmen; no freedmen were removed, and the statutes were enacted and the agreements were made that we have described. But those statutes and agreements gave no rights to the freedmen. The only explicit provision for the freedmen was the allotment of forty acres of land to each of them. They claim to be

beneficiaries of the $300,000, but the disposition of that under the treaty was to be in the United States, and only to be used for freedmen who should remove from the territory. None have removed. There is an intimation in the brief of their counsel that in their memorials to Congress they expressed a willingness to remove, but Congress did not choose and has not chosen to remove them; indeed, has provided for the exact opposite—provided for the allotment of homes to them out of the lands of the Indians and for payment to the Indians therefor if it should be determined, in this suit, that the freedmen were not, independently of that agreement, "entitled to allotments in Choctaw and Chickasaw lands."

As we hold the freedmen were not so entitled, the decree of the Court of Claims is

Affirmed.

DELAWARE INDIANS *v.* CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

No. 240. Argued December 1, 2, 1903.—Decided February 23, 1904.

In a suit brought under § 25 of the act of June 28, 1898, 30 Stat. 495, by the Delaware Indians residing in the Cherokee Nation for the purpose of determining their rights in and to the lands and funds of the Cherokee Nation under their contract and agreement with the Cherokee Nation of April 8, 1867.

Held that the registered Delawares acquired in the 157,000 acres set off to them east of the ninety-sixth meridian only the right of occupancy during life with a right upon allotment of the lands to not less than 160 acres together with their improvements, and their children and descendants took only the rights of other citizens of the Cherokee Nation as the same are regulated by law.

Held that the Cherokee Nation has been recognized as a distinct political community, *Cherokee Fund Cases*, 117 U. S. 288, having its own consti-

tution and laws and power to administer the same, and it was not the purpose of the enabling act under which this suit was brought to revise the political action of the administration of the Nation in admitting persons to citizenship therein under authority of provisions of its constitution which were in force when the Delawares were consolidated with the Cherokee Nation.

Held that the enabling act contemplated a judgment of the court, determining the rights of the Delawares and Cherokees in the lands and funds of the Cherokee Nation, in such wise as to enable a division to be made conformable to the rights of the parties as judicially determined.

Held that the bill should not be dismissed because the Delawares have not proved their asserted claims but a decree should be entered finding the registered Delawares entitled to participate equally with Cherokee citizens of Cherokee blood in the allotment of lands.

THE facts are stated in the opinion of the court.

Mr. Walter S. Logan, with whom *Mr. Charles M. Demond* was on the brief, for appellants.

Mr. John J. Hemphill and *Mr. William T. Hutchings* for respondents.

MR. JUSTICE DAY delivered the opinion of the court.

On June 28, 1898, the Congress of the United States passed an act entitled "An act for the protection of the people of the Indian Territory and other purposes." 30 Stat. 495. By the twenty-fifth section of the act it is provided:

"That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand six hundred acres purchased by the Delaware tribe of Indians from the Cherokee Nation under agreement of April eighth, eighteen hundred and sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to

bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

Under this section the present suit was prosecuted in the Court of Claims by the Delaware Indians residing in the Cherokee Nation, as a tribe and individually, joined by certain others suing for the surviving registered Delawares, their children, descendants and personal representatives, against the Cherokee Nation, for the purpose of determining the right of the Delaware Indians "in and to the lands and funds of said nation" under the contract and agreement with the Cherokee Nation dated April 8, 1867. This contract sets forth:

"Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

"The Cherokees, parties of the first part, for and in consideration of certain payments and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the 'Indian country,' to which list may be added, only with the consent of the Delaware council, the names of such other Delawares as may, within one month after signing of this agreement, desire to be added thereto, and the selections of the lands to be purchased by the Delawares may be made by said Delawares in

any part of the Cherokee reservation east of said line 96° not already selected and in possession of other parties, and in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares to include their improvements according to the legal subdivisions when surveys are made (that is to say, one hundred and sixty acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon native citizens thereof.

"Provided that nothing herein shall confer the right to alienate, convey or dispose of any such lands except in accordance with the constitution and laws of said Cherokee Nation.

"And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees from the Delaware funds now held or hereafter received by the United States, a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for.

"And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said lands; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value, at the date of such transfer.

"And the said Delawares further agree that there shall be paid from their funds now or hereafter to come into possession of the United States a sum of money which shall sustain the same proportion to the existing Cherokee national fund that

the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation. And for the purpose of ascertaining such relative numbers the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken under the laws of that nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of calculation as to the Cherokees.

"And that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000.

"And the Delawares further agree that in calculating the total amount of said national fund there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee national fund $1,678,000; and this last mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

"Provided, that as the $678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the *pro rata* contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

"All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the

Delawares under the agreement, shall be invested and applied in accordance with the twenty-third article of the treaty with the Cherokees of August 11, 1866.

"On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

"And the children hereinafter born of such Delawares so incorporated into the Cherokee Nation shall, in all respects, be regarded as native Cherokees."

The treaties which led up to this agreement are referred to in the contract and were ratified in 1866. The fifteenth article of the treaty of August 11, 1866, between the United States and the Cherokee Nation provided:

"Article XV. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of, the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres,

if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

"And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or shall determine to abandon their tribal organizations, shall be permitted to settle east of the ninety-sixth degree of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the ninety-sixth degree of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the ninety-sixth degree of longitude."

Article IV of the Delaware treaty, referred to in the agreement of April 8, 1867, is in the following terms:

"Article IV. The United States agree to sell to the said Delaware Indians a tract of land ceded to the government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware

Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of land in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior."

At the time of moving upon these lands there were 985 registered Delawares, of whom 212 survived at the beginning of this suit, together with children and descendants of those deceased.

The agreement of April 8, 1867, was before this court in the case of the *Cherokee Nation* v. *Journeycake*, 155 U. S. 196. While the precise questions involved in the present controversy were not then before the court, the rights adjudicated turned upon the construction of the agreement of April 8, 1867, and its nature and the history of the events which led up to its execution by the parties thereto were the subjects of consideration and determination by this court. In that case it was held that under the agreement the registered Delawares were incorporated into the Cherokee Nation, and as members and citizens thereof were entitled to participate in the proceeds of the sale of a portion of the Cherokee lands upon equal terms with native Cherokee citizens. The claim is made that the contract of 1867 secured to the registered Delawares individually, or to the Delawares as a tribe, the 157,000 acres of land which were to be set off to them east of the ninety-sixth meridian. This agreement was made and entered into in pursuance of the treaty stipulations hereinbefore referred to. And while it may be regarded as arising from these preliminary treaties with the United States, the care with which it was

made and the evident intention of the parties to deal at arm's length with full knowledge of their respective rights and aims, leaves little to be gained from these preliminary treaties as an aid to construction, except as a means of placing ourselves in the situation of the parties when the contract was signed and delivered. It is the claim in behalf of the Delawares that if not technically an estate in fee, one was conveyed permanent in its character and transmissible by descent to the children and kin of the registered Delawares, or at least it was a holding which should endure so long as the Delawares and their descendants continued to exist as a tribe.

It was held in the *Journeycake* case to be the purpose of this agreement to incorporate the registered Delawares into the Cherokee Nation, with full participation in the political and property rights of citizens of that nation. As a part of the general agreement, provision is made for rights in certain lands as a home for the Delawares who are to remove from their Kansas lands to the Indian Territory. These lands are to pass to registered Delawares and they are to have the privilege of selecting them from unoccupied lands east of the line 96 degrees west longitude. This right is conferred not upon the Delaware Nation, but upon certain registered Delawares who are to be incorporated into the Cherokee Nation. To such is given a quantity of land equal in the aggregate to 160 acres for each registered Delaware, whose name is required to be entered upon a register to be filed in the Office of Indian Affairs, the lands thus conveyed being distinctly declared to be sold to the Delawares "for their occupancy." This limitation, in what may be characterized as the *habendum* clause of the conveyance, does not import a holding beyond the life of the first taker, and is entirely inconsistent with the idea of permanency of tenure in the estate conveyed unless there is something in the nature of Indian titles to lands or in the terms of the instrument which requires an enlargement of an estate for occupancy into one the equivalent of a fee. It is argued that an estate of occupancy is the ordinary estate of the Indian tribes and

embraces all the title held by them, the fee remaining in the United States. There is nothing to prevent the United States if it chooses to convey a fee to the Indian tribes from so doing.

Indeed, in the sixteenth clause of the treaty with the Cherokee Nation of August, 1866, it is provided that a fee may be conveyed to friendly Indians settled west of the ninety-sixth meridian. But for the present purpose, it is unnecessary to speculate as to the nature of the Indian title derived from the United States by treaty. The nature and extent of the Cherokee title has been settled by previous adjudications of this court. In the case of *Cherokee Trust Funds*, 117 U. S. 288, 308, it was held that the lands in the Cherokee Nation belonged to them as a political body, and not to its individual members, and speaking of the rights of individual Cherokees it was said: "He had a right to use parcels of the lands thus held by the nation, subject to such rules as its governing authority might prescribe."

The lands of the Cherokee Nation are not held in individual ownership, but are public lands, though held for the equal benefit of all the members. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294. Under the patent issued to the Cherokees for their lands, whatever title conveyed was to the Cherokees as a nation, and no title was vested in severalty in any of the Cherokees. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 207.

In an agreement incorporating certain Delawares into the Cherokee Nation it is important to consider under what terms and conditions its citizens held and used the lands occupied by them. We are here dealing with the extent of the title conveyed as between Indian tribes, and the question is what did the Cherokees convey in the agreement to the Delawares who came within the terms of the compact and who were to be incorporated into the Cherokee Nation. In addition to the limitations expressed in the conveyance, "for occupancy," we find other terms of the instrument inconsistent with the grant of a perpetual estate. It is provided that in case the Cherokee

lands shall hereafter be allotted among the members of said nation, the aggregate amount of land provided for the Delawares to include their improvements according to the legal subdivisions when surveys are made (that is to say, one hundred and sixty acres for each individual), shall be guaranteed to each Delaware incorporated by the articles into the Cherokee Nation. The lands which are for occupancy of the Delawares are described as "Cherokee lands," and a provision made which secures 160 acres to include their improvements to each registered Delaware in case of allotment. If the full title was intended to be transferred to the Delawares, either as a tribe or individually, this stipulation to secure the rights of the Delawares in the contingency named was entirely superfluous. Further, the contract reads: "Nor shall the ownership and occupancy of said lands by any Delawares so registered be interfered with in any manner whatsoever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the native citizens thereof. Provided, that nothing herein shall confer the right to alienate, convey or dispose of any such land except in accordance with the constitution and laws of said Cherokee Nation."

These stipulations, wholly inconsistent with the full title of the Delawares to the lands in question, must be read in the light of the constitution and laws of the Cherokee Nation as to the holding of land by Cherokee citizens.

The provisions of the Cherokee constitution and the statutes passed in pursuance thereof pertinent to the subject are collected in the opinion of the Court of Claims in the *Journeycake* case, and are cited in a note to the opinion of this court in the same case. 155 U. S. 196, 207. From them it is apparent that lands to be held upon the same terms as the Cherokees hold their lands cannot be alienated by those who occupy and hold them, but the ownership is lodged in the Cherokee Nation. The individual has no right to alienate or lease the lands. The nation grants and restricts the right of occupancy. The title

to the lands is vested in the government, to be held and controlled in such wise as to promote the general welfare. Under these restrictions and conditions the registered Delawares held the lands set apart for their occupancy. In the laws of the Cherokee Nation we find that the use of the terms "for use and occupancy" was not an unfamiliar form of expression in describing the character and limitation upon the right of private ownership. Thus in the act relating to the public domain, and reserving tracts of lands one mile square along railroads at stations, and providing for the sale of town lots, it is provided that the purchaser shall acquire no other rights than those of use and occupancy. If the lands in question were granted in perpetuity to the Delawares, we have the awarding of an estate of this character carved out of lands recognized in the agreement as continuing to be Cherokee lands, belonging to the nation which expressly limits the conveyance of its lands to its own citizens for use and occupancy only. Again, if it was intended to provide for the children or heirs of the first takers—the registered Delawares—we should expect to find some words in the agreement competent for that purpose, conceding that the technical terms of the common law to create an estate in fee need not have been used. As to the children of the registered Delawares we find this specific provision: "And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees." This provision is utterly inconsistent with the grant of an estate in the lands to survive the "occupancy" of the registered Delawares. Such children are to have the rights of native Cherokees and no more. Their parents were incorporated into the Cherokee Nation with certain specific rights; the children were to stand upon an equality with their adopted brethren of the Cherokee blood.

The importance of the issue now distinctly made as to the title to these lands has led us to give renewed examination to the question of the extent and character of the interest conveyed to the Delawares, in the lands in controversy. In the

Journeycake case, while it is true that the precise question was not the same as is now presented, full consideration to all the terms of this contract was given in order to determine the interests of the Delawares in the Cherokee lands sold, and the court, speaking by Mr. Justice Brewer, used this pertinent language, the force of which has not been diminished in the light of subsequent examination aided by the arguments and briefs of counsel now presented: "So far as the provision in the agreement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees in their long occupation of this reservation had generally secured homes for themselves; that the laws of the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remain a part of the Cherokee reservation. And as a further consideration for the payment of this sum for the purchase of homes the Delawares were guaranteed not merely the continued occupancy thereof, but also that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they should receive an aggregate amount equal to that which they had purchased, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements. So that if, when the allotment was made, there was for any reason not land enough to secure to each member of the Cherokee Nation 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees *pro rata*. In other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee reservation. The individual Delawares took their homes in and remaining in the Cherokee reservation, and as lands to be considered in any subsequent allotment in severalty among the members of

the Cherokee Nation. All this was in the line of the expressed thought of a consolidation of these Delawares with and the absorption of them into the Cherokee Nation as individual members thereof. If it be said that all of the Delaware trust funds were not turned into the national fund it will be remembered that there was no impropriety in the reservation of a part thereof in order to enable the Delawares to make such improvements as they might desire on the tracts that they selected for homes, and also that there was no certainty that all the members of the Delaware tribe would elect to remove to the Cherokee country, and that those who remained in Kansas were entitled to their share in the Delaware national funds."

If such be the true construction of the agreement, it is nevertheless insisted that it should not be literally enforced in view of the understanding of the parties, more particularly of the Delawares, that they were thereby receiving full title to the occupied lands. To establish this contention it is claimed that in view of the character of the contracting parties they should not be held to the strict rule of evidence which denies the competency of parol testimony to contradict written agreements, and a class of cases is cited of which *Worcester* v. *Georgia*, 6 Pet. 515, may be taken as an example. The language of Mr. Justice McLean is quoted, in which he said (p. 582):

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

But the learned Justice was here dealing with a treaty negotiated between the representatives of the United States and those of the Indians, wherein the disparity of the contracting parties in education and knowledge of law and the use of language is obvious.

The contract of April 7, 1867, was negotiated between representatives of Indian nations meeting upon equal terms. In the testimony of John G. Pratt, called for the Delawares, and at one time Indian agent for the Delaware agency, it appears:

"Question. Do you know whether or not the agreement frequently referred to in your testimony was read over to the two delegations representing the Delawares and Cherokee tribes of Indians?

"Answer. It was read over repeatedly; read over and corrected and altered and read over again several times, and each party put in his suggestions, until they finally harmonized.

"Question. Then, as I understand, the agreement, as finally signed, expressed the wishes of both sides, and both sides were fully satisfied with all it contained?

"Answer. No; the Delawares were not satisfied, but they signed because it was the best they could do. They wanted to own the land outright.

"Question. They did not contend at any time afterwards that the agreement did not fully express what they intended to express, did they?

"Answer. No, sir; I did not hear anything of that kind."

We can perceive no room in this case for a departure from the familiar rules of the law protecting written agreements from the uncertainties of parol testimony. The testimony offered was in the main that of interested persons nearly thirty years after the agreement had been reduced to writing and signed by the parties thereto. Nor can we find a latent ambiguity in the terms of the contract which requires the admission of parol testimony to explain its effect. In the light of the circumstances and the language used in the writing, its construction is not rendered difficult because of latent ambiguities. It is claimed as a cogent circumstance, which should be considered in construing this agreement, that the Cherokee Nation received one dollar per acre for these lands —a sum sufficient to cover their full value, and of consequent importance in determining the character of the estate con-

veyed. In the *Journeycake* case it was held that, in consideration of the sum paid for citizenship rights, the Delawares obtained an interest in the lands of the Cherokee Nation, although the same were not considered in making up the sum paid for what has been denominated the right of citizenship. In that case it is pointed out that at the time the agreement under consideration was made the Cherokee Nation possessed, in addition to the "neutral" lands in Kansas, which were estimated at $1,000,000 in making up the total of the Cherokee national fund of $1,678,000 upon the basis of which the Delawares paid into the common fund—

"Strip" lands in Kansas (about)	400,000	acres.
Lands west of 96 degrees, Indian Territory, (about)	8,000,000	"
Lands east of 96 degrees, Indian Territory Home reservation (about)	5,000,000	"

In that case it was held that the Delawares acquired a right in the distribution of the proceeds, not only of the Kansas lands, but as well in such sales as were made of this vast domain held by the Cherokee Nation. Of this feature of the agreement Mr. Justice Brewer, in the *Journeycake* case, says: "Neither should too much weight be given to the fact that the Delawares were to pay for their homes at the rate of one dollar an acre, for by that purchase they acquired no title in fee simple, and it is not unreasonable to believe that the price thus fixed was not merely as compensation for the value of the lands, (to be taken in the eastern portion of the reservation, where the body of the Cherokees had their homes, and therefore probably the most valuable portion of the entire reservation,) but also as sufficient compensation for an interest in the entire body of lands, that interest being like that of the native Cherokees, limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and the right to share in any future allotment."

We conclude, then, that the registered Delawares acquired in these lands only the right of occupancy during life, with a right upon allotment of the lands, to not less than 160 acres together with their improvements, and the children and descendants of such Delawares took only the rights of other citizens of the Cherokee Nation as the same are regulated by its laws.

The bill further seeks to exclude from the allotment of Cherokee lands and funds certain citizens alleged to have been illegally admitted to citizenship, thereby wrongfully diminishing the shares of the Delawares in the common property. At the time of the agreement of April 7, 1867, the constitution, secs. 2 and 5, of the Cherokee Nation had been amended to read:

"SEC. 2. The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th July, 1866, between the United States and the Cherokee Nation.

"SEC. 5. No person shall be eligible to a seat in the national council but a male citizen of the Cherokee Nation, who shall have attained to the age of twenty-five years, and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as freed colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

These constitutional provisions were in full force when the Delawares acquired their rights and when they were incorporated, or, as the agreement expressed it, "consolidated," with

the Cherokee Nation. Under its terms the Delawares have participated in political rights and have taken part in the government of the nation. It is claimed that these amendments were illegally adopted for want of compliance with authorized methods for amending the national constitution. But the nation has never undertaken to set them aside or call in question their force and effect. They were in the fundamental law when the Delawares were made a part of the Cherokee Nation and the rights exercised were only those belonging to the nation when the Delawares saw fit to subject themselves to the laws of a new nation of which they were to become a component part upon equal terms with other citizens. The Cherokee Nation has many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community and treaties have been made with them in that character. *Cherokee Trust Fund Cases*, 117 U. S. 288. It is not reasonable to suppose that in the act under which these proceedings were brought it was intended to authorize inquiry into the administration of the political affairs of the Cherokee Nation with a view to setting aside the adoption of constitutional amendments and the revision of political action in admitting persons to citizenship in the nation under authority of its constitution. The same conclusion disposes of the contention of the appellants that relief can be granted in this case in respect to alleged maladministration of the financial affairs of the Cherokee Nation with a view to holding it to account in favor of the Delawares prosecuting this suit. We are authorized by the enabling act to determine the contractual rights of the Delawares in the national lands and funds, not to overhaul the political and administrative action of the Cherokee Nation.

The act authorizing this suit contemplates a determination of the rights and interest of the Delawares residing in the Cherokee Nation in the lands and funds of the Cherokee Nation under the compact of April, 1867. That it was the purpose

of Congress to have a full and final determination of such rights is further shown in the Cherokee allotment act of July 1, 1902. Section 23 of this act provides:

"SEC. 23. All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe, as their rights may be determined by the judgment of the Court of Claims, or by the Supreme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said commission is ready to begin the allotment of lands of the tribe as herein provided, the commission shall cause to be segregated one hundred and fifty-seven thousand six hundred acres of land, including lands which have been selected and occupied by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eighth, eighteen hundred and sixty-seven, such lands so to remain, subject to disposition according to such judgment as may be rendered in said cause; and said commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. Said commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees, and said suit shall be advanced on the dockets of said courts and determined at the earliest time practicable."

These acts contemplate a judgment of the court which shall determine the rights of the Delawares and Cherokees in the lands and funds of the Cherokee Nation in such wise as to enable a division to be made conformable to the rights of the parties as judicially determined. The Court of Claims ren-

dered a decree dismissing the bill. Whilst agreeing with the conclusions reached in that court, as to the rights of the Delawares, we think the bill was broad enough in its allegations and prayer for relief to require a definite settlement of the rights in controversy. Instead of dismissing the bill we think a decree should have been entered finding the registered Delawares entitled to participate equally with Cherokee citizens of Cherokee blood in the allotment of lands of the Cherokee Nation, with the addition that if there is not enough land to give to each citizen of the nation 160 acres, then the registered Delawares shall be given that quantity, together with their improvements. In all other respects the Cherokee citizens, whether of Delaware or Cherokee blood, should be given equal rights in the lands and funds of the Cherokee Nation. The decree dismissing the bill is so modified as to conform to the terms just stated; and as so modified it is

Affirmed.

GILES *v.* TEASLEY, BOARD OF REGISTRARS OF MONTGOMERY COUNTY, ALABAMA.

GILES *v.* TEASLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Nos. 337, 338. Argued January 5, 1904.—Decided February 23, 1904.

The right of this court to review the decisions of the highest court of a State is, even in cases involving the gravity of statements charging violations by the provisions of a state constitution of the Fifteenth Amendment, circumscribed by the rules established by law, and in every case coming to the court on writ of error or appeal the question of jurisdiction must be answered, whether propounded by counsel or not.

Where the state court decides the case for reasons independent of the Federal right claimed its action is not reviewable on writ of error by this court.

A negro citizen of Alabama and who had previously enjoyed the right to vote, and who had complied with all reasonable requirements of the

board of registrars, was refused the right to vote for, as he alleged, no reason other than his race and color, the members of the board having been appointed and having acted under the provisions of the state constitution of 1901. He sued the members of the board for damages for such refusal in an action, and applied for a writ of mandamus to compel them to register him, alleging in both proceedings the denial of his rights under the Federal Constitution and that the provisions of the state constitution were repugnant to the Fifteenth Amendment. The complaint was dismissed on demurrer and the writ refused, the highest court of the State holding that if the provisions of the state constitution were repugnant to the Fifteenth Amendment they were void and that the board of registrars appointed thereunder had no existence and no power to act and would not be liable for a refusal to register him, and could not be compelled by writ of mandamus to do so; that if the provisions were constitutional the registrars had acted properly thereunder and their action was not reviewable by the courts.

Held that the writs of error to this court should be dismissed as such decisions do not involve the adjudication against the plaintiff in error of a right claimed under the Federal Constitution but deny the relief demanded on grounds wholly independent thereof.

THESE cases are writs of error to the Supreme Court of the State of Alabama.

In No. 337, the action was brought to recover damages in the sum of $5,000 against the board of registrars of Montgomery County, Alabama, for refusing to register the plaintiff as a qualified elector of the State. The substance of the complaint is: The plaintiff is a native of the State of Alabama, a resident of Montgomery County for thirty years, and of the voting precinct for more than two years. He applied for registration, having theretofore enjoyed the right of voting in the State; the application was made to the board of registrars on March 13, 1902; the plaintiff complied with all reasonable requirements of the board, but was arbitrarily refused the right of registration for no other reason than his race and color. At the same time a large number of negroes similarly situated were likewise refused, while all the white men were registered and given certificates, without denial, nor was any question raised as to their qualifications. The registrars required the plaintiff and all members of his race to furnish the testimony of two white men as to their qualifications and refused to accept the testimony of colored persons, while all the white men

were registered without any proof except the oath of the applicant. It is alleged that sections 180, 181, 183, 184, 185, 186, 187 and 188 of article 8 of the constitution of the State of Alabama, which went into effect November 28, 1901, under authority of which the registrars were acting, was intended, designed and enacted by the constitutional convention to deny and abridge the right of the plaintiff and others of his race in the State to vote, solely on account of race, color and previous condition of servitude. The convention of the State of Alabama was composed entirely of white men, although the population of the State is composed of 1,001,152 white and 827,545 colored persons. It is alleged that article 180 of said constitution is repugnant to the Fourteenth and Fifteenth Amendments to the Constitution of the United States because subdivisions one and two of said section do not contain a statement of qualifications applicable to all, regardless of race, color and previous condition of servitude, but discriminate against negroes solely on account of race. Subdivision three is unreasonable and void, in not defining what character a good citizen must have and what obligations he must understand under a republican form of government, and gives to the registrars a wide discretion and authority and invests them with arbitrary power. That section 181 of article 8 is repugnant to the said amendments to the Constitution of the United States in that, while it pretends to describe the qualifications of persons who shall apply for registration after January 1, 1903, it was in truth and in effect enacted to apply to the plaintiff and all negroes of the State, and not to operate against and affect any white persons in the State, and is a part of a scheme to disfranchise the negroes of Alabama on account of race, color and previous condition of servitude. By refusing to permit the negroes to register the board of registrars is forcing them to wait until January 1, 1903, when section 181 comes into effect. It is charged that said board is composed exclusively of white men, and the right of appeal given from the action of said board to the Circuit Court and thence to the Supreme Court of the State was given to more effectually hinder the plaintiff and others of his race in their right to vote and not to accom-

plish their registration. The negroes are excluded from serving on juries in the trial courts of the State and have been for many years, although qualified for the service, on account of race, color and previous condition of servitude. That on appeal the plaintiff would encounter the same prejudice and obtain the same result as before the board of registrars. The defendants, well knowing the object of the constitutional provisions, were appointed by the State to administer the same, and while so engaged did wilfully and wrongfully refuse to register the plaintiff and others of his race for no other reason than their race and color, and thus deprived them of the right to vote as electors of the State, contrary to the provisions of the first section of the Fifteenth Amendment to the Constitution of the United States.

In No. 338, the petition for mandamus contains like allegations as to the right of the petitioner to be registered as a voter in the State of Alabama, and avers that he is a person of good character and understands the duties of citizenship under a republican form of government. The petitioner avers, as in his petition for damages, his application to be registered March 13, 1902, which was arbitrarily refused for the reasons set forth in the petition for damages, contrary to the right of the petitioner. He repeats the allegations as to the registration of white persons, and avers that the denial of registration to him and others of his race was a denial by the State of Alabama of the equal protection of the laws and the denial of his right to vote solely on account of his race, color and previous condition of servitude, and was in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Allegations are inserted as to the intent and purpose of the State in calling the constitutional convention and the adoption of the constitution September 3, 1901. It is alleged that the sections 180, 181, 183, 184, 185, 186, 187 and 188 of article 8 of said new constitution were enacted with the intent and for the purpose set forth in the petition for damages. Allegations are set forth as to the exclusion of the negroes from representation, notwithstanding the part they compose of the population of the State. It is claimed that

section 180 of article 8 is obnoxious and repugnant to the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in that it divides the inhabitants into three classes, viz: 1, soldiers' class; 2, descendants of soldiers' class; 3, a class not soldiers nor their descendants. That the class not soldiers or their descendants are under greater restrictions and given greater burdens than the other classes. That section three is void and unreasonable, failing to define what duties and obligations a citizen must understand under a republican form of government, and gives too wide a discretion to the registrars, amounting to vesting them with arbitrary power. Subdivisions 1 and 2 do not contain a statement of qualifications which are applicable to all alike, but discriminate against the negroes of the State on account of race, color and previous condition of servitude. The petition in mandamus contains substantially the allegations of the petition for damages as to the manner in which the constitution was adopted, and avers that section 181, describing the qualifications of persons who apply for registration after January 1, 1903, was designed and intended to apply to petitioner and others of his race and not intended to operate against and affect white persons in the State of Alabama. It is charged that in the counties of Alabama colored persons are refused registration, while, under the same circumstances and possessing the same qualifications, white men are registered without objection, thereby compelling colored men to wait until January 1, 1903, when the provisions of section 181 will be in operation, and compelling the colored men to have greater and different qualifications than are imposed upon the white men in the State, all of which, it is charged, was in pursuance of a design to evade the terms of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and to deny to the plaintiff and others of his race the equal protection of the laws, and to deprive them of the right to vote solely on account of their race, color and previous condition of servitude. Petitioner repeats the allegations of the former petition for damages as to the composition of the board of registrars, and the remedy of appeal from their action to the courts of the State, and claims

that if such appeal was prosecuted it could not be heard and determined before the election, but the hearing of the cases would take many years. There are attached to the petition as exhibits extracts from the speeches and debates in the convention of Alabama. The petition charges that the board of registrars refused to register colored men, so that not less than 75,000 of such persons were denied registration solely on account of race, color and previous condition of servitude, although possessing the necessary qualifications of electors, while the white men were permitted to register without let or hindrance. Affidavits were filed with the petition setting forth the denial of the right of colored persons in various counties in the State of Alabama. The prayer of the petition is that the aforesaid sections of the state constitution be declared absolutely null and void as repugnant to the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and for a writ of mandamus commanding the board of registrars to register the plaintiff as a qualified voter of the State of Alabama, and to issue to him a certificate of the fact, and the like to all voters of his race in the State of Alabama who were such under the constitution of the State prior to the adoption of sections 180, 181, 183, 184, 185, 186, 187 and 188 of the new constitution of the State. And that said board be further commanded not to refuse to register said petitioner or other members of his race on account of their race or color and previous condition of servitude.

To the petitions in both cases demurrers were filed in the court of original jurisdiction, which were sustained, and upon appellate proceedings in the Supreme Court of the State of Alabama the decisions of the lower court were affirmed. These writs of error seek to bring this action of the state courts in review here.

Mr. Wilford H. Smith for plaintiff in error:

The record clearly shows that nothing but a Federal question was therein presented to the highest court of Alabama for decision, and that its decision was absolutely necessary to the determination of the causes, and that the judgment ren-

dered by the Supreme Court of Alabama could not have been rendered without deciding the Federal question. *Johnson* v. *Risk*, 137 U. S. 300; *Wood Machine Co.* v. *Skinner*, 139 U. S. 293.

It, however, undertook to avoid the Federal question relying on cases cited in 17 Am. & Eng. Ency. Law (2d ed.), 727.

This action has resulted in denying the rights claimed by the plaintiff in error under the Constitution of the United States, and to uphold the suffrage provisions of the constitution of Alabama, and the authority exercised under them, which were drawn in question as being repugnant to the Federal Constitution, and it is well settled that this court has jurisdiction in such cases to review the decision of a state court. *Railway Co.* v. *Elliott*, 184 U. S. 534.

The political nature of the rights involved cannot be urged against the jurisdiction of this court. *McPherson* v. *Blacker*, 146 U. S. 23. *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487, were suits for damages where political rights under the Federal Constitution had been denied by virtue of an unconstitutional state statute. See also *Kinneen* v. *Wells*, 144 Massachusetts, 497.

All the material facts alleged by the plaintiff in error were admitted by the demurrers.

The purpose of framers of the suffrage provisions of the constitution of Alabama was repugnant to the Fourteenth and Fifteenth Amendments of the Constitution of the United States, such purpose being to disfranchise the negroes without disfranchising any white man. *Ah Kow* v. *Nunan*, 5 Sawyer, 553; Cooley, Constitutional Limitations (3d ed.), p. 65; *Goedell* v. *Palmer*, 15 App. Div. N. Y. 86.

Had the constitutional convention been called for the purpose of establishing an educational or a property qualification, or a qualification of good moral character for all the electors of Alabama, black and white alike, and had carried out such a purpose, the plaintiff in error and the negroes of that Commonwealth would have made no complaint. But the convention made race and color the standard of qualification by resorting to a trick or legerdemain of law in constitution

making, as evidence by the addresses in the constitutional convention on this subject.

The suffrage provisions of the constitution of Alabama are in themselves repugnant to the Fourteenth and Fifteenth Amendments to the Constitution of the United States by their language and meaning, they being so artfully constructed as to evade the prohibitions of the Federal Constitution, so that white men alone can become electors and negroes can be excluded on account of their race and color and previous condition. *Cox* v. *The State*, 144 N. Y. 396; *Colon* v. *Lisk*, 153 N. Y. 188; *People* v. *Albertson*, 55 N. Y. 50.

Not only were they constructed in defiance and in fraud of the Federal Constitution, but with great ingenuity, so as to make it difficult to get the question of their constitutionality before the courts.

Subd. 1 and 2, § 180, art. 8 are not such a statement of qualifications as are applicable to and attainable by all alike, regardless of race, color or previous condition, but were framed purposely to discriminate against the negroes of Alabama, and to deny them the same rights as electors given to white men.

Subd. 3, § 180, art. 8 is made so general and indefinite as to invest the registrars with arbitrary power, so that they could discriminate against negroes and favor white men. The citizen is left to conjecture as to what kind of good character is meant, whether good moral character, or good character for peace or violence, or for honesty and fair dealing, or for truth and veracity. Likewise is a citizen at a loss to know what or which of the manifold duties and obligations of citizenship he is required to understand in order to meet the requirements of this subdivision.

Section 186 of the suffrage article is repugnant to the Federal Constitution, in so far as the registrars were given the discretion and power of a court, with the right of appeal from their decision to the Circuit Court, thence to the Supreme Court, in view of the purpose the convention sought to accomplish by giving such discretion and power and in view of the admitted manner in which the registrars have used such discretion in the discharge of the duties of their office.

The admitted facts showing the suffrage provisions of the Alabama constitution in actual operation establish that practically all white men in the State were admitted to the electorate and given life certificates, while practically all the negroes were denied registration on account of their race and color and previous condition, which alone would render them unconstitutional, no matter what the intent was at the time of their enactment, and no matter in what form of language they were expressed. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Davis* v. *McKeeby*, 5 Nevada, 396.

Section 181 of the suffrage article is a part of one entire scheme to evade the Fifteenth Amendment to the Constitution of the United States, and to subject the negroes of Alabama to a different test than that required of white citizens, and should also be declared null and void, since it is admitted that practically all the white men have been admitted to the electorate for life under section 180, or the temporary plan, and practically all the negroes have been refused.

To allow section 181 to stand would be to sanction the discrimination against negroes, and force them to submit to an educational and property qualification test not required of white men, in contravention of the Fourteenth and Fifteenth Amendments to the Federal Constitution. *United States* v. *Reese*, 92 U. S. 214.

Fair and equal treatment as a citizen is all that the plaintiff in error and the negroes of Alabama are contending for in this litigation, which treatment will be accorded wherever the Fifteenth Amendment to the Federal Constitution is held in proper esteem.

Mr. William A. Gunter for defendant in error:

The Fourteenth Amendment of the Constitution and the statutes to enforce its provisions relate only to civil rights. Either to the privileges or immunities of citizens of the United States; or, the right of life, liberty and property, unless taken away by "due process of law;" or, the equal protection of the laws. *Slaughter House Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303-306; *Gibson* v. *Miss-*

issippi, 162 U. S. 566; *Virginia* v. *Rives*, 100 U. S. 313; *Williams* v. *Mississippi*, 170 U. S. 213.

The provisions of same amendment all have reference to state action exclusively, and not to any action of private individuals. *Virginia* v. *Rives*, 100 U. S. 318.

While under the fifth section of the Amendment Congress may enforce the prohibitions whenever they are disregarded by either the legislature, the executive, or the judicial department of the State, it is plain that the action of Congress to enforce a limited power cannot extend beyond the power granted.

The Fourteenth Amendment not only does not undertake to deal with political rights, but in the second section expressly contemplates that the privilege of voting may be denied at the pleasure of the State, attaching, however, a penalty in the way of a reduction of representation. The prohibitions of section one of the Amendment have no reference to political rights, and the authority of Congress, given by the fifth section, is limited by the second section.

The Fifteenth Amendment is limited to a single matter and the power of Congress to enforce the same, by appropriate legislation, is also restricted to that item. The prohibition of this amendment also refers to governmental action of the United States or by the State, and not to any action of private individuals. *Virginia* v. *Rives*, 100 U. S. 318; *Slaughter House Cases*, 16 Wall. 37, 77, 126.

The Fifteenth Amendment itself can never be violated except by a State or the United States, and not by them until there is a denial or restriction by some *law* of the right to vote.

To bring a statute within the operation of the Constitution it must appear to be passed under a grant of power contained therein, *United States* v. *Harris*, 106 U. S. 35, and to bring a case within a statute of the United States, it must appear that the right, the enjoyment of which is interfered with, is one granted or secured by the Constitution or the laws of the United States. Everything essential to make out a case must be charged positively and not inferentially. *United States* v. *Cruikshank*, 92 U. S. 549, 555.

On every writ of error to a state court the doctrine of *res judicata* is called in question. It must appear by all the certainty and according to the principles of *res judicata*, that a Federal right was directly or necessarily involved and decided adversely to the plaintiff in error claiming such right. If there are several questions involved upon one or more of which judgment may rest without the decision of a Federal question, this court is without jurisdiction to hear the case. *New Orleans* v. *New Orleans Waterworks*, 142 U. S. 84; 12 Notes to U. S. Rep. 64; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425; *Russell* v. *Place*, 94 U. S. 606.

There is a single exception to the rule that this court will adopt the state construction of its statutes and constitution, and that is "when it has been called upon to interpret the contracts of States," etc. *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 492, 493; *Jefferson Bank* v. *Kelly*, 1 Black, 436, 443. But if this court is not so restricted in this case, nevertheless a view of the nature of the proceeding is conclusive that the registrars were acting judicially. They were judges, and their action judicial, and not to be called in question by a suit against them personally for damages. 17 Ency. of Law (2d ed.), pp. 726, 727, 728; *Flournoy* v. *City of Jeffersonville*, 79 Am. Dec. 468; *Bradley* v. *Fisher*, 13 Wall. 335; 7 Notes to U. S. Rep. 712; *Busteed* v. *Parsons*, 54 Ala. 393, 401.

Neither the Fourteenth nor Fifteenth Amendments, or statutes enforcing their provisions, overturn the rule that a judge is not liable *civiliter* for judicial conduct. *Virginia* v. *Rives*, 100 U. S. 318; *Harrison* v. *Nixon*, 9 Pet. 503; *United States* v. *Harris*, 106 U. S. 639; *Hemsley* v. *Myers*, 45 Fed. Rep. 283; construing these amendments make it impossible to suppose that § 1979, Rev. Stat., was intended to take away from state courts the right to pass judicially on questions before them and within their jurisdiction.

No Federal question was raised in the case and adversely decided. It is impossible to discover the adjudication of any Federal question in the state court adversely to the right claimed, which is a *sine qua non* to the jurisdiction of this court. *Ins. Co.* v. *The Treasurer*, 11 Wall. 208; *Capital Bank*

v. *Cadiz Bank*, 172 U. S. 430; Rev. Stat. § 709; *Scott* v. *Jones*, 5 How. 375; *Michigan Central R. R.* v. *Michigan S. R. R.*, 19 How. 379.

The demurrer in the state court which disposed of the case did not controvert any Federal right. It only raised questions of procedure as to sufficiency of pleading and of general jurisprudence as to the individual liability of persons acting officially. If a dismissal may rest upon one of several grounds there is no right to confine it to any particular ground, and if an appeal must be based on a decision of a particular ground, when other questions equally may have been the point decided, the predicate of appeal is wanting. *Connecticut, etc.*, v. *Woodruff*, 153 U. S. 689; *Hammond* v. *Johnston*, 142 U. S. 73; *New Orleans* v. *New Orleans W. W. Co.*, 142 U. S. 79; *Delaware Nav. Co.* v. *Reybold*, 142 U. S. 636. The Rev. Stat. § 1979, under which the action is brought, is unconstitutional, and there is no basis for the suit, and if not unconstitutional has no application to this suit. *United States* v. *Harris*, 106 U. S. 629, *Baldwin* v. *Franks*, 120 U. S. 678, held that Rev. Stat. § 5519, punishing violations of the third clause of § 1980, was unconstitutional, and in *United States* v. *Reese*, 92 U. S. 214, Rev. Stat. §§ 2007, 2008, and 5506, were held to be unconstitutional as too broad for the powers given by the Constitution to Congress; that they were not appropriate legislation.

Section 1979, however, has no application to this case. *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487; *Logan* v. *United States*, 144 U. S. 293.

If the constitution of Alabama were a violation of the Federal Constitution the effect would be to nullify and discharge the entire registration program. *Ex parte Yarborough*, 110 U. S. 651, 665; *Giles* v. *Harris*, 189 U. S. 475.

This court can only act upon the cases made by the pleadings, and the case here simply discloses a judgment which must necessarily rest upon grounds not touching the construction of the constitution of Alabama or any right claimed in opposition to its terms.

And it is accepted, as an undeniable proposition, that the "Denials of equal rights in the action of the judicial tribunals of the State are left to the *revisory* powers of this court." *Virginia* v. *Rives*, 100 U. S. 322; *Strauder* v. *West Virginia*, 100 U. S. 310; *In re Wood*, 140 U. S. 278; *Gibson* v. *Mississippi*, 162 U. S. 565, 583.

And, therefore, if the right in this case sought to be vindicated rested upon a statutory declaration of a liability on the part of judges, it would make no difference, for a statute holding them liable *civiliter* would not be "appropriate legislation."

As to the clauses of the state constitution objected to while the history and circumstances of the enactment of Constitutions may be looked at, it is only for the purpose of understanding and applying the words themselves where there is obscurity or doubt about the real meaning. *Bleaker* v. *McPherson*, 146 U. S. 27; *Ogden* v. *Saunders*, 12 Wheat. 332; *Lake County* v. *Rollins*, 130 U. S. 670.

No legislative body can be held responsible for individual declarations of members when it is not evident from the laws themselves that the particular matter has been incorporated in the enactment. The *corpus delicti* is wanting and there can be no conviction, when the law does not disclose "the bloody deed." *Fletcher* v. *Peck*, 6 Cranch, 87; *Maxwell* v. *Dow*, 176 U. S. 601; *Dodge* v. *Woolsey*, 18 How. 374; *United States* v. *Des Moines*, 142 U. S. 545; *Downes* v. *Bidwell*, 182 U. S. 254; *Williams* v. *Mississippi*, 170 U. S. 222; *Lake County* v. *Rollins*, 130 U. S. 670.

The third class comprises, "All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government." This is a provision under which any citizen of any race or color or previous condition of servitude worthy to be admitted as an elector may be registered. It has been held by this court that provisions of exclusion predicated on bad character, or admission to privileges on "good character," are not discriminations against races. *Williams* v. *Mississippi*, 170 U. S. 222; *In re Wood*, 140 U. S. 284; *In re Jugiro*, 140 U. S. 291, 298.

If defendants committed any wrong or error in the admin-

istration of the law, the law cannot be blamed for the administration; and their wrong, whatever it may have been, can only be corrected by the revisory powers of this court, in the original suit or application for registration. Where the objection is not founded on defects of the law itself, but relates to its administration only, the remedy is only through the revisory powers of the courts of the United States after the state courts have decided against the claim or right founded on the Constitution and laws of the United States. *In re Wood*, 140 U. S. 284; *Gibson* v. *Mississippi*, 162 U. S. 583; *In re Frederick*, 149 U. S. 77; *Virginia* v. *Rives*, 100 U. S. 321.

The bad administration of *other* persons, if there has been such, defendants in error are not accountable for; nor is the law itself to be blamed for administration not traceable to its words. *Yick Wo* v. *Hopkins*, 118 U. S. 356, distinguished.

It is suggested as a solution of the whole difficulty that if the plan of *registration* under the Constitution of Alabama is in violation of the Fifteenth Amendment of the Constitution, the law is simply void and is not in the way of voting when ballots may be offered, and that until a ballot is offered and refused, there is no ground for a private citizen to ask judicial action against the validity of the void law of registration, since until then he is not injured. *Turpin* v. *Lemon*, 187 U. S. 51; *Tyler* v. *Judges of Registration*, 179 U. S. 405.

And, on the other hand, if there was only bad administration of a valid law, the objection should have been made in the course of an appeal provided for in cl. 6 of § 186 of the Constitution. It must be presumed the state court would have corrected any abuse whatever. There was, therefore, no occasion for or right to a mandamus.

Independently of all other questions, application for the mandamus could not be awarded after the defendants have long since been out of office by expiration of their term, and could not possibly obey the judgment, which this court, it seems, must judicially know here to be the case. Case No. 338 should abate. *United States* v. *Boutwell*, 17 Wall. 604; *Mills*

v. *Green*, 159 U. S. 651, 657; Century Dig. vol. 33, col. 2132, sec. 52; col. 2151, sec. 60.

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

The right to review in this court the judgment of a state court is regulated by section 709 of the Revised Statutes. The extent and nature of the remedy therein given has been the subject of numerous decisions. The jurisdiction in the cases now under consideration is invoked because of alleged denial of the rights of the plaintiff in error, secured to him by the Fourteenth and Fifteenth Amendments to the Constitution of the United States. When the jurisdiction depends, as in the present cases, upon a right, privilege or immunity under the Constitution of the United States specially set up and denied in the state court, certain propositions, it is said by Mr. Chief Justice Fuller, speaking for the court in *Sayward* v. *Denny*, 158 U. S. 180, 184, are well settled, among others, "The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt* v. *Sheldon*, 1 Black, 518; *Maxwell* v. *Newhold*, 18 How. 511, 515. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it." It is equally well settled that if the decision of a state court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the state court. *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79; *Eustis* v. *Bolles*, 150 U. S. 361; *Dower* v. *Richards*, 151 U. S. 658, 666; *Wade* v. *Lawder*, 165 U. S. 624, 628.

In every case which comes to this court on writ of error or appeal the question of jurisdiction must be first answered, whether propounded by counsel or not. *Defiance Waterworks*

Company v. *Defiance*, decided at this term, 191 U. S. 184. In No. 337, in which an action was begun against the registrars for damages, the case was decided upon demurrer to the declaration. The Supreme Court of Alabama placed its decision affirming the lower court, which sustained the demurrer, upon two grounds, as follows:

"If we accept (without deciding) as correct the insistence laid in appellant's brief that section 186 of article VIII of the constitution of 1901 is void because repugnant to the Fourteenth and Fifteenth Amendments of the Constitution of the United States, then the defendants were wholly without authority to register the plaintiff as a voter, and their refusal to do so cannot be made the predicate for a recovery of damages against them.

"On the other hand, if that section is the source of their authority, the jurisdiction is expressly conferred by it upon the defendants as a board of registrars to determine the qualifications of plaintiff as an elector and of his right to register as a voter. For their judicial determination that plaintiff did not possess the requisite qualifications of an elector, and their judicial act of refusing to register him predicated upon that determination, they are not liable in this action. 17 Am. & Eng. Ency. Law (2d ed.), pp. 727, 728, and notes.—Affirmed." 136 Alabama, 164.

A consideration of the plaintiff's petition shows that it attacked the provisions of the Alabama constitution regulating the qualifications and registration of the electors of the State as an attempt to disregard the provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, by qualifying the whites to exercise the elective franchise and denying the same rights to the negroes of the State. It is alleged that sections 180, 181, 182, 183, 184, 185, 186, 187 and 188 of the Alabama constitution, which took effect on November 28, 1901, and under which the defendants were appointed registrars, and were acting at the time, were enacted by the State of Alabama, through its delegates to the constitutional convention, to deny and abridge the right of the plaintiff and others of his race to vote in the State on account of their color

and previous condition of servitude, without disfranchising a single white man in the State. These sections of the Alabama constitution were before this court in the case of *Giles* v. *Harris*, 189 U. S. 475, and the general plan of voting and registration was summarized by Mr. Justice Holmes, delivering the opinion of the court as follows:

"By § 178 of article 8, to entitle a person to vote he must have resided in the State at least two years, in the county one year and in the precinct or ward three months, immediately preceding the election, have paid his poll tax and have been duly registered as an elector. By § 182, idiots, insane persons and those convicted of certain crimes are disqualified. Subject to the foregoing, by § 180, before 1903 the following male citizens of the State, who are citizens of the United States, were entitled to register, viz: First. All who had served honorably in the enumerated wars of the United States, including those on either side in the 'war between the States.' Second. All lawful descendants of persons who served honorably in the enumerated wars or in the war of the Revolution. Third. 'All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government.' . . . By § 181, after January 1, 1903, only the following persons are entitled to register: First. Those who can read and write any article of the Constitution of the United States in the English language, and who either are physically unable to work or have been regularly engaged in some lawful business for the greater part of the last twelve months, and those who are unable to read and write solely because physically disabled. Second. Owners or husbands of owners of forty acres of land in the State, upon which they reside, and owners or husbands of owners of real or personal estate in the State assessed for taxation at three hundred dollars or more, if the taxes have been paid unless under contest. By § 183, only persons qualified as electors can take part in any method of party action. By § 184, persons not registered are disqualified from voting. By § 185, an elector whose vote is challenged shall be required to swear that the matter of the challenge is untrue before his vote shall be received. By § 186,

the legislature is to provide for registration after January 1, 1903, the qualifications and oath of the registrars are prescribed, the duties of registrars before that date are laid down, and an appeal is given to the county court and Supreme Court if registration is denied. There are further executive details in § 187, together with the above-mentioned continuance of the effect of registration before January 1, 1903. By § 188, after the last mentioned date applicants for registration may be examined under oath as to where they have lived for the last five years, the names by which they have been known, and the names of their employers."

It is apparent that paragraph 3 of section 180, permitting the registration of electors before 1903, of "all persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government," opened a wide door to the exercise of discretionary power by the registrars. It is charged that this section, in connection with section 181, permitting the registration of certain persons after January, 1903, was intended to be so carried into operation and effect that the negroes of Alabama should be excluded from the elective franchise, and to permit the white men to register before January 1, 1903, and thus become electors, compelling the colored men to wait until after January 1, 1903, and then to apply under conditions which were especially framed and would have the effect to exclude the colored man from voting. It is charged that the registrars well knew the scheme and purpose set forth in the complaint to work the disfranchisement of negro voters and to qualify the white voters to exercise the elective franchise, and it is charged that the defendants were appointed by the State under sections of the state constitution adopted for the purpose of denying the colored man the right to vote and under which the defendants are undertaking to carry out the scheme and were so acting when they denied the right of the plaintiff to register, thus depriving him of the right guaranteed to him by the first section of the Fifteenth Amendment to the Constitution of the United States. A consideration of the allegations of this complaint, to which the demurrer was sustained,

makes apparent that the Federal right for which the plaintiff sought protection and the recovery of damages was that secured by the amendment to the Federal Constitution, which prohibits a State from denying to the citizen the right of suffrage because of race, color or previous condition of servitude. But in the present case the state court has not sustained the right of the State to thus abridge the constitutional rights of the plaintiff. It has planted its decision upon a ground independent of the alleged state action seeking to nullify the force and effect of the constitutional amendments protecting the right of suffrage. The first ground of sustaining the demurrer is, in effect, that, conceding the allegations of the petition to be true, and the registrars to have been appointed and qualified under a constitution which has for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the Federal Constitution could have the effect to disqualify a legal voter, otherwise entitled to exercise the elective franchise. In such a decision no right, immunity or privilege, the creation of Federal authority, has been set up by the plaintiff in error and denied in such wise as to give this court the right to review the state court decision. This view renders it unnecessary to consider whether, where a proper case was made for the denial of the right of suffrage, it would be a defence for the election officers to say that they were acting in a judicial capacity where the denial of the right was solely because of the race, color or previous condition of servitude of the plaintiff. In the ground first stated we are of opinion that the state court decided the case for reasons independent of the Federal right claimed, and hence its action is not reviewable here.

In the case for a writ of mandamus the same attack was made upon the action of the State of Alabama in adopting and enforcing the provisions of the state constitution which it was charged were adopted for the purpose of disfranchising the negroes and permitting white men only to exercise the elective

franchise. In the mandamus case the decision of the state court was:

"The petition in this case is for a writ of mandamus to compel the board of registrars for Montgomery County to register the petitioner as an elector. It alleges that sections 180, 181, 183, 184, 185, 186, 187 and 188 of art. VIII of the constitution of 1901, fixing the qualifications of electors and prescribing the mode of registration, are unconstitutional because violative of the Fourteenth and Fifteenth Amendments of the Constitution of the United States. The prayer is in substance that these sections of the constitution above enumerated be declared null and void, and that an alternative writ of mandamus issue to the board of registrars commanding them to register as a qualified elector of the State of Alabama, upon the books provided therefor, the name of petitioner and to issue to him a certificate of the fact in disregard of said sections of the constitution, etc.

"As these sections of the constitution assailed created the board of registrars, fixed their tenure of office, defined and prescribed their duties, if they are stricken down on account of being unconstitutional, it is entirely clear that the board would have no existence and no duties to perform. So then, taking the case as made by the petition, without deciding the constitutional question attempted to be raised or intimating anything as to the correctness of the contention on that question, there would be no board to perform the duty sought to be compelled by the writ and no duty imposed of which the petitioner can avail himself in this proceeding, to say nothing of his right to be registered.—Affirmed." 136 Alabama, 228.

We do not perceive how this decision involved the adjudication of a right claimed under the Federal Constitution against the appellant. It denies the relief by way of mandamus, admitting the allegations of the petition as to the illegal character of the registration authorized in pursuance of the Alabama constitution.

This is a ground adequate to sustain the decision and wholly independent of the rights set up by the plaintiff as secured to him by the constitutional amendments for his protection.

The plaintiff in error relies upon two cases adjudicated in this court, *Wiley* v. *Sinkler*, 179 U. S. 58, and *Swafford* v. *Templeton*, 185 U. S. 487. In the former it was held that an action may be sustained in a court of the United States against election officers for refusing the plaintiff's vote for member of Congress. The allegations of the complaint are set forth in full in the statement of the case, and it appears that the board of managers were averred to be legally qualified to preside at the Federal election, and as such wrongfully refused the proffered vote of the plaintiff, a duly qualified elector, willfully and without legal excuse. It was held that the complaint was defective for not averring that the plaintiff was a duly registered voter. It appeared that the registration law had not been held unconstitutional, and it further appeared that if such was the fact plaintiff was not in a position to impugn its constitutionality. In *Swafford* v. *Templeton*, it was held that the Circuit Court erred in dismissing for want of jurisdiction an action kindred to that sustained in *Wiley* v. *Sinkler*, wherein the plaintiff was denied the right to vote for member of Congress, which was held to have its foundation in the Constitution of the United States, with consequent jurisdiction in a Federal court to redress a wrongful denial of the right. Neither of these cases is in point in determining our right to review the action of the state court in the case now before us. It is apparent that the thing complained of, so far as it involves rights secured under the Federal Constitution, is the action of the State of Alabama in the adoption and enforcing of a constitution with the purpose of excluding from the exercise of the right of suffrage the negro voters of the State, in violation of the Fifteenth Amendment to the Constitution of the United States. The great difficulty of reaching the political action of a State through remedies afforded in the courts, state or Federal, was suggested by this court in *Giles* v. *Harris*, *supra*.

In reaching the conclusion that the present writs of error must be dismissed the court is not unmindful of the gravity of the statements of the complainant charging violation of a constitutional amendment which is a part of the supreme law

of the land; but the right of this court to review the decisions of the highest court of a State has long been well settled, and is circumscribed by the rules established by law. We are of opinion that plaintiffs in error have not brought the cases within the statute giving to this court the right of review.

The writs of error in both cases will be dismissed.

MR. JUSTICE MCKENNA concurs in the result.

MR. JUSTICE HARLAN dissents.

SECURITY LAND AND EXPLORATION COMPANY *v.* BURNS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 127. Argued January 19, 1904.—Decided February 29, 1904.

The general rule that in matters of boundaries natural monuments or objects will control courses and distances is not absolute and inexorable.

When the plat of a government survey is the result of, and founded upon a gross fraud, and there is actually no lake near the spot indicated thereon, and adopting the lake as it is actually located as a natural monument would increase the patentee's land fourfold, the false meander line can be regarded as a boundary, instead of a true meander line, and the patentee confined to the lots correctly described within the lines and distances of the plat of survey and of the field notes which he actually bought and paid for.

Where the patentee has in fact received and is in possession of all the land actually described in the lines and distances and is seeking for more on the theory that his plat of survey carries him to a natural boundary, a denial of that right on the ground that the plat was fraudulent, and that the natural boundary did not actually exist anywhere near the spot indicated, is a legal defence which can be set up by defendant in an action in ejectment, and it is not necessary to seek the aid of a court in equity to obtain a reformation of the patent.

THIS is an action of ejectment, commenced in the District Court of St. Louis County, in the State of Minnesota, to recover certain lands in that county described in the complaint. The trial was by the court, and judgment was entered for the de-

fendant, which was affirmed by the Supreme Court of Minnesota, and the plaintiff has sued out this writ of error to review that judgment. 87 Minnesota, 97.

The following facts (among others) were found by the trial court:

"1. That plaintiff is a corporation duly organized and existing under the laws of the State of Minnesota, and the defendants are husband and wife.

"2. In 1876, township fifty-seven north of range seventeen west, in St. Louis County, Minnesota, was ordered by the General Land Office of the United States to be surveyed, and a contract for the survey thereof was made by the United States surveyor general of the State of Minnesota with one H. S. Howe, who, by said contract, was constituted a deputy United States surveyor for said purpose. Under said contract said Howe was required and undertook and agreed to survey said township, to run out all section lines, and to set posts making all section and quarter section corners throughout said township where the same could be marked upon the ground, and accurately to meander and establish upon the ground meander posts of all lakes and streams found to exist within said township.

"3. Thereafter said Howe ran and marked the exterior lines of said township, except the south township line, which had been previously surveyed, and set posts at all section and quarter section corners on said three exterior lines. He also set a meander post upon the north line of said township as surveyed by him, where said line running west from the northeast corner of said township first encountered the shore of Ely Lake, or, as it is sometimes called, Cedar Island Lake.

"4. No survey of the interior of said township was ever made, and no section lines within said township were ever run by said Howe, with the possible exception of the west line of section 36 thereof, and no section or quarter section corners were ever located, established or marked by him (with the possible exception of the northwest corner of section 36 aforesaid), and

none of the streams or permanent lakes (of which there were several) within said township were meandered by him, and no posts of any description were ever set, nor any lines or bearing trees ever blazed, within said township, with the possible exception of a corner post at the northwest corner of said section 36.

"5. Said Howe made and filed with the United States surveyor general of the State of Minnesota what purported to be field notes of a survey of said township made by him under said contract, purporting to give the length and directions of all interior section lines in said township, the location of all sections and quarter section posts, and the bearing trees thereof, the character of the soil and timber in said township, and all other data and information required by the statutes of the United States and the rules of the United States General Land Office, to be ascertained and reported by deputy surveyors in due course of making surveys of public lands.

"6. With the exception of the description of the survey of the three exterior boundary lines of said township actually run by him, said field notes returned by said Howe were imaginary and fictitious, and the purported facts and data contained therein were not based upon any personal knowledge or inspection of the interior of said township, and were, in fact, false and erroneous.

"7. From said purported field notes it appears that there existed in the northerly part of said township, lying in sections 2, 3, 4, 9, 10 and 11 thereof, a lake known as Ely Lake, or Cedar Island Lake, with surface area, as indicated in said field notes, of eighteen hundred acres; in fact, instead of having an area of about eighteen hundred acres, said lake then was and still is a body of water not exceeding eight hundred acres in area. It is a permanent, deep and navigable lake, having high, steep and heavily timbered banks, except about the outlet thereof. Said lake does not, in fact, touch section 11 at all, and covers only an area of very small extent (less than one-half of a forty-acre tract) in the southeast corner of sec-

tion 4. Between the actual water line of said lake and the meander line thereof, as returned by the purported field notes of said Howe, there were at the time of the survey, and still are, at least one thousand acres of high, tillable land, which has never been a part of the lake, and which was and is heavily timbered with trees of more than a century's growth and growing down to the water's edge.

"8. The field notes and report of survey made and filed by said Howe were approved by the surveyor general for the district of Minnesota, August 7, 1876, and a plat of said township was made in accordance with said purported field notes under the direction of said surveyor general, and was approved by him on said 7th day of August, 1876, and a duly certified copy thereof was transmitted by him to the proper local United States land office on the 24th day of August, 1876, and another duly certified copy of the same was by him forwarded to the General Land Office of the United States, and filed therein August 23, 1876, and was by that office accepted as representing a correct survey of said township and as the official plat thereof. Such survey and plat of said township were the only ones ever made by or under the authority of the United States government."

[The plat, which is to be found at page 43 of 189 United States Reports, illustrates with sufficient accuracy the township in which the lands in question lie, and it delineates the meandering of Cedar Island Lake, the outer meander line representing that which was marked on the official plat of the survey and as shown by the field notes of Howe, and the inner meander line representing the lake as it actually existed in 1876, when the field notes were made and filed, and as it now exists. A portion of the land lying between these lines is the land involved in this action, being land lying between the lake and the lots 3, 5, 6 and 7, in section 4, of the township mentioned.

The dotted lines on the plat show the courses which would have to be followed in order to permit each of the lots above named to reach the lake as it actually exists.]

"9. Since the spring of 1892, the defendants have been in actual and continuous occupancy of a portion of the land lying between the meander line described and returned by said Howe in his said purported field notes, and as located upon the government plat of said township, and the actual water line of said lake. Said occupancy has been under the claim that the lands occupied by said defendants were and are unsurveyed government lands subject to homestead entry, and that they have not been patented by the government. The defendants have made valuable and lasting improvements upon the lands occupied by them respectively.

"10. According to the plat of said township, the land in section 4 was divided into eight fractional government lots, lots 1, 2 and 8 comprising all of the land in the east half of said section, containing an aggregate of 122.3 acres, and lots 3, 4, 5, 6 and 7 containing an aggregate of 182.08 acres, comprising all of the land in the west half of said section.

"11. Between December, 1879, and March, 1887, all of said government lots [and all the surveyed lands within said township] were patented and conveyed by the United States, pursuant to the laws relating to the disposal of public lands, and by patents containing the usual clause, 'according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general.' By divers mesne conveyances from said patentees, the title to said lots 3, 5, 6 and 7, containing according to said plat and to the patents of said lands, the following quantities of land, respectively: Lot 3, 50.37 acres; lot 5, 34.75 acres; lot 6, 30.5 acres; and lot 7, 25.25 acres; became vested in the plaintiff in the year 1891 and prior to the commencement of the actions; and the plaintiff is still the owner thereof, and, as such owner, has within the boundary of said lots, as shown upon said plat, and within the meander line of said lake described in said field notes, the full quantity of land above described as contained therein.

* * * * * * * *

"If the side lines of said lot three were produced and ex-

tended in straight lines southerly from its southern boundary, as shown upon the government plat, and as herein found and determined, and the said lot was so extended to the southerly boundary of said section 4, then in that event the said lot would not touch said Ely Lake, nor would there be any lake frontage thereon, and said lot would then contain one hundred and sixty acres of land; neither would said lines nor said lot reach said lake, no matter how far extended.

"If the side lines of said lot five were produced and extended easterly from the eastern boundary of said lot, as shown upon the government plat, and as herein found and determined, to the eastern boundary of said section 4, the northern line of said lot following the old meander line of said lake, and the southern line of said lot being produced and extended in a straight line, and said lot was so extended, then in that event the said lot would not touch said Ely Lake, nor would there be any lake frontage thereon, and said lot would contain about one hundred and twelve acres of land.

"If the side lines of lot six were produced and extended in straight lines easterly from the eastern boundary of said lot, as shown upon the government plat and as herein found and determined, to the eastern boundary of section 4, and said lot was so extended, then in that event the said lot would not touch said Ely Lake, nor would there be any lake frontage thereon, and said lot would then contain one hundred and sixty acres of land.

"If the side lines of said lot seven were produced and extended in straight lines easterly from its eastern boundary, as shown upon the government plat and as herein found and determined, in the eastern boundary of said section 4, and the said lot was so extended, in that event the south line of said lot would touch said Ely Lake, and a few feet of lake frontage would then be contained in said lot, and said lot would contain about one hundred and thirty-nine acres of land.

"I further find that it would be impossible to extend said lots within their respective side lines, as above specified, with-

out instant and irreconcilable interference with each other, and that no one of said lots has any prior or superior right over any of the others to be so extended."

Mr. William W. Billson, with whom *Mr. Chester A. Congdon* was on the brief, for plaintiff in error:

Monuments prevail over courses, distances and quantities. *Grier* v. *Penna Coal Co.,* 128 Pa. St. 79, 95; Rev. Stat. 2396; Public Domain, A. D. 1883, 598, 604.

When lands are granted according to an official plat of the survey of such lands, the plat itself, *with all its notes, lines, descriptions and land marks,* becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself. *Cragin* v. *Powell,* 128 U. S. 691; *Noonan* v. *Lee,* 2 Black, 499, 504; *Hardin* v. *Jordan,* 140 U. S. 371, 380; *County of St. Clair* v. *Livingston,* 23 Wall. 46, 63; *Chapman* v. *Polock,* 11 Pac. Rep. (Cal.) 764; *Vance* v. *Fore,* 24 California, 436; *Jefferies* v. *East Omaha Land Co.,* 134 U. S. 178, 194; *McIver's Lessee* v. *Walker,* 9 Cranch, 173; *Barclay* v. *Howell's Lessee,* 6 Pet. 498, 510.

It is a *universal* rule that course and distance yield to natural and ascertained objects. *Preston's Heirs* v. *Bowmar,* 6 Wheat. 582; *Brown* v. *Huger,* 21 How. 305, 318; *Higueras* v. *United States,* 5 Wall. 827, 835; *Morrow* v. *Whitney,* 95 U. S. 551, 555; *Gerrard* v. *Silver Peak Mines,* 82 Fed. Rep. 578, 585; *Nelson* v. *Hall,* 1 McLean, 518; *S. C.,* Fed. Cas. No. 10,107; *Koons* v. *Bryson,* 69 Fed. Rep. 297; *Robinson* v. *Moore,* 4 McLean, 279; *S. C.,* Fed. Cas. No. 11,960; *Kirwan* v. *Murphy,* 83 Fed. Rep. 275; *Jones* v. *Martin,* 35 Fed. Rep. 348; *Ellenworth* v. *Standcliff,* 42 Fed. Rep. 316; *United States* v. *Murray,* 41 Fed. Rep. 468; *Whitehurst* v. *McDowel,* 53 Fed. Rep. 633; *McDowel* v. *Whitehurst,* 47 Fed. Rep. 757; *S. C.,* 103 Fed. Rep. 157; *S. C.,* 109 Fed. Rep. 354; *Belden* v. *Hebbard,* 103 Fed. Rep. 532, 541; *Ex parte Davidson,* 57 Fed. Rep. 883.

The rule has been repeatedly enforced in cases involving

larger discrepancies than in this case. *Newsom* v. *Pryor's Lessee*, 7 Wheat. 7; *Ayers* v. *Watson*, 113 U. S. 594; *Land Co.* v. *Saunders*, 103 U. S. 316; *Chinoweth* v. *Haskell's Lessee*, 3 Pet. 92, 98; *Horne* v. *Smith*, 159 U. S. 40; *Mitchell* v. *Smale*, 140 U. S. 406; *Simm's Lessee* v. *Baker*, Cooke (Tenn.), 146; *Whiteside* v. *Singleton*, Meigs (Tenn.), 207, 218; *Overton's Heirs* v. *Cannon*, 2 Humph. 264; *Fowler* v. *Nixon*, 7 Heisk. 719, 724; *Sturgeon* v. *Floyd*, 3 Rich. 80; *Simpkins* v. *Wells*, 19 Ky. L. R. 881; *Pitman* v. *Nunnelly*, 17 Ky. L. R. 793; *President &c.* v. *Clark*, 31 N. Car. (Iredell) 58.

The principle is uniformly recognized in the Minnesota cases. *Turnbull* v. *Schroeder*, 29 Minnesota, 49, 51; *Nicolin* v. *Schuerderham*, 37 Minnesota, 63; *Chan* v. *Brandt*, 45 Minnesota, 93.

Monuments have been enforced against the courses and distances although it appeared with exceptional distinctness that the result was to pass more land than the parties had designed. *Pringle* v. *Rogers*, 193 Pa. St. 94, 98; *Sackett* v. *Twining*, 18 Pennsylvania, 199; *Johnston* v. *House*, 2 Hayw. (N. C.) 301; *Deaver* v. *Jones*, 119 N. C. 598; *Gilman* v. *Riopelle*, 18 Michigan, 145, 164; *Willoughby* v. *Foster*, Dyer, 80b; *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183, 188; *Reddick* v. *Leggat*, 7 N. Car. 539; *Chandler* v. *McCard*, 38 Maine, 564; 11 U. Can. O. B. 631; Rawle on Covenants (5th ed.), 297; *Dunn* v. *Turner*, 3 U. C. Com. Pl. 104; *Doe dem Murray* v. *Smith*, 5 U. S. 225.

The rule of monumental supremacy when viewed in the light of its true reason, is seen to be necessarily a universal rule of interpretation. Ross, Early Land Holding among the Germans, 13, 149, 150. See Rev. Stat. § 2396; Public Domain, 1883, 468, 590; *Cox* v. *Couch*, 8 Pa. St. 147, 154; *Blasdell* v. *Bissell*, 6 Pa. St. 258; *Wood* v. *Appal*, 63 Pa. St. 222; *Yoder* v. *Fleming*, 2 Yeates, 311; *Hall* v. *Powell*, 4 Serg. & R. 456, 461; *Doe* v. *Paine*, 4 Hawks, 65, 71; *Cherry* v. *Slade*, 3 Murphy, 82, 86; *Deaver* v. *Jones*, 119 N. Car. 598; *Miller* v. *White*, 1 N. Car. 223; *McClintock* v. *Rogers*, 11 Illinois, 279, 296; *Baxter* v.

Evell's Lessee, 7 Mon. (Ky.) 329; *Ayres* v. *Watson*, 137 U. S. 584, 597; *Chinoweth* v. *Haskell*, 3 Pet. 92, 96. Cases on defendant's brief distinguished.

In some jurisdictions the rule may have degenerated. Early cases in New York held that monuments were supreme. *Jackson* v. *Camp*, 1 Cow. 605, 612; *Jackson* v. *Frost*, 5 Cow. 346, 349; *Jackson* v. *Ives*, 9 Cow. 661; *Cudney* v. *Early*, 4 Paige, 209, 212; *Jackson* v. *McConnell*, 19 Wend. 175.

Afterwards by losing sight as above mentioned, of the reason and foundation of the rule, they held that where the courses and distances coincide with designated quantity, their accuracy is verified, with the effect of denuding the monuments of their supremacy. *Baldwin* v. *Brown*, 16 N. Y. 359; *Buffalo, etc., Co.* v. *Stigeler*, 61 N. Y. 348; *Higinbotham* v. *Stoddard*, 72 N. Y. 95, 99; *Danziger* v. *Boyd*, 21 J. & S. 398, 409.

As to Texas, see *Blum* v. *Bowman*, 30 U. S. App. 50, 54; *Booth* v. *Upshur*, 26 Texas, 64, 70; Oregon, *Hale* v. *Cottle*, 21 Oregon, 580, 585.

Prior to the decision of *Davis* v. *Rainsford*, 17 Massachusetts, 207, in 1821, the State enforced the rule in favor of monuments. *Howe* v. *Bass*, 2 Massachusetts, 380; *Pernam* v. *Weed*, 6 Massachusetts, 131. But see *Parks* v. *Loomis*, 6 Gray, 467; *Murdock* v. *Chapman*, 9 Gray, 156; *Hall* v. *Eaton*, 139 Massachusetts, 217, 221.

These cases show that the relaxation of the rule has not extended beyond a very peculiar and narrow line of cases.

If by reason of the magnitude of the discrepancy or otherwise, the government is entitled to relief, it must be sought through reformation in equity. *White* v. *Burnley*, 20 How. 235; *Lamprey* v. *Mead*, 54 Minnesota, 290, 299; *Russell* v. *Maxwell Land Co.*, 158 U. S. 253; *Cragin* v. *Powell*, 128 U. S. 691; *Gazzan* v. *Phillips*, 20 How. 372; *White* v. *Blum*, 52 U. S. App. 59, 63; *Sears* v. *Parker*, 1 Hayw. (N. Car.) 126; *Fowler* v. *Nixon*, 7 Heisk. (Tenn.) 719, 725; *Curle* v. *Barrell*, 2 Sneed, 66; *Pringle* v. *Rogers*, 193 Pa. St. 94; *Hull* v. *Fuller*, 7 Vermont, 100, 105; *Owens* v. *Rains*, Hayw. (Tenn.) 106.

These propositions are established by the terms of the statute. § 2396, Rev. Stat.; *Ogilvie* v. *Copeland*, 145 Illinois, 98, 105.

In water frontage cases a monument is supported not only by its greater certainty, but by its greater materiality. A water boundary adds to the market value of a tract by augmenting its usefulness for almost any purpose and the court will presume that it was one of the inducements to the purchase. *Newsom* v. *Prior's Lessee*, 7 Wheat. 7; *County of St. Clair* v. *Livingston*, 23 Wall. 46, 65.

All the equities are in favor of this contention. Errors in surveys were always claimed and generally allowed to the settler. *Taylor* v. *Brown*, 5 Cranch, 234, 249. It would be unjust to curtail the survey. *Beckly* v. *Bryan*, Sneed's Ky. Cas. 107; *Johnson* v. *Buffington*, 2 Wash. (Va.), 116; *Houston* v. *Pillow*, 1 Yerg. 481, 488. The most the government could expect would be payment for excess acreage at original rate. *Lindsay* v. *Hawes*, 2 Black, 554, 560.

Complainants are not chargeable with notice of fraud on the part of the surveyor, or of the discrepancy in the acreage; nor if they are, would their rights be affected. *Anderson* v. *Richardson*, 92 California, 623; *Land Co.* v. *Saunders*, 103 U. S. 316, 322, and other cases cited *supra*.

It is not a material circumstance that the government contractor and deputy surveyor to whom the government confided the subdivision of this township may have fraudulently neglected to perform his duty. *Murphy* v. *Kirwan*, 103 Fed. Rep. 104, 107, reversed in this court but on other grounds, 189 U. S. 35.

The absence of survey expressly appeared in *Simm's Lessee* v. *Baker*, Cooke (Tenn.), 146, and in *Singleton* v. *Whiteside*, 5 Yerg. at p. 36, and in *Whiteside* v. *Singleton*, Meigs (Tenn.), 207, 218. And see also *Fowler* v. *Nixon*, 7 Heisk. 719, 724; *Sturgeon* v. *Floyd*, 3 Rich. 80; *Stafford* v. *Quig*, 30 Texas, 257; *Phillipps* v. *Ayers*, 45 Texas, 605; *Jones* v. *Burget*, 46 Texas, 292.

The meander line cannot be used as a boundary line to cut

off plaintiff's lots. *Bruce* v. *Taylor*, 2 J. J. Marshall, 160. Monuments are superior to meander lines. *Shurmeier* v. *St. Paul R. R. Co.*, 10 Minnesota, 59; *St. Paul R. R. Co.* v. *Schurmeier*, 7 Wall. 272, 286; *Hardin* v. *Jordan*, 140 U. S. 371; *Middleton* v. *Pritchard*, 3 Scam. 510; *Mitchell* v. *Smale*, 140 U. S. 406; *Sizior* v. *Logansport*, 151 Indiana, 626; *Boorman* v. *Sunnucks*, 42 Wisconsin, 233; *Everson* v. *City of Waseca*, 44 Minnesota, 247; *Lamprey* v. *State*, 52 Minnesota, 181; *Forsyth* v. *Smale*, Fed. Cas. 4950; *Schlosser* v. *Cruikshank*, 96 Iowa, 424; *S. C.*, 65 N. W. Rep. 344; *Menasha Co.* v. *Lawson*, 70 Wisconsin, 600; *Coburn* v. *San Mateo County*, 75 Fed. Rep. 520.

The question in this case is identical with that involved in the case of *Murphy* v. *Kirwin*, which involved the title to other portions of this same belt of land lying between Cedar Island Lake and its meander line. See 83 Fed. Rep. 275; 103 Fed. Rep. 104; 109 Fed. Rep. 354, and analogous to *Nicolin* v. *Schneiderhan*, 37 Minnesota, 63, and *Olson* v. *Thorndike*, 76 Minnesota, 399.

Natural monuments when embraced in the calls of surveys of patents have absolute control and both course and distance must yield to their influence. *Brown* v. *Huger*, 21 How. 305, 318; *Preston's Heirs* v. *Bowmar*, 6 Wheat. 581; Tyler on Boundaries, 30; *Menasha Wooden Ware Co.* v. *Lawson*, 36 N. W. Rep. (Wis.) 412; *Wright* v. *Day*, 33 Wisconsin, 263; *Sphrang* v. *Moore*, 22 N. E. Rep. (Ind.) 319; *Palmer* v. *Dodd*, 31 N. W. Rep. (Mich.) 209.

Meander lines have no significance as boundary lines and are only intended to afford a means of computing the number of acres the government requires payment for, nor is the grantee limited to the number of acres specified in the patent. *St. Clair* v. *Lovingston*, 23 Wall. 46, 62; *Fuller* v. *Dauphin*, 124 Illinois, 542; *Clute* v. *Michigan*, 65 Michigan, 48; *Chan* v. *Brandt*, 45 Minnesota, 93; *St. Paul &c. R. R. Co.* v. *St. Paul &c. R. R. Co.*, 26 Minnesota, 31; *Ladd* v. *Osborn*, 79 Iowa, 93; *Heald* v. *Yumisko*, 7 N. D. 427; *Jones* v. *Pettibone*, 2 Wisconsin, 308, 320; *Lodge's Lessee* v. *Lee*, 6 Cranch, 237; *French* v. *Ban-*

head, 11 Gratt. 136, 157; *Lynch* v. *Allen*, 4 Dev. Bat. 62; *Kelley* v. *Graham*, 9 Watts, 116.

Cases cited by defendant in error can be distinguished from this case.

As involving the construction of a Federal survey the case is reviewable by this court. *French-Glenn Co.* v. *Springer*, 185 U. S. 47, 54; *Cousin* v. *Labatut*, 19 How. 202; *Magwire* v. *Tyler*, 1 Black, 195, 203; *Railroad Co.* v. *Schurmeier*, 7 Wall. 272; *Kennedy's Exrs.* v. *Hunt's Lessee*, 7 How. 586, 594; *Packer* v. *Bird*, 137 U. S. 661; *Knight* v. *Land Assn.*, 142 U. S. 161; *Shively* v. *Bowlby*, 152 U. S. 1; *Glasgow* v. *Baker*, 128 U. S. 57.

Mr. John R. Van Derlip and *Mr. R. R. Briggs*, with whom *Mr. George P. Wilson* was on the brief, for defendants in error.

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

The land in controversy in this case is described in the foregoing statement of facts, and it lies between the meander line as it appears on the plat of the survey referred to in the patents and the actual borders of the lake. (See the sketch of the plat at page 43 of volume 189, United States Reports.) Regarding the question of the boundaries, counsel for plaintiff in error assert in their brief that if distance is to prevail, then the land in controversy is an unsurveyed strip lying between the lots of the plaintiff in error and the lake; while if the natural monument is to prevail, then the strip of land in controversy is part and parcel of the lots of the plaintiff in error. The boundaries of the lots as shown upon the plat of survey giving the so-called meander line of the lake, described in the field notes, are unquestionably correct, so far as the three sides of the fractional lots are concerned, and the only difference is as to the side which purports to front on the lake. In regard to this fourth side, the plaintiff in error, as a remote grantee from the patentees, bases its claim to the land lying between the

meander line and the lake, upon the grounds that the patents conveying the lots to the patentees contained the clause: "According to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;" that the plat of the survey of the lands, by reason of such reference, became a part of the grant described in the patents; that the plat showed, as the fourth side of the land granted, a meander line around Cedar Island Lake; that the lake thereby became a natural monument or boundary, and that although the plat of the survey turns out to have been a mistake as to the position of the lake, and the line was, therefore, not in truth anything like an accurate meander line, yet by reason of that plat and of that line, which assumed to show the borders of a lake, the patentees had the right to claim that they bought in reliance upon and that they were entitled to a boundary upon a lake.

In support of these contentions the plaintiff in error cited *Cragin* v. *Powell*, 128 U. S. 691, and *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 194, as to the effect of a grant according to an official plat of a survey referred to in the grant, and the cases of *McIver's Lessee* v. *Walker* (1815), 9 Cranch, 173; *Newsom* v. *Pryor's Lessee* (1822), 7 Wheat. 7; *County of St. Clair* v. *Lovingston* (1874), 23 Wall. 46; *Land Company* v. *Saunders* (1880), 103 U. S. 316, and other cases, affirming the general rule that, in matters of boundaries, natural monuments or objects will control courses and distances.

These general rules may be admitted. The rule as to natural monuments is not, however, absolute and inexorable. It is founded upon the presumed intention of the parties, to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within some reasonable distance, and places the monument somewhere near where it really exists. *White* v. *Luning*, 93 U. S. 514; *Ainsa* v. *United States*, 161 U. S. 208, 229; *Baldwin* v. *Brown*, 16 N. Y. 359; *Buffalo &c. Railroad Company* v. *Stigeler*, 61 N. Y. 348; *Higinbotham* v. *Stoddard*, 72 N. Y. 94;

Hall v. *Eaton*, 139 Massachusetts, 217. These cases illustrate, somewhat, the principle upon which the general rule is founded, and show how far it has, upon occasion, been regarded as inapplicable. The patents mention the number of acres contained in each lot, and that number is stated in the eleventh finding of the trial judge, which is set forth in the foregoing statement of facts. The difference between the number of acres stated in the patents to be in each lot and the number now claimed by the plaintiff in error is very large, and is subsequently referred to herein. It seems plain that the intention was to convey no more than the number of acres actually surveyed and mentioned in the patents. In *Ainsa* v. *United States* (*supra*), this is deemed to be a very important and sometimes a decisive fact. It is true that many cases cited by the plaintiff in error have enforced the superiority of natural monuments over courses and distances where the difference in the amount of the land conveyed as between the two classes of description was also very great. In the case at bar, while there is a great difference in the amount of land so described, there are at the same time other facts which are material and which in our opinion, when considered in connection with this difference, justify and demand a refusal to be controlled by the borders of the lake as a boundary.

It is well to see what the facts in this case were upon which the state court founded its decision. They are set forth in detail in the foregoing statement of facts, but a few of the more important may be here referred to.

There was, in truth, no such survey as was called for by the contract between the government and the surveyor. The exterior lines, with the exception of the south line of the township, were run, but no survey of the interior of the township was ever made and no section lines thereof were ever run, with one possible exception, and in truth the survey as a whole was a fraud. No such body of water at the place indicated on the plat of survey then existed or now exists. On the contrary, the lake is from half a mile to a mile away from what is called

its meander line on the plat of the survey filed by the surveyor. It covers only about twenty acres in the southeast corner of section 4. The surveyor never was on the ground and never saw the lake he pretended to measure, and the lake never existed where he laid it down in his fraudulent survey. If the side lines of the various lots were projected in their course, those of lot 3 would never reach the lake, and those of lots 5 and 6 would not reach the lake within the limits of section 4, while the south line of lot 7 would touch the lake, and a few feet of frontage would then be secured, and that lot would then have 139 instead of 25.25 acres. The side lines of lots 5, 6 and 7, if protracted, would instantly cross the protracted side lines of lot 3. There are at least 1,000 acres of high, tillable land between the actual water line of the lake and the meander line as returned by the field notes and the plat of survey, and the land is covered by trees of more than a century's growth and growing down to the water's edge. In order to bound on the lake the lots would exhibit a totally different form from that which they take on the plat of survey and such boundary would violate every rule of statutory survey, by conveying lands not conforming to the system adopted by the government and carried out ever since its adoption.

The patentees, it must also be borne in mind, get all the land they really purchased and paid for, as laid down by the lines and distances set forth in the survey and as stated in the patents. These lines and distances (of lots 3, 5, 6 and 7) gave the patentees 140.87 acres of land, and that was the amount they paid for, while if the fourth line of the boundary of the lots were taken out and others substituted in the way shown by the dotted lines in the plat in 189 U. S. *supra*, and so as to reach the borders of the lake as it then actually existed and now exists, they would get 571 acres, or fourfold more land than was actually mentioned and described in the patents conveying these four lots, or than they supposed they were purchasing, or than they actually paid for.

Upon these facts the question recurs whether the patentees

by reason of the general rules above mentioned took these lands which they now claim, although they never in reality bought or paid for them. We think they did not; that the rules have no application to a case like this, and that plaintiff in error must be confined to the lots which are correctly described within the lines and distances of the plat of survey and of the field notes and which the patentees actually bought and paid for.

The fraudulent character of the survey, the non-existence of the lake within at least half a mile of the point indicated on the plat, the excessive amount of land claimed as compared with that which was described and stated in the patents and actually purchased and paid for, the difficulty in reaching the lake at all, and the necessity in order to do it of going outside of section 4, (with the exception as to a small part of lot 7,) the section in which the description and plat placed all the land, all go to show that the lake ought not to be regarded as a natural monument within the cases, or within the principle upon which the rule is founded, and therefore the courses and distances by which the amount of land actually purchased and paid for was determined, ought to prevail.

The non-existence of a lake anywhere near the spot indicated on the plat is a strong reason for regarding the so-called meander line as one of boundary instead of a true meander line, and when the plat itself is the result of a gross fraud, and indeed is entirely founded upon it, the reason for refusing to recognize the lake as a boundary becomes apparent.

The land actually purchased and paid for was conveyed and covered by the description by courses and distances set forth in the field notes and referred to in the patents, and the government is concluded as to such land, but the implication of a boundary by the lake as delineated on the plat of survey, which might otherwise be made, will not be permitted when it is based upon such facts as have been already adverted to in this case. Giving the patentees all the land in acres, stated in the patents and described and contained in lines and dis-

tances in such patents, and which is all they paid for, protects them, and the government ought not to be further concluded by the fraudulent acts of a public officer.

As is said in the trial court in this case, there must be some limit to the length courts will go in search of the water delineated on a plat of survey, with a meander line shown thereon. If the water were ten miles away, it is certain that a claim to be bounded thereon would not for one moment be admitted. A distance of half a mile, enough to plainly show the gross error of the survey, together with the other facts adverted to herein, are sufficient to justify a refusal to apply the general rule that a meander line is not usually one of boundary.

Nor in such case is it necessary to go into equity to reform the patent. Where the patentee has in fact received and is in possession of all the land actually described in the lines and distances, and is seeking for more on the theory that his plat of survey carries him to the water, a denial of that claim upon such facts as appear here is well founded, and requires no reformation of the patent. It is simply a question of boundary, and it is a legal defence, it is but a denial that the land claimed is in fact included in the patent as it exists, and no aid of a court of equity is necessary to sustain such a defence.

We think *French-Glenn Live Stock Company* v. *Springer*, 185 U. S. 47, is authority which calls for the affirmance of this judgment. In that case the plaintiff claimed under patents from the United States, which referred to the official plats of the survey, and by which it appeared the township was rendered fractional by abutting upon the meander line along the south side of Malheur Lake, which plat appeared to have been approved by the Land Department of the government, and the plat showed the lots as bounded "north by the meander line of Malheur Lake." The field notes of the survey of the exterior boundaries of the township and its subdivisions and the meander line of Malheur Lake itself, under the title heading "Meanderings of the south shore of Malheur Lake through fractional township 26," etc., indicated that it was run "with

the meander of the lake." The plaintiff in that case claimed title to land which was just north of this meander line on the ground that such land was a portion of the lake when the survey was made and the meander line run around it; that the water had since receded because of certain facts stated, and that plaintiff was entitled to the land thus uncovered, as an accretion by way of reliction to his adjoining land. The defendant disputed this claim, and asserted that when the survey was made and the plat thereof, with its meander line, was referred to in the patent, there was in fact no such lake anywhere near that spot, and the so-called meander line was in truth a line bounding plaintiff's land and limiting him thereby so that he could not go beyond it in order to find the lake which plaintiff claimed as a boundary. This court held that the line, which appeared on the plat as a meander line of the lake, was in truth a line of boundary beyond which the plaintiff could not go in search for the lake. The question of fact as to which of the two contentions was right, the receding of the water or the non-existence of the lake at the time of the survey, was submitted to the jury, and that body found in favor of the defendant's theory. The result of the decision was to refuse to consider the lake as a natural monument, because it did not exist at any point near where it was placed on the plat. What purported on the plat to be a meander line was held not to be one, but on the contrary it was held to be a boundary of the land of the plaintiff, beyond which he could not go. After speaking of the question of fact and its decision by the jury in favor of the defendant, Mr. Justice Shiras, in giving the opinion of the court, said:

"The land in dispute, in the possession of the defendant in error, was not included within the lines of the original survey, nor in the description of the lots contained in the patents and in the deeds of conveyance under which the plaintiff in error holds, and to add the land in controversy to the lots so described would more than double the area of the land claimed by the plaintiff in error; but the contention of the plaintiff in

error was, in the courts below and now is, in this court, that, as the plaintiff in error bought in reliance upon the plats and patents which showed the meander line of the lake, such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land, so far as the rights of riparian grantees are concerned. . . .

"While it may be conceded that the description of the lots contained in the survey, plats and patents are conclusive as against the government and holders of homesteads, so far as the lands actually described and granted are concerned, such conclusive presumption cannot be held to extend to lands not included within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, whose recession has left bare land accruing to the owners of the abutting lots. We agree with the Supreme Court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. If, indeed, there had been a lake in front of these lots at the time of the survey, which lake had subsequently receded from the platted meander lines, the claim of the owner of the lots to the increment thus occasioned might be conceded to be good, if such were the law of the State in which the lands were situated. But if there never was such a lake—no water forming an actual and visible boundary—on the north end of the lots, it would seem unreasonable, either to prolong the side lines of the survey indefinitely until the lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake. The jury having found that the facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey and to the extent of the acreage called for in the patents, and

that the meander line was intended to be the boundary line of the fractional section."

In the above cited case the important point to be considered is that the court refused to be bound by the appearance on the plat of survey showing a meander line of the lake when the fact was found by the jury (and exists in this case) that at the time of the survey there was no such lake existing at any point near where it appeared to be on the plat, and that under those circumstances a meander line appearing on the plat would be and was regarded as a line of boundary to the exclusion of what was claimed to be a natural object, namely, the lake itself.

It is not important that the plaintiff's claim was founded upon the allegation that the land there in question was the result of a subsidence of the water of the lake, and that he was, therefore, entitled to such land by reason of accretion. The point lies in the fact that what appeared as a meander line on the plat was treated as a boundary line and the lake was held not to be such boundary, for the reasons stated in the opinion. Those reasons exist in full force in this case, only here the disparity between the amount of land conveyed and paid for and the amount now claimed is double that stated in the case cited. Mr. Justice Shiras in the course of his opinion, refers to other cases in this court as authority for the proposition that a meander line may be in some cases a line of boundary limiting the land conveyed or described by the line itself, and not by any body of water. See *Niles* v. *Cedar Point Club*, 175 U. S. 300, 308; *Horne* v. *Smith*, 159 U. S. 40. Upon this subject it was well said by the State Supreme Court in this case as follows:

"The official plat was only intended to be a picture of the actual conditions on the ground; but the fraudulent mistake in the plat in this case was so gross that no man actually viewing the premises could possibly be misled, or believe that the shore line of the lake was intended as the boundary line of the lots. He would understand at once that the meander line

as traced on the plat was the actual boundary line of the lots.

"This case, then, is one where the call for the natural monument, the lake, must be disregarded; for the admitted facts show that it is an impossible call, and that, if it is rejected, the courses and distances and the meander line will exactly close, and give to the plaintiff the precise quantity of land bought from the government and paid for. It falls within the rule that a meander line is not, as a general proposition, a boundary line; yet the boundaries of fractional lots will not be indefinitely extended where they appear by the government plat to abut on a body of water which in fact has never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits."

That this was a fraudulent survey cannot be denied. Still, the government is concluded by such survey, so far as the lands actually described, granted and paid for are concerned, but it will not be concluded in regard to other lands, which were not within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, when such lake or body of water is in fact and always has been more than half a mile away from such lots, and where the patentee has received all the land that he actually paid for.

It appears from the various reports of the case of *Kirwan* v. *Murphy*, cited by plaintiff in error, that the government was intending to make a survey of that portion of this township lying between the alleged meander line and the actual lake, as unsurveyed land, when certain grantees of patentees of lots, which by the plat of survey bounded on the lake, commenced proceedings to obtain an injunction to prevent what was alleged would be a resurvey. The case is first reported in 83 Fed. Rep. 275, where the opinion of the Circuit Court of Ap-

peals is given upon affirming the order granting the injunction. The case was then tried, and the decision of the United States Circuit Court in Minnesota, upon such trial, directing judgment for the plaintiffs, is reported in 103 Fed. Rep. 104, and upon appeal the decision of the United States Circuit Court of Appeals for the Eighth Circuit, affirming the judgment, is reported in 109 Fed. Rep. 354. Those courts were of opinion that the Land Department had no right to make the proposed survey, and that the fractional lots went to the lake, and the government could not revoke its grant and correct the survey so far as regarded the patentees, or their grantees, in good faith. Upon writ of error from this court the judgment was reversed for the reason that the remedy by injunction was not proper, and also because the Land Department was vested with the administration of the public lands and could not be divested by the fraudulent action of a subordinate officer outside of his authority, and in violation of the statute. The exact point involved here was not presented in that case, and this court held that it could not be passed upon in that proceeding. 189 U. S. 35.

For the reasons we have stated, we cannot concur in the conclusions of the lower Federal courts, that the patentees had the right to bound their lots by the lake as it actually existed. The judgment is

Affirmed.

SECURITY LAND AND EXPLORATION COMPANY *v.* WECKEY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 128. Argued January 19, 1904.—Decided February 29, 1904.

Argued simultaneously with, by the same counsel, and on the same briefs as, No. 127.

MR. JUSTICE PECKHAM delivered the opinion of the court.

In this case land in the same section as in the foregoing case is involved, and as the title depends upon precisely the same facts, this case is by stipulation of counsel to abide the event of the other.

Judgment affirmed.

WINOUS POINT SHOOTING CLUB *v.* CASPERSEN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 153. Argued February 24, 1904.—Decided March 7, 1904.

Federal questions cannot be raised in this court which did not arise below, and where no Federal question is otherwise raised, and the only provision of the Constitution referred to in the assignment of errors in the State Court has no application, an averment of its violation creates no real Federal question and the writ of error will be dismissed.

THE facts are stated in the opinion of the court.

Mr. S. H. Holding, with whom *Mr. Harvey D. Goulder* and *Mr. Frank S. Masten* were on the brief, for plaintiff in error.

Mr. George A. True for defendants in error.

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

This was a suit brought by the Winous Point Shooting Club against Caspersen and others in the Court of Common Pleas, Ottawa County, Ohio, to enjoin defendants from fishing on certain premises alleged to be parts of Sandusky River and Mud Creek and to belong to plaintiff.

The court found that the waters in dispute formed part of a public bay, which defendants had the right to navigate and to fish in; and dismissed the petition.

The case was then carried to the Circuit Court of Ottawa

County and there tried *de novo*. That court filed findings of fact and conclusions of law; held that the waters in question were not parts of Sandusky River and Mud Creek, and formed part of a public bay, in whose waters defendants as members of the public had the right of navigation and fishing; and the petition was again dismissed. Plaintiff then took the case on error to the Supreme Court of Ohio, and, with other alleged errors not material here, assigned as error that "the judgment of the court is in contravention of section 19, article I, of the constitution of Ohio, and article V of the Constitution of the United States, in that by said judgment the private property of the plaintiff in error is taken for public use without just compensation." There was no suggestion that any right under the Constitution, or any statute of, or authority exercised under, the United States, had been specially set up or claimed, and decided against. The Supreme Court affirmed the judgment of the Circuit Court and entered an order certifying as "part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error to this court from the Circuit Court of Ottawa County, and in the arguments made in this court, in behalf of plaintiff in error, it was insisted and relied upon by said plaintiff that the waters in dispute had been surveyed and meandered by the United States as those of Sandusky River and Muddy Creek, and the lands mentioned and described in said case had been surveyed, sold and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which acts had been done under authority of acts of Congress; that plaintiff had and possessed the sole and exclusive right of fishing in said waters; that the judgment and decree of the said Circuit Court, that said waters are not those of Sandusky River and Muddy Creek, but those of an open and public bay, in which the public had the rights of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property and the same was taken for a public use, without just

compensation to it; and it became material to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein."

The certificate in itself would not confer jurisdiction, but may properly be referred to, and it appears therefrom as well as from the terms of the assignment of error in the Supreme Court that plaintiff's contention was that the judgment of the Circuit Court was in violation of the Fifth Amendment. But that amendment is a restriction on Federal power, and not on the power of the States. The Supreme Court of Ohio gave no affirmative expression of its views in that regard, or, indeed, in respect of section 19 of article I of the constitution of Ohio, treating of taking private property for public use on compensation made.

The judgment was affirmed on the authority of *Bodi* v. *Winous Point Shooting Club*, 57 Ohio St. 226. In that case the same waters were in dispute as in this case, and it was held that they formed "part of a public bay and not parts of the Sandusky River and Mud Creek," and the ruling in *Sloan* v. *Biemiller*, 34 Ohio St. 492, sustaining the public rights of navigation and fishing, in such circumstances, was followed and approved.

Federal questions cannot be raised here which did not arise below, and as the Fifth Amendment had no application the averment of its violation created no real Federal question. *Chapin* v. *Fry*, 179 U. S. 127.

Writ of error dismissed.

HODGES *v.* COLCORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 155. Submitted February 23, 1904.—Decided March 7, 1904.

A homestead entry which is *prima facie* valid, although made by one in fact disqualified to make the entry, removes the land temporarily out of the public domain, and one who attempts to enter the land on the ground that the original entry was void, acquires no rights against one who initiates a contest in the land office and obtains a relinquishment in his favor from the original entryman.

THE facts are stated in the opinion of the court.

Mr. J. S. Jenkins for appellants.

Mr. John W. Shartel, Mr. James R. Keaton and *Mr. Frank Wells* for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

On June 1, 1901, James L. Hodges filed his petition in the District Court of Oklahoma County, Oklahoma Territory, praying that the defendants, the heirs of William R. Colcord, deceased, the holders of the legal title by patent from the United States to a tract of land in the county, be decreed to hold that title in trust for him. In it he alleged that on July 22, 1889, he was legally qualified to make a homestead entry of the land; that on that day he settled upon it with intent to acquire title under the homestead laws of the United States, and immediately made permanent and lasting improvements as required by law. He further alleged "that at the time he entered upon said land, and made settlement thereon, one John Gayman had entered upon and occupied said land; that on the 25th day of April, 1889, the said John Gayman obtained a pretended

homestead entry on said land; that said Gayman was disqualified from ever entering or obtaining any right or title to said land, by reason of his entering upon and occupying a portion of the Oklahoma country declared open to settlement by the President's proclamation of March 3, 1889, prior to 12 o'clock noon, April 22, 1889, as shown by a copy of the decision of the Land Department, recorded in vol. 24, page — of the United States Land Decisions, hereto attached, marked 'Exhibit A' and made a part of this petition.

"In the decision above referred to the honorable Secretary of the Interior finds as facts that James L. Hodges has resided on said land since July 22, 1889; that Runyan has resided on said land since May 13, 1890, and William R. Colcord since 1893.

"Said William R. Colcord filed his contest against the said John Gayman on the 23d day of July, 1889, on the ground of disqualification, and the plaintiff James L. Hodges filed his contest against said John Gayman August 23, 1889, on the ground of prior settlement, as shown by the decision of the Hon. Secretary of the Interior dated December 1, 1894, hereto attached marked 'Exhibit B,' and made a part hereof."

A demurrer to the petition was sustained by the District Court and the suit dismissed. The decision was affirmed by the Supreme Court of the Territory, 70 Pac. Rep. 383, whereupon an appeal was taken to this court. Pending the proceedings in the territorial courts Hodges died, and the suit was revived in the names of his heirs.

The appellants' contention is that Gayman was legally disqualified to make a homestead entry of the land; that his entry was absolutely void; that Hodges was the first person legally qualified to make an entry who actually settled upon the land and that therefore upon Gayman's relinquishment he became entitled to entry and patent. On the other hand, the defendants' contention rests on sec. 2, chap. 89, 21 Stat. 140, which provides:

"SEC. 2. In all cases where any person has contested, paid

the land office fees, and procured the cancellation of any preemption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

The exhibits attached to the petition show that the Land Department found that Gayman was within the territory at the time of the opening of the lands for settlement; that after the decision in *Smith* v. *Townsend*, 148 U. S. 490, he filed a relinquishment in the local land office, and that such relinquishment was induced by the contest of Colcord. This finding, being one of fact, is conclusive upon the courts. Colcord was the contestant who procured the cancellation of Gayman's homestead entry. He comes within the terms of the statute. Was this statutory right of entry destroyed by Hodges' settlement, a settlement made intermediate Gayman's homestead entry and the initiation of this contest? We are of the opinion that it was not. Gayman's homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the proclamation of the President. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries. The first to contest was Colcord, and as a result of that contest Gayman relinquished his entry. To take from Colcord the benefit of the relinquishment which his contest had secured would be an injustice to him as well as a disregard of the act of 1880.

Some reliance is placed by the appellants on the language of this court in *Calhoun* v. *Violet*, 173 U. S. 60, 64, in which we said, in respect to an entry similar to Gayman's, "that an entry of land made under such circumstances was void, and that the ruling by the Land Department so holding was correct," but that language was used with reference to the claim of the entryman, and what was meant was that such entry

was void as to him—that is, gave him no rights. So here the entry by Gayman was as to him void—gave him no rights. But that decision did not determine what effect an entry *prima facie* valid, although made by one in fact disqualified to make the entry, had upon the status of the land or the rights of other parties. Generally, a homestead entry while it remains uncancelled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. In *In re Cliff*, 3 L. D. 216, 218, it was said by Secretary Teller:

"Under the present ruling of this department, entries of record *prima facie* valid appropriate the lands covered thereby, and, while they remain uncancelled, the land is not subject to further entry. *Graham* v. *H. & D. R. R. Co.*, 1 L. D. 380; *Whitney* v. *Maxwell*, 2 L. D. 98; *McAvinney* v. *McNamara*, 10 C. L. O. 274; *Davis* v. *Crans et al.*, 11 C. L. O. 20."

The same proposition was affirmed in *In re Laird*, 13 L. D. 502, 503. In *McMichael* v. *Murphy*, 20 L. D. 147, 150, the question arose as to an entry in Oklahoma, and Secretary Smith discussed it in these words:

"Although White had entered the Oklahoma country during the prohibitory period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remained forever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void, but voidable only. True, White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void but voidable. *Leary* v. *Manuel*, 12 L. D. 345; *Hollants* v. *Sullivan*, 5 L. D. 115; *Pfaff* v. *Williams et al.*, 4 L. D. 455; *St. Paul, Minneapolis & Manitoba R. R. Co.* v. *Forsyth*, 3 L. D. 446. Being voidable only, White's entry segregated the land so long as it remained of record."

In *Jones* v. *Arthur*, 28 L. D. 235, it was decided that "land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry." See also *Butler* v. *California*, 29 L. D. 610. In *Witherspoon* v. *Duncan*, 4 Wall. 210, it was held that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained;" and in *Hastings &c. R. R. Co.* v. *Whitney*, 132 U. S. 357, it was said by Mr. Justice Lamar (p. 361):

"In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, preëmption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And again, on page 364, after noticing some defects in the form of the entry—

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

But it is unnecessary to multiply quotations. The entry of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside. It was relinquished and removed from the records of the land office as the result of a contest by Colcord. He was entitled under the statute to the benefit of that contest, and was rightfully given an entry of and patent to the land.

The judgment of the Supreme Court of Oklahoma is

Affirmed.

NORTHERN SECURITIES COMPANY *v.* UNITED STATES.

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

No. 277. Argued December 14, 15, 1903.—Decided March 14, 1904.

Stockholders of the Great Northern and Northern Pacific Railway companies—corporations having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound—combined and conceived the scheme of organizing a corporation, under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation. Pursuant to such combination the Northern Securities Company was organized as the holding corporation through which that scheme should be executed; and under that scheme such holding corporation became the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies, who delivered their stock, receiving, upon the agreed basis, shares of stock in the holding corporation.

Held, that, necessarily, the constituent companies ceased, under this arrangement, to be in active competition for trade and commerce along their respective lines, and became, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease.

Held, that the arrangement was an illegal combination in restraint of interstate commerce and fell within the prohibitions and provisions of the act of July 2, 1890, and it was within the power of the Circuit Court, in an action, brought by the Attorney General of the United States after the completion of the transfer of such stock to it, to enjoin the holding company, from voting such stock and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin the railroad companies from paying any dividends to the holding corporation on any of their stock held by it.

Held, that although cases should not be brought within a statute containing criminal provisions that are not clearly embraced by it, the court should not by narrow, technical or forced construction of words exclude cases from it that are obviously within its provisions and while the act of July 2, 1890, contains criminal provisions, the Federal court has power under § 4 of the act in a suit in equity to prevent and restrain violations

of the act, and may mould its decree so as to accomplish practical results such as law and justice demand.

HARLAN, BROWN, MCKENNA and DAY, JJ.[1]

The combination is, within the meaning of the act of Congress of July 2, 1890, known as the Anti-Trust Act, a "trust"; but if not, it is a combination in restraint of interstate and international commerce, and that is enough to bring it under the condemnation of the act.

From prior cases in this court, the following propositions are deducible and embrace this case:

Although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it embraces and declares to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.

The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy or monopoly upon such trade or commerce.

Railroad carriers engaged in interstate or international trade or commerce are embraced by the act.

Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act.

Congress has the power to establish rules by which interstate and international commerce shall be governed, and by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce.

Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act.

The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce.

To vitiate a combination, such as the act of Congress condemns, it need not

[1] Mr. Justice HARLAN announced the affirmance of the decree of the Circuit Court and delivered an opinion in which BROWN, MCKENNA and DAY, JJ., concurred. Mr. Justice BREWER delivered a separate opinion in which he concurred in affirming the decree of the Circuit Court.

Mr. Justice WHITE delivered a dissenting opinion in which the CHIEF JUSTICE and PECKHAM and HOLMES, JJ., concurred; Mr. Justice HOLMES delivered a dissenting opinion in which the CHIEF JUSTICE and WHITE and PECKHAM, JJ., concurred.

be shown that such combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.

The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce.

Under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution.

If in the judgment of Congress the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

When Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce.

Subject to such restrictions as are imposed by the Constitution upon the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce.

No State can, by merely creating a corporation, or in any other mode, project its authority into other States, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land.

Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress.

By MR. JUSTICE BREWER.

The act of July 2, 1890, was leveled, as appears by its title, at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld.

The general language of the act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.

A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person, but it is an artificial person, created and existing only for the convenient transaction of business.

Where, however, no individual investment is involved, but there is a combination by several individuals separately owning stock in two competing railroad companies engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a direct restraint of trade by destroying competition, and is illegal within the meaning of the act of July 2, 1890.

A suit brought by the Attorney General of the United States to declare this combination illegal under the act of July 2, 1890, is not an interference with the control of the States under which the railroad companies and the holding company were, respectively, organized.

THE pleadings in this action and the decree of the Circuit Court are as follows:

PETITION.[1]

To the judges of the Circuit Court of the United States for the District of Minnesota:

Now comes the United States of America, by Milton D.

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[1] Bill in equity of United States, this page, *supra*.

Exhibit: Certificate of Incorporation of Northern Securities Company, page 216, *post*.

Answer of Northern Securities Company, page 221, *post*.

Answer of Hill and other defendants, page 241, *post*.

Answer of Great Northern Railway Company, page 241, *post*.

Answer of Northern Pacific Railway Company, page 242, *post*.

Answer of Morgan and other defendants, page 247, *post*.

Answer of Lamont, defendant, page 255, *post*.

Purdy, the United States attorney for the District of Minnesota, acting under direction of the Attorney-General of the United States, and brings this its proceeding by way of petition against the Northern Securities Company, a corporation organized and existing under the laws of the State of New Jersey; the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota; the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin; James J. Hill, a citizen of the State of Minnesota and a resident of St. Paul, and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont, citizens of the State of New York and residents of New York City, and, on information and belief, complains and says:

I. The defendants, the Northern Pacific Railway Company and the Great Northern Railway Company, were, at the times hereinafter mentioned, and now are, common carriers, employed in the transportation of freight and passengers among the several States of the United States and between such States

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Decree of the Circuit Court, page 255, *post*.

Summary of facts from argument and brief of Mr. George B. Young for appellants, page 257, *post*.

Abstract of argum nt of Mr. John G. Johnson for appellant Northern Securities Company, page 268, *post*.

Abstract of argum nt of Mr. Charles W. Bunn for appellant Northern Pacific Railway Company, page 273, *post*.

Abstract of brief submitted by Mr. John W. Griggs for appellant Northern Securities Company, page 276, *post*.

Abstract of brief submitted by Mr. M. D. Grover for appellant Great Northern Railway Company, page 280, *post*.

Abstract of brief submitted by Mr. Francis Lynde Stetson and Mr. David Willcox for appellants Morgan, Bacon and Lamont, page 290, *post*.

Abstract of argument and brief of Mr. Attorney General Knox and Mr. William A. Day, assistant to Attorney General, for the United States, appellee, page 297, *post*.

Opinion of MR. JUSTICE HARLAN, page 317, *post*.

Opinion of MR. JUSTICE BREWER, page 360, *post*.

Opinion of MR. JUSTICE WHITE, page 364, *post*.

Opinion of MR. JUSTICE HOLMES, page 400, *post*.

and foreign nations, and, as such carriers so employed, were and are engaged in trade and commerce among the several States and with foreign nations.

II. On and prior to the 13th day of November, 1901, the defendants, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and certain other persons whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as James J. Hill and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Great Northern Railway Company, and the defendants, J. Pierpont Morgan and Robert Bacon (members of and representing the banking firm of J. P. Morgan & Co., of New York City), George F. Baker and Daniel S. Lamont, and certain other persons whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Northern Pacific Railway Company.

III. The Northern Pacific Railway Company and the Great Northern Railway Company, at and prior to the doing of the acts hereinafter complained of, owned or controlled and operated two separate, independent, parallel, and competing lines of railway running east and west into or across the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, the Northern Pacific system, extending from Ashland, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Helena, in the State of Montana, and Spokane, in the State of Washington, to Seattle and Tacoma, in the State of Washington, and Portland, in the State of Oregon, and the Great Northern system, extending from Superior, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Spokane, in the State of Washington, to Everett and Seattle, in the State of Washington, and to Portland, in the State of Oregon, with a branch line to Helena, in the State of Montana, thus furnishing

to the public two parallel and competing transcontinental lines connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean. At the times mentioned, these two railway systems, which will hereafter be referred to respectively as the Northern Pacific system and the Great Northern system, each of which, with its leased and controlled lines, main and branch, aggregates over 5,500 miles in length, were the only transcontinental lines of railway extending across the northern tier of States west of the Great Lakes, from the Great Lakes and the Mississippi River to the Pacific Ocean, and were then engaged in active competition with one another for freight and passenger traffic among the several States of the United States and between such States and foreign countries, each system connecting at its eastern terminals, not only with lines of railway, but with lake and river steamers to other States and to foreign countries, and at its western terminals with sea-going vessels to other States, Territories, and possessions of the United States and to foreign countries.

IV. Prior to the year 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized and existing under certain acts and resolutions of Congress. During that year the company became insolvent, and the line was placed in the hands of receivers by the proper courts of the United States. While in this condition, awaiting foreclosure and sale, an arrangement was entered into between a majority of the bondholders of the Northern Pacific Railroad Company and the defendant, the Great Northern Railway Company, for a virtual consolidation of the Northern Pacific and Great Northern systems and the placing of the practical control of the Northern Pacific system in the hands of the defendant, the Great Northern Railway Company. This arrangement contemplated the sale, under foreclosure, of the property and franchises of the Northern Pacific Railroad Company to a committee of the bondholders, who should organize a new corporation, to be known as the Northern Pacific Railway Company, which was to become the

successor of the Northern Pacific Railroad Company; one-half of the capital stock of the new company was to be turned over to the shareholders of the defendant, the Great Northern Railway Company, which in turn was to guarantee the payment of the bonds of the Northern Pacific Railway Company. An agreement was to be entered into for the exchange of traffic at intersecting and connecting points and for the division of earnings therefrom. The carrying out of this arrangement was defeated by the decision of the Supreme Court of the United States in the case of *Pearsall* v. *The Great Northern Railway Company* (which was decided March 30, 1896, and is reported in the one hundred and sixty-first volume of the reports of said court, beginning on page 646, to which reference is made), in which it was held that the practical effect would be the consolidation of two parallel and competing lines of railway, and the giving to the defendant, the Great Northern Railway Company, a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, to the detriment of the public and in violation of the laws of the State of Minnesota.

V. Early in the year 1901 the defendants, the Great Northern and Northern Pacific Railway companies, acting for the purpose of promoting their joint interests, and in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, united in the purchase of the total capital stock of the Chicago, Burlington and Quincy Railway Company, of Illinois, giving the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum, for such stock, at the rate of $200 in bonds in exchange for each $100 in stock, and in this manner purchased and acquired about $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, or about 98 per cent thereof. In this manner, at the time stated, the defendants, the Great Northern and Northern Pacific Railway companies, secured control of the vast system of rail-

way lines known as the Burlington system, about 8,000 miles in length, extending from St. Paul, in the State of Minnesota, where it connects with the Great Northern and Northern Pacific Railway systems, through the States of Minnesota, Wisconsin, and Illinois, to Chicago, in the State of Illinois, and from these two cities through said States and through the States of Iowa, Missouri, Nebraska, Colorado, South Dakota, Wyoming, and Montana, to Quincy, in the State of Illinois; to Burlington and Des Moines, in the State of Iowa; to St. Louis, Kansas City, and St. Joseph, in the State of Missouri; to Omaha and Lincoln, in the State of Nebraska; to Denver, in the State of Colorado; to Cheyenne, in the State of Wyoming, and to Billings, in the State of Montana, where it again connects with the Northern Pacific Railway system, these States lying west of Chicago and south of the States crossed by the Great Northern and Northern Pacific systems, and constituting the territory occupied in part by what is known as the Union Pacific Railway system, which has been and is a parallel and competing system within said territory with the said Burlington system.

VI. The attempt to turn over a controlling interest in the stock of the Northern Pacific Railway Company to the Great Northern Railway Company and thus effect a virtual consolidation of the two railway systems, having thus, in the year 1896, been defeated by a decision of the Supreme Court of the United States, the defendants James J. Hill and his associate stockholders of the defendant, the Great Northern Railway Company, owning or controlling a majority of the stock of that corporation, and the defendants J. Pierpont Morgan and his associate stockholders of the defendant, the Northern Pacific Railway Company, owning or controlling a majority of the stock of that corporation, acting for themselves as such stockholders and on behalf of the said railway companies in which they owned or held a controlling interest, on and prior to the 13th day of November, 1901, contriving and intending unlawfully to restrain the trade or commerce among the several States

and between said States and foreign countries carried on by the Northern Pacific and Great Northern systems, and contriving and intending unlawfully to monopolize or attempt to monopolize such trade or commerce, and contriving and intending unlawfully to restrain and prevent competition among said railway systems in respect to such interstate and foreign trade or commerce, and contriving and intending unlawfully to deprive the public of the facilities and advantages in the carrying on of such interstate and foreign trade or commerce theretofore enjoyed through the independent competition of said railway systems, entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, through the instrumentality and by the means following, to wit: A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over and transferred the capital stock, or a controlling interest in the capital stock, of each of the defendant railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks. In this manner, the individual stockholders of these two independent and competing railway companies were to be eliminated and a single common stockholder, the Northern Securities Company, was to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities company. The individual stockholders of the

Northern Pacific Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system, and the individual stockholders of the Great Northern Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Great Northern system, but having ceased to be stockholders in the railway companies and having become stockholders in the holding corporation, both were to draw their dividends from the earnings of both systems, collected and distributed by the holding corporation. In this manner, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.

VII. In pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on the 13th day of November, 1901, the defendant, the Northern Securities Company, was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000. A copy of the articles of incorporation of such company is attached to and made a part of this petition. Among the purposes and powers designedly inserted in said articles is the purpose and power, not only to "purchase" and "hold" "shares of the capital stock of any other corporation or corporations," under which said company wrongfully claims and is exercising the power to acquire by exchange

and hold the stock of the Northern Pacific and the Great Northern Railway companies, but the purpose and power, while owner thereof, "to exercise all the rights, powers, and privileges of ownership;" that is, to vote such stock, collect the dividends thereon, and in all respects act as a stockholder of such railway companies; and the purpose and power "to aid in any manner any corporation . . . of which any bonds . . . or stock are held, . . . and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds . . . or stock," meaning thereby to do whatever it may deem necessary to aid in any manner the Northern Pacific and the Great Northern Railway companies, or to preserve or enhance the value of their stocks or bonds.

VIII. In further pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on or about the 14th day of November, 1901, the defendant the Northern Securities Company was organized by the election of a board of directors and the selection of a president and other officers, the defendant James J. Hill, the president and controlling power in the management of the defendant the Great Northern Railway Company, being chosen a director and president thereof; and thereupon, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendants James J. Hill and his associate stockholders of the defendant the Great Northern Railway Company assigned and transferred to the defendant the Northern Securities Company, a large amount of the capital stock of the Great Northern Railway Company, the exact amount being unknown to complainant, but constituting a controlling interest therein, and complainant believes a majority thereof, upon the agreed basis of exchange of $180, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Great Northern Railway Company; and the defendants J. Pierpont Morgan and his associate stockholders of the Northern Pacific Railway Company assigned and transferred to the defendant the Northern Securities Company a

large majority of the capital stock of the defendant the Northern Pacific Railway Company, the exact amount being unknown to complainant, upon the agreed basis of exchange of $115, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; and thereafter, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendant, the Northern Securities Company, offered to the stockholders of the defendant railway companies to issue and exchange its capital stock for the capital stock of such railway companies, upon the basis of exchange aforesaid, no other consideration being required. In further pursuance of the unlawful combination or conspiracy aforesaid the defendant the Northern Securities Company has acquired an additional amount of the stock of the defendant railway companies, issuing in lieu thereof its own stock upon the basis of exchange aforesaid, and is now holding, as owner and proprietor, substantially all of the capital stock of the Northern Pacific Railway Company and, as complainant believes and charges, a majority of the capital stock of the Great Northern Railway Company, but if not a majority, at least a controlling interest therein, and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof in the organization, management, and operation of said railway companies, and in the receipt and control of their earnings, and will continue to do so, unless restrained by the order of this court. By reason whereof a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been effected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been formed and is in operation, and the defendants are thereby attempting to monopolize, and have monopolized, such interstate and foreign trade or commerce, to the great and irreparable damage of the people of the United

States, in derogation of their common rights, and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

IX. If the defendant the Northern Securities Company has not acquired a large majority of the capital stock of the defendant the Great Northern Railway Company, it is because the individual defendants named, and their associates in the combination or conspiracy charged in this petition, or some of them, since it became apparent that the legality of their corporate device for the merger of the stock of competing railway companies, through the instrumentality of a central or holding corporation, would be assailed in the courts, have purposely withheld, or caused to be withheld, a large amount of the capital stock of said railway company from transfer for the stock of the Northern Securities Company, and have purposely discouraged and prevented the transfer and exchange of such stock for the stock of the Northern Securities Company, all for the purpose of concealing the real scope and object of the unlawful combination or conspiracy aforesaid, and of deceiving and misleading the state and Federal authorities, and of furnishing a ground for the defence that the Northern Securities Company does not hold a clear majority of the stock of the Great Northern Railway Company. The complainant avers that such stock, so withheld or not transferred to the Northern Securities Company, is now in the hands of some person or persons (unknown to the complainant) friendly to and under the influence of the individual defendants named and their associates aforesaid, or some of them, and will either not be voted, or be voted in harmony with the Great Northern stock held by the Northern Securities Company, until the question of the legality of this corporate device for merging competing railway lines shall be finally and judicially determined, when such stock will either be turned over to the Northern Securities Company or continue to be held and voted outside said company but in harmony with the Great Northern

stock held and voted by it, as may at the time seem advisable.

X. In further pursuance of the unlawful combination or conspiracy aforesaid, the Northern Securities Company (subject, it may be, to the condition stated in the next preceding paragraph) is about to and will, unless restrained by the order of this court, receive and acquire, and hereafter hold and control as owner and proprietor, substantially all of the capital stock of the defendant railway companies, issuing in lieu thereof its own capital stock to the full extent of the authorized issue, of which, upon the basis of exchange aforesaid, the former stockholders of the Great Northern Railway Company have received or will receive and hold about 55 per cent thereof, the balance going to the former stockholders of the Northern Pacific Railway Company.

XI. No consideration whatever has existed, or will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company, other than the issue of the stock of the Northern Securities Company to them in exchange therefor, for the purpose, after the manner, and upon the basis aforesaid.

The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depositary, custodian, holder, and trustee of the stocks of the Great Northern and the Northern Pacific Railway companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool. The Northern Securities Company does not have and never had any capital sufficient to warrant such a stupendous operation. Its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 is just sufficient, when all issued, to

represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which is about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par.

XII. If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and act as owner of the stock of the Northern Pacific and Great Northern Railway companies as aforesaid, not only will a virtual consolidation of two competing transcontinental lines, with the practical pooling of their earnings, be effected, and a monopoly of the interstate and foreign commerce formerly carried on by them as competitors be created, and all effective competition between such lines in the carrying of interstate and foreign traffic be destroyed, but thereafter, to all desiring to use it, an available method will be presented, whereby, through the corporate scheme or device aforesaid, the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," may be circumvented and set at naught, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

XIII. In furtherance of the purpose and object of the unlawful combination or conspiracy aforesaid to monopolize or attempt to monopolize the trade or commerce among the several States, and between such States and foreign countries, formerly carried on in free competition by the defendants, the Northern Pacific and Great Northern Railway companies, and to place a restraint thereon, the individual defendants named and their associate stockholders of the defendant railway companies, have combined or conspired with one another and with other persons (whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained) to use and employ, in addition to the corporate scheme

or device aforesaid, and in aid thereof, various other schemes, devices, and instrumentalities, the precise details of which are at present unknown to the complainant but will be laid before the court when ascertained, by means of which, unless prevented by the order of this court, the object and purpose of the unlawful combination or conspiracy aforesaid may and will be accomplished.

PRAYER.

In consideration whereof, and inasmuch as adequate relief in the premises can only be obtained in this court, the United States of America prays your honors to order, adjudge, and decree that the combination or conspiracy hereinbefore described is unlawful, and that all acts done or to be done in carrying it out are in derogation of the common rights of all the people of the United States and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that the defendants and each and every one of them, and their officers, directors, stockholders, agents, and servants, and each and every one of them, be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same, and, in addition, that the several defendants be respectively enjoined as follows:

First. That the defendant, the Northern Securities Company, its stockholders, officers, directors, executive committee, and its agents and servants, and each and every one of them, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting (whether by proxy or otherwise), or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of

either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued.

Second. That the defendant, the Northern Pacific Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock, unless authorized by this court.

Third. That the defendant, the Great Northern Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock unless authorized by this court.

Fourth. That the individual defendants named, and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each, respectively, perpetually enjoined from in any manner holding, voting, or acting as the owner of any of the stock of the Northern Securities Company, issued in exchange for the stock of either of the said railway companies, unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept

therefor the stock of the defendant railway company in exchange for which the same was issued.

Fifth. That the individual defendants named, and their associate stockholders, and each and every person combining or conspiring with them, as charged in Paragraph XIII hereof, and their trustees, agents, and assigns, present or future, and each and every one of them, be perpetually enjoined from doing any and every act or thing mentioned in said paragraph, or in furtherance of the combination or conspiracy described therein, or intended or tending to place the capital stock of the defendant railway companies, or the competing railway systems operated by them, or the competitive interstate or foreign trade or commerce carried on by them, under the control, legal or practical, of the defendant, the Northern Securities Company, or of any person or persons, or association or corporation, acting for or in lieu of said company, in the carrying out of the unlawful combination or conspiracy described in said paragraph.

The United States prays for such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end, therefore, that the United States of America may obtain the relief to which it is justly entitled in the premises, may it please your honors to grant unto it writs of subpœna directed to the said defendants, the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and their associate stockholders of the Great Northern Railway Company, as their names may become known to complainant and the court be advised thereof, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, and their associate stockholders of the Northern Pacific Railway Company, as their names may become known to complainant and the court be advised thereof, and the persons referred to in Paragraph XIII hereof, as their names may become known to complainant and the court be advised thereof, and to each of them, commanding them, and

each of them, to appear herein and answer (but not under oath) the allegations contained in the foregoing petition, and abide by and perform such order or decree as the court may make in the premises; and that, pending the final hearing of this case, a temporary restraining order may issue enjoining the defendants and their associates, and each of them, and their stockholders, directors, officers, agents, and servants as hereinbefore prayed.

The petition was signed and verified by Milton D. Purdy, Attorney of the United States for the District of Minnesota, and also signed by Philander C. Knox, Attorney-General of the United States, and John K. Richards, Solicitor-General of the United States.

Annexed to the petition as an exhibit was the charter of the Northern Securities Company, as follows:

CERTIFICATE OF INCORPORATION OF NORTHERN SECURITIES COMPANY.

STATE OF NEW JERSEY, *ss:*

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey entitled "An act concerning corporations" (revision of 1896), and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1) To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of

indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage, and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($400,000,000), divided into

four million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business), are as follows:

Name and post-office address.	Number of shares.
George F. Baker, jr., 258 Madison avenue, New York, N. Y...	100
Abram M. Hyatt, 214 Allen avenue, Allenhurst, N. J.....	100
Richard Trimble, 53 East Twenty-fifth street, New York, N. Y.	100

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year, the directors of the second class for a term of two years, and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion

of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification, or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the seventeenth section of the act concerning corporations (revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum,

and to such extent as shall be provided in the by-laws such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice-presidents, one or more assistant treasurers, and one or more assistant secretaries, and, to the extent provided in the by-laws, the persons so appointed, respectively, shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and payment of dividends, and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors, from time to time shall determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholders shall have any right to inspect any account or book or document of the corporation except as conferred by statute of the State of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

The board of directors may make by-laws, and from time to time may alter, amend, or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof we have hereunto set our hands and seals the 12th day of November, 1901.

Signed, sealed and acknowledged by Geo. F. Baker, Jr., Abram M. Hyatt and Richard Trimble.

The answer of the Northern Securities Company to the petition of the United States of America, was as follows:

I. This defendant admits and avers that the defendant railway companies were, at the time mentioned in the petition, and are now common carriers employed in transportation of freight and passengers within and among those States of the United States in which the railways operated by them are situated, and not further or otherwise, but were and are engaged in commerce among the several States and with foreign nations.

II. This defendant admits that, on and prior to November 13, 1901, the capital stock of the defendant railway companies was owned and controlled by their respective shareholders, and it avers, on information and belief, that the outstanding capital stock of the Great Northern Railway Company was owned by more than eighteen hundred (1,800) separate owners, and the outstanding capital stock of the Northern Pacific Railway Company was owned by more than thirty-five hundred (3,500) separate owners; and that among the shareholders of the Great Northern Railway Company (hereinafter called the Great Northern Company) were the defendants Hill, Clough, James, Morgan, and Kennedy; and that among the shareholders of the Northern Pacific Railway Company (hereinafter called the Northern Pacific Company) were the defendants Morgan, Bacon, Baker, Hill, Kennedy, James, and Lamont. It avers that the persons named and meant to be designated in the peti-

tion as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Great Northern Company, did not at any time, nor in any manner, own or control a majority of said stock, nor as much as one-third ($\frac{1}{3}$) part thereof. Their holdings in said stock were at all times separate and individual, and not in association with each other, or with any other person or persons, and neither of them was under any obligation or promise to any of the others, or to any other person, to hold, use, or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest. The persons named and meant to be designated in the petition as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Northern Pacific Company, did not, at the date named, nor at any time, or in any manner, own or control a majority of such stock, nor as much as one-third ($\frac{1}{3}$) part thereof. Their holdings in said stock were at all times separate and individual, and neither of them had any control of the holdings of the other, or of any other person or persons, and neither of them was under any promise of obligation to the other, or to any person, to hold, use or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest.

Except as herein admitted and averred, this defendant denies each and every allegation of subdivision II of the petition.

III. This defendant admits that the Northern Pacific Company owned and operated a railway from Ashland, in Wisconsin, via Duluth, and from St. Paul, across Minnesota, North Dakota, Montana, Idaho, and Washington, and into Oregon, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle in Washington, and to Portland in Oregon; and that the Great Northern Company operated lines of railway extending from St. Paul, in the State of Minnesota, across said State and North Dakota, Montana, Idaho, and Washington to Everett and Seattle in Washington, passing through Spokane in that State.

It admits that the said lines so operated by said companies connected with other railway lines, and that, either directly or by means of such other railway lines, they connected with lines of steamships on the Great Lakes and the ocean; and that the mileage operated by said companies aggregated about fifty-five hundred (5,500) miles for the Northern Pacific Company and about forty-one hundred and twenty-eight (4,128) miles for the Great Northern Company.

It denies that the lines operated by said companies are parallel or competing, except for the short distances and to the limited extent hereinafter mentioned, and denies that said companies were engaged in active competition with each other, except in the manner and to the extent hereinafter stated.

Except as hereinabove and hereinafter stated, it denies each and every allegation in subdivision III of said petition.

IV. This defendant admits and avers that prior to 1893 those portions, and those portions only, of the lines of the Northern Pacific Company which had been built and were operated by virtue of the act of Congress incorporating the Northern Pacific Railroad Company, approved July 2, 1864, were owned and operated by the last-named company, and that in the year 1893 that company became insolvent and its lines passed into the hands of receivers appointed by various Federal courts.

It admits that while in this condition a contract was made, as set forth in the report of the *Pearsall* case, referred to in the petition. It avers that said contract was made under and in conformity with the provisions of the act of incorporation of the Great Northern Company, and that the only objection made to the validity of the contract was that the provisions in said charter under which it was made had been repealed by subsequent general laws of the State. It denies that the case, or that the decision therein, is correctly stated in the petition. And it avers that neither the said contract nor the issues raised and decided in the said case have any relevancy to the matters in controversy in this case.

V. This defendant admits and avers that in the winter and

spring of 1901 the defendant railway companies, for the purpose of promoting their several interests and the interests of the country traversed by their lines and by those of the Chicago, Burlington and Quincy Railroad Company, purchased in equal parts the stock of the last-named company to the amount and at the price and upon the terms of payment stated in the petition. It admits that the lines operated by the Chicago, Burlington and Quincy Railroad Company and its connections are substantially as stated in the petition. It denies that what is called in the petition the Burlington system was or is parallel to or competing with what is therein called the Union Pacific system, but admits that some of the lines of each system compete with some lines of the other.

It denies that said purchase of stock was made in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, or that it was made for any other motive or with any other purpose than as hereinafter stated.

Except as herein admitted, it denies each and every allegation in subdivision V of the petition.

VI. This defendant denies that prior to its organization the defendants James J. Hill or J. Pierpont Morgan, or said Hill and Morgan, or any persons associated with them, or either of them, owned or controlled a majority of, or held a controlling interest in, the stock of either of said railway companies.

It denies that said persons, or that any of the persons concerned in its organization, contrived or intended any of the things alleged in subdivision VI of the petition or entered into any agreement or conspiracy to do any of the things charged in said subdivision.

It admits and avers that said James J. Hill and other holders (not exceeding ten in number) of the stock of the Great Northern Company, but not including the defendants Morgan, Bacon, or Lamont, did plan its organization with an authorized capital of four hundred million dollars ($400,000,000) for the purposes, and those only, set forth in its certificate of incorporation.

It denies that James J. Hill and J. P. Morgan agreed between themselves, or with other stockholders of either of the defendant railway companies, or with either of said railway companies, or with anyone whomsoever, that a controlling interest of the stock of either of said railway companies should be turned over or transferred to this defendant, whether in exchange for its stock or otherwise.

It denies that any of the matters stated in said subdivision VI of the petition were contemplated or intended, or have resulted, or will result, from its formation and operation. And it denies the allegation that it is the duty of the directors of said railway companies to pursue a policy which will promote the interest of both systems at the expense of the public.

It alleges that the motives and intentions of the persons so forming this defendant were and are such, and such only, as are in this answer stated, and it denies each and every allegation in subdivision VI of the petition not herein expressly admitted or specifically denied.

VII. This defendant admits its formation under the laws of New Jersey, with the articles, a copy of which is attached to the petition, and that the provisions of said articles were designedly inserted therein and were fully authorized by the general corporation laws of that State. And it says that the exercise of the powers of a stockholder provided for in said articles was not, as wrongly stated in the petition, confined to the stock of the defendant railway companies which this defendant might hold. It avers that the clause in said articles, partially quoted in paragraph VII of the petition, was not intended to, and does not, enlarge its powers, as the same are set forth in the preceding clauses of said articles, but makes clear its power to do such acts as making or procuring advances of money to any corporation whose securities are held by it, the indorsement or guaranty by it of the obligations of such corporation, becoming surety therefor, or in any lawful manner using its name or resources in aid of such corporation.

VIII. This defendant admits and avers that on or about the

14th day of November, 1901, its directors and officers were elected, and among them the defendant James J. Hill as a director and president, but denies that he was or is the controlling power in the management of the Great Northern Company.

It admits and avers that thereafter the defendant James J. Hill and other stockholders of the Great Northern Company, severally and each acting for himself alone, and without any agreement to that effect with any other stockholder, sold to this defendant a large amount of Great Northern stock at one hundred and eighty dollars ($180) per share in exchange for stock of this defendant at par, but it avers that the stock so sold was not within twenty-six million dollars ($26,000,000) of a majority of the stock of the Great Northern Company.

It admits and avers that thereafter and about November 22, 1901, it offered like terms of purchase to the other shareholders of the Great Northern Company, the offer to hold good for sixty days from its date, and that many of the shareholders of that company, each acting for himself alone, accepted such offer and made such sale.

It admits and avers that the defendant J. P. Morgan and other shareholders of the Northern Pacific Company sold to the defendant a majority of the stock of the Northern Pacific Company; and that this defendant has received such dividends as have been paid on the shares held by it, in the same manner and at the same rate as other shareholders; but it denies that it has acted, whether as owner of stock or otherwise, in the management or direction of either of said railway companies or in receipt or control of the earnings of either of them, and it avers that no change whatever has taken place in the management of the said railway companies, or either of them, and that each of them is managed by the same board of directors and officers as existed before the organization of this defendant.

It denies that any of the things done by the defendants James J. Hill and J. Pierpont Morgan, or by either of them, or by this defendant or its promoters, directors, officers, or stockholders, or any of them, were done in pursuance of the pre-

tended combination or conspiracy alleged in subdivision VIII of the petition, or as an instrumentality to effect the purposes thereof, and it denies that by reason of the matters or any of them in the petition alleged a virtual or any consolidation of said defendant railway companies or their business has been effected or intended; and it denies any conspiracy or combination in restraint of trade or commerce among the States, or with foreign nations, or that the defendants or any of them are attempting or intending to monopolize or restrain any such trade or commerce.

IX. It denies each and every allegation in subdivision IX of the petition.

X. This defendant says that it does not know and cannot set forth how much additional stock of either defendant railway company it is likely to acquire, since each acquisition of shares by it depends, among other contingencies, on the willingness of the holders of the said stock to sell it upon terms which this defendant may be willing to accept.

XI. This defendant says it has bought and paid for and has caused to be transferred to it upon the records of the Great Northern Company, in accordance with the by-laws of that company, about five-twelfths ($\frac{5}{12}$) of the shares of that company's stock; and has also negotiated for, but has not yet caused to be presented to the Great Northern Company for transfer upon its records, other shares of the stock of that company aggregating about four-twelfths ($\frac{4}{12}$) of the total amount of its stock, but has not acquired a right to vote as stockholder of the Great Northern Company on stock not so transferred. This defendant, in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with the separate owners of the said shares in their respective individual capacities. It has no knowledge of any agreement, promise, or understanding between any of the holders of said stock concerning the sale thereof to it, and it denies that any such agreement, promise, or understanding was ever made. All the sales and transfers of the said stock to this defendant

were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.

This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upward of forty million dollars ($40,000,000) cash in the making of such purchases. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks. There has been and is no agreement, promise, or understanding between any of the holders of said stock so acquired by this defendant, or between any of them and any other person or corporation, that any of said shares should at any time be held, used, or voted by this defendant for the purpose of combining or consolidating or placing under one common management or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many stockholders of the said companies have not sold, and may never sell, their shares to this defendant; and the said railway companies have not nor have any of the directors of either of them, by any act, formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to this defendant. This defendant was organized in good faith, and it denies all the allegations in subdivision XI of the petition.

XII. This defendant denies each and every allegation in subdivision XII of the petition.

XIII. This defendant denies each and every allegation in subdivision XIII of the petition.

SECOND.

Further answering the petition, this defendant, upon information and belief, says that the facts as to the purchase of the shares of the Chicago, Burlington and Quincy Railroad Company (hereinafter called the Burlington Company) and the planning and forming of this defendant and the motives, intentions, and purposes of the persons and corporations concerned in these enterprises, or either of them, were not as erroneously stated in the petition, but were and are as follows:

I. When projecting the line of the Great Northern Company to the Pacific coast, that company and its directors contemplated the necessity of creating for the line not merely State and interstate, but an international commerce. Nearly all the country traversed or reached by the line was then but sparsely settled or not settled at all. It was principally agricultural, grazing, or timber land, with mineral deposits in the mountain ranges believed to be large and valuable, but not developed or explored. Whatever commodities the region might furnish for carriage would be raw material, of great weight and bulk in proportion to its value, which would not bear transportation to market except at a low mileage rate, such as could be made possible only by every practical reduction in the cost of transportation. The available market for all such products was far from the places of production.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for which is in the prairie States of the Mississippi Valley east of the Rocky Mountains; but the lumber and shingles from the Pacific coast would not bear the cost of transportation to those States if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. And

the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line, or reached by it, could not furnish a market for commodities enough to load the returning cars; the result being that unless the company could secure traffic for carriage beyond the Pacific coast no great traffic either way could exist or be created.

To meet these conditions the Great Northern Company not only went to great additional expense in the construction of its line to obtain gradients lower than those of any other line to the Pacific coast, but also made great efforts to create and increase in the countries of eastern Asia a demand for the products of this country; and soon after the completion of its railway in 1893 it induced a Japanese company to run a line of steamships, connecting with its railway, on the route between Seattle and ports of Japan, China, and Russian Siberia, and succeeded in creating and has since been actively engaged in building up a commerce in which the flour manufactured along its line, cotton (both raw and manufactured), iron and steel (especially steel rails and plates), machinery, and such other manufactures of this country as a market could be found or made for in eastern Asia, have been carried to oriental ports, and return cargoes of such oriental products as are consumed in this country have been brought back. A large west-bound, as well as an increased east-bound, traffic has thus been secured by the company, enabling it to make such rates on lumber and other products of the country served by it as permit them to be shipped to Eastern markets with a profit to the shippers.

One year before the Burlington purchase, this oriental traffic had reached such proportions that the Great Northern Company caused to be begun the construction of steamships to run from Seattle to ports in Japan, China, and the Philippines, which, from their great carrying capacity (being the largest in the world), will be able to carry at very low rates (if full cargoes can be secured), and thus enable the company to move the largest volume of west-bound traffic (and also of east-bound traffic) at the lowest cost.

In the interstate and international commerce which the Great Northern Company has thus built up, it competes both in this country and on the ocean with the other transcontinental lines (including the Canadian Pacific), and at the oriental ports it competes for commerce of the world. Its rates are and must be made in competition with the rates of ocean carriers and by way of the Suez Canal.

The policy thus followed by the Great Northern Company in building up an international, and thereby interstate, commerce has been followed by the Northern Pacific Company since its reorganization in 1896.

In creating and maintaining this competitive interstate and international commerce both the Great Northern Company and the Northern Pacific Company were hampered and placed at a disadvantage with the other transcontinental railways, as well as with European competitors, by the want of sufficient direct connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distribution from which their traffic must be supplied. For many months before the purchase of the Burlington shares they had considered the best means of getting closer to such markets and sources of supply. The lines of the Burlington, better than those of any other company, fulfilled the requirements of both the Great Northern Company and the Northern Pacific Company in respect of markets for east-bound and freight for west-bound traffic. The Burlington lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas, and Colorado, which afford the best markets for the lumber of the Pacific coast. They reach Denver, Kansas City, Omaha, and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City, and Chicago, where are the great packing houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon, and Washington.

They reach St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery, and other manufactured articles that find a market in Japan and China.

The Burlington line southward from Minneapolis and St. Paul along the Mississippi River reaches the great coal deposits of southern Illinois, the largest west of Pennsylvania and West Virginia; and its light gradients and consequent low cost of transportation make it possible to supply such coal to points on the lines of each defendant railway company east of the Missouri River, relieving the people and the railways of that territory from entire dependence upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain.

The price paid for said Burlington stock was lower per mile of main track covered by the stock than that for which the stock of any other large and well established system in the same general territory could have then been bought.

The purchase of the Burlington stock by the Northern Pacific and Great Northern companies in equal parts served each company as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

The Great Northern and Northern Pacific companies therefore each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on

the Pacific coast. These connections and such interchange of traffic were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian Pacific Railway, and with European carriers, for the trade and commerce of the Orient.

In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, or to lessen any competition between the purchasers. Such purchase was not intended to have, and it cannot have, any such effect.

The purchase of the Burlington stock was not made in view of the formation of this defendant, but solely from the motives and with the purposes already stated.

II. The project of forming a holding company of any kind was not the result, in any way, of the failure of the plan which was defeated by the decision of the Supreme Court in the *Pearsall* case. There was no connection whatever between the two.

The project of a holding company which finally developed into the formation of this defendant had its inception years before that date, among several gentlemen, not exceeding ten in number, who had been large shareholders in the Great Northern Company and its predecessor, the St. Paul, Minneapolis and Manitoba Railway Company; some of them from the original organization of the latter company in 1879, and others from dates not long after that time. They have never held a majority of the stock of the Great Northern Company, but have taken an active interest in its policy and administration; have aided it when necessary in financing its operations; have acted together in promoting its interests; have, with some exceptions, served from time to time as directors and officers (Mr. Hill having been president of the successive companies since 1882); and by reason of their active interest in the company and serv-

ices to it have influenced to a large degree its policy and management. As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company. It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. These conclusions were the result of various consultations among the persons mentioned, or some of them, but no definite agreement was made for forming such a company or binding anyone to transfer his shares to it if formed.

From time to time, beginning with the reorganization of the Northern Pacific Company in 1896, Mr. Hill and said other Great Northern shareholders who had discussed with him the plan of forming a holding company, had made large purchases of Northern Pacific shares, individually, each for himself, without any concerted action, and solely as investments. About May 1, 1901, their aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars ($20,000,000) of the eighty million dollars ($80,000,000) common stock of the company, which also had a preferred stock, amounting to seventy-five million dollars ($75,000,000), with the same voting power as the common stock. At this time the firm of J. P. Morgan & Co. held about six million dollars ($6,000,000) of the common stock. In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of putting their holdings of Northern

Pacific stock into the proposed holding company, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company, and that its capital stock should be made large enough to enable it to buy such holdings, though it was not known that the holders of any considerable amount of Great Northern stock, other than those above named, would desire to make such transfer.

At the time of the purchase of the Burlington shares it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing companies, or among their shareholders, was needed to preserve to each company its fair share of the advantages secured by the purchase. It was thought that the manifest interest of each company rendered any further guaranty or security needless. But pending or just after the conclusion of the negotiations for the Burlington stock, parties acting in the interest of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred, to the amount of about seventy-eight million dollars ($78,000,000), being a clear majority of the entire capital stock of that company. The apparent intent of such purchase was to defeat and, if successful, it would have defeated, the carrying out of the purposes for which the Burlington shares had been bought by the Great Northern and Northern Pacific companies, and the development of the interstate and international commerce of each of them, and would have subordinated the policy of each to an interest adverse to both the Great Northern and Northern Pacific companies, and to the public served by their lines.

To protect the interests of the shareholders of the Northern Pacific Company, J. P. Morgan & Co. made additional purchases of Northern Pacific common stock, which, with the holdings in said stock of Mr. Hill and other Great Northern shareholders who had discussed with him the plan of forming a holding company, constituted about forty-two million dollars ($42,000,000), being a majority of the common stock. In

view of the injury apprehended to both companies, and to their shareholders, and the better to protect their interests in the future, the Great Northern shareholders holding Northern Pacific shares, deemed it advisable that the projected holding company should have power to purchase not only their own Great Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to said holding company, and the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic or operations of the Great Northern and Northern Pacific companies, respectively. At this time it was not expected by any of the persons concerned that any Northern Pacific shares except the said forty-two million dollars ($42,000,000) would be acquired by the proposed holding company. The organization of such company was not dependent on any agreement that it should acquire a majority of the shares of either defendant railway company. It would have been organized if the Burlington purchase had not been made, and if its promoters had had no other shares to transfer to it than the thirty-four million dollars ($34,000,000) Great Northern stock and the twenty million dollars ($20,000,000) Northern Pacific stock held by them on May 1, 1901. It was not known that all or how many of the shareholders of either of the railway companies would be likely to transfer their shares to this defendant when formed. After its organization this defendant bought and still holds about one hundred and fifty million dollars ($150,000,000) of the stock of the Northern Pacific Company; and it has also purchased and negotiated for the purchase of the stock of the Great Northern Company, as hereinbefore stated. Neither the said persons who were concerned in the formation of this defendant, nor the said persons from whom it has acquired the stocks of said railway companies, nor this defendant itself since its formation, nor its stockholders, directors, or officers, have planned or intended that the stock of said railway companies acquired by this defendant, or any part thereof, should be held, used, or voted by

it, or by its officers, agents or proxies, for the purpose of combining, consolidating or placing under one common management or control the railways of the Great Northern and Northern Pacific companies, or the business thereof; or for the purpose of monopolizing or restraining competition between the said railway companies; or for any other purpose than the election by each of said railway companies of a competent and distinct board of directors, able and intending to manage each of them independently of the other, and for the benefit of their shareholders and of the public. By the acts of the legislature of the State of Minnesota incorporating the Great Northern Railway Company, and by the acts of the legislature of the State of Wisconsin incorporating the Northern Pacific Railway Company, it is, in substance, provided that the business and affairs of each railway company shall be managed by a board of directors to be elected by the stockholders, and that all the powers of each corporation relating to said matters shall be vested in such board.

Every share of stock issued by this defendant has been issued to the persons and corporations receiving the same in good faith, for full value paid to it, either in cash or its equivalent, and in accordance with the provisions of its articles of incorporation and with the laws of the State of New Jersey. No agreement, promise, or understanding has been made between this defendant and any of its stockholders, or between its stockholders themselves or any of them, or between said stockholders or any other persons or corporations, that the stock of this defendant should be held, used, or voted other than by each stockholder, separately and individually, and in such way as he should see fit; and there has been no agreement, promise, or understanding between said stockholders themselves, or any of them, or between said stockholders and any other person or corporation, that they or any of them should use, hold, or vote their stock in this defendant in association or for any common purpose or object. The owners and holders of stock of this defendant are more than thirteen hundred (1,300) in number, and the owner-

ship of the stock is being changed from day to day by sales and transfers in the usual course of dealing. The said persons who formed or were otherwise concerned in the formation of this defendant have never, all together, held, owned or otherwise controlled an amount of stock of the said company equal to so much as one-third of the whole amount thereof now outstanding. This defendant has no contract or obligation to purchase or acquire any shares whatever in either railway company, in addition to those which it has purchased or negotiated to purchase, as above stated. Its authorized capital was fixed by persons who planned its organization to enable it to give to each stockholder in each of the defendant railway companies an opportunity to sell his stock to it, should he see fit to do so, and should this defendant desire to acquire it. The sum fixed was deemed ample by those who planned the formation of this defendant to furnish the means to pay for all such shares as would likely be acquired by it, and to leave remaining a large amount to be used for the purchase of stock in other corporations, not common carriers, which this defendant might consider beneficial to acquire. This defendant was not formed as a scheme or a device to evade the act of Congress known as the "Anti-Trust Act," or any other law whatever, but solely for the purposes hereinbefore stated.

III. This defendant was not formed, nor did any of those concerned in its formation, nor any of those who sold their shares of stock to it, have any purpose or intention, to restrain trade or commerce, or to lessen competition between said railway companies, or to monopolize traffic in any manner whatever; nor can any such results follow from the formation or operation of this defendant. In point of fact, since the organization of this defendant rates on the defendant railway companies' lines, including rates to and from points common to both, have voluntarily been so reduced as to decrease their earnings by upwards of a million of dollars annually. For all interstate commerce on the lines of either the defendant railway companies, except traffic beginning and ending on their own lines

respectively, the rates are fixed by joint tariffs with connecting lines. In respect to all such traffic neither of the defendant companies has ever had, or can have, any independent rate-making power or control of traffic or rates. All joint tariffs with other companies to or from points common to the lines of the defendant railway companies have always been, and necessarily must be, the same, whether the traffic is carried by one or the other of said companies. The total amount of all other interstate traffic, that is, traffic between common points on the two roads, which is not competitive both as to rates and quality of service with other carriers having equal rate-making power with them, is less than 2 per cent of the total interstate traffic of the two companies.

IV. The sale and transfer of property, whether in the form of shares of corporate stock or otherwise, has never been adjudged to be, and is not, in violation of the act of Congress of July 2, 1890, known as the "Anti-Trust Act."

This defendant is not a railroad company, and it has no power to operate or manage railways or make or control rates of transportation, nor to monopolize or restrain traffic of any kind. So far from intending to violate any provision of said act of Congress, the persons who were concerned in organizing this defendant and those who have sold their shares to it had every reason to believe and did believe that such sales were not in any way in contravention of that act. In common with the general public, they were aware that during the eleven years since the passage of that act in many instances the stock of a competing railway company has been acquired by its competitor or the shareholders thereof, such acquisition including many of the principal railways doing business throughout the country. This has been done without objection from any branch of the Government of the United States, and has invariably proven beneficial to the railway companies concerned and to the public, and those making sales of stocks to this defendant had no reason to believe that such sales were open to any legal objection or question whatever.

V. This defendant was not organized for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have any such effect. The transactions referred to in the petition have consisted in the organization of a lawful corporation and the purchase of property by it. All acts done in relation to the organization of this defendant and in the conduct of its business have been expressly authorized by law, and have had no effect whatever to restrain trade or commerce among the several States or with foreign nations. If these lawful transactions should hereafter have any effect to restrain trade or commerce among the several States or with foreign nations (which is hereby denied), that effect would be merely indirect, remote, incidental, and collateral, and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which this defendant believes is destined to result from the enterprise of the two railway companies, that culminated in the purchase of the Burlington stock.

And this defendant says:

1. The "Anti-Trust Act" was not intended to prevent or defeat an enterprise in aid of a great competitive interstate and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

2. Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock.

3. Otherwise construed, the act would be unconstitutional, because:

The power to regulate commerce with foreign nations and

among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest.

VI. There is a defect of necessary parties defendant, because, as already set forth, the persons who made sales of stock of the said railway companies to this defendant were numerous, exceeding more than 1,300 in number, and few of them had any connection whatever in the planning or forming of this defendant, and in their absence from this litigation no decree can be made affecting their rights in the premises.

VII. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

Signed (no verification) for the Northern Securities Company, by John W. Griggs and Geo. B. Young, solicitors and counsel.

A separate answer was filed by the defendants James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker, which was substantially the same as the answer of the defendant Northern Securities Company.

The answer of the Great Northern Railway Company was substantially the same as that of the Northern Securities Com-

pany with the omission of Paragraph II of the second statement of defence.

The answer of the defendant the Northern Pacific Railway Company was as follows:

I. This defendant admits the allegations of Paragraph I of the petition that this defendant and the Great Northern Railway Company were at the times mentioned in said petition and now are common carriers employed in the transportation of freight and passengers among the several States of the United States within which the railways operated by them are situated.

This defendant denies each and every other allegation of paragraph I of the petition.

II. This defendant admits the allegations of Paragraph II of the petition that prior to November 13, 1901, the stock of this defendant was owned and controlled by its shareholders, and that among them were the parties in that behalf alleged.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph II of the petition.

III. This defendant admits the allegations of Paragraph III of the petition that this defendant at the times mentioned owned and operated a railway extending from Ashland in Wisconsin via Duluth, Minnesota, and from St. Paul, Minnesota, across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; that the Great Northern Company operated lines of railway extending from St. Paul aforesaid across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Spokane and extending to Everett and Seattle, in the State last aforesaid; that the said lines connected with other railway lines, and either directly or by means of such other railway lines connected with lines of steamships on the Great Lakes and the ocean, and that the mileage operated by said companies aggregated about five thousand five hundred miles for this defendant

and about four thousand one hundred and twenty-eight miles for the Great Northern Company.

This defendant denies each and every other allegation of Paragraph III of the petition.

IV. This defendant admits the allegations of Paragraph IV of the petition that, prior to the year 1893, a corporation known as the Northern Pacific Railroad Company, organized and existing under certain acts and resolutions of Congress, and which then operated some parts of the lines of this defendant, became insolvent and was placed in the hands of receivers appointed by various courts of the United States; that, while in this condition, a plan of reorganization was entered into by the bondholders of said company, and that an arrangement was proposed between the said bondholders and the Great Northern Company which was never carried out. This defendant admits that a case entitled Pearsall against the Great Northern Railway Company was decided by the Supreme Court of the United States on March 30, 1896, and is reported in volume 161 of the reports of said court, beginning on page 696.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph IV of the petition. It is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

V. This defendant admits the allegations in Paragraph V of the petition that early in the year 1901 this defendant and the Great Northern Company, acting for the purpose of promoting their several interests, each purchased shares of stock of the Chicago, Burlington and Quincy Railroad Company of Illinois, paying therefor with the joint bonds of the Great Northern Company and the Northern Pacific Company, payable in twenty years from date, with interest at 4 per cent per annum, at the rate of $200 in bonds for each $100 in stock, and in this manner the said companies severally purchased and acquired each about 49 per cent of said stock; that the lines operated by said

Burlington Company and its connections were geographically as stated in the petition, and that some of said lines compete with some lines of what is called in the petition the Union Pacific system.

This purchase was made by these defendants primarily in order to secure a terminus in Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable to the agricultural and mineral products of the northwest, and also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself. It had no connection with the future formation of any company whatsoever and was not made with intent to violate the statute or common law of any State or of the United States, and was not in violation of any such law.

This defendant denies each and every other allegation of Paragraph V of the petition. It is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

VI. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph VI of the petition.

VII. This defendant admits the allegation of Paragraph VII of the petition, that the defendant Northern Securities Company was heretofore organized, as it is informed and believes, under the general laws of the State of New Jersey.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph VII of the petition.

VIII. This defendant admits the allegations of Paragraph VIII of the petition that the defendant, Northern Securities Company, has purchased and now holds and owns a large majority of the capital stock of this defendant, and that the Securities Company has received such dividends as have been paid on any shares held by it.

This defendant denies any knowledge or information suffi-

cient to form a belief of each and every other allegation of Paragraph VIII of the petition.

IX. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph IX of the petition.

X. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph X of the petition.

XI. This defendant denies each and every allegation of Paragraph XI of the petition.

XII. This defendant denies each and every allegation of Paragraph XII of the petition. It is informed and believes that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph XIII of the petition.

XIV. As this defendant is informed and believes, the purchase by the Northern Securities Company of shares of stock of this defendant and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, that would not be their direct effect, but would be merely indirect, remote, incidental, and collateral, and would, therefore, not bring said transactions within said act of Congress above mentioned. Any other construction would render the statute unconstitutional, as beyond the power of Congress, and as depriving the sellers of the stock thus sold and also the stockholders of this defendant who have not sold

their shares to the Securities Company, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. This result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by state statutes under which the same has been or may hereafter be taken.

XV. There is a defect of necessary parties defendant herein, because in this suit it is sought to annul all sales of shares made by shareholders of this defendant to the Northern Securities Company and to cancel all certificates of stock of the latter company issued in purchase of the same. The parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in this defendant to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XVI. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and

avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

The first five paragraphs of the answer of the defendants, J. Pierpont Morgan and Robert Bacon, were substantially the same as the same paragraphs of the answer of the Northern Pacific Railway and the remainder of the answer of such defendants was as follows:

VI. These defendants admit that the defendant James J. Hill and certain other persons decided upon the formation of a securities company for the purposes set forth in the certificate of incorporation of the Northern Securities Company attached to the petition and in all respects as therein stated.

These defendants deny each and every other allegation of Paragraph VI of the petition.

VII. These defendants admit the allegations of Paragraph VII of the petition that on November 13, 1901, the defendant Northern Securities Company was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000, and that a copy of the articles of incorporation of said company correctly stating its powers is attached to the petition.

These defendants deny each and every other allegation of Paragraph VII of the petition.

VIII. These defendants admit the allegations of Paragraph VIII of the petition that on or about November 14, 1901, the defendant Northern Securities Company was organized by the election of directors and officers; that the defendant James J. Hill was chosen a director and president thereof; that thereupon the said James J. Hill and other stockholders of the Great Northern Company, each individually and separately

from the others, sold to the Securities Company a large amount of the capital stock of the Great Northern Company for the price of $180 par value of the capital stock of the Securities Company for each share of the capital stock of the Great Northern Company; that these defendants and other stockholders of the Northern Pacific Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Northern Pacific Company; that the Securities Company also offered, for a limited period, like terms of purchase to the other shareholders of the Great Northern Company; that the Securities Company now holds and owns a large majority of the capital stock of the Northern Pacific Railway Company, and a large amount, though less than a controlling interest, of the stock of the Great Northern Company, and has negotiated for the purchase of additional shares of that company, and that the Securities Company has received such dividends as have been paid on any shares held by it.

These defendants deny each and every other allegation of Paragraph VIII of the petition.

IX. These defendants deny each and every allegation of Paragraph IX of the petition.

X. These defendants deny any knowledge or information sufficient to form a belief of each and every allegation of Paragraph X of the petition.

XI. These defendants deny each and every allegation of Paragraph XI of the petition.

XII. These defendants deny each and every allegation of Paragraph XII of the petition. They are informed and believe that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. These defendants deny each and every allegation of Paragraph XIII of the petition.

XIV. In July, 1896, the capital stock of the Northern Pacific Railway Company was fixed at $155,000,000, of which

$75,000,000 were preferred and $80,000,000 common stock. The preferred stock of the company was issued in exchange for various obligations of the former Northern Pacific Railroad Company because the holders thereof would not accept new common stock therefor. At the same time it was contemplated that the time would arrive when said preferred stock should properly be retired, and it was, accordingly, then provided that the preferred stock might be retired in whole or in part at par on any first day of January, up to and including January 1, 1917. Both classes of stock were made subject to a voting trust in this defendant Morgan and others, continuing until November 1, 1901, but terminable by the trustees in their discretion at an earlier date.

The Northern Pacific Company shared in the recent prosperity of the country, and its common stock appreciated in value until it was deemed practicable to carry out the original intention of retiring the preferred stock and also to terminate the voting trust. Accordingly said trust was terminated by the trustees upon January 1, 1901, and the preferred stock was retired. Although the latter action was in contemplation and was practically decided upon some time before the termination of the voting trust, it was not made the subject of formal action by the board of directors until November 13, 1901, and was completed upon January 1, 1902.

XV. As hereinbefore stated, early in 1901, the Northern Pacific Company, and the Great Northern Company, each purchased about 49 per cent of the capital stock of the Chicago, Burlington and Quincy Railroad Company. This purchase was made by the Northern Pacific Company primarily in order to secure a terminus at Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable for the agricultural and mineral products of the northwest, but also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself.

These purchases were not made, as the petition alleges, "in

contemplation of the ultimate placing of the Great Northern and Northern Pacific system under a common source of control." They had no connection whatever with the future formation of the Northern Securities Company, or any other company whatsoever, and had no connection with the fact alleged in the petition that the Union Pacific Railway system is to some extent a competing system with the Burlington system.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States; were not in violation of any such law, and are not charged in the petition to have been in any respect unlawful.

XVI. During the reorganization of the Northern Pacific system the firm of J. P. Morgan & Co., of which these defendants are members, acted as reorganization managers, and ever since the reorganization of the Northern Pacific Company has been its fiscal agent. Said firm has accordingly at all times desired to further the best interests of the company and all its stockholders, and especially to aid in steadily devoloping the business of the company and the prosperity of the country which it serves. Said firm considered that these results were accomplished, so far as possible, by the policy of the company during the existence of the voting trust, as above stated. Not long after the termination of the voting trust, however, and very early in May, 1901, said firm became aware that unusually large purchases of both classes of stock were in progress in the stock market, apparently in a single interest. Said firm was apprehensive that these purchases were for the purpose of securing control of the direction of the Northern Pacific Company and thus managing it, not for what said firm conceived to be the best interest of the company, but for some ulterior purpose of which said firm was not informed.

Accordingly said firm, prior to May 7, 1901, purchased common stock of the Northern Pacific Company in considerable amounts, and their holdings upon that day amounted to about two hundred thousand shares. In making these purchases said

firm acted on its own account and in behalf of no other person whomsoever, and was actuated by no motive save those above stated.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States, and were not in violation of any such law.

XVII. For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time. In or about August, 1901, as this plan was approaching maturity, said parties for similar reasons determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire.

By this time it had become known that the purchases in the market of shares of the Northern Pacific Company, to which reference is made above, had been made in behalf of a corporation known as the Oregon Short Line Railroad Company, controlled by the Union Pacific Railroad Company; that there were held in that interest shares of the Northern Pacific Company to about the amount of $41,000,000 of preferred stock, which, however, was to be retired on January 1, 1902, and $37,000,000 of common stock, together making 780,000 shares and constituting an absolute majority of the total capital stock of the Northern Pacific Company. Thereupon and therefore,

with the view and for the purpose of protecting the Northern Pacific Company and the holders of its common stock against the possible control of the direction of said company in an adverse interest, these defendants determined and also advised their friends to sell their Northern Pacific stock to the new company.

As set forth in the petition, the Northern Securities Company was duly organized pursuant to the laws of New Jersey upon November 13, 1901. It was organized according to law, and possesses all the powers set forth in its certificate of incorporation, and has full power to do every act which it has in fact done, and the petition does not allege the contrary.

It having become known that the Oregon Short Line Company was not disinclined upon satisfactory terms to sell its holdings of the major part of the Northern Pacific stock, the firm of J. P. Morgan & Company, deeming such action for the best interest of the Northern Pacific Company, purchased from said Oregon Short Line Company all its holdings of the capital stock of the Northern Pacific Company.

After its organization the Northern Securities Company duly purchased all the shares of the Northern Pacific Company and of the Great Northern Company hereinbefore mentioned, including those purchased by the firm of J. P. Morgan & Company from the Oregon Short Line Company, for which it paid partly in cash and partly in its own shares. It also was willing to purchase the shares of any other shareholders of the Great Northern Company, who desired to sell the same, for the price of one hundred and eighty dollars for each share of the Great Northern Company, payable in its own shares, and did actually purchase and pay for considerable amounts of said stock at such price.

None of these purchases by the Northern Securities Company were made with intent to violate the statute or common law of any State or of the United States, or were in violation of any such law.

XVIII. The foregoing is a correct statement of all the mat-

ters mentioned in the petition, omitting its many irrelevant adjectives, adverbs, and conclusions, and of some other facts in addition thereto. The transactions prior to the formation of the Northern Securities Company had no connection whatever with the formation thereof, save as above stated. That company was organized, not for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but as above set forth. It was not organized for the purpose of affecting railway rates or competition in the slightest degree, and has not had any such effect. In the transactions above stated these defendants and, so far as they are aware, the other parties who have been engaged therein have never sought or intended to violate the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647), or to enter into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations.

The transactions have consisted merely in the organization of a lawful corporation of New Jersey and the sale to and purchase by it of property lawfully salable. All acts done in relation to the organization of the Securities Company and the purchase by it of shares of stock of the railway companies and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, such effect would not be their

direct effect, but would be merely indirect, remote, incidental, and collateral, and aside from any intention of the parties, and therefore would not bring said transactions within said act of Congress. Any other construction would render the statute unconstitutional as beyond the power of Congress, and as depriving these defendants and the sellers generally of the stock thus sold, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. Such a result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by state statutes under which the same has been taken.

XIX. There is a defect of necessary parties defendant herein because in this suit it is sought to annul all sales of shares made by shareholders of the Great Northern Company and the Northern Pacific Company to the Northern Securities Company, and to cancel all certificates of stock of the latter company issued in purchase of the same. As already set forth, the parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares in the railway companies to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in the railway companies to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XX. And these defendants deny all and all manner of

unlawful combination and confederacy wherewith they are by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

The answer of the defendant Daniel S. Lamont was substantially the same as that of defendants Morgan and Bacon except that certain allegations as to the actions of J. P. Morgan & Co. in Paragraphs XVI and XVII were omitted.

On April 9, 1903, after the case had been tried before a Circuit Court consisting of Circuit Judges Caldwell, Sanborn, Thayer and Vandevanter (for opinion of Judge Thayer, see 120 Fed. Rep. 720), the following decree was entered:

"Ordered, adjudged and decreed as follows, to wit:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.

"That all the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be owned and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.

"That the Northern Securities Company, its officers, agents, servants and employés be and they are hereby enjoined from

acquiring, or attempting to acquire further stock of either of the aforesaid railway companies.

"That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

"That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

"And that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold;

"And that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting

the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

"It is further ordered and adjudged that the United States recover from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor."

Mr. George B. Young for appellants argued and presented in a brief the following summary of the facts:

1. For some years prior to 1901 the two railway companies had been engaged in an enterprise of building up a great interstate and Oriental commerce.

2. In April, 1901, they purchased nearly all the Burlington shares at a cost of over $200,000,000, paying for them with their joint bonds, and not with the bonds of the Burlington as stated in the decision of the lower court. They made the purchase not with any view of placing the two companies, their shares or their commerce, under a single control.

3. Immediately after this purchase, persons interested in the Union Pacific attempted to obtain the stock control of the Northern Pacific, their object being to prevent the carrying out of the enterprise of the defendant railway companies, and especially to prevent the use of the Burlington road in carrying out that enterprise.

4. This "raid" (as it is called) on the Northern Pacific stock failed, the failure being largely due to an error of the raiders in buying common instead of preferred stock. But there was imminent danger that another like attempt might be made and be successful.

5. Such a raid, if successful, would destroy the commerce the railway companies were building up, and in aid of which they had bought the Burlington shares.

6. For some years prior to 1901, Mr. Hill and ten other shareholders in the Great Northern Co., holding less than 30 per cent of its stock had contemplated the formation of a company to which they should make absolute transfers of their shares in consideration of the shares of such new company. Their purpose was that the shares should be voted alike in the future as they had been in the past, and that they should fare alike in any sale of them that might be made.

7. In June, 1901, after the defeat of the raid, it was first suggested that the proposed company should be enlarged so as to include the Northern Pacific common stock (about $21,000,000) held by the same persons, and later the plan was still further widened so as to include the Northern Pacific common stock (about $20,000,000) held by J. P. Morgan & Co. should they desire to make such disposition of the stock held by them.

8. It had all along been the purpose of Mr. Hill and his ten associates that every shareholder in the Great Northern Co. should be given an opportunity to join the company as originally planned,—this not because they needed or desired the accession of such other shareholders, but to avoid any complaint of unfair treatment on their part.

9. This purpose was carried into the enlarged project, and at the instance of Mr. Morgan, the same opportunity was to be given to holders of Northern Pacific stock. And like the company originally projected, the enlarged company was to be authorized and was expected to acquire shares in coal mines and in industrial enterprises of utility to the railways, but whose stock the railway companies could not hold, and also to be a financial as well as an investment company, with power in that capacity to aid the operations of the railway companies, or of any other companies whose shares or securities it might hold.

10. The amount of Great Northern stock held by Mr. Hill and his ten associates was from 33 to 35 millions out of a total capital of $125,000,000. In 1896, they had severally

acquired $29,000,000 of Northern Pacific common stock, which amount had, on May 1, 1901, been reduced by sales to $20,000,000.

11. In forming the Northern Securities Co. it was the intention of its promoters that it should acquire, if it could, a majority of Northern Pacific stock, thereby protecting such stock from future raids, and protecting the commerce of the railways from the ruin that would result from a successful raid. They did not desire or expect that the Securities Co. should acquire a majority of Great Northern shares. Such acquisition was not deemed necessary for the protection of the stock of that company or of the commerce of the roads.

12. While the capitalization of the Securities Co. is nearly, it is not (as stated in the opinion) the *exact* amount required to pay for all the shares of the two railway companies at the prices ($180 for Great Northern and $115 for Northern Pacific) fixed for such exchanges.

13. Mr. Hill and his ten associates who promoted the Securities Co. did not agree or bind themselves even to transfer their own shares to the Securities Co. Each of them was left to decide for himself. Mr. Hill retained between two and three millions of his shares.

And neither they, nor any one concerned in promoting the Securities Co., nor J. P. Morgan & Co. ever agreed in any manner that upon the organization of the Securities Co. they would "use their influence to induce other stockholders in their respective companies to do likewise," as erroneously stated in the decision of the lower court.

14. The Securities Co. is not a railway company and has no power to build or operate railways. Its powers are limited to buying, selling and holding stocks, bonds and other securities, with power to aid in any manner any company whose stock or bonds it may hold, and to do all acts designed to aid any company whose shares or securities it may hold, and protect or enhance the value of its investment; also to hold any real or personal property required for the transaction of its business.

In short, it is at once an investment and a financial company.

15. Soon after its organization, and on November 18, 1901, the Securities Co. purchased the Northern Pacific shares that had been acquired by those concerned in the raid, known as the Harriman shares. Those had been purchased from them by J. P. Morgan & Co. The purchase comprised $37,023,000 of common stock and $41,085,000 of preferred stock, at a lump price of $91,407,500, payable (and paid) $8,915,629 in cash, and $82,491,871 in shares of the Securities Co. at par. About the same time it received from its promoters and J. P. Morgan & Co., the Northern Pacific common stock (about $42,000,000) held by them. It availed itself of its right as a common stockholder of the Northern Pacific to purchase at par for cash, the new common stock (issued to replace the $75,000,000 preferred stock retired) to the amount of 75-80 of the amount of common stock held by it. As a result of these purchases, the Securities Co., at the beginning of the year 1902, and before this suit was begun (in March, 1902) held about $152,000,000 of the total $155,000,000 stock of the Northern Pacific.

16. Soon after its organization, Mr. Hill and the other promoters of the Securities Co. transferred to it about 30 millions of Great Northern shares at $180 in exchange for Securities shares at par, and within three months from its organization, (and before the commencement of this suit,) the Securities Co. had acquired, on the same terms and from other holders, about 65 millions of Great Northern shares, making its total holdings 95 millions of the total capital of 125 millions.

17. It is not the fact, as stated in the decision that the Securities Co. was enabled to make the purchase of 65 millions of stock bought from non-promoters, or of any of it, by the advice, procurement or persuasion of the Great Northern shareholders who had been instrumental in organizing the Securities Co. There is not any evidence in support of this finding, and the evidence is conclusive against it.

The facts proved beyond question are that each purchase

was an independent transaction between the seller of stock, and the Securities Co., without solicitation, persuasion or other influence by the Securities Co., or any one else.

18. At the time of the formation of the Securities Co., the Great Northern shareholders were 1,800 in number. Of them about 1,200 transferred their shares to the Securities Co.

When this suit was begun, in April, 1902, the shareholders of the Securities Co. were more than 1,300; in October, 1902, they were about 1,800.

19. The Securities Co. is the absolute owner of the shares acquired by it and of the dividends thereon. The shares are not pooled or consolidated, nor are the earnings of the two roads pooled. It is in no sense a "trust."

20. The promoters of the Securities Co.—Mr. Hill and his ten associates—do not, all of them together hold, nor have they ever held more than one-third of the $360,000,000 stock of the Securities Co. that has been issued and is outstanding, and these gentlemen and J. P. Morgan & Co. have never held more than $140,000,000.

21. By the charter of each railway company, its commerce is controlled and directed wholly by a board of directors, the members of which are chosen for prescribed terms and cannot be removed during their terms. And by the laws of Minnesota and Wisconsin no person who is a director in one company can be a director in the other.

22. The Securities Co. has not attempted to control or meddle with the commerce or the management of either railway, nor is there any evidence that it purposes doing either. Ever since its formation such commerce has been conducted by the two boards of directors in complete independence of each other.

23. There has been no agreement to suppress and no suppression of competition between the two railway companies, which is as active as it was before the Securities Co. was formed.

24. The entire interstate commerce of the two railways, the rates on which can be controlled by those companies without other competition or consent of connecting lines, falls short

of three per cent of their total interstate commerce; and any restraint that could be in any event imposed by the Securities Co. on their interstate commerce could only affect this three per cent.

All the interstate commerce of each railroad (including the competitive three per cent) has been largely increased since the organization of the Securities Co., owing to the great advantages of the Burlington connection, and to the protection afforded to all the commerce of the roads by placing a majority of Northern Pacific shares beyond the reach of raids, in the ownership of the Securities Co. And during such period rates have been reduced to such an extent as to reduce net earnings by upwards of $1,000,000.

25. There has been no increase of capitalization of either railway company, nor any watering of that of the railway companies or of the Northern Securities Co. The capital of each railway remains unchanged. If the Securities Co. had issued its shares at par for cash, and used the money to buy the railway shares for cash in the market at their market value, its outstanding shares would be more than at present. It would have had to issue and sell at least 190 of its shares, to be able to buy for cash each 100 shares of Great Northern which it has obtained by exchange of only 180 of its own shares. And it would have had to pay more than $115 for Northern Pacific. The course pursued, instead of watering in any way the Securities Co.'s stock, has furnished that company with properties of a market and intrinsic value considerably in excess of the par value of the shares issued by it in payment for them.

Appellants contend as to the Anti-Trust Act and its meaning:

1. The act is wholly a criminal law, directed to the punishment and prevention of crime. The remedy by injunction, etc., given by the fourth section is not to protect property interests, but solely to prevent "violations of this Act" (i. e. crimes, for every violation of the act is a crime, and, without this section, would not be within the competence of a court of equity to restrain by injunction).

2. Being a criminal statute, the act is not to be enlarged by construction. The first section cannot be stretched so as to make criminal (and whatever the section declares unlawful, it makes criminal, and makes nothing criminal it has not declared unlawful) every agreement, combination or conspiracy that merely tends to restrain commerce among the States, or that confers on the parties to it or any one else the power to restrain trade.

3. The act makes unlawful and criminal every contract, combination or conspiracy in direct restraint of interstate trade or commerce.

The gist of the crime is the contract, combination or conspiracy, and the offense is complete on the making of such contract, or the formation of such combination or conspiracy, though nothing be done to carry it out, and though trade be not in fact restrained.

But to constitute a combination or conspiracy in restraint of interstate trade or commerce, the parties must combine or conspire to do acts, which, if performed, will of themselves restrain such trade or commerce, and will directly restrain it—that is, acts which operate directly on such commerce.

If the acts which the parties combine or conspire to do fall short of this, if they are not such as operate directly on the commerce, and by such operation directly restrain it, then the combination or conspiracy is not within the act.

4. The act makes criminal those contracts, combinations and conspiracies only which directly and immediately restrain interstate trade or commerce—that is by acting directly and immediately upon such trade or commerce. 171 U. S. 568, 592; 175 U. S. 234, 245.

5. As the crime consists in contracting, combining or conspiring to do acts which by their own operation will directly and immediately restrain interstate commerce, it necessarily follows that if the acts which the parties contract or combine to do are of that description, they violate the law, though they had no conscious purpose or "specific intent" to restrain interstate

commerce by the means of such acts or at all. 156 U. S. 341.

On the other hand, if the acts to be done are not such as by their own operation on interstate commerce directly restrain it, the contract, combination or conspiracy to do those acts is not a crime under the Anti-Trust Act. 175 U. S. 234.

6. The act makes criminal every contract, etc., in direct restraint of commerce, without respect of persons.

A contract or combination or conspiracy that would be criminal as in restraint of interstate commerce or trade if made between two or more railway companies, is equally a crime if made between two or more interstate carriers by wagon or stage-coach or ferry, or between two or more interstate traders wholesale or retail. 166 U. S. 312.

7. Any restraint of interstate commerce, or power to restrain it, directly consequent upon the acquisition of property and incident to its ownership, is not, nor is the agreement for such acquisition made criminal by, this act. 156 U. S. 16.

Hence, where competitors in interstate trade or commerce agree to and do form a partnership or a corporation, or where one of them buys out the other, or a third person or association of persons buys out both, whatever suppression of competition or power to suppress competition may follow is not, nor is the agreement to form such corporation, partnership or association for such purchase, made criminal by the act. 171 U. S. 505, 567.

8. So where a combination is formed to acquire, and which does acquire, nearly all of an article in common use throughout the country and shipped in large quantities among the States, such ownership, though it gives the power to control the interstate trade and commerce in such article, and to suppress such trade and commerce altogether, is not, nor is such combination, a restraint of commerce prohibited by the Anti-Trust Act, the power being an incident of ownership. 156 U. S. 1, 16.

9. By this act Congress regulates commerce by punishing

the making of certain contracts by fine and imprisonment. The regulation is and must be uniform throughout the United States, for an act made criminal when done in Minnesota cannot be innocent when done in Massachusetts. The matters embraced in the act, thus requiring a uniform regulation throughout the country, are matters within the *exclusive* jurisdiction of Congress, and no matters that are not within such exclusive jurisdiction are within the act. If it appears that the States have jurisdiction of any matter (e. g., the ownership of stock in or the consolidation of railway companies doing an interstate business) claimed to be within this act, the existence of jurisdiction in the States is conclusive that such matter is not within the act.

The appellants, therefore, maintain the following propositions:

1. The Government is not entitled to maintain this proceeding under sections 1 and 4 of the Anti-Trust Act, nor had the Circuit Court jurisdiction of it under those sections, for the conspiracy or combination charged in the petition and found by the Circuit Court, if it ever existed, had done all it was formed to do, and had come to an end, before the proceeding was instituted.

2. The only combination of which there is any evidence is a combination formed in aid of commerce, to liberate, protect and enlarge and not to restrain it, and which has liberated, protected, aided and enlarged it, and has not restrained and does not threaten to restrain it.

3. There is no evidence of the combination or conspiracy charged in the petition, or of the combination or conspiracy found by the Circuit Court.

4. The conspiracy or combination in question whether as alleged in the petition or as found by the Circuit Court, was not a combination or conspiracy in restraint of interstate commerce, for the only things which the parties thereto combined or conspired to do or procure to be done were (1) the organization of the Securities Co., and (2) the acquisition by the Se-

curities Co., with their help, of a large majority of the shares of each of the defendant railway companies in exchange for its own shares.

The things so to be done or procured to be done (whether taken separately or together) are such as do not and cannot in any wise restrain interstate commerce, and hence a combination or conspiracy to do them or procure them to be done is not in restraint of interstate commerce.

The Circuit Court erred in holding (1) that the Securities Co., having acquired such majority of shares, has power to suppress competition between the railway companies. In fact, the Securities Co. is without power to suppress competition. It is a mere shareholder and not a director. The office of director is created by the State and not by the shareholder. As to power of directors being distinct from those of shareholders, see *Hoyt* v. *Thompson*, 19 N. Y. 207, 216; *Burrill* v. *Nahant Bank*, 2 Metc. 163; *Pullman Car Co.* v. *Missouri Pac. Ry. Co.*, 115 U. S. 587. The charter of each railway company gives to the board of directors all the powers attributed to it in the foregoing decisions. Rev. Stat. Wisconsin, 1878, c. 87, § 1804; Gen. Stat. Minnesota, 1894, § 2717; (2) that it obtained and holds such power by means of and as a party to the combination or conspiracy and not as an incident of its ownership of the shares; (3) that the possession of such power to suppress competition is of itself, and irrespective of its exercise, a restraint of interstate commerce; and therefore (4) the combination or conspiracy in question was in restraint of such commerce.

5. The petition does not allege nor do the proofs disclose any facts showing a monopoly or a conspiracy or attempt to monopolize any interstate or foreign commerce. For definition of monopoly, see *Texas Pacific* v. *Interstate Com. Com.*, 162 U. S. 197, 210; *United States* v. *Freight Association*, 166 U. S. 290; *Pearsall* v. *Great Northern*, 161 U. S. 646, 676; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 10; *In re Corning*, 51 Fed. Rep. 205, 211.

6. The case is not within the Anti-Trust Act, for in any view of the matters complained of, their effect upon commerce—whether much or little, for good or for ill—is indirect and remote. The Anti-Trust Act and the regulative power of Congress under the commerce clause of the Constitution, are alike strictly limited to matters which directly and immediately affect interstate or foreign commerce.

In determining what is a combination in direct restraint of commerce the distinction between direct and indirect regulations of commerce becomes important, see *Fargo* v. *Michigan*, 121 U. S. 230; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 328; *N. Y., L. Erie &c. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, 25. In the declarations of the limitations of the act and of the power of Congress, the court has merely repeated its settled doctrine. *Hooper* v. *California*, 155 U. S. 648, 655; *Williams* v. *Fears*, 179 U. S. 270, 278.

Where subjects for commercial regulation are of a nature to require or admit of one uniform system or plan of regulation, the power to regulate them is exclusively in Congress, and any attempted regulation by a State whether to enlarge or restrain, is simply *ultra vires*, for it is a usurpation of a power vested exclusively in Congress. *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557, 574; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Bowman* v. *Chicago, etc., R. R. Co.*, 125 U. S. 465, 480. Anything, therefore, not exclusively within the jurisdiction of Congress is not within the act.

7. The very general language of the Anti-Trust Act was not intended to include combinations to purchase railways or railway shares, competing or non-competing, nor consolidations actual or "virtual" of railways or railway companies. Congress, when passing the act did so with full knowledge of the situation. *Ches. & O. Tel. Co.* v. *Manning*, 186 U. S. 238, 245. It knew that the railway systems of the country

rested on such combinations authorized by state laws, some of them having existed many years.

These are matters of public history and within the knowledge of the court. *Ohio L. & T. Co.* v. *Debold*, 16 How. 416, 435; *R. R. Co.* v. *Maryland*, 21 Wall. 456, 469; *Brown* v. *Piper*, 91 U. S. 37, 42; *Phillips* v. *Detroit*, 111 U. S. 604, 606; *Lehigh Valley* v. *Pennsylvania*, 145 U. S. 192, 201; *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 699; *Preston* v. *Browder*, 1 Wheat. 115, 121; *United States* v. *Union Pacific*, 91 U. S. 72, 79; *Platt* v. *Union Pacific*, 99 U. S. 48, 55.

If Congress had meant to declare such consolidations and stock purchases of competing companies to be illegal, the securities issued by them void and state legislation unconstitutional, it would have said so in plain, specific and apt language.

The construction put on the act by all branches of the government and by everybody down to the commencement of this proceeding, has been in full accord with our position that the act has nothing to do with combinations to own railways or railway shares. The following consolidations of competing railroad lines existed at the time of the passage of the act or have been effected since that time: Boston & Maine Railroad Company and competing lines; New York, New Haven & Hartford Railroad Co., and New England Railroad Co. and other roads; New York Central Railroad and the West Shore and Rome, Watertown and Ogdensburg and other railroad companies; Pennsylvania Railroad Company and Baltimore and Ohio and other companies; the Reading Company.

8. Even though the Government were entitled to any injunction, the decree goes far beyond what the Government was entitled to receive, or the Circuit Court authorized to grant.

Mr. John G. Johnson, for appellant, Northern Securities Company, argued:

The facts found by the court below cannot be deduced from the testimony and the substratum of the bill filed, of the ar-

guments below in its support, and of the decision of the lower court was the assertion of a conspiracy which never existed. It is conceded that the Securities Company did acquire a majority of stock of both railroad companies and such acquisition was because of its intent to acquire. The company is chargeable with all the legal consequences of an intentional acquisition of such shares. It is denied, however, that any individuals or corporations conspired to do anything except to form a corporation and acquire shares of the Northern Pacific Railway Company belonging to them, and about twenty-seven per cent of the stock of the Great Northern Railway Company. The subsequent acquisition of an additional fifty per cent of the Great Northern stock was for third persons over whom the defendants had no control but who simply accepted an invitation to sell their stock issued by the Securities Company after its formation. The authorized capital of that company was made sufficiently large to enable it to acquire all the stock of both roads but this was not in pursuance of any combination, conspiracy or contract but of the policy of the appellants to let every co-shareholder of the railroad companies have the benefit of every advantage obtained for themselves.

Everything of which the Government complains was done with the intention of working out with permanent results the problem of interstate and international commerce. In order to effect permanent arrangements and to promote a great public end through a greatly increased commerce, at low rates, the two railway companies purchased the shares of the Burlington road for over $200,000,000, paid by their joint and several bonds, thus being able to give assurances of permanency of low rates and do such other things as were necessary in building up and enlarging this great commerce. This resulted in demands by the Union Pacific for a part of the traffic and on their being refused the Oregon Short Line acting for the Union Pacific acquired a large amount, almost a controlling interest, in the stock of the Northern Pacific. The situation was critical and the organization of the Securities Com-

pany and all that followed was for the purpose of preventing a raid on the stock similar to that which had so nearly succeeded and was done solely with the attempt to secure the maintenance of the benefit to commerce, which had resulted, and which, still more in the future, would result from the acquisition of the Burlington shares.

Such alliances as that of the Burlington with the Northern Pacific and Great Northern are valuable because they give an opportunity of securing a large number of markets in a great and rich territory under a fairly permanent transportation policy. They are of enormous value to the people along the lines of the railroads, to the country generally and to the world. To transact business, large investments must be made and the condition prerequisite thereto is reasonable assurance of continuance. When the Government seeks to condemn an arrangement which promotes the interest of the whole nation by pretending that it was intended to restrain trade, it must establish convincingly the existence of the illegal intent alleged.

The sole question of law to be determined is whether or not the acquisition by a corporation of a controlling interest in the shares of two competitive railway companies, violates the Sherman Act. It is not illegal for an existing corporation to acquire such controlling interest; it is not illegal for persons holding a sufficient number of shares to enter into an agreement that will form a company to acquire such control. An agreement to do what is legal cannot be an illegal conspiracy, combination or contract.

The Sherman Act is a penal one, defining a criminal offense, for which it provides a punishment. It is an indispensable prerequisite to a conviction for a criminal misdemeanor, especially if there be no criminal intent, and such does not exist in the present case, that the offense condemned shall be clearly defined, and it is well settled that penal laws are to be strictly construed. *United States* v. *Willberger*, 5 Wheat. 76; *United States* v. *Whittier*, 5 Dillon, 35, citing *United States* v. *Morris*, 14 Pet. 464; *United States* v. *Sheldon*, 2 Wheat. 119; *United*

States v. *Clayton*, 2 Dillon, 219; Bishop on Statutory Crimes, sec. 41; *Andrews* v. *United States*, 2 Story, 213; *United States* v. *Hartwell*, 6 Wall. 385, 396; *Swearingen* v. *United States*, 161 U. S. 446, 451; *France* v. *United States*, 164 U. S. 676, 682; *Schooner Paulina's Cargo* v. *United States*, 7 Cr. 52, 61; *United States* v. *Reese*, 92 U. S. 214, 219; *United States* v. *Comerford*, 25 Fed. Rep. 902; *United States* v. *Chase*, 135 U. S. 255, 261; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Sarlls* v. *United States*, 152 U. S. 570, 575.

This court will not legislate but will merely discharge its duty of construction. If the legislation is incomplete a crime cannot be fastened upon one who has done innocently something not defined as criminal. An act not made criminal cannot be condemned because it may seem equally, or even more, evil than the one made criminal. That Congress had no clearly defined understanding of the nature of the misdemeanor at which it struck, is evidenced by the final debates in the House of Representatives.

The purchase by a person or corporation, of a majority of the shares of two competing railway companies, is not "a contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The Sherman Act prohibits, not a contract *tending* to restrain trade, but one actually in restraint thereof. The meaning of "restraint of trade" was well understood when the Sherman Act was passed. *United States* v. *Freight Association*, 166 U. S. 290, 328. In the *Addyston Case*, 175 U. S. 211, the contract was actually in restraint of trade.

The holding by a person or corporation as owner of a majority of the shares of two competing railway companies, is not "a contract or combination or conspiracy in restraint of trade" within the meaning of the act.

A corporation, though incorporated for the purpose of holding, and actually holding, a majority of the shares of two competing railway companies is not such a combination or conspiracy. See the *Pearsall Case*, 161 U. S. 646; *United States*

v. *Joint Traffic Association*, 171 U. S. 505, 567. A person or corporation, by purchasing a majority of the shares of two competing railway companies does not monopolize, or attempt to monopolize, "any part of the trade or commerce among the several States." As to what a monopoly is, see *In re Green*, 52 Fed. Rep. 104; dissenting opinion of Story, J., in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 606; 20 Am. & Eng. Ency. of Law, 846; 2 Rawle's Bouvier's Dictionary, 435, and cases cited; Blackstone, Bk. IV, 159; Century Dictionary.

The purchase by one person, of the property of his rival, with the intention thereby to destroy his competition, is not illegal, although by the purchase he will acquire the power to prevent the same. *Oregon Coal Co.* v. *Winsor*, 20 Wall. 64. A person or corporation, by holding, as owner, the majority of the shares of two competing railway companies, does not monopolize, or attempt to monopolize "any part of the trade or commerce among the several States."

The power of Congress to regulate commerce does not confer upon it a right to prescribe the persons who may engage therein, or to regulate, or to control, the ownership of shares of stock of corporations engaging therein. *United States* v. *Knight*, 156 U. S. 1; *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 693.

The States create railroad corporations and may prescribe the manner of issuance of their shares, and the method of transfer of title thereto. In the use and operation of railroads engaged in interstate commerce, the corporations owning the same must submit to Federal jurisdiction but this does not involve any right on the part of the United States to control the transfer of shares by the shareholders, even though as a result of said transfers the controlling interest may be transferred. It is not within the power of the Federal government to destroy the title to property created by the State.

Congress has unrestricted power to prevent restraint or monopolization of interstate commerce, as the authorities de-

fine those words, but not as the United States now claims. Properly interpreted, the Sherman Act is constitutional but the United States is now endeavoring to have its provisions interpreted so as to be violative of States' rights. Such a construction should not be adopted, if there is one which harmonizes with the Constitution. *Grenada County* v. *Brogden*, 112 U. S. 261; *Hawaii* v. *Mankichi*, 190 U. S. 197.

The mere ownership of property cannot be an illegal restraint of trade. As to the power of the State over railroad corporations, see *Railroad Co.* v. *Maryland*, 21 Wall. 456; *Ashley* v. *Ryan*, 153 U. S. 436.

The relief decreed by the lower court was improper under any aspect of the case. *United States* v. *Knight*, 156 U.S. 1, 17.

Mr. Charles W. Bunn for appellant, Northern Pacific Railway Company, argued:

The Sherman Act only declares those contracts illegal which are in restraint of trade. The government cannot rest on proof of combination and conspiracy but must establish restraint of commerce and to do this must prove that the ownership by one person of the stocks of two competing roads is *per se* such restraint.

The statute must be interpreted so as to fall within the constitutional powers of Congress which do not extend to determine the ownership of stock in corporations or to the regulation of consolidations of railroad companies chartered by the States.

This power belongs to the States; Congress only has the power to regulate the use of such property in commerce between the States. See definition of commerce in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 196, as repeated by this court in *Passenger Cases*, 7 How. 283, 394, 462; *Henderson* v. *Mayor*, 92 U. S. 259, 270; *Lottery Case*, 188 U. S. 321, 346. Congress has power only under § 8, Art. I, of the Constitution, and by Amendment X all power not thus granted is reserved to the States. Under the guise of regulating commerce Congress

cannot prescribe general rules as to transfer of real or personal property or prohibit the purchase of stock and bonds because when bought they may be used in a business carried on with intent to monopolize or restrict interstate commerce. *In re Greene*, 52 Fed. Rep. 104, 113, citing *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The power of Congress extends only to those things that directly and immediately pertain to commerce; the powers of the States include many things which operate indirectly though importantly on commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203. For cases involving this demarkation between national and state powers, see *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 228; *Hopkins* v. *United States*, 171 U. S. 578, 592; *Anderson* v. *United States*, 171 U. S. 604, 615; *Sherlock* v. *Alling*, 93 U. S. 99; *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 701. In the last case this court cites decisions in which state statutes prohibiting or permitting consolidation were enforced. This would have been erroneous if the things complained of fell within the power of Congress, for that power if it exists is exclusive of all state action, and must be so in order that it be uniform. As to matters in regard to which the States may act until Congress acts, see *Cooley* v. *Board of Port Wardens*, 12 How. 299; *The James Gray* v. *The John Fraser*, 21 How. 184; *Pound* v. *Turck*, 95 U. S. 459; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492; and cases cited *supra*. No rule of law is introduced by the Sherman Act; what was restraint of commerce is the same now; the only feature of the act is making the preliminary conspiracy a crime. The Constitution itself forbade restraint of interstate commerce. *In re Debs*, 158 U. S. 564. A combination that is restraint of trade now was restraint of trade before the act of leasing, buying and consolidation of competing railroads has gone on for fifty years both before and since the act of 1890.

If a thing restrains interstate commerce it is immaterial how innocent the intent may be, and if it does not restrain it, it is immaterial how evil the intent may be. The question is does the agreement restrain trade or commerce. *United States* v. *Freight Association*, 166 U. S. 290, 341; *Addyston Case, supra.* If an action be lawful its purpose is immaterial. This is elementary. *Phelps* v. *Nowlen*, 72 N. Y. 39, 45; *Kiff* v. *Youmans*, 86 N. Y. 324, 329; *Wood* v. *Amory*, 105 N. Y. 278, 281; *Lough* v. *Outerbridge*, 143 N. Y. 271, 282; *Adler* v. *Fenton*, 24 How. 407, 410; *United States* v. *Greenhut*, 51 Fed. Rep. 205, 211; *In re Greene*, 52 Fed. Rep. 104, 111; *Randall* v. *Hazleton*, 12 Allen, 412, 418; *Brackett* v. *Griswold*, 112 N. Y. 454; *United States* v. *Isham*, 17 Wall. 496; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Fahrney* v. *Kelly*, 102 Fed. Rep. 403; *Mogul S. S. Co.* v. *McGregor*, App. Cas. (1892) 25, 41; *Allen* v. *Flood*, L. R. App. Cas. (1898) 1; *Bohn Mfg. Co.* v. *Hollis*, 54 Minnesota, 223, 234. The opinion of the court below proceeds upon the proposition that a combination of two competitors is a restraint of trade because it lessens competition. This is error. The *Trans-Missouri, Joint Traffic* and *Addyston* cases prove only that a contract restraining rival companies from competing is a restraint of trade. No such agreement exists in this case. The law does not require competition. The business of a rival may be purchased for the purpose of being rid of his competition. *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91, 104; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Rafferty* v. *Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 621; *Trenton Potteries Co.* v. *Olyphant*, 56 N. J. Eq. 680; *Oakdale Co.* v. *Garst*, 18 R. I. 484.

The Securities Company is neither alleged nor proved to have done or omitted anything which can be construed as a violation of the Anti-Trust Act. If it has the power to suppress or diminish competition it has not used it and if the act has been violated at all it must be due to the mere existence of the Securities Company, to its powers as applicable to railway com-

panies or to something illegal in its origin. The illegality can not be sustained under the decisions of this court.

Mr. John W. Griggs for appellant, Northern Securities Company, submitted a brief:

The acts of the defendants do not constitute a contract, combination, or conspiracy in restraint of interstate trade or commerce within the meaning and prohibition of the Sherman Act. The United States rests its case upon two allegations:

First. That the Northern Securities Company has been formed and has taken over a majority of the shares of the two railroad companies in the manner indicated by the pleadings and proofs.

Second. That the intended and the necessary effect of those acts is to destroy competition between the two railroad companies.

The answer of the defendants is:

First. That the formation of the Northern Securities Company and the acquirement by it of stock of the two railroad companies was a lawful transaction, governed solely by local state laws, and not in contravention of any provision of the Federal Constitution or statutes.

Second. That the acts of the defendants were all done in good faith, without any purpose to destroy competition or restrain trade.

To put it more concisely: The defendants contend that what they have done is lawful, has no direct effect in restraint of competition, and was not intended to restrain competition.

The creation of railway corporations; the form of their corporate organization; the character and qualities of their corporate stock; the routes which their roads shall take, whether they may connect with other roads running in the same general direction, whether they may or may not consolidate with parallel lines, or operate parallel lines through different portions of a State—all these matters are, and always have been, subjects of state jurisdiction. *Louisville & Nashville R. Co.* v.

Kentucky, 161 U. S. 677, 702; *Pearsall* v. *Great Northern*, 161 U. S. 646; *Lake Shore & Mich. Southern* v. *Ohio*, 173 U. S. 285; *Missouri, Kansas & Texas* v. *Haber*, 169 U. S. 613; *Cleveland &c. Railway* v. *Illinois*, 177 U. S. 514.

The lower court did not find as matter of fact that the defendants had in any way restrained trade or commerce; or that they had attempted so to do; or that they had contracted or combined so to do. What the court did find and decide was, that the defendants had done certain things whereby they had obtained the power to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. This idea is repeated again and again throughout the opinion. It speaks of "a direct restraint of interstate commerce because it would have placed in the hands of a small coterie of men the power to suppress competition between two competing interstate carriers."

To say that one person, or several persons, cannot acquire or own a majority of the stock of two competing railroad corporations because they are thereby occupying a vantage ground from which they can, if they choose, effect an agreement or understanding between the two companies in restraint of competition, is to say that the power to commit a crime is equivalent to its actual commission.

The acts of the defendants being *prima facie* lawful, the burden of proof is upon the Government to show that they were, as the Attorney General charges, not *bona fide*, but a mere formal device intended to defeat the provisions of the Sherman Act. *Joint Traffic, Trans-Missouri, Addyston Pipe Cases; United States* v. *Hopkins*, 171 U. S. 578; *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; *State* v. *Shippers Compress & Warehouse Co.*, 67 S. W. Rep. (Texas) 1049; *S. C.*, affirmed, 69 S. W. Rep. 58.

Any restraint of trade or commerce which may result from the acts done by the defendants is indirect and incidental only, and not covered by the act. In every instance where this court has had occasion to pass upon the meaning of the act

it has carefully distinguished between acts which directly restrain commerce, and acts which only indirectly or incidentally have that effect. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 16; *Joint Traffic Case*, 171 U. S. 505, 566; *United States* v. *Ches. & Ohio Fuel Co.*, 105 Fed. Rep. 93; *S. C.*, affirmed, 115 Fed. Rep. 610.

If the Sherman Act can be so construed as to forbid the sale of stock in two competing railroad corporations to one purchaser, then that act is an attempted interference on the part of Congress with transactions which are wholly within the control of the States of the Union, and in that respect the act is unconstitutional.

As to the extent of state legislative power over the instrumentalities of interstate commerce, see *Louisville & Nashville Case*, 161 U. S. 677, 702; *C. & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204. Regulation of commerce, to be constitutional, must be confined to commerce itself, and cannot reach out to those things which not being designed as agencies of such commerce, or not being actually enjoined therein, may yet have an indirect or ultimate relation thereto.

Such a construction of the Constitution would vest in Congress the regulation of all branches of productive business from their first beginnings. *License Tax Cases*, 5 Wall. 462.

The fact that an article was manufactured for export to another State does not make it an article of interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *Kidd* v. *Pearson*, 128 U. S. 1.

The creation of state corporations and the regulation of the sales of corporation shares belong to the class of business affairs over which the States have exclusive jurisdiction. *United States* v. *Boyer*, 82 Fed. Rep. 425; *Clark* v. *Central R. R. & Banking Co. of Georgia*, Jackson, J., June 30, 1893, U. S. Circuit Court, Savannah; *In re Greene*, 52 Fed. Rep. 104, 112; *Pearsall* v. *Great Northern*, 161 U. S. 646, 671; *Rogers* v. *Nashville &c. Ry. Co.*, 92 Fed. Rep. 312.

But assuming that Congress may, under the commerce clause of the Constitution and as a regulation of commerce, restrain

the States in the exercise of their prerogatives from permitting two or more corporations to which the States have given life from merging, yet such a purpose on the part of the Government ought to be clearly and distinctly expressed, and not be found in the judicial interpretation of doubtful language contained in a penal statute.

So that, if it be argued that Congress may forbid the sale of one railroad to another, it is enough to reply that it has never done so; that the Sherman Act does not expressly, or by any just interpretation, do so.

The Sherman Act is a penal statute; every act which may be prevented by injunctive order would, if committed and proven, subject the parties to criminal prosecution. The rule of strict construction must be therefore applied. *United States* v. *Whittier*, 5 Dillon, 35; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Shackford*, 5 Mason, 445; *United States* v. *Clayton*, 2 Dillon, 219; *United States* v. *Garretson*, 42 Fed. Rep. 22; Dwarris' Stat. 641; *Hubbard* v. *Johnstone*, 3 Taunt. 177.

Acquiescence by the Government for more than eleven years in the actual merger and consolidation of many important parallel and competing lines of railroads and steamships engaged in interstate and international commerce, has given a practical construction to the act of July 2, 1890, to the effect that it was not intended to forbid, and does not forbid, the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock. As held in 1803 in *Stuart* v. *Laird*, 1 Cranch, 299, where the right of a justice of the Supreme Court to sit as a Circuit Judge was challenged, upon the ground that, not having been appointed as such, and not having been distinctly commissioned as such, the act of Congress of 1789, under which the Circuit Court was originally instituted, was unconstitutional.

"Practice and acquiescence for a period of several years, commencing with the organization of the judicial system,

affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed."

This is a just principle of jurisprudence, founded upon the very highest considerations of public equity.

It has frequently been invoked and enforced in order to prevent the disturbance and unsettlement of important affairs which have been transacted in reliance upon a general public and private belief that the law did not include them in its terms of condemnation.

But we venture the assertion that no case has ever arisen in which a disregard of that salutary rule of construction would result in such widespread and irremediable injury to vested interests as this. Not that any decree which this court could make against these defendants would particularly or radically affect their property interests, but because the decision once made that the Sherman Act applies to such transactions as the purchase, lease, merger or consolidation of parallel lines of transportation, would render every such transaction for the last thirteen years unlawful, and require the Attorney General, in the due discharge of his duty, to bring suit for dissolution and injunction. Unnumbered millions of dollars of capital stock and bonds issued upon railroad mergers and consolidations would be tainted with illegality, or affected in value by the withdrawal of the property against which they were issued. Purchases of stock in underlying roads long ago made and paid for would be unsettled, and financial chaos would result.

Mr. M. D. Grover for appellant, Great Northern Railway Company, submitted a brief:

The findings of fact upon which the decree rests are contrary to the evidence. This is made clear by separating the findings and considering the evidence bearing on each

separately. There was no desire or intent to evade the Anti-Trust Act, to restrain competition, to monopolize trade, to inflate securities, water stock, or create fictitious capital.

I. It is not denied that the Northern Securities Company is a corporation lawfully organized under the laws of the State of New Jersey, with charter power to purchase and sell securities of all kinds, and to purchase, hold, vote and sell all the shares of stock of any single corporation or of non-competing corporations. Its right to purchase, hold, vote and sell all the stock of the Great Northern Railway Company alone, or the Northern Pacific Railway Company alone, is not denied.

II. The organization of the company was the result of a plan to form an investment or holding company, which had its inception years before its articles were filed, among not exceeding ten large holders of Great Northern stock, who had taken an active interest in the policy of the company and its administration, but who never had held in the aggregate to exceed one-fourth of its outstanding stock. It was thought that if a company were formed to which they might sell their individual holdings, their shares would be likely to be held together, so long as a majority of the holding company should wish, and that this would tend to give stability to the policy of the company, be of aid to it in its financial operations, and maintain the value of its investments.

III. The Burlington purchase was made to enlarge trade, not to restrain it; to increase competition, not to suppress it. At the time of the purchase it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing company or its shareholders was needed to preserve to each company its fair share of the advantages secured by the purchase.

IV. At the time of the organization of the Securities Company the Great Northern shareholders referred to owned about $30,000,000 of Great Northern stock, and $35,000,000

of Northern Pacific common stock, having increased their holdings of the latter by purchases from J. P. Morgan & Co. They did not control a majority of the shares of either of the defendant railway companies. In view of the injury apprehended to both companies, and their shareholders, and the better to protect their interests in the future, against raids of adverse interests, the Great Northern shareholders referred to deemed it advisable that the holding company which they had considered should be organized, should have power to purchase, not only their own Great Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to it, and also the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic operations of the Great Northern and Northern Pacific companies.

V. At this time it was not expected by any of the persons concerned, that any Northern Pacific shares, except the $42,000,000 owned by them and by J. P. Morgan & Co. would be acquired by the proposed holding company. The organization of the company was not dependent on any agreement that it should acquire, nor upon the question of, a majority of the shares of either of the defendant railway companies. There was no agreement or understanding between the Great Northern shareholders referred to, that they or either of them would undertake to influence any one of the other 1,800 Great Northern shareholders, or of the other 3,600 Northern Pacific shareholders, to sell their shares to the company.

VI. The Great Northern shareholders referred to, upon the organization of the Northern Securities Company and the sale of their shares to it, parted with such stock control as they had in the Great Northern and Northern Pacific companies. They do not own to exceed one-third of the outstanding capital stock of the Securities Company. At the time of the trial the stock of the Securities Company was held by 1,800

separate owners. The stock control of the Securities Company is, therefore, not in the eight or ten Great Northern shareholders referred to, but in the 1,790 other shareholders of the Securities Company, owning at least two-thirds of its outstanding shares.

VII. Nothing has been done except the purchase by the Securities Company of a majority of the stock of the Great Northern and Northern Pacific companies.

VIII. The Securities Company as owner of the stock so purchased may sell it or pledge it. It has made no agreement as to what it will do with it, or how it will vote it, or how it will dispose of the dividends received upon it. It is not a trustee of those from whom it received such shares, and owes them no duty or obligation respecting the shares, since they have no further interest in them.

IX. It is not claimed or pretended that the defendant railway companies have entered into any contract or combination in restraint of trade, or that either of them has done anything to restrain trade or in violation of law. It is not claimed that the Securities Company can restrain trade, except through the exercise of its right, as owner of the shares it purchased, to vote them at stockholders' meetings, in the election of a separate board of directors for each of the defendant railway companies; for the boards must be separate under the laws of the States of Minnesota and Wisconsin.

X. This suit was not brought to prevent or restrain the execution of a contract, or the forming of a combination, in restraint of trade, but to restrain the Securities Company from voting the stock it owns at stockholders' meetings, and from receiving dividends thereon, thereby preventing payment of dividends upon its own shares issued in payment for the shares it purchased, upon the ground that mere possession of the voting power of the shares, is an unlawful restraint and regulation of the interstate commerce of the defendant railway companies.

XI. The Government has no financial interest in this suit.

The only way in which the Securities Company could restrain the commerce of the two railway companies, is through the voting power of the shares it owns. If it had purchased the shares of only one of the companies, its right to vote such shares would not be questioned. Trade could not, within the contention of the Government, or the ruling of the court, be restrained by the Securities Company, should its voting powers be limited to the shares of one of the companies. The decree enjoins it from voting the shares of either company and from receiving dividends from either. The effect of the decree is to deprive it of the means to pay dividends upon its own stock whether issued in payment for the stock it purchased, or issued for cash. Thus the decree destroys the earning power of the stock of the Securities Company, a large majority of which is now held by over eighteen hundred *bona fide* holders in the usual course of business not parties to the suit.

The important questions are: 1. Does the commerce clause of the Constitution of the United States confer upon Congress jurisdiction to regulate the issue, sale and ownership of the capital stock of corporations organized under the laws of any one of the several States, or to inquire into the motives of incorporators, or of the buyers or sellers of their shares?

2. Has Congress, under the commerce clause of the Constitution of the United States, power to forbid or regulate the purchase or lease, by one railway company engaged in interstate commerce, of the railway of its competitor, or the purchase or lease by the owner of one ferryboat, stage coach or river steamboat, engaged in interstate trade, of the ferryboat, stage coach or river steamboat, of a competitor, on the ground that through such purchase or lease competition may be restrained, and commerce regulated?

3. Is the unity of ownership through purchase, partnership, consolidation or lease, of a majority of the shares of competing corporations, engaged in interstate trade, a contract or combination in the form of trust or otherwise, forbidden by the Anti-Trust Act, as in restraint of trade?

4. Is there anything in connection with the organization of the Northern Securities Company, or its purchasers of stock, that in any way distinguishes its right to vote and receive dividends upon such stock from the right of any single interest, individual or corporate, to vote and receive dividends upon shares of competing corporations engaged in interstate trade, purchased in the ordinary course of business, or acquired by gift or inheritance?

5. This suit was brought under section 4 of the Anti-Trust Act, which gives the court jurisdiction to prevent and restrain violations of the act. Every violation of the act is criminal. The court is, therefore, given jurisdiction to prevent and restrain the commission of a crime. Months before the suit was begun, the Securities Company had acquired a large majority of the shares of the defendant railway companies, from time to time, from hundreds of individual shareholders, who sold their holdings in good faith, and much of the stock so taken in payment therefor has since been sold and exchanged, and passed through many hands, in the usual course of business. Does the Anti-Trust Act give the court jurisdiction to annul the purchases made by the Northern Securities Company, and compel a return of the shares it purchased? Payment for the shares it bought was made in its own stock in part only. It paid cash to the amount of over $40,000,000. The owners of such shares are changing from day to day; they are not before the court. The decree does not restrain a contract or combination in restraint of trade. It destroys or impairs the value of millions of dollars worth of property, owned by many hundreds of people who acquired their title in good faith and who are not parties to this suit. *First.* The commerce clause of the Constitution of the United States does not take away from the several States the right to authorize the formation of corporations, define their business, fix the amount of their capital or purchasing power, and regulate the issue, sale and ownership of their capital stock.

As respects the purchase by one corporation of the shares

of another, the matter rests with the States which have created the corporations. Should unification of ownership of property in corporations proceed to such an extent as to be thought against public policy, it may be prevented by the several States, through limiting the power of corporations, and restraining their right to engage in business.

It has been the practice, since the infancy of railroads in this country, for one railroad company to purchase or lease the railroad of a competing company, or to acquire a majority of the shares of a competing company, or of two companies competing with each other, or to effect the consolidation of competing companies. This has been done without objection from any branch of the Federal Government, and has invariably proven beneficial to the railway companies concerned, to their shareholders, and to the public. The extent to which this has been done appears in the record, and is shown by extracts from Poor's Manual and from the annual reports made by the Interstate Commerce Commission to Congress, from 1889 to 1900. And see the brief of Judge Young where this subject is discussed at length with proper reference to the record.

Second. Unity of ownership of shares of competing corporations, engaged in interstate trade, does not restrain such trade, and is not forbidden by the Anti-Trust Act, nor is such unity of ownership a regulation of interstate commerce, and thus subject to exclusive Federal jurisdiction under the commerce clause of the Constitution. *Joint Traffic, Trans-Missouri* and *Addyston Pipe Co.* cases.

There is a distinct difference between an agreement between the owners of competing concerns, to divide territory, to restrain output, or to maintain prices, and the unconditional sale of the property or business of one of them to the other, or of the property of business of both to another person. In the former case, the agreement in terms restrains competition in trade operations, between separate owners or establishments, or instrumentalities engaged in such operations. The agree-

ment relates to the manner in which competitors shall conduct their business. If one competing concern buys the plant or business of its competitor, competition is not thereby directly restrained. The restraint in such case, if any, is merely an incident to the ownership of property, and the fact that there may be such a restraint does not forbid the acquiring of such ownership. By unity of interest output is not necessarily limited, prices are not necessarily increased. On the contrary, the public may be benefited, prices may be less by reason of greatly increased volume of business and less cost per unit of production.

Third. The Anti-Trust Act is a penal statute and, as construed by the court below, it makes unity of ownership of a majority of the shares of competing corporations engaged in interstate trade, no matter how such ownership is acquired, criminal, because such ownership gives power to commit crime.

It is conceded that such ownership, so far as it may control the policy of the corporations, can be exercised for a lawful purpose, for building up trade, increasing competition and reducing prices.

It is not claimed or pretended that in the case under review trade has been restrained, yet the court below held that unity of ownership of a majority of the stock of the defendant railway companies was unlawful, and, therefore, criminal, because such ownership has necessarily caused the doing of something that has not been done; has necessarily restrained trade, though trade has not been restrained.

Stated in another way, the court below decided that ownership by the Securities Company of a majority of stock of the defendant railway companies regulates the commerce of the companies, and though such commerce has in fact been so regulated as to build up trade, increase competition and reduce prices, in law it has necessarily been so regulated as to restrain trade, suppress competition and increase prices because through unity of ownership motive to compete has been destroyed. *Tozer* v. *United States*, 4 I. C. C. Rep. 246; *R. R. Co.* v. *Dey*,

2 I. C. C. Rep. 325; *Schooner Paulina's Cargo* v. *United States*, 7 Cranch, 52, 61; *United States* v. *Reese*, 92 U. S. 214.

Fourth. Trade has not been restrained through the exercise of the voting power of these stocks. The ruling that trade has been restrained, is contrary to the facts, and charges the individuals engaged in this transaction with a crime, that has not been committed nor intended.

When this suit was begun, the shares of the Northern Securities Company were held by over eighteen hundred separate owners who had purchased them in good faith, in the usual course of business. The shareholders of the defendant railway companies, who were instrumental in organizing the Securities Company, have never owned to exceed one-third of its stock. The control of the Securities Company, so far as stock ownership can control it through the election of a board of directors, is not in the eight Great Northern shareholders who were concerned in the organization of the company, but in the seventeen hundred and ninety shareholders owners of more than two-thirds of its stock. The combination of which the court convicted the eight individual defendants, was not one by which they were to acquire control over the two railway companies, for themselves, but one through which such control would necessarily be conferred upon the seventeen hundred and ninety other stockholders of the Securities Company.

The ruling of the court that the possession of the voting power of a majority of the shares of the defendant railway companies by the Securities Company, necessarily restrains trade through suppressing competition, finds no support in facts. The boards of directors of both railway companies may be elected by the Securities Company. The executive officers of the two companies will be elected by these boards, and the ruling of the courts rests upon the proposition, that such boards and officers will be influenced, persuaded or coerced in such way, that they will lack their former incentive to compete for traffic, to obtain it from each other, and to underbid each other for the purpose of getting it; that they will enter

into contracts or in some way through concert of action, maintain higher rates than ought to be maintained; in other words, that they will charge unreasonable rates, will not provide adequate facilities, nor extend construction of lines.

The Northern Securities Company has no power or motive to restrain trade which any single owner of a majority of the shares of defendant railway companies would not have, and which the individual owners of the shares did not have, by lawful conference and concert of action, before they transferred their shares to it.

The defendant railway companies were hampered and placed at disadvantage with other transcontinental railways, as well as with ocean competitors by the want of sufficient direct connection with traffic centers offering the best markets for the products of the country along their lines, and with places of production and distribution from which their traffic must be supplied. Through the Burlington purchase they acquired permanent access to markets and sources of supply, instead of a temporary one resting upon joint rates subject to change at any time without regard to their interest. Having made the purchase and assumed the resulting joint and several obligations, it became a matter of the highest importance to each company that the burdens should be equally borne and the advantages equally shared. Through placing the ownership of a majority of the shares of both companies in the hands of a single owner, the benefits of the Burlington purchase became better assured than would be the case if the shares were held in many hands, and liable at any time to be sold to an interest adverse to the building up of the business of the defendant railway companies and the country which their lines traverse.

It has not been shown that the power of the defendant railway companies to restrain competition can affect more than three or four per cent of their interstate traffic, or that it has affected or can affect construction or extension of their lines, or the amount or quality of their equipment. Through their

ownership of Burlington shares, and by reason of the obligation assumed in paying for the shares, they have a common interest in building up the traffic of each in connection with the Burlington Company. This connection became necessary to their prosperity, to the welfare of their patrons, and to the successful meeting of a world-wide competition. What has been done was done, not to restrain competition, but to enlarge it.

The unity of ownership of their shares has not restrained the commerce of either, and the extent to which such unity can restrain it, is as nothing compared with the great increase in volume of interstate and international commerce which was intended, and which will result from the carrying out of the enterprise of the two companies in the purchase of the Burlington stock, and the preservation of the purchase, and its benefits, by placing the stock of the railroad companies where it is less likely to become scattered and to pass under control of adverse interests, than it would be if held by many owners.

Mr. Francis Lynde Stetson and *Mr. David Willcox* for appellants, Morgan, Bacon and Lamont, submitted a brief:

The transactions alleged are entirely lawful in their character. They consisted merely in the organization of a lawful corporation of New Jersey, and in the sale to, and purchase by, it of property lawfully salable. All the acts were expressly authorized by law. The legal effect of the transaction has been that the owner of stock in one of the railway companies has sold the same to the Securities Company, and has received therefor stock of the Securities Company, which company owns the stock not merely of one of the railway companies, but the stock of both. So that each individual who has transferred his property to the Securities Company has obtained therefor something entirely different—namely, an interest in a company holding stock of the other railway company as well. It is manifest that in the fullest possible sense this constituted a sale of the property. *Berger* v. *U. S. Steel*

Corp., 53 Atl. Rep. (N. J.) 68. The title passed for valuable consideration to a purchaser authorized to hold the property. Aside from the corporate form of the transaction, the effect, too, was that each stockholder in one of the railway companies transferred an interest in his holdings to every other such stockholder.

These transactions being lawful are not affected by allegations as to the motive which actuated them. As the means employed were lawful, the only question must be whether the result accomplished was unlawful. *Pettibone* v. *United States*, 148 U. S. 197, 203; *United States* v. *Isham*, 17 Wall. 496; *Adler* v. *Fenton*, 24 How. 407, 410; *Kiff* v. *Youmans*, 86 N. Y. 324, 329; cited with approval in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 546; *Randall* v. *Hazleton*, 12 Allen, 412, 418; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 190; *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819; *Phelps* v. *Nowlen*, 72 N. Y. 39, 45; *Wood* v. *Amory*, 105 N. Y. 278, 281; *Lough* v. *Outerbridge*, 143 N. Y. 271, 282; *National Assn.* v. *Cumming*, 170 N. Y. 315, 326, 340; *Mogul Steamship Co.* v. *McGregor*, App. Cas. 1892, pp. 25, 41, 42; *Allen* v. *Flood*, L. R. App. Cas. 1898, p. 1; *Pender* v. *Lushington*, L. R. 6 Ch. Div. 70, 75.

An intent to violate the Anti-Trust Act, and therefore to commit a crime, could not in any case be inferred, but must be actually proved.

No indirect or remote effect of these lawful transactions upon competition between the railway companies could bring them within the Federal Anti-Trust Act.

The mere fact that a contract has the effect of restraining trade or suppressing competition in some degree does not render it injurious to the public welfare and thus bring it within the police power. *Oregon Co.* v. *Winsor*, 20 Wall. 64; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *Hyer* v. *Richmond Co.*, 168 U. S. 471, 477, affirming, 80 Fed. Rep. 839; *Continental Ins. Co.* v. *Board*, 67 Fed. Rep. 310; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Hodge* v. *Sloan*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Tode* v. *Gross*, 127 N. Y. 480; *Matthews* v. *Associated Press*, 136

N. Y. 333; *Lough* v. *Outerbridge*, 143 N. Y. 271, 145 N. Y. 601; *Oakes* v. *Cattaraugus Co.*, 143 N. Y. 430; *Curran* v. *Galen*, 152 N. Y. 33, 36; *Watertown Co.* v. *Pool*, 51 Hun, 157, affirmed 127 N. Y. 485; *Central Shade Roller Co.* v. *Cushman*, 143 Massachusetts, 353.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604, and *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 246, the Anti-Trust Act concerns only those agreements of which the direct and immediate effect is to restrain commerce. The transaction now under review was lawful, and, however considered, was not prohibited by the Anti-Trust Act, because such restraint upon interstate trade or commerce, if any, as it might impose, would be indirect, collateral and remote.

This act *is a criminal statute pure and simple* and its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding. Conversely, the act should not receive such construction only as it would receive upon the trial of those indicted for violating its provision. Criminal intent is essential to constitute a crime, and the testimony bearing thereon is always a question for the jury. *People* v. *Wiman*, 148 N. Y. 29, 33; *People* v. *Flack*, 125 N. Y. 324, 334.

Regardless of all other considerations presented on this argument, the judgment under review must be reversed unless it is to be established *as matter of law* that the mere possession of the power to control all the means of transportation of two competing interstate commerce carriers operates as the effectual exercise of such power and directly affects interstate commerce, notwithstanding the fact that such power has never been exercised by its possessors, and the further fact that it is perfectly practicable for them to exercise it in a perfectly proper way. Support for the proposition now under review was sought below in the *Pearsall case*, 161 U. S. 646, 674, the *Joint Traffic case*, the *Trans-Missouri case* and the *Addsyton*

Pipe case. The proposition, however, can be deduced from these cases only by what to us seems violent distortion. As to the case first cited, see *Minnesota* v. *Northern Securities Co.*, 123 Fed. Rep. 692, 705.

In the other cases and also in cases decided by the Circuit Court and Court of Appeals, the combinations had been formed by corporations or individuals engaged in business independently of one another and they had agreed to regulate their prices or mode of carrying on their business by the rules of the combination. *United States* v. *Jellico Coal Co.*, 46 Fed. Rep. 432; *United States* v. *California Coal Dealers Association*, 85 Fed. Rep. 252; *Chesapeake Fuel Co.* v. *United States*, 115 Fed. Rep. 610; *Gibbs* v. *McNeeler*, 118 Fed. Rep. 120.

It has been held repeatedly that such restraints as result from the sale or the purchase of property are not within the provisions of anti-trust statutes. Indeed, it is the settled law that the transfer of a business is not illegal because it restrains trade, even by an express covenant. *Oregon Co.* v. *Winsor*, 20 Wall. 64; *Union Co.* v. *Connolly*, 99 Fed. Rep. 354, aff'd 184 U. S. 540; *Fisheries Co.* v. *Lennen*, 116 Fed. Rep. 217; *Harrison* v. *Glucose Co.*, 116 Fed. Rep. 304; *Hodge* v. *Sloan*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Tode* v. *Gross*, 127 N. Y. 480; *Oakes* v. *Cattaraugus Co.*, 143 N. Y. 430; *Watertown Co.* v. *Pool*, 51 Hun, 157, approved 127 N. Y. 485; *Wood* v. *Whitehead Co.*, 165 N. Y. 545; *Walsh* v. *Dwight*, 40 App. Div. (N. Y.) 513; *Park & Sons Co.* v. *Druggists' Association*, 54 App. Div. (N. Y.) 223; *S. C.*, 175 N. Y. 1; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473.

So, too, it has been ruled precisely that the formation of associations or corporations is not illegal, because the result will be to restrain competition. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *United States Vinegar Co.* v. *Foehrenbach*, 148 N. Y. 58; *Rafferty* v. *Buffalo City Gas Co.*, 37 App. Div. (N. Y.) 618; *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91, 104; *In re Greene*, 52 Fed. Rep. 104; *United States* v. *Greenhut*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed.

Rep. 213; *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq. 507; *Mogul S. S. Co.* v. *McGregor*, App. Cas. (1892) 25; *Lough* v. *Outerbridge*, 143 N. Y. 283; *State* v. *Continental Tobacco Co.*, 75 S. W. Rep. (Mo.) 737.

It is very doubtful whether in any case the second section of the act applies to railroads. Prof. Langdell, 16 Harvard Law Review, 545, June, 1903; Mr. Thorndike, Pamphlet, 1903, *The Merger Case*, p. 32.

In the *Joint Traffic* cases the court did not specifically define "monopoly," but said that it had the meaning given to it in the body of the Anti-Trust Act, which was not involved in the *Pearsall* case, and the decision there cannot now be urged upon this court as a limitation upon its freedom of construction of the statute. See *Laredo* v. *International Bridge Co.*, 66 Fed. Rep. 246.

Obviously, a consolidation of two railroads authorized by the laws of every State which they enter would not be condemned as constituting a monopoly; nor would a purchase of all the stock of one road by a competing road similarly authorized be so condemned; nor would a combination to induce the legislatures of the several States to authorize such a consolidation or such a purchase. It cannot be that, in prohibiting monopolies, the Congress intended to forbid these familiar processes of railroad amalgamation, and if, when authorized by state law, the consummated act is not a monopoly, it would not be such merely because it has not been so authorized.

The construction claimed would make the statute unconstitutional because it would deprive the Securities Company of its property without due process of law. Corporations are entitled to the same constitutional protection of their property rights as natural persons. *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26; *Carrington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Gulf Co.* v. *Ellis*, 165 U. S. 150, 154; *Lake Shore Co.* v. *Smith*, 173 U. S. 684, 690; *County of Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. Rep. 385, 404; *County*

of San Mateo v. *Southern Pacific R. R. Co.*, 13 Fed. Rep. 722, 745, 760.

This constitutional provision protects the right to acquire property—equally with the right—to hold the same after it has been acquired. *Holden* v. *Hardy*, 169 U. S. 366, 391; *State* v. *Goodwill*, 33 W. Va. 179; *State* v. *Julow*, 129 Missouri, 163, 173; *Knight Case*, 156 U. S. 1.

The *Pearsall Case*, 161 U. S. 646, distinctly recognizes that a natural person would be entirely at liberty to buy all the shares which his means permitted of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company. The State creating a corporation might limit its power in this respect, but Congress had no such general authority to cut down the powers granted by the States to their corporations, merely because they are artificial instead of natural persons. Therefore, it is obvious that a corporation having authority by its charter to make such purchases cannot, merely because it is a corporation, be prevented from so doing without depriving it of that right without due process of law.

As construed and applied by the Circuit Court the Anti-Trust Act is unconstitutional, in that it discriminates between persons in the matter of property rights and privileges on grounds that are purely arbitrary and are without justification in reason.

The power to suppress competition between two competing interstate railroad companies being always existent and under the theory of the Circuit Court always attaching to a majority of the shares of both, whether owned by one person or by several, the Anti-Trust Act, if understood as intended to do away with such power, should be enforced so as to prevent any one person, as much as any two or more persons, from acquiring stock in both of such competing companies.

If as construed by the court below, the Anti-Trust Act arbitrarily and without reason discriminates between persons in the matter of their property, rights and privileges, the act

is beyond the power of Congress as clearly as it would be beyond the power of any state legislature.

"Liberty," as used in the Fifth Amendment to the Constitution means not merely bodily liberty—freedom from physical duress, but in effect comprehends substantially all those personal and civil rights of the citizen which it is meant to place beyond the power of the general government to destroy or impair. *Slaughter House Cases*, 16 Wall. 36, 122, 127; *Munn* v. *Illinois*, 94 U. S. 113, 142; *People* v. *Walsh*, 117 N. Y. 60; *Butchers' Union Co.* v. *Crescent Co.*, 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 228; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *King*, 110 N. Y. 418; *Godcharles* v. *Wigeman*, 113 Pa. St. 431. And see *Regina* v. *Druitt*, 10 Cox C. C. 592, 600.

It follows that, as used in the Fifth Constitutional Amendment, "liberty" includes equality of rights under the law and secures citizens similarly situated against discriminations between them which are arbitrary and without foundation in reason. *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 160.

Hence, the principles affirmed and acted upon by this court in applying the Fourteenth Amendment to state legislation, are equally applicable to legislation by Congress, and, as construed by the court below, the Anti-Trust Act is invalid as trespassing upon the "liberty" of citizens, by denying them equality of rights and discriminating between them in the matter of their property rights, arbitrarily and without reason. *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 106; *Connolly* v. *Union Sewer Co.*, 184 U. S. 540; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

As construed and applied by the Circuit Court, the statute is unconstitutional because without due process of law, it

would deprive these defendants and all others who sold to the Securities Company of their property. If there were any prohibitions on the companies it would not apply to their stockholders. A corporation and its stockholders are different entities. *Pullman Co.* v. *Missouri Pacific*, 115 U. S. 587; *Watson* v. *Bonfils*, 116 Fed. Rep. 157; *American Preserves Co.* v. *Norris*, 43 Fed. Rep. 711; *Electric Co.* v. *Jamaica Co.*, 61 Fed. Rep. 655, 678.

Any effort to limit the right to sell necessarily would deprive these defendants of their property without due process of law. *Cleveland Co.* v. *Backus*, 154 U. S. 439, 445; *People ex rel. Manhattan Co.* v. *Barker*, 146 N. Y. 304, 312; *People ex rel. Manhattan Institution* v. *Otis*, 90 N. Y. 48, 52; *Holden* v. *Hardy*, 169 U. S. 366, 391; *People* v. *Marx*, 99 N. Y. 377, 386; *People* v. *Gillson*, 109 N. Y. 389; *Forster* v. *Scott*, 136 N. Y. 577; *Ingersoll* v. *Nassau Co.*, 157 N. Y. 453, 463; *Purdy* v. *Erie R. R. Co.*, 162 N. Y. 42, 49; *City* v. *Collins Baking Co.*, 39 App. Div. (N. Y.) 432; *Rochester Turnpike Co.* v. *Joel*, 41 App. Div. (N. Y.) 43; *People* v. *Meyer*, 44 App. Div. (N. Y.) 1; *Ingraham* v. *National Salt Co.*, 72 App. Div. (N. Y.) 582; *Janesville* v. *Carpenter*, 77 Wisconsin, 288, 301.

If complainant's contention should be sustained, the right of an owner of property to sell the same would be dependent upon what the courts at any future time might hold to be the intention of the purchaser in buying the property. Such a result would seriously impair the liberty of the owner, and the value of his property.

Whatever view be taken of the character of the transaction the decree of the Circuit Court transcended the authority of the court under the statute, which was the sole ground and source of its jurisdiction.

Mr. Attorney General Knox, with whom *Mr. William A. Day*, Assistant to the Attorney General, was on the brief, for the United States, appellee:

The bill was filed by the United States to restrain a violation

of the Anti-Trust Act of July 2, 1890, 26 Stat. 209; the defendant, Northern Securities Company, is a corporation organized under the general laws of New Jersey; the two railway companies are common carriers engaged in freight and passenger traffic among the several States and with foreign nations; the Great Northern was chartered by the State of Minnesota and the Northern Pacific Railway Company operates under a Federal franchise originally granted to the Northern Pacific Railroad Company, and in taking over that franchise it not only became invested with the rights and privileges incident thereto, but also became charged with the duties, obligations and conditions which Congress attached to the granting thereof. The Northern Pacific Railroad Company was the constant concern of Congress. See Act of July 2, 1864, Res. May 7, 1866, extending time for completion; Act of June 25, 1868, relative to filing reports; Joint Resolution, July 1, 1868, extending time for completion; Joint resolution of March 1, 1869, allowing issue of bonds; Joint Resolution, April 10, 1869, granting right of way; Resolution of May 31, 1870, authorizing issue of bonds; act of September 29, 1890, forfeiting certain granted lands; act of February 26, 1895, providing for classification of mineral lands; act of July 1, 1898, granting lands in lieu of those taken by settlers.

The individual defendants were, prior to November 13, 1901, large and influential holders of the stock, some of one railway company and some of both companies. The two railroads are practically parallel for their entire length; each system runs east and west through Minnesota, North Dakota, Montana, Idaho and Washington; each connects with steamers on Lake Superior running to Buffalo and other eastern points and at Seattle with lines of the steamships engaged in trade with the Orient. The lower court found that the roads "are, and in public estimation have ever been regarded as, parallel and competing." The testimony in this case establishes that fact which is also *res judicata*, *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646, and even if the roads only competed for

three per cent of their interstate business they would be competing lines.

It has been the ever present aim of those dominating the policy of the Great Northern and the Northern Pacific, during the past few years, to bring about a community of interest or some closer form of union to the end that the motive from which competition springs might be extinguished. On at least three prior occasions Mr. Hill and Mr. Morgan and their associates acted in concert in transactions affecting both roads: the attempted transfer of half the stock of the Northern Pacific to the Great Northern in exchange for a guarantee of the bonds of the Northern Pacific which was held to be violative of the laws of Minnesota, *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646; the joint purchase of the Burlington in 1901; in the events leading up to the panic of May, 1901. After the refusal to admit the Union Pacific to an interest in the Burlington purchase, those in control of the Union Pacific attempted to acquire control of the Northern Pacific and as soon as Mr. Hill and Mr. Morgan heard of this attempt they reached an understanding to oppose it in concert, and this resulted in the threat to retire the preferred stock of the Northern Pacific, and the subsequent conference at which the plan announced in the statement of June 1, in the Wall Street Summary, was arranged. The testimony of defendants shows that the incorporation of the Securities Company, and its acquisition of a large majority of the stock of both railway companies were the designed results of a plan or understanding between the defendants Hill and Morgan and their associates, which was carried out to the letter by the parties thereto. The facts, as the Government asserts them, are recapitulated in the opinion of the Circuit Court.

On the facts as proved the Government maintains that a combination has been accomplished by means of the Securities Company which is in violation of § 1 of the act of July 2, 1890; that the defendants have monopolized or attempted to monopolize a part of the interstate or foreign commerce of the United

States and that if either result has been accomplished, the relief granted by the Circuit Court was authorized by law. The contention as to whether the Anti-Trust Act is or is not a criminal statute is not material. Nor was it in the *Joint Traffic Case*, 171 U. S. 505. The primary aim of Congress in passing the act was not to create new offenses but to pronounce and declare a rule of public policy to cover a field wherein the Federal government has supreme and exclusive jurisdiction. As the United States has no common law, contracts in restraint of trade would not be repugnant to any law or rule of policy of the United States in the absence of a statute, and the controlling purpose of the act was to declare that the public policy of the nation forbade contracts, combinations, conspiracies, and monopolies in restraint of interstate and international trade and commerce, and the jurisdiction conferred upon courts of equity to restrain violations of the act was intended as a means to uphold and enforce the principle of public policy therein asserted, not as a means to prevent the commission of crimes. *United States* v. *Trans-Mo. Freight Assn.*, 166 U. S. 290, 342.

If the Anti-Trust Act is a criminal statute, it is also in the highest degree a remedial statute; as such it is invoked in the case at bar, and as such it ought to be construed liberally and given the widest effect consistent with the language employed. It ought not to be frittered away by the refinements of criticism. Broom's Legal Maxims, 5th Am. ed., 3d London ed., 80; Potter's Dwarris on Stat. and Const. 231, 234; Pierce and Hopper, Str. 253. It makes no difference in the application of these rules that the statutes have a penal as well as a remedial side. Ch. Prac. 215.

A statute may be penal in one part and remedial in another part. But in the same act a strict construction may be put on a penal clause and a liberal construction on a remedial clause. Sedgwick on Construction of Statutory and Constitutional Law, (2d ed.) 309, 310; Dwarris on Statutes, 653, 655; *Hyde* v. *Cogan*, 2 Doug. 702.

The Anti-Trust Act was purposely framed in broad and general language in order to defeat subterfuges designed to evade it. It is framed in sweeping and comprehensive language which includes every combination, regardless of its form or structure, in restraint of trade or commerce among the several States or with foreign nations, and every person, natural or artificial, monopolizing, attempting to monopolize, or combining with any other person to monopolize any part of such trade or commerce.

The form or framework is immaterial. Congress, no doubt, anticipated that attempts would be made to defeat its will through the "contrivances of powerful and ingenious minds," and to meet these it used the broad and all-embracing language found in the act; and it is in this light that that language is to be construed. And the device of a holding corporation for the purpose of circumventing the law can be no more effectual than any other means. Noyes on Intercorporate Relations, § 393.

This court has decided that this act applies to common carriers by railroad, as well as all other persons, natural or artificial. *Trans-Missouri Case*, 166 U. S. 290. The words in restraint of trade as used in the act extend to any and all restraints whether reasonable or unreasonable, partial or total, and there are peculiar reasons why this applies to railroad corporations.

In exercising its powers over commerce Congress may to some extent limit the right of private contract, the right to buy and sell property, without violating the Fifth Amendment. It may declare that no contract, combination, or monopoly which restrains trade or commerce by shutting out the operation of the general law of competition shall be legal. *Trans-Missouri Case, supra; Joint Traffic Case, supra; Addyston Pipe Co. Case*, 175 U. S. 211.

When its natural effect is to stifle, smother, destroy, prevent, or shut out competition, the agreement or combination is in restraint of trade or commerce and illegal under section 1 of

the act if in interstate or international trade or commerce. *Trans-Missouri Case, supra.*

"To prevent or suppress competition" and "to restrain trade" are, in fact, often used by judges as convertible terms to express one and the same thought.

Mogul S. S. Co. v. *McGregor*, L. R. App. Cas. (1892), 25, was decided upon common law principles, there being no statute, such as the Federal Anti-Trust Act, making it unlawful and criminal to enter into agreements or combinations in restraint of trade.

Both the Court of Appeal and House of Lords held that the action could not be maintained because, even if it were in restraint of trade, an agreement in restraint of trade was not unlawful at common law in the sense that it furnished cause for a civil action by one damaged by it, but only in the sense that it was void and unenforceable if sued on.

The Government does not claim that ordinary corporations and partnerships formed in good faith in ordinary course of business come within the prohibitions of the act because incidentally they may to some extent restrict competition, but those where the corporation or partnership is formed for the purpose of combining competing businesses. The act embraces not only monopolies but attempts to monopolize. The term monopoly as used by modern legislators and judges signifies the combining or bringing together in the hands of one person or set of persons the control, or the *power* of control, over a particular business or employment, so that competition therein may be suppressed. *People* v. *Chicago Gas Trust Company*, 130 Illinois, 294; *People* v. *North River Sugar Refining Co.*, 54 Hun (N. Y.), 377; *United States* v. *E. C. Knight Co.*, 156 U. S. 1. And as to railroads, see *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 677; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677.

A combination or monopoly exists within the meaning of the act even if the immediate effect of the acts complained of is not to suppress competition or to create a complete monopoly.

It is sufficient to show that they *tend* to bring about those results. Cases cited *supra,* and *Salt Co.* v. *Guthrie,* 35 Ohio St. 672.

It is not essential to show that the person or persons charged with monopolizing or combining have actually raised prices or suppressed competition, or restrained or monopolized trade or commerce in order to bring them within the condemnation of the act. It is enough that the necessary effect of the combination or monopoly is to give them the power to do those things. The decisive question is whether the power exists, not whether it has been exercised. In the *Trans-Missouri, Joint Traffic, Pearsall* and *Addyston Cases, supra,* this court held that it was immaterial that trade or commerce had not actually been restrained—that it made no difference, even, that rates and prices had been lowered, it being enough to bring the combination within the condemnation of the act that it had the *power* to restrain trade or commerce. The very existence of the *power,* under these rulings, constitutes a restraint.

It is not necessary in order to bring a combination or conspiracy within the operation of the act that the members *bind* themselves each with the other to do the acts alleged to be in restraint of trade. It is enough that they act together in pursuance of a common object, and while, of course, this presupposes agreement between them in a broad sense, an agreement or contract in the technical sense is not at all essential. *Reg.* v. *Murphy,* 8 C. & P. 397.

A combination or a monopoly, the necessary effect of which is to restrain trade or commerce, is a violation of the act, and the aim, motive, intention, or design with which the combination is entered into or the monopoly created is wholly immaterial and outside the question. It may have been to aid and further commerce rather than to restrain it; but if in point of law the effect or the tendency of the combination is to restrain trade or commerce the combination is unlawful, and the motive behind it, however beneficent, does not alter that fact in the

slightest degree. *Trans-Missouri Case,* 166 U. S. 290, 341; *C. & O. Fuel Co.* v. *United States,* 115 Fed. Rep. 623.

A combination or monopoly of competing lines of interstate railway—of competing instrumentalities of interstate commerce—is a combination or monopoly in restraint of interstate commerce within the prohibition of the act. The transportation of persons and things is commerce and if a combination or monopoly of such transportation is a combination or monopoly in restraint of commerce within the act, and hence illegal, it follows as a corollary that a combination or monopoly of the means or instrumentalities of transportation is likewise a combination or monopoly in restraint of commerce, because a monopoly of the means of transportation leads directly and inevitably to a monopoly of transportation itself.

Again, a monopoly of the *means* of transportation puts it in the *power* of the monopolist to stifle competition in the *business* of transportation, and a combination or monopoly which had the *power* to stifle competition in the *business* of transportation among the States is in restraint of interstate commerce and therefore illegal.

From still another standpoint, Congress may prohibit, and has prohibited, combinations and monopolies in the *business* of interstate and international transportation. But what does this power amount to if Congress may not also prohibit monopolies of the *means and instrumentalities* of such transportation—of the roads themselves? Virtually nothing; for he who has a monopoly of the means of transportation has a monopoly of transportation itself. See the *Trans-Missouri Case, Joint Traffic Case* and *Pearsall Case, supra.*

The Anti-Trust Act prohibiting combinations and monopolies in restraint of interstate and foreign commerce is an exercise of the power granted to Congress to regulate commerce, *Champion* v. *Ames,* 188 U. S. 321, and the term "commerce" as used in that grant embraces the instrumentalities by which commerce is or may be carried on. *Railroad Co.* v. *Fuller,*

17 Wall. 560, 568; *Welton* v. *Missouri*, 91 U. S. 275, 280; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203.

But put the proposition as it is put by appellants: Can Congress regulate the ownership of interstate railroads under its power to regulate commerce among the States, and has it done so by this act of 1890? Most certainly, yes. Congress can regulate anything and everything in the sense that it can prohibit and prevent its use in a way that will defeat a law that Congress may constitutionally enact. For this purpose, the supreme power operates upon everything, upon every one.

No device of State or individual creation can be interposed as a shield between the Federal authority and those who attempt to subvert it. No rules of law which govern the relations which individuals have created *inter sese*, or which have been assumed between themselves and a State, are to be considered in an issue between them and the United States to defeat the ends of a constitutional law. The Federal power would not be supreme if the operation of its laws could be defeated, embarrassed, or impeded by any means whatsoever.

It is no violation of the reserved rights of the States, but, on the contrary, is clearly within the Federal power for Congress to enact that no persons, natural or artificial, shall form a combination of the instrumentalities of any part of interstate commerce the effect or tendency of which would be to restrain interstate trade or commerce, and that no person or persons, natural or artificial, shall acquire a monopoly of such instrumentalities. This is a natural and logical deduction from the supreme, plenary, and exclusive nature of the power of the Federal Government over foreign and interstate commerce, in the exercise of which Congress may descend to the most minute directions.

The "penetrating and all-embracing" nature of this power has often been stated, explained, and emphasized by this court. *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, and see concurring opinion of Johnson, J., also. The principles announced in

this case have never been departed from, but have been reaffirmed time and again by this court, notably in *Brown* v. *Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *In re Debs*, 158 U. S. 564; *Champion* v. *Ames*, 188 U. S. 321; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 11, 16.

The fact that in recent years interstate commerce has come to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Of course, it makes no difference whether the obstruction be physical or economic—whether it be a sand bar, a mob, or a monopoly—whether it result from the sinking of a vessel or the stifling of competition—the power of Congress to remove it is the same in each case. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724.

On these subjects the state legislatures have no jurisdiction. *Addyston Pipe Co. Case*, 175 U. S. 211, 232; *Boardman* v. *Lake Shore &c. Ry. Co.*, 84 N. Y. 157, 185.

Congress has the power to legislate upon the subject of consolidations of railroad corporations when the consolidations form interstate lines; in the absence of legislation by Congress, the power exists in the States to legislate upon the subject, but in the presence of legislation by Congress the power of the States over the subject is excluded. Noyes on Intercorporate Relations, § 19, citing *Louisville & Nashville* v. *Kentucky*, *supra*.

This exclusive jurisdiction of the Federal Government over commerce with foreign nations and among the States, and over the instrumentalities of such commerce, includes the power of police, or, that which is its equivalent, over those subjects in all its undefined breadth and fullness and which is just as full, complete, and far-reaching as is the police power of the state legislatures with reference to subjects within the

exclusive jusridiction of the States. In either case there are no limitations to its exercise, except the constitutional guaranties in favor of life, liberty, and property. Thayer's Cases on Const. Law, 742, note; Cooley's Const. Lim. 723; Noyes on Intercorp. Rel. § 409.

Anti-trust statutes are enacted in the exercise of the police, or an analogous, power. *State* v. *Firemen's Fund Ins. Co.*, 152 Missouri, 46; *State* v. *Schlitz Brewing Co.*, 104 Tennessee, 715; *Waters-Pierce Co.* v. *State*, 19 Tex. Civ. App. 1.

Congress having the police power, or its equivalent, over foreign and interstate commerce and the instrumentalities thereof, may in exercising it, strike down restraints upon such commerce, whether they result from combinations and monopolies of the agencies of transportation or otherwise, just as a State could prohibit similar restraints upon interstate commerce. To contend otherwise is to contend that the Federal power over interstate and foreign commerce is not supreme, but is in some respects subordinate to state authority; that the police powers or the reserved powers of the States are, for some purposes, paramount to the powers of Congress in fields wherein the Federal Government has been invested by the Constitution with complete and supreme authority. This, of course, is not so. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661.

The *Louisville & Nashville Case, supra,* does not hold that Congress has no power to prohibit the consolidation of competing interstate railroads. Congress has created "the instruments of such commerce," and it has passed regulations concerning them, and the power to do these things is now unquestioned. *California* v. *Pacific Railway Co.*, 127 U. S. 1. What the court meant in the *Louisville Case* was that in respect of matters of a local nature, which did not admit or require uniform regulation, the States may "regulate the instruments of such commerce" until Congress legislates on the same subjects, while in respect of matters of national importance, or which admit of uniform regulation, the power

of the States is wholly excluded. The distinction was stated in *Welton* v. *Missouri*, 91 U. S. 275.

Ownership of a majority of its stock constitutes the control of a corporation when the inquiry is whether a combination or monopoly has been formed to stifle competition between two or more rival and competing railroads. Noyes on Intercorp. Rel. § 294; *Farmers' L. & T. Co.* v. *N. Y. &c. R. R. Co.*, 150 N. Y. 410, 424; *People* v. *Chicago & Gas Trust Co.*, 130 Illinois, 268, 291; Greenhood on Public Policy, 5; *Richardson* v. *Crandall*, 48 N. Y. 343; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Milbank* v. *N. Y., L. E. & W.*, 64 How. (N. Y.) 29; *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 671; *Pullman Co.* v. *Mo. Pac. R. Co.*, 115 U. S. 587; *Pa. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 371.

The Great Northern and Northern Pacific Railway companies, competing interstate carriers, have been combined in violation of section 1 of the Anti-Trust Act, that is to say, a majority of the stock of each road has been transferred to a common trustee, the Securities Company, which is thus vested with the power to control and direct both roads for the common benefit of the stockholders of each.

The Anti-Trust Act condemns in express terms every "combination in the form of trust," and if those companies have been combined "in the form of trust," a violation of the very letter of the statute has been proved.

There is no great difficulty in getting at what Congress meant by a "trust." The meaning of the term was well understood in the economic and industrial world at the time of the passage of the Anti-Trust Act, and is now. The word was first used to describe an arrangement whereby the business of several competing corporations is centralized and combined by causing at least a majority of the stock of the constituent corporations to be transferred to a trustee, who, in return, issues to the stockholders "trust certificates." The trustee holds the legal title to the shares and has the right to vote them, and in this way exercises complete control over the

business of the combination. The trustee also receives the dividends on the shares, and out of these pays the former stockholders of the constituent corporations dividends on the "trust certificates." See Century Dictionary; Am. & Eng. Ency. Law, 2d ed., title Monopolies & Trusts; *State* v. *Standard Oil Co.*, 49 Ohio St. 137; Eddy on Combinations, § 582; Noyes on Intercorp. Rel. § 304; Dodd's Pamphlet on Combinations: Their Uses and Abuses. The facts show that the Northern Securities Company constitutes a trust—it has all the essential elements of one. It is a trustee, and as such holds the stock of two competing companies; it has the legal title, its stockholders have the equitable title, to the property. Morawetz, § 237, and cases cited. There is a trust agreement, the terms whereof are in the charter; it is sufficient to show an agreement if the stockholders acted in pursuance of *any* understanding plan or scheme, verbal or otherwise. *Harding* v. *Am. Glucose Co.*, 182 Illinois, 551. The certificates of stock of the company represent and fill the same office as trust certificates; the company has the power to vote the stock of both railways and thus elect the directors of both. As trustee, it collects the dividends on the stock of both companies and thereout pays dividends on its own stock exactly as a trustee of a trust collects and pays on the trust certificates.

It constitutes a trust in another light also. As the courts throughout the country held with practical unanimity that the class of "trusts" just described is illegal, a second class was invented of corporations that have acquired control of other corporations by purchasing their stock. This organization is of the same general character as the preceding, but the form is changed in order to escape the force of the decisions of the courts relating to corporate partnerships. Beach on Monopolies and Industrial Trusts, § 159. The Securities Company clearly comes within this second classification of "trusts." Noyes on Intercorp. Rel. §§ 310, 285, 393; *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 292, 302, citing *Chicago Gas*

Light Co. v. *People's Gas Light Co.*, 121 Illinois, 530; *Am. Glucose Case, supra.*

It is not essential, however, to show that the Great Northern and Northern Pacific Railway companies have been combined in the technical form of "trust," or "corporate combination," as some writers call it when the trustee is a holding corporation. Section 1 of the Anti-Trust Act covers any and every form of combination. A violation of that section will have been established, therefore, if it is shown that—

Mr. Hill, Mr. Morgan, and the other individual defendants, acting in concert or in pursuance of a previous understanding, have caused the title to a majority of the shares of the Great Northern and Northern Pacific companies to be vested in a single person—the Securities Company—thereby centering the *control* of the two roads in a single head and in that way effecting a *combination* of them, the effect or tendency of which is to suppress competition between them.

When analyzed the disguise by which the defendants sought to hide the fact of the combination, and their connection therewith, appears so thin and transparent that it is a cause of wonder that they should ever have adopted such a flimsy device.

It may succeed for a time in baffling persons who may have an interest in preventing its being done and has succeeded, but it was a mere crafty contrivance to evade the requisition of the law. *Attorney-General* v. *The Great Northern Railway Company*, 6 Jur. (N. S.) 1006; *S. C.*, 1 Drew. & Smale, 159.

The defendants seem to have thought that they could procure the organization of a corporation and have it do what they could not lawfully do themselves or through the agency of natural persons, as if that which would have been illegal if done through the agency of a natural person would lose the stamp of illegality if done through the agency of a corporate organization; but see *Attorney General* v. *Central R. Co.*, 50 N. J. Eq. 52; *Ford* v. *Chicago Milk Shippers' Assn.*, 155 Illi-

nois, 166, 178, 180, citing Morawetz, § 227; 1 Kyd on Corp. 13; *State ex rel.* v. *Standard Oil Co.*, 49 Ohio St. 137; *Distilling and Cattle Feeding Co.* v. *People*, 156 Illinois, 448, 490.

Defendants insist that it is immaterial that a combination can be discovered by going behind the fiction that the Securities Company is a private person with an existence separate and apart from its members, because, as they say, the law will not allow that fiction to be disregarded or contradicted—will not allow the acts of the corporate entity to be treated as the acts of the natural persons who compose it. The defendants thus seek to defeat the ends of the law by a fiction invented to promote them. This proposition cannot be sustained. *People* v. *North River Sugar Rfg. Co.*, 121 N. Y. 582, 615.

It can never be a question as to whether parties to a combination in restraint of trade are individuals or corporations; it is always a question as to the nature, effect, and operation of the combination.

Of course a State has certain powers over the instrumentalities of commerce which it creates, as it has over the individuals by whom commerce is conducted. But a State has no power over either instrumentalities or individuals that can be interposed between them and the obligations imposed by a Federal statute regulating interstate commerce.

Where the subject is national in its character the Federal power is exclusive of the state power. *Welton* v. *Missouri*, 91 U. S. 280.

Congress has power to regulate commerce among the States, and when in the exercise of that power it becomes necessary to legislate respecting the instrumentalities of commerce, it may do so, irrespective of the question as to how or by what authority those instrumentalities were created.

And if regulation of the control of these instrumentalities is essential to prevent the subversion of a policy of Congress it may regulate that control.

The power to regulate commerce among the several States includes the power to prevent restraint upon such commerce.

To restrain commerce is to regulate it.

Therefore any law of any State which restrains interstate commerce is invalid; and any contract between individuals or corporations, or any combination in any form which restrains such commerce is invalid.

The supreme power extends to the whole subject. Under this plenary power Congress has supervised interstate commerce from the granting of franchises to engage therein, to the most minute directions as to its operation. For this purpose it possesses all powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament of England. *In re Debs*, 158 U. S. 586; *Gilman* v. *Philadelphia*, 3 Wall. 725.

If the arrangement accomplishes that which the law prohibits, through the means which the law prohibits, it is certainly within the prohibition of the law, and if this *were* a consolidation under state *authority instead* of being a combination which effects that which defies the law of every foot of land which these railroads occupy, there should be no hesitation in saying that it violated the Federal statute, if it accomplished a restraint upon interstate commerce. To hold otherwise would be to read into the law a proviso to the effect that the act should not apply when the combination took the form of a railroad consolidation under authority of state legislation.

Fictions of law, invented to promote justice, can never be invoked to accomplish its defeat. "*In fictione juris semper æquitas existit.*" *Mostyn* v. *Fabriges*, Cowper, 177; *Morris* v. *Pugh*, 3 Burr. 1243; Morawetz, §§ 1, 227; Taylor on Corporations, § 50; Clark and Marshall on Private Corporations, 17, 22; *State* v. *Standard Oil Co.*, 49 Ohio St. 137; *Ford* v. *Milk Shippers*, *supra*, and other cases cited *supra*.

The Northern Securities Company, in violation of section 2 of the Anti-Trust Act, has monopolized a part of interstate commerce by acquiring a large majority of the shares of the

capital stock of the Great Northern and Northern Pacific Railway companies—two parallel and competing lines engaged in interstate commerce; and the Northern Securities Company and the individual defendants, or two or more of them, have combined, each with the other, so to monopolize a part of interstate commerce.

From the facts and the argument already made it appears that by acquiring a majority of the shares of the Great Northern and Northern Pacific the Securities Company has obtained the control of, and, therefore, the power to suppress competition between, two rival and competing lines of railway engaged in interstate commerce, and in that way has monopolized a part of interstate commerce. This conclusion is sustained by the judgment of this court in the case of *Pearsall* v. *Great Northern Railway*, *supra*, which is conclusive of the case at bar, since it establishes the principle that to vest, designedly, in one person or set of persons, a majority of stock of two competing lines of interstate railway is to monopolize a part of interstate railroad traffic.

Even if a natural person could lawfully have done what the Securities Company has done, that would be no argument to prove that the Securities Company, in so doing, has not violated the law against monopolies. *People* v. *North River Sugar Refining Company*, *supra*, p. 625.

It is not denied that the very spirited contention that the construction the Government puts upon the law in question interferes with the power of people to do what they will with their property.

That was the very object of the law, and it was certainly contemplated that the rights of purchase, sale, and contract would be controlled, so far as necessary, to prevent those rights from being exercised to defeat the law.

A combination cannot be imagined coming into existence without more or less redistribution of property between individuals through purchases, sales, or contracts. Combinations are never bestowed upon us ready made.

It must be remembered that the monopoly complained of is a monopoly of railway traffic resulting from centering in a single body controlling stock interests in two competing railways, and whatever may be the power of Congress or state legislatures over monopolies in general, they may unquestionably, in the exercise of their broad regulative powers over *quasi*-public corporations, prohibit any monopoly of railway transportation within their respective spheres of action.

As to the contention that the transaction is simply a sale of stock to an investor and to stamp it as illegal would be an unwarranted infringement upon the right of contract, and that the Securities Company never intended to take any active part in the controlling of the two companies, the argument is not sincere and it is demonstrated by the testimony of the individual defendants that the Securities Company was the designed instrument for directing and controlling the policies of the competing lines.

As to the circular of Mr. Hill to the stockholders, it is well settled that because a person has the right to purchase stock it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person to sell him their stock and induce others to do the same, so as to center the controlling stock interests of the several corporations in a single head, in violation of statutes against combinations, consolidations, and monopolies. Noyes on Intercorp. Rel. § 36; *Penna. R. Co.* v. *Com.*, 7 Atl. Rep. 373.

This distinction between an actual *bona fide* sale, and one which is merely nominal and really a cloak under which to accomplish a combination sometimes leads to confusion of language or thought. See *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq. 507; Noyes on Intercorp. Rel. § 354.

As to the argument of the appellants that the "acquiescence by the Government for more than eleven years in the merger and consolidation of many important parallel and competing

lines of railroad and steamships engaged in interstate commerce and foreign commerce has given a practical construction to the Anti-Trust Act of July 2, 1890, to the effect that it was not intended to forbid and does not forbid the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock," there is no force whatever to the contention which the court below evidently deemed too flimsy even to refer to. But the answer to it is threefold—the case of a company formed for the purpose of holding stocks of two competing lines of interstate railways is a new one and arose for the first time in this case; the constitutionality of the act and its application to railroads was not settled until 1898 by the decision of *Trans-Missouri* and *Joint Traffic Cases, supra;* even if there had been acquiescence as to certain combinations it would not amount to an estoppel against the Government for prosecuting this action. *Louisville & Nashville* v. *Kentucky,* 161 U. S. 677, 689.

The combination and monopoly charged by the United States operate directly on interstate commerce, and do not affect it only indirectly, incidentally, or remotely. Noyes on Intercorp. Rel. § 392, and authorities there cited.

The question in this case is not whether the means by which the power of the combination is brought into play are direct or indirect, but whether the combination itself, whenever its power has been brought into play—it matters not how indirect may have been the means employed in bringing it into play—operates directly on interstate or international commerce. The failure of the defendants' counsel to bear this in mind has led them to make very elaborate arguments to show that the combination charged by the Government affects interstate commerce only indirectly and remotely. In reply to the contention on this point, see opinion of the court below, after citing *United States* v. *E. C. Knight Company,* 156 U. S. 1; *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604, on which counsel for defendants rely,

properly held that no combination could more immediately affect such commerce.

The relief granted by the Circuit Court was authorized by section 4 of the Anti-Trust Act.

The gist of the Government's charge being that a combination of the two railway companies has been formed by centering the title to a majority of their respective shares in the Securities Company, which by obtaining such majority of both stocks has acquired a monopoly—all in violation of the Anti-Trust Act and as unlawful combination and monopoly exists solely by virtue of the Securities Company's ownership of such majorities the logical and most direct way to destroy the combination and monopoly and prevent the continued violation of the statute is to strip such ownership, which was acquired in pursuance of an illegal object, of its powers and incidents—to disarm it of its power to violate the law. And this is what the Circuit Court did. Clearly this decree violates no rights of property which the Securities Company or any of the other defendants is entitled to claim.

It is proper to grant this relief even though the purpose of the company had already been accomplished. The combination charged by the Government is a combination of the two railways, formed by concentrating in the Securities Company the power to control both roads. This combination did not "come to an end," did not "accomplish its purpose," with the organization of the Securities Company, and therefore the violation of the Anti-Trust Act did not "come to an end" there, but continued on without interruption, and under the act the Circuit Courts can prevent, restrain, enjoin or otherwise prohibit violations thereof, and are left free to frame their remedial process to meet the exigencies of the case, and as courts of equity they enjoy the same wide latitude in formulating relief in cases of this class that they enjoy in any other class of cases within the jurisdiction of equity. *Taylor* v. *Simon*, 4 Mylne & Craig, 141; *Chicago, R. I. & P. Ry. Co.* v. *Union Pacific Ry. Co.*, 47 Fed. Rep. 15, 26.

There is no defect of parties; all interests materially affected by the decree of the Circuit Court are represented by the parties before the court.

There were 1,300 persons who exchanged stock of the railway companies for stock of the Securities Company, and in a court of equity the interests of absent parties are represented when there are parties having similar interests before the court. *Smith* v. *Swornstedt*, 16 How. 288, 302.

Any question as to a defect of parties which might have existed has been removed from the case by the form of the decree entered by the Circuit Court, which simply adjudges that the parties defendant have entered into an unlawful combination and conspiracy in restraint of interstate commerce, and then proceeds to enjoin the defendants, the Securities Company, and the railway companies from doing the things which alone give life and force to the combination. The decree thus operates only on the parties to the bill and materially affects only their interests. The defendant corporations stand for the interests of their respective stockholders. *Sanger* v. *Upton*, 91 U. S. 59; *Hawkins* v. *Glenn*, 131 U. S. 329; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

MR. JUSTICE HARLAN announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2, 1890, commonly known as the Anti-Trust Act, and entitled "An act to protect trade

and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars,

or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

" SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

" SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

" SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

" SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the dis-

trict in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and

sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minn. 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and Northern Pacific Railway companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form,

under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the

State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold, purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and

Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent

and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this

record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership.* Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original

combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . . in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding cor-

poration, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or

conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the States or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust Act was *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. That was followed by *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Hopkins* v. *United States*, 171 U. S. 578, *Anderson* v. *United States*, 171 U. S. 604, *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38. To these may be added *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway companies should be consolidated and by which competition between those companies was to cease. In *United States* v. *E. C. Knight Co.*, it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect

of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti-Trust Act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly

reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce,* and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose

to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding"—supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or state corporations may dispose of their property and invest their money in any way they choose; and that in regard to all

such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, is it asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited

by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan* v. *Wilson*, 127 U. S. 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 U. S. 545; *Lottery Case*, 188 U. S. 321, 355, and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete

in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown* v. *Maryland*, 12 Wheat. 419; *Sinnot* v. *Davenport*, 22 How. 227, 238; *Henderson* v. *The Mayor*, 92 U. S. 259; *Railroad Company* v. *Husen*, 95 U. S. 465, 472; *County of Mobile* v. *Kimball*, 102 U. S. 691; *M., K. & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *The Lottery Case*, 188 U. S. 321, 348. In *Cohens* v. *Virginia*, 6 Wheat. 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 U. S. 564, 582, this court, every member of it concurring, said: "The entire strength of the Nation may be used to enforce in any part of the land the

full and free exercise of all National powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare

will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of the State. Why that suggestion is made in this case we cannot understand, for there is no pretense that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association:* "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce,* Congress has power to legislate and to prohibit." (pp. 569, 571.) That such a rule was applied to interstate commerce

should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust Act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173, 186, the Supreme Court of Pennsylvania dealt with a combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are

paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . . *There is a potency in numbers when combined*, which the law cannot overlook, where injury is the consequence." The same principles were applied in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the Supreme Court of Ohio in *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft* v. *McConoughy*, 79 Illinois, 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly

against which the public interest had no protection." Again, in *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited. But among them we refer to *Richardson* v. *Buhl*, 77 Michigan, 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 California, 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association* v. *Kock*, 14 La. Ann. 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within their limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several States is vested in Congress as absolutely

as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in *Addyston Pipe & Steel Co.* v. *United States*), or in tiles, grates and mantels (as in *Montague* v. *Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate

and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound why may not *all* the railway companies in the United States, that are engaged, under state charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign states by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offence to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination

described in the bill? All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People;" and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow

such restraint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are state corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such com-

merce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from coöperating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It

would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of *Railroad Company* v. *Maryland*, 21 Wall. 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Gov-

ernment as from the words of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *In re Debs*, 158 U. S. 564; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626, 627. In *Texas* v. *White*, 7 Wall. 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane* v. *Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which

even intimates that a State or a state corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitu-

tion of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee,* 106 U. S. 196, 220, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it

did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin

in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign

nations. In *Brown* v. *Maryland*, 12 Wheat. 419, 446, it was said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Association* case, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 657; *Chicago &c. R. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 90; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 475; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 332; *Smyth* v. *Ames*, 169 U. S. 466, 544; *Lake Shore &c. Ry. Co.* v. *Ohio*, 173 U. S. 285, 301. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent com-

panies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such com-

bination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants and employés, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stock-

holders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless

to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but

the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King* v. *Inhabitants of Hodnett*, 1 T. R. 96, 101, Mr. Justice Buller said: "It is not true that the courts in the exposition of penal statutes are to narrow the construction." In *United States* v. *Wiltberger*, 5 Wheat. 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States* v. *Morris*, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said: "In expounding a penal statute the court certainly will not extend it beyond

the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95." So, in *The Schooner Industry*, 1 Gall. 114, 117, Mr. Justice Story said: "We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn*, 3 Sumner, 209, 211, 212. In *People* v. *Bartow*, 6 Cowen, 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction." So, in *Commonwealth* v. *Martin*, 17 Massachusetts, 359, 362, the highest court of Massachusetts said: "If a statute, creating or increasing a penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to

preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

MR. JUSTICE BREWER, concurring.

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States* v. *Freight Association*, 166 U. S. 290, followed by the cases of *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided,

I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the

Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could

the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with state control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with state law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE PECKHAM, and MR. JUSTICE HOLMES, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the Government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company.

Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust Act. 26 Stat. 209. The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations;" and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

States or with foreign nations." The court below sustained the contentions of the government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars were paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars were expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad,

which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the

States and with foreign nations "is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated*

by prescribing rules for carrying on that intercourse." (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse;" that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and state governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Consti-

tution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every state law forbidding such consolidations, for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.

In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to state action taken before the adoption of the Anti-Trust Act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from state control. *County of Mobile* v. *Kimball*, 102 U. S. 691; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such

ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words, the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion resulting from the alleged distinction, to admit it would do violence to both the letter and spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, individuals could lawfully do the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." *Paul* v. *Virginia*, 8 Wall. 168, 183.

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction and denial of rights of property which the decree exemplifies, let me see

if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under state authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust Act the power to put its provisions in motion is, as to many particulars, confided to the highest law officer of the govern-

ment, and if that officer did not invoke the aid of the courts to restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by state legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in state corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of state legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both state and national, from the beginning and the adjudications of this court, how wanting in merit is the proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust Act of 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, 24 Stat. 379, it sedulously confined the provisions of that act to the

carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 27 Stat. 531. It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading, and the Pennsylvania systems.

One of the illustrations—as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust Act in 1890. Who can deny that from that date to this consolidations and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by state laws, to a vast extent, and that during all this time, despite the energy of the government in invoking the Anti-Trust Law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system.

The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons* v. *Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate concerning the ownership of property of every character or to create railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul* v. *Virginia*, 8 Wall. 168, the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled

in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul* v. *Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co.* v. *Maryland*, 21 Wall. 456, the question was this: The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473):

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company* v. *Illinois*, 118 U. S. 557. But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the

Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, 102 U. S. 691, was approvingly quoted. That definition was as follows (p. 574):

" 'Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *if applied to legislation upon subjects which are merely auxiliary to commerce.*' "

In *Ashley* v. *Ryan*, 153 U. S. 436, this was the question: The property of various railroad corporations operating in the States of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated company. This was refused on the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could

alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440):

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446):

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the facts and the relief based on them were thus stated by Mr. Chief Justice Fuller, delivering the opinion of the court (p. 9):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890."

After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11):

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11):

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the state sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice Marshall of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as thus defined, it did not embrace the ownership of stock in state corporations, because the products of such manufacture might subsequently become the subject of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the

purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall* v. *The Great Northern Railway Company*, 161 U. S. 646, the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice Brown, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the state law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a state corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, the power of the State to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered, and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of

state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

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"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more completely decisive of another than the ruling in the case just quoted is of this, I am unable to perceive.

The subject was considered at circuit in *In re Greene*, 52 Fed. Rep. 104. The case was this: A person was indicted in one State for creating a monopoly in violation of the Anti-Trust Act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the *Pearsall* and *Louisville and Nashville* cases, because it was decided by Mr. Justice Jackson, then a Circuit Judge, who subsequently, became a member of this court. The opinion manifests that the case was considered by Judge Jackson with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ, Judge Jackson said (p. 112):

"Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the

subject of trade or commerce among the several States or with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203. In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

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"That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. *Freight Association*, 166 U. S. 290, was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound themselves by the provisions contained in the articles of agreement. Many stipulations relating to

the carrying on of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provided as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

The government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust Act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge, to be made therefor, it was conceded on all hands that it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti-Trust Act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust Law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-Trust Statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case,

United States v. *Joint Traffic Association*, 171 U. S. 505. In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust Law. If this were held not to be true, a reconsideration of the questions decided in the *Freight Association* case was invoked. The court reviewed and reiterated the rulings made in the *Freight Association* case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. *United States*, 171 U. S. 578, involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards was valid. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice Peckham, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the

act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust Act. 26 Stat. 209.

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust Act was decided. *Anderson* v. *United States*, 171 U. S. 604. The difference between that case and the *Hopkins* case was thus stated by Mr. Justice Peckham, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins* case were only commission merchants who sold the cattle upon commission as a compensation for their services.

"Counsel for the Government assert that any agreement or combination among buyers of cattle coming from other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was not in violation of any of the provisions of the Anti-Trust Act.

The *Anderson* case was followed by *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust Act. Coming to consider the subject, the court, through Mr. Justice Peckham, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the *Knight* and *Hopkins* cases, the *Knight* case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240):

"The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured articles; nothing looking to a transaction in the nature of interstate commerce.

* * * * * * * *

"We think the case now before us involves contracts of the nature last before mentioned, not incidentally or collaterally,

but as a direct and immediate result of the combination engaged in by defendants. . . . *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination.* As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?" (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the act of Congress, and was therefore void. I do not pause to consider the case of *Montague & Co.* v. *Lowry*, 193 U. S. 38, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the *Knight*, in the *Pearsall*, in the *Louisville and Nashville* case and in the *Hopkins* case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their con-

text they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the *Knight* case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.* If then the passage from the *Knight* case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And this would be the result in the *Pearsall* case, since in that case it was decided that the States had the power to forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the *Louisville and Nashville* case, immediately following the *Pearsall*, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the *Pearsall* case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the *Louisville and Nashville* case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the *Freight Association* and *Joint Traffic* cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust Act. Now in the *Hopkins* case, decided subsequent to the *Freight Association* and *Joint Traffic* cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress.

It would follow then, if the sentences quoted from the opinions in the *Freight Association* and *Joint Traffic* cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the *Hopkins* case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that, after having overruled those cases in the *Hopkins* case, the court, in expressing its opinion through the same Justice, proceeded in the *Addyston Pipe* case, which related only to interstate commerce, to overrule the *Hopkins* case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceeded be not obscured, that is, the difference which arises from the power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the Government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the Government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Welton* v. *Missouri*, 91 U. S. 275; *Pensacola Tele-*

graph Co. v. *Western Union Telegraph Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again confounding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under state law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities

during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and state courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by state laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of state legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subjects.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results

of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated by the cases which have been referred to, and was very lucidly pointed out by Judge Jackson in the *Greene* case. Take the *Knight* case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the *Addyston Pipe* case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it

found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the *Knight* case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that,

at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the state and Federal governments, but by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers

founded our government upon an enduring basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the Government is, to my mind, illustrated by the summing up of the case for the Government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the Government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and creature, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to

limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the preëxisting authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Constitution, by destroying the lines which separate state and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest.

If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust Act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust Act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an opinion of Mr. Justice Holmes, which explains the true interpretation of the statute, as it is understood by me, more clearly that I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the Anti-Trust Act, as is shown in the opinion of Mr. Justice Holmes, I dissent.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE PECKHAM and MR. JUSTICE HOLMES, concur in this dissent.

MR. JUSTICE HOLMES, with whom concurred the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE PECKHAM, dissenting.

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests

exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, 26 Stat. 209, it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one

of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do

not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the Government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what

these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States* v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation

of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *Montague & Co.* v. *Lowry*, 193 U. S. 38. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States* v. *Joint Traffic Association*, 171 U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without perversion of plain language, to apply to an arrangement by which competition is ended through com-

munity of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association's* case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that

the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing—probably the present one does. But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an

objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete—and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests

on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and decree. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present stat-

ute. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the *Trans-Missouri Freight Association's* case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of

trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

EATON *v.* BROWN.

APPEAL FROM AND ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 171. Submitted March 3, 1904.—Decided March 14, 1904.

Courts do not incline to regard a will as conditional where it reasonably can be held that the testator was merely expressing his inducement to make it, although his language, if strictly construed, would express a condition.

THE facts are stated in the opinion of the court.

Mr. J. Altheus Johnson and *Mr. Joseph A. Burkart* for the appellant.

Mr. Thomas Watts for appellee:

It appears plainly that testatrix intended the disposition of her property to become effectual only in case of the happening of the contingency specified in the will. *Parsons* v. *Lanoe*, 1 Ves. Sr. 190; *S. C.*, Ambler, 557; *Sinclair* v. *Hone*, 6 Ves. Jr. 607; *Estate of Winn*, 2 Sw. & Tr. 47; *Roberts* v. *Roberts*, 8 Jur. N. S. 220; *Matter of Porter*, L. R. 2 P. & D. 22; *In re Robinson*, L. R. 2 P. & D. 171; *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 449; *In re Ward*, 4 Hagg. 179; *In re Todd*, 2 W. & S. (Pa.) 145; *Morrow's Appeal*, 116 Pa. St. 440; *Wagner* v. *McDonald*, 2 Har. & J. 346; *Maxwell* v. *Maxwell*, 3 Met. (Ky.) 101; *Daugherty* v. *Daugherty*, 4 Met. (Ky.) 25; *Robnett* v. *Ashlock*, 49 Missouri, 171; *McGee* v. *McNeill*, 41 Mississippi, 17.

The language used by the respective testators in some of the cases cited is strikingly similar to that used by testatrix in the case at bar.

As to the rule for construction of wills, see *Keteltas* v. *Ketaltas*, 72 N. Y. 312; 3 Jarman on Wills, 708, rule XIX.

Mr. Justice Holmes delivered the opinion of the court.

The question in this case is whether the following instrument is entitled to probate:

"Washington, D. C. Aug. 31″/001.

"I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession of Mr H H Brown to go to the Methodist Church at Bloomingburgh All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C, All I have is my one hard earnings and and I propose to leave it to whome I please. Caroline Holley."

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and

setting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicil of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

It might be argued that logically the only question upon the probate was the *factum* of the instrument. *Pohlman* v. *Untzellman*, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened. *Parsons* v. *Lanoe*, 1 Ves. Sr. 189; *S. C.*, Ambler, 557; 1 Wils. 243; *Sinclair* v. *Hone*, 6 Ves. 607, 610; *Roberts* v. *Roberts*, 2 Sw. & Tr. 337; *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix

would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of the opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon* v. *Damon*, 8 Allen, 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *In the Goods of Porter*, L. R. 2 P. & D. 22, 23; and it is almost a common place. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody* v. *Conly*, 27 Gratt. 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands. We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith* v. *Cabell*, 19 Gratt. 758, 783. And then she goes on to say that all that

she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, *Parsons* v. *Lanoe*, Lord Hardwicke emphasizes the proposition that under the circumstances of that case no Court of Equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. Ambler, 561; 1 Ves. Sr. 192. It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return, (which I will, no preventing Providence)." *Todd's Will*, 2 W. & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *In the*

Goods of Porter, L. R. 2 P. & D. 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *In the Goods of Mayd*, 6 P. D. 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. *In the Goods of Mayd*, 6 P. D. 17; *In the Goods of Dobson*, L. R. 1 P. & D. 88; *In the Goods of Thorne*, 4 Sw. & Tr. 36; *Likefield* v. *Likefield*, 82 Kentucky, 589; *Bradford* v. *Bradford*, 4 Ky. Law Rep. 947; *Skipwith* v. *Cabell*, 19 Gratt. 758, 782-784; *French* v. *French*, 14 W. Va. 458, 502.

Decree reversed.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK *v.* THE CITY OF NEW YORK.

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

No. 150. Argued January 29, February 23, 24, 1904.—Decided March 21, 1904.

Where the sole ground on which the jurisdiction of the Circuit Court is invoked is that the case arises under the impairment of contract clause of the Constitution of the United States, and the facts set up by complainants are, as matter of law, wholly inadequate to establish any contract rights as between them and the State, no dispute or controversy arises in respect to an unwarranted invasion of such rights and the bill should be dismissed for want of jurisdiction.

The mere filing of a map and profile, and the payment of the regular incorporation tax, by a company, organized under the general railroad law of 1850 of New York, but which did not obtain the consents of municipal authorities or of abutting property owners or substituted consent of the Supreme Court, or acquire any property by condemnation, did not create

a contract with the State for the exclusive use of the space included in the map and profile, and a subsequent act of the State authorizing the construction of a railroad partly over the same route, does not violate the impairment of contract clause of the Constitution of the United States.

THE facts are stated in the opinion of the court.

Mr. Roger Foster for appellant:

The Circuit Court had jurisdiction of the bill. All it is necessary to show in order to secure a reversal of the decree is that the complainants claim a franchise and that all of their objections to the constitutionality of the Rapid Transit Act are not so manifestly frivolous and without color of right as conclusively to prove bad faith upon their part. *Swafford* v. *Templeton*, 185 U. S. 487, 493, 494; *Riverside & A. Ry. Co.* v. *City of Riverside*, 118 Fed. Rep. 736, 740; *City Railway Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557, 563; *Pacific El. Co.* v. *Los Angeles*, 118 Fed. Rep. 746, 752.

Having jurisdiction of the Federal question raised by the bill, the court had also jurisdiction of the whole bill including all questions that were not Federal. *Omaha Horse Ry. Co.* v. *Cable Tramway Co.*, 32 Fed. Rep. 727, 729; *Louisville Trust Co.* v. *Stone*, (C. C. A.) 107 Fed. Rep. 305, 309, 310; *Nashville C. & St. T. Ry. Co.* v. *Taylor*, 86 Fed. Rep. 168, 178, 188; *Pa. Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Scott* v. *Donald*, 165 U. S. 58, 71; *Owensboro* v. *Owensboro Waterworks*, (C. C. A.) 115 Fed. Rep. 318, 320.

Where there is a single ingredient of Federal jurisdiction in the case, the relief may be given upon other grounds although the Federal question is decided adversely to the complainants. *Osborne* v. *U. S. Bank*, 9 Wheat. 738, 823; *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Gold W. W. Co.* v. *Keyes*, 96 U. S. 199, 203.

This is not a special rule of practice established for the sole benefit of banks and railway companies chartered by Congress, but it extends to all classes of cases. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 32, 33.

Equity abhors a multiplicity of suits. *Werlein* v. *New*

Orleans, 177 U. S. 399; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 216, 217; *Robinson* v. *Brown*, 166 N. Y. 159, 162; *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1, 51.

It seems clear consequently, that so much of the bill that seeks relief grounded upon fraud and mistake in execution of the Rapid Transit contract, the breach of the same by the contract or its invalidity because it creates a municipal indebtedness beyond the limitation of the state constitution is sufficient to compel a decree in the complainant's favor.

The statute is unconstitutional because of its failure to provide adequate compensation for the property taken. *Keene* v. *Bristol*, 26 Pa. St. 46; *Sage* v. *Brooklyn*, 89 N. Y. 189; *Bloodgood* v. *Mohawk & Hudson R. R. Co.*, 18 Wend. (N. Y.) 9, 17, 18; *Kennedy* v. *Indianapolis*, 103 U. S. 599, 603; *Connecticut River R. R. Co.* v. *Franklin Co. Comrs.*, 127 Massachusetts, 50, 52, 54, 55, 56; *Baltimore & Susquehanna R. R. Co.* v. *Nesbit*, 10 How. (U. S.) 395, 398, 399; *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R.*, 2 Gray (Mass.), 1, 37; *Haverhill Bridge Proprietors* v. *Essex Co. Comrs.*, 103 Massachusetts, 120, 124; *Brickett* v. *Haverhill Aqueduct Co.*, 142 Massachusetts, 394, 396.

The statute takes public funds for a private use and is not due process of law. A decision sustaining the act logically implies the power of the United States to build and operate all railroads that engage in interstate commerce. *Pleasant Township* v. *Ætna Life Ins. Co.*, 138 U. S. 67; *Rippe* v. *Becker*, 56 Minnesota, 101, 111; *People* v. *Salem*, 20 Michigan, 452, 478; *Re Municipal Fuel Plants*, 66 N. E. Rep. 24.

This is a Federal question. *Loan Association* v. *Topeka*, 20 Wall. 655.

The act takes property without due process of law by subjecting complainants to the payment of taxes for the expenses of officers neither elected by the people, nor appointed by representatives of the people, and gives to such officers control of the complainants' business and of the city's money. A majority of the quorum of the Rapid Transit Board have been elected by the remainder of those appointed by the legislature.

Such a close corporation is unconstitutional. *Fox* v. *M. & H. R. Humane Society*, 165 N. Y. 517, 525; *Rathbone* v. *Wirth*, 6 App. Div. 277, 285, 308; aff'd 150 N. Y. 459; *State* v. *Barker*, 89 N. W. Rep. 204, 208; *State* v. *Fox*, 63 N. E. Rep. 19.

The filing of the maps and profiles of their route gave to the complainants and their predecessors a vested and exclusive right thereto and the State then contracted not to interfere with the same. *Rochester H. & L. R. R. Co.* v. *N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 128, 132; *S. C.*, 44 Hun, 206, 210; *Suburban R. T. Co.* v. *Mayor*, 128 N. Y. 510, 519; *United States* v. *O. & C. R. R. Co.*, 176 U. S. 28, 50.

The franchise is property which cannot be taken without compensation and the obligation of that contract cannot be impaired without a violation of the Constitution. *City Railway Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557; *People* v. *O'Brien*, 111 N. Y. 1; *Chesapeake & O. Canal Co.* v. *Baltimore & O. R. R. Co.*, 4 G. & J. (Md.) 1.

The Constitution protects rights which are contingent as well as those that are vested in present possession and enjoyment. *Dunn* v. *Sargent*, 101 Massachusetts, 336; *Appeal of Benson*, 22 Pa. St. 164; *White* v. *White*, 5 Barb. 474; *S. C.*, 4 How. Pr. 102; *Holmes* v. *Holmes*, 4 Barb. 295; *Forster* v. *Scott*, 136 N. Y. 577, 585; *Danolds* v. *New York*, 89 N. Y. 37, 45; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *West River Bridge* v. *Dix*, 6 How. 507; *Richmond* v. *Railroad Co.*, 13 How. 71; *Troy & Boston R. R. Co.* v. *Northern Turnpike Co.*, 16 Barb. 100; *People* v. *O'Brien*, 111 N. Y. 1; *Huffimire* v. *Brooklyn*, 162 N. Y. 584; *Westervelt* v. *Gregg*, 12 N. Y. 202; *White* v. *White*, 5 Barb. 474; *United States* v. *Central Pac. R. R. Co.*, 118 U. S. 235, 238; *State* v. *Banker*, 4 Kansas, 324; *Jones* v. *Hobes*, 63 Tennessee, 113.

So far as these complainants are concerned the validity of the Tunnel Law has been directly adjudicated. *Matter of Union El. R. R. Co.*, 112 N. Y. 61, 70; *Barrow* v. *Hunton*, 99 U. S. 80; *People ex rel. Underground Ry.* v. *Newton*, 58 N. Y. Super. Ct. 439.

Since the Rapid Transit Underground Railroad Company was chartered less than five years before the bill was filed, it cannot be claimed that its charter has been forfeited. The defendants are estopped from claiming that the charters of the other corporations have been forfeited. *Coney Island &c. R. R. Co.* v. *Kennedy*, 15 App. Div. 588; *Devereaux* v. *Brownsville*, 29 Fed. Rep. 742.

Delay due to the inaction of the court is sufficiently excused. *Hunt* v. *Smith*, 3 Rich. Eq. (S. C.) 465, 511; *Pendlery* v. *Carleton*, 59 U. S. App. 288; *Bell* v. *Bell*, 181 U. S. 175, 179; *Matter of Kings County El. R. R. Co.*, 105 N. Y. 97.

No one but the Attorney General of the State can raise the question of the forfeiture of the charter. *Re N. Y. El. R. Co.*, 70 N. Y. 327, 338; *Santa Rosa City R. R. Co.* v. *Central St. Ry. Co.*, 38 Pac. Rep. 986; *Olyphant S. D. Co.* v. *Olyphant*, 196 Pa. St. 553; *Briggs* v. *Cape Cod Ship Canal Co.*, 137 Massachusetts, 71; *Am. Cable Ry. Co.* v. *New York*, 68 Fed. Rep. 227; 70 Fed. Rep. 853; *Southern Pac. R. Co.* v. *Orton*, 32 Fed. Rep. 457; *Bybee* v. *Oregon, etc., Ry. Co.*, 139 U. S. 663; *Dousenbury* v. *N. Y., W. & C. Tr. Co.*, 46 App. Div. 267; *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540.

When the consent was granted by the court and municipal authorities, it inured by relation to the corporation which had the prior right to construct the street railroad. *Ingersoll* v. *Nassau El. R. Co.*, 157 N. Y. 453; *Geneva & W. Ry. Co.* v. *N. Y. C. & H. R. R. Co.*, 163 N. Y. 228, 235.

The act denies the complainants the equal protection of the laws. *Hincks* v. *Milwaukee*, 46 Wisconsin, 559; *Gordon* v. *Winchester B. & A. F. Assn.*, 12 Bush (Ky.), 110, 113; *Memphis* v. *Fisher*, 9 Baxter (Tenn.), 239; *Stearns* v. *Minnesota*, 179 U. S. 223, 262; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 164; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ryan* v. *New York*, N. Y. Law Journal, Feb. 11, 1904.

Mr. Edward M. Shepard, with whom *Mr. George W. Wickersham* and *Mr. De Lancey Nicoll* were on the brief for the

Rapid Transit Board, John B. McDonald, and others, respondents:

As to the jurisdictional question:

The court below was without jurisdiction. Before there can be any jurisdiction there must be a Federal question; and here there is no such question, for the matter in dispute did not arise under the Constitution or laws of the United States. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, and cases cited on p. 190; *Shreveport* v. *Cole*, 129 U. S. 36; *St. Paul &c. R. Co.* v. *St. Paul & N. P. R. Co.*, 68 Fed. Rep. 2; *McCain* v. *Des Moines*, 174 U. S. 168; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *New Orleans* v. *New Orleans W. W. Co.*, 142 U. S. 79, 88.

The court below in order to retain jurisdiction had to find in the allegations of the bill a real and substantive Federal question. Assuming the truth of the allegations of fact, some contract with the State, real or apparent, must be made out. *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79, 88.

In cases of this character where this court has sustained the jurisdiction, a contract has been established by sufficient allegations at the least. *Illinois Central R. R.* v. *Chicago*, 176 U. S. 646; *Citizens' Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557.

Swafford v. *Templeton*, 185 U. S. 487, and *Wiley* v. *Linkler*, 179 U. S. 58, merely distinguished cases where the subject-matter of the suit was Federal—as plainly the subject-matter of this suit is not—from cases which were like this suit, where a Federal question has been held to be presented in a controversy over subject-matter not Federal.

Mr. George L. Rives and *Mr. Theodore Connoly* submitted a brief on behalf of the city of New York and other respondents.

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

This was a bill filed on behalf of the Underground Railroad of

the City of New York and the Rapid Transit Underground Railroad Company, corporations organized under the laws of New York, against the City of New York, the Mayor, the Comptroller, and the Rapid Transit Commissioners of New York, and contractors engaged in the construction of an underground railway and subway in that city, all of the State of New York, to enjoin payment for work done and further construction. The bill was demurred to for the reason, among others, that the Circuit Court was without jurisdiction in that the averments of the bill did not present a case arising under the Constitution or laws of the United States, which was the sole ground on which jurisdiction was invoked. The demurrer was sustained and the bill dismissed for want of jurisdiction, 116 Fed. Rep. 952, and, the question of jurisdiction being certified, the case was brought directly to this court.

If, on the face of complainants' statement of their own case, it does not appear that the suit really and substantially involved a dispute or controversy as to the effect or construction of the Constitution, on the determination of which the result depended, the Circuit Court was right and its decree must be affirmed. *Defiance Water Company* v. *Defiance*, 191 U. S. 184, and cases cited.

The bill refers to the rapid transit acts of 1891, Laws, 1891, c. 4, 1894, Laws, 1894, c. 752, and 1895, Laws, 1895, c. 519, and sets forth their provisions for a rapid transit board empowered to construct an underground railroad in the city of New York; for the submission to the electors of the city of the question whether there should be municipal construction of railroads; for the power of the board, in case a majority vote favored municipal construction, to grant the right to maintain and operate the municipal railroad for not less than thirty-five years nor more than fifty years; for the advance by the city of the funds to construct the railroad; for the borrowing of money and the issuing of bonds therefor; for the laying out of the routes and the adoption of the plan of construction by the board; for the requisite consent of the local authorities,

consisting of the mayor and common council, and of a majority in value of the abutting owners, or, in lieu thereof, of the Supreme Court of the State; for the various steps of procedure after the popular vote in favor of municipal construction; and for details of the contract for the construction and operation of the municipal road.

The bill further alleges that the Rapid Transit Board had determined on the construction of an underground railroad; that the local authorities have duly given their consent and that the Appellate Division of the Supreme Court has, on application of the board, appointed three commissioners to determine whether the railroad ought to be constructed and operated; that said commissioners have duly determined that it ought to be; that their determination has been duly approved by the court, and has been taken in lieu of the consent of the property owners; that the city of New York, the municipal authorities and board have entered into a contract, February, 1900, with defendant contractors, to construct the road over the routes determined on, and that the railroad is now in process of construction, and large sums of money have been paid out by the city therefor.

But it is asserted that the complainants had a prior exclusive right under contract with the State to the use for underground railroad purposes of the streets now sought to be used for the municipal rapid transit road, and that the legislation is in conflict with the Fourteenth Amendment, and section 10 of article II of the Constitution.

No rights created by the Constitution are asserted, and if the facts set up by complainants are, as matter of law, wholly inadequate to show possession of contract rights as between them, or either of them, and the State, then no dispute or controversy arises in respect of an unconstitutional invasion of such rights.

The bill avers that the Underground Railroad of the city of New York, one of the complainants, was formed August 21, 1896, by the consolidation of the Central Tunnel Railway

Company, the New York and New Jersey Tunnel Railway Company and the Terminal Underground Railway Company, as to the two latter of which no claim is made and no question arises.

And it alleges that the Central Tunnel Company was organized March 26, 1881, "under the so-called General Railroad and Tunnel Law of the State of New York, namely, chapter one hundred and forty of the Laws of 1850, and of the various acts amendatory of and supplemental to the same, and chapter five hundred and eighty-two of the Laws of 1880."

That company's articles of association declared its purpose to be "constructing and maintaining and operating a railroad for public use in the conveyance of persons and property."

Chapter 140 of the Laws of New York of 1850, as amended by chapter 133 of the Laws of 1880, provided that railroad corporations formed under it should possess in addition to "the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes," (which did not include power to construct railroads or to use the streets of a city,) the power "to construct their road across, along, or upon any . . . street, highway, . . . which the route of its road shall intersect or touch. . . . Nothing in this act contained shall be construed . . . to authorize . . . the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of such city." Laws, 1850, pp. 211, 224; Laws, 1880, pp. 242, 244.

By chapter 10 of the Laws of 1860 it was provided: "It shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any or either of the streets or avenues of the city of New York, wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide," (Laws, 1860, p. 16,) which was carried forward into the charter of the city of New York of 1882. Laws, 1882, c. 410, § 1943. This was held by the Court of Appeals to

render the general railroad act inapplicable to the city of New York. *Matter of Washington &c. Railroad Company*, 115 N. Y. 442.

The constitution of the State contained, by amendment adopted in 1874, the following provision:

"But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of the street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the general term of the Supreme Court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

This was continued by the constitution of 1894, which changed the words "General Term" to "Appellate Division," and the word "district" to "department."

The Court of Appeals ruled in *People* v. *O'Brien*, 111 N. Y. 1, that in order for a railroad corporation to acquire authority to construct or operate a railroad upon the streets of any municipality, not only the consent of the municipal authorities was indispensable, but that they were empowered to grant such consent on such terms and conditions as they chose to impose.

The first section of chapter 582 of the Laws of 1880, provided:

"Whenever such road, or any part of the same, is intended to be built within the limits of any city or incorporated village of this State and to run by means of a tunnel underneath any of the streets, roads or public places thereof, the said company, before building the same underneath any of said streets, roads or public places, shall obtain the consent of the owners of one-

half in value of the property bounded on the line, and the consent of the board of trustees of the village by resolution adopted at a regular meeting and entered on the records of said board, and of the proper authorities having control of said streets, roads or public places; or in case such consent of the owners of property bounded on the line cannot be obtained, the general term of the Supreme Court in the district in which such city or village is situated may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said street, roads and public places, or any of them, . . . and the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent of said authorities and property owners." Laws, 1880, p. 872.

In *Matter of New York District Railway Company*, 107 N. Y. 42, decided in 1887, the Court of Appeals held that street underground roads were street railways and that the constitutional provision applied to them; that the act of 1850 had no application to street railroads, and, if it had, the authority to construct had been taken away by the act of 1860; and that the provision of the act of 1880, allowing the action of the Supreme Court commissioners to stand in the place of the consent of the municipal authorities was unconstitutional, and also as to the consent of the abutting owners, because indivisible; but that perhaps the act might stand as authority for the construction of an underground street railway on condition of the assent of the city authorities and the half of abutting values, rejecting all the provisions for the appointment of commissioners.

It follows that the Central Terminal Company could have acquired no right to build the proposed railroad without the consent of the municipal authorities and the consent of the abutting property owners, yet no such consents are asserted to have been given it, and the contrary appears on the face of the bill. But after setting forth the provisions for a rapid transit board by the Rapid Transit Act of 1891, as amended,

especially in 1894, and the proceedings thereunder, which showed that the consent of the municipal authorities and of the Supreme Court in lieu of the property owners had been given to the municipal construction sought to be enjoined, the bill argues that the determination and consents in favor of such municipal construction amounted to authority to construct the railroad of the Central Tunnel Company because it was an underground railroad, which it had been proposed should occupy the same route or part of it, notwithstanding the railroad of that company had not been consented to by either the local authorities or the abutting property owners of the Supreme Court acting for them.

We quite agree with the Circuit Court that this contention is wholly inadmissible. The determination of the Rapid Transit Board and the consents of the municipal authorities and the abutting owners to municipal construction could not be regarded as enuring to the benefit of private parties who had endeavored to acquire the franchise twenty years before and had failed to perform the conditions essential to the right to construct such a road.

The bill also avers that the consent of the abutting property owners could not be obtained by the Central Tunnel Company, and that the company applied to the General Term of the Supreme Court for the appointment of three commissioners, and that on February 2, 1883, commissioners were appointed, one of whom declined to serve, whereupon the court appointed another commissioner, who also declined to serve; that the company thereupon applied for another appointment, and "said application was duly granted by said court;" but that the said General Term and its successor, the Appellate Division, had not yet entered said order, and that, by reason of the inaction of the Supreme Court, the Central Tunnel Company and its successor, the Underground Railroad Company, had not been able to continue the proceedings before commissioners, and neither of said corporations had been able to commence the construction of its line of railroad. If this

imputation of laches could in any view be entertained it is enough to say that the General Term in 1886 adjudged the act of 1880, under which the application was made, to be unconstitutional in respect of obtaining consents, *Matter of New York District Railway Company*, 42 Hun, 621, and, as already mentioned, this decision was affirmed by the Court of Appeals. 107 N. Y. 42.

The general railroad law of 1850 provided for the filing of a map and profile of the proposed route, and this was done by the Central Tunnel Company, March 28, 1882, and the bill claims that thereby the company obtained a contract right. But the mere filing of a map and profile by a company incorporated under that law could not give an exclusive right to the occupancy of the space included in such map and profile as against the State. In some instances it might give priority as between railroad corporations, whose corporate existence had not lapsed for non-construction, but only until the legislature otherwise provided. And so it was held in *People* v. *Adirondack Railway Company*, 160 N. Y. 225, where, among other things, it was observed: "There is no property in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation." The judgment was affirmed by this court in *Adirondack Railway Company* v. *New York State*, 176 U. S. 335, and we said:

"But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope. . . .

"We agree with the Court of Appeals, as has already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right."

Where certain routes have been determined according to law, and the necessary consents have been obtained, and real estate has been acquired by condemnation, the situation would be entirely different. *Suburban Rapid Transit Company* v. *Mayor*, 128 N. Y. 510. But without the consents the right to construct and operate could not become vested. *In Matter of Application of the Rochester Electric Railway Company*, 123 N. Y. 351.

The Underground Railroad, one of the complainants, was, as before stated, formed by the consolidation of the Central Tunnel Company with two other companies under chapter 676 of the Laws of 1892, which provided for the consent of the proper city authorities and of the owners of one-half in value of the abutting property, or, as to the latter, the determination of commissioners affirmed by the Supreme Court. Neither of these consents is alleged to have been obtained.

It is averred, however, that the company paid, when its articles of consolidation and incorporation were filed in August, 1896, the incorporation tax of one-eighth of one per cent on its capital stock, required to be paid by chapter 908 of the Laws of 1896; but the payment of a tax for the privilege of being a corporation did not carry with it the right to occupy any street of New York with its proposed railroad.

And the fact, also asserted, that this company filed a map or profile did not, as we have seen, in itself create a contract right.

The company is alleged to have leased its road to the Rapid Transit Underground Railroad Company, the other complainant, which was incorporated in 1897, subject to the rapid transit law of the State and the railroad law under which it was incorporated. The consent of the municipal authorities and the consent of the abutting property owners, or the substituted consent of the Supreme Court, were essential to the right to construct a railroad, and these it never obtained. It paid the incorporation tax under the tax law of 1896, but that gave no right of construction, nor did its filing of a map or

profile. There is also an averment that this company "paid taxes duly assessed against it by the city, county and State of New York," but none that any tax was paid on the right to construct a railroad in the streets of New York.

The result is that it appeared on the record that complainants possessed no contract rights, which were impaired, or of which they were deprived, and that the suit did not really and substantially involve a dispute or controversy as to the application or construction of the Constitution.

We, therefore, do not deem it necessary to further unfold the convolutions of this lengthy bill. Many matters attacking the validity of the Rapid Transit acts, and the proceedings in municipal construction thereunder, were put forward, but we are not called on to consider them in view of the conclusion that the Circuit Court did not acquire jurisdiction.

Decree affirmed.

BARNEY *v.* THE CITY OF NEW YORK.

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

No. 159. Argued March 3, 4, 1904.—Decided March 21, 1904.

Where the jurisdiction of the Circuit Court is invoked on the ground of deprivation of property without due process of law in violation of the Fourteenth Amendment, it must appear at the outset that the alleged deprivation was by act of the State.

And where it appeared on the face of plaintiff's own statement of his case that the act complained of was not only unauthorized, but was forbidden, by the state legislation in question, the Circuit Court rightly declined to proceed further and dismissed the suit.

THIS was a bill to enjoin the city of New York, the Board of Rapid Transit Commissioners for New York, John B. McDonald and the administratrix of Shaler, deceased, from proceeding with the construction of the rapid transit railroad

tunnel under Park avenue, New York, adjacent to the premises of Charles T. Barney, "until the easements appurtenant thereto shall have been acquired according to law and due compensation made therefor to complainant;" and from constructing such railroad otherwise than in accordance with the routes and general plan adopted and approved by the local authorities and by the owners of abutting property, or the Appellate Division of the Supreme Court in lieu thereof.

From the bill it appeared that the Rapid Transit Board had, on behalf of the city, devised routes and general plans, and entered into a contract for the construction of a rapid transit railroad with McDonald, of whom Ira A. Shaler was a subcontractor, under the Rapid Transit Acts of the State, Laws 1891, c. 4; Laws 1892, c. 102, 556; Laws 1894, cs. 528, 752; Laws 1895, c. 519; Laws 1900, c. 729; Laws 1901, c. 587; Laws 1902, cs. 533, 542, 544, 584.

Park avenue was one of the streets under which the railroad was authorized to be built, and the routes and general plan of the road were prescribed by the board by resolutions of January 14 and February 4, 1897, which received the assent of the local authorities and of the Appellate Division of the Supreme Court in lieu of the consent of the abutting property owners.

Complainant alleged that he "consented to the construction of the said rapid transit railroad in accordance with the said routes and general plan of construction, and did not oppose the proceedings hereinafter mentioned, which the said Board of Rapid Transit Railroad Commissioners instituted for the purpose of obtaining the determination of three commissioners appointed by the said Appellate Division that such rapid transit railroad ought to be constructed and operated; nor did your orator oppose the confirmation of said determination by the said Appellate Division."

But complainant averred that the portion of the railroad under Park avenue and in front of his premises was being built twenty-seven feet nearer to his premises than was authorized

by the routes and general plan; and that the work was "being thus performed by said defendant, McDonald, and the said Shaler without any authority other than certain directions given by the chief engineer employed by the Board of Rapid Transit Commissioners and embodied in certain so-called working drawings, or detail drawings, prepared by him or at his instance, and recently approved informally by said board. And . . . that the fact that such directions had been given by the chief engineer and that said work was being thus performed by the contractor, as aforesaid, was not until recently specifically known to said board; that such action of said chief engineer and contractor has never been formally or specifically approved by said board; that there has been no change made or authorized by said board in the said 'routes and general plan,' nor has there been any modification of the contract or specifications with reference to the construction of that part of the tunnel lying under Park Avenue between Thirty-third and Forty-first streets; that no notice was given to any of the property owners along said street that it was proposed by the defendants or any of them to change the position of the tunnel to any material extent from the position shown and described in the said 'routes and general plan,' nor was any opportunity ever given to said property owners or the citizens generally to be heard with respect to any such change."

Complainant further averred "that at none of the times herein mentioned did the said Board of Rapid Transit Railroad Commissioners have authority (if at all) to enter into any contract for the construction of any rapid transit railroad under or upon the said Park avenue, except in accordance with the said 'routes and general plan' contained in the said resolutions of January 14 and February 4, 1897, and that at no time did the said board have authority to prepare detailed plans and specifications, except (if at all) in accordance with the said general plan of construction or to alter any plans or specifications prepared by them, excepting in accordance with said general plan of construction. That the act of the

said board in permitting the defendants McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized, and the defendants McDonald and the said Shaler have entered upon the same unlawfully and without authority; and for the further reason that the construction of the rapid transit railway on the easterly side of Park avenue, in front of your orator's said premises, takes his property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that said rapid transit act, so far as it purports to authorize the construction of a tunnel and railway in said Park avenue without the consent of abutting owners or compensation therefor, is void, because it deprives your orator of his property without due process of law, in violation of the provisions of the said amendment."

On the bill and affidavits, complainant moved for an injunction *pendente lite*, and defendants resisted the motion, submitting, in pursuance of stipulation, affidavits filed in their behalf in the case of *Huntington* v. *City of New York and others*, the same defendants, since brought here, numbered at this term 173, and argued with this case. The opinion in that case, 118 Fed. Rep. 683, was adopted in this, and the court of its own motion, under section 5 of the act of March 3, 1875, c. 137, entered a decree dismissing the bill for want of jurisdiction, and certified that question to this court.

Mr. Maxwell Evarts and *Mr. Arthur H. Masten* for appellants in this case and in No. 173.

The theory of the court seemed to be that an agent of the State can only be considered such when it acts in conformity with the specific authority given to it by the act of the Legislature creating it, and that if it does any act without express legislative authority, although purporting to act by reason of the power and right conferred upon it by the State, such act

is not done in its character as agent and is not to be deemed the act of the State.

This question, however, is no longer open for argument; any act of an agent of a State, done pursuant to the powers derived by him from the Legislature and by virtue of his public position as such agent, whether specifically authorized by the statute appointing him or not, is an act of the State within the meaning of the Fourteenth Amendment of the Constitution. *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370, 394; *Civil Rights Cases*, 109 U. S. 3, 15; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374; *Scott* v. *McNeal*, 154 U. S. 34; *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 233.

In *N. C. & St. L. Ry.* v. *Taylor*, 86 Fed. Rep. 168, the statute itself was held unconstitutional. *Blake* v. *McClung*, 172 U. S. 239, involved a dispute over the state statute. In *Riverside & A. Ry. Co.* v. *Riverside*, 118 Fed. Rep. 736; *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, the action complained of was action by a municipal legislature. In *Bancroft* v. *Commissioners*, 121 Fed. Rep. 874, the act complained of was the taxing of property by commissioners to whom the State had directly delegated the power to tax. *Water Works Co.* v. *San Francisco*, 124 Fed. Rep. 574, involved the improper exercise of a power to fix rates to be paid for water supply, directly delegated to local authorities by the Legislature.

The court below was without jurisdiction for the reason that the bill of complaint did not show that the appellant was threatened with the deprivation of any property.

The fee of the streets of New York belongs to the city itself. Hoffman, Estate and Rights of the Corporation of New York, 368; *People* v. *Kerr*, 27 N. Y. 188; *Kellinger* v. *Forty-second Street Railway Co.*, 50 N. Y. 206, 211; *Matter of New York C. & H. R. R. R. Co.*, 77 N. Y. 248; *Drake* v. *Hudson River R. R. Co.*, 7 Barb. 508. The only easements which the appellant has in the street are easements of light, air and access. *Story* v. *N. Y. El. Ry. Co.*, 90 N. Y. 122; *Bischoff* v. *N. Y. El. R. R.*,

138 N. Y. 257, 262; *American Bank Note Co.* v. *New York El. R. R. Co.*, 129 N. Y. 252, 271, and cases cited.

Although guilty of a deviation of some thirty feet from the duly filed routes and general plan hereinbefore referred to, the Board of Rapid Transit has acted in the name of and for the State, and from purely public motives. It has been clothed with the State's power, and its acts, even though now held by the court below to have been unauthorized, were in point of fact carried through solely by virtue of the authority conferred upon it by the State and because of the power derived from the Legislature. See *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362.

As to what constitutes the act of a State with reference to the provisions of the Fourteenth Amendment to the Federal Constitution, see *Iron Mountain R. Co.* v. *Memphis*, 96 Fed. Rep. 113; *Pacific Gas Imp. Co.* v. *Ellert*, 64 Fed. Rep. 421, and cases cited on p. 429.

Mr. Edward M. Shepard for the appellees, members of the Rapid Transit Board, and *Mr. Platt A. Brown*, with whom *Mr. DeLancey Nicoll* was on the brief, for appellee McDonald:

In view of the decisions of the state court and for the purposes of this case it must be assumed that the construction complained of by the appellant is in violation of the laws of New York and without any authority from the State of New York. So that the controversy is one between parties all of whom are citizens of the State of New York in the course of which the sole question is whether the laws of that State have or have not been violated by the acts of the defendants. Such a controversy, as we submit, belongs to the courts of the State itself. *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Virginia* v. *Rives*, 100 U. S. 313; *St. Joseph & Grand Island Co.* v. *Steele*, 167 U. S. 659; *Hartell* v. *Tilghman*, 99 U. S. 547; *United States* v. *Cruikshank*, 92 U. S. 542, 554; *United States* v. *Harris*, 106 U. S. 629, 638,

The fact that the Rapid Transit Commissioners have some duties and powers in the construction of a rapid transit railroad does not commit the State to any acts of theirs in plain excess of their authority. *Missouri* v. *Dockery*, 191 U. S. 165. The rigorous provisions of law already quoted make it clear that the placing of the tunnel of a rapid transit railroad under a part of the street not within the routes and general plan is as clear a violation of law as to place a railroad in an entirely different street or in a different city.

Although the prohibition of the Fourteenth Amendment runs against the State and the State alone, it is not disputed that the State may act by executive officers as well as by its courts or its legislature. *Ex parte Virginia*, 100 U. S. 339; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, at p. 233. The unlawful act of a man does not give the party aggrieved a claim against the State or other government of which he was a public officer. *Tindal* v. *Wesley*, 167 U. S. 204; *United States* v. *Lee*, 106 U. S. 196; *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, 452; *Stanley* v. *Schwalby*, 147 U. S. 508, 518; *Stanley* v. *Schwalby*, 162 U. S. 255, 271; *Belknap* v. *Schild*, 161 U. S. 10; Guthrie's Fourteenth Amendment, 72; *Kiernan* v. *Multonomah County*, 95 Fed. Rep. 849; *Re Storte*, 109 Fed. Rep. 807; *Manhattan Ry. Co.* v. *City of New York*, 18 Fed. Rep. 195. None of these authorities is weakened by the cases cited by appellants.

The rapid transit railroad in Park Avenue is entirely under ground, and affects neither light nor air nor access of abutters, and the alleged impairment of the comfort to be enjoyed in the plaintiff's premises through the acts of the city and its Rapid Transit Board underneath the surface of its own streets is not a taking of property within the meaning of the Fourteenth Amendment. *Marchant* v. *Pa. R. R. Co.*, 153 U. S. 380; *Meyer* v. *City of Richmond*, 172 U. S. 82; *Gibson* v. *United States*, 166 U. S. 269; *Eldridge* v. *Trezevant*, 160 U. S. 452; *Messenger* v. *M. R. Co.*, 129 N. Y. 502; Guthrie's Fourteenth Amendment, 94; *Pa. R. R. Co.* v. *Miller*, 132 U. S. 75.

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

The jurisdiction of the Circuit Court was invoked upon the ground that by the tunnel construction sought to be enjoined, complainant was deprived of his property without due process of law, in violation of the Fourteenth Amendment. But that amendment prohibits deprivation by a State, and here the bill alleged that what was done was without authority and illegal.

The city acts through the Rapid Transit Board, which possesses the powers specifically vested. It is empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city, and every such plan must "contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected." Consents of the municipal authorities and the abutting property owners to construction on the routes and plan adopted must be obtained, and any change in the detailed plans and specifications shall accord with the general plan of construction, and, if not, like consents must be obtained to such change.

The bill asserted that the easterly tunnel section under Park avenue was not within the routes and general plan consented to, and that the construction was unauthorized. And this is the view taken by the Supreme Court of New York. *Barney* v. *Board of Rapid Transit Commissioners*, 38 Misc. Rep. 549; *Barney* v. *City of New York*, 39 Misc. Rep. 719; *Barney* v. *City of New York*, 83 App. Div. (N. Y.) 237.

Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.

Controversies over violations of the laws of New York are

controversies to be dealt with by the courts of the State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law. *Missouri* v. *Dockery*, 191 U. S. 165; *Civil Rights Cases*, 109 U. S. 3; *Virginia* v. *Rives*, 100 U. S. 313.

In *Virginia* v. *Rives*, referring to an alleged denial of civil rights on account of race and color in the empaneling of a jury, the laws of Virginia in respect of the selection of juries appearing to be unobjectionable, Mr. Justice Strong, speaking for the court, said:

"It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sec. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. . . .

"When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sec. 641. But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has

commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of sec. 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

In the *Civil Rights Cases*, in which the court was dealing with the act of March 1, 1875, 18 Stat. 335, c. 114, Mr. Justice Bradley said:

"In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

There are many cases in this court involving the application of the Eleventh Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii;* and in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, Mr. Justice Lamar defined the two classes to be,

those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in *Tindal* v. *Wesley*, 167 U. S. 204, and *Fitts* v. *McGhee*, 172 U. S. 516. Appellant's counsel rely on certain expressions in the opinion in *Ex parte Virginia*, 100 U. S. 339, but that was a case in which what was regarded as the final judgment of a state court was under consideration, and Mr. Justice Strong also said: "Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

And see *Manhattan Railway Company* v. *City of New York*, 18 Fed. Rep. 195; *Kiernan* v. *Multnomah County*, 95 Fed. Rep. 849; *In re Storti*, 109 Fed. Rep. 807.

Scott v. *McNeal*, 154 U. S. 34, and *Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226, are cited by appellant, but in those cases judgments of the highest judicial tribunals of the State were treated as acts of the State, and no question of the correctness of that view arises here.

And so in *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, the general assembly of Texas had established a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission "in a court of competent jurisdiction in Travis County, Texas," and a citizen of another State sued them in the Circuit Court of the United States for the district which embraced Travis County, and this was held to be authorized by the state statute.

And as the establishment of rates by the commission was the establishment of rates by the State itself, and the determination of what was reasonable was left to the discretion of the com-

mission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.

Similarly in *Pacific Gas Imp. Company* v. *Ellert*, 64 Fed. Rep. 421, where a public board was given power to improve streets, and proceeded in excess of its powers but not in violation of them, its action was regarded by Mr. Justice McKenna, then Circuit Judge, as state action.

In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions.

Section 5 of the act of March 3, 1875, 18 Stat. 470, c. 137, provided that if in any suit in the Circuit Court it should appear, to the satisfaction of the court, at any time, that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, the court should proceed no further, but dismiss the suit. The last paragraph of this section was in terms repealed by the act of March 3, 1887, 24 Stat. 552, c. 373, reënacted August 13, 1888, 25 Stat. 433, c. 866, (the part repealed not being material here,) but otherwise the section remained and remains in full force. This case went off on the motion for preliminary injunction, and the bill was properly dismissed, whether treated as if heard on demurrer, or on the proofs by affidavit.

Decree affirmed.

HUNTINGTON *v.* THE CITY OF NEW YORK ET AL.

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

No. 172. Argued March 3, 4, 1904.—Decided March 21, 1904.

Decided on authority of *Barney* v. *City of New York*, *ante*, p. 430.

Same counsel as in No. 159.

THE CHIEF JUSTICE. This case is governed by the decision just announced, and the decree is accordingly

Affirmed.

BOERING *v.* CHESAPEAKE BEACH RAILWAY COMPANY.

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

No. 174. Argued March 4, 1904.—Decided March 21, 1904.

Where in an action for personal injuries the trial court submits to the jury the question whether a person riding on a pass is or is not a free passenger, and there is a general verdict for the defendant, that question of fact is settled in favor of the defendant.

A person may not through the intermediary of an agent obtain a privilege —a mere license—and then plead ignorance of the conditions upon which it was granted.

The duty of ascertaining the conditions on which a free pass is given and accepted when the same are plainly printed on the pass, rests upon the person accepting and availing of the pass, and the carrier is not bound at its peril to see that the conditions are made known.

THE facts in this case involved the right of the plaintiffs who were husband and wife to recover for injuries sustained by the wife while riding upon a pass which contained a stipulation relieving the carrier from responsibility for injuries whether caused by negligence of company's agents or otherwise, and are stated at length in the opinion of the court.

Mr. Charles F. Carusi and *Mr. Charles H. Merillat* for plaintiffs in error:

A public carrier may not limit its common law liability for negligence to passengers by special agreement. This rule, founded on public policy, operates no less for the protection of gratuitous passengers than for passengers for hire. It is conceded for the purposes of argument, that the plaintiff held a free pass. This court in *Phila. & Reading R. R.* v. *Derby*, 14 How. 485, said that a pass is not free or gratuitous in the sense in which these words were used by the learned court below if the consideration therefor be " pecuniary or otherwise," which distinguishes this case from *Duncan* v. *Maine Central R. R. Co.*, 113 Fed. Rep. 508.

In the United States the law of passenger carriers, with the exception of the precise point at bar, has been perfectly well settled by this court, in which it has been held:

I. That passenger carriers are liable for the consequences of negligent acts to all passengers, gratuitous or otherwise. *Steamboat New World* v. *King*, 16 How. 469; *Phila. & Reading R. R. Co.* v. *Derby*, 14 How. 485.

II. That this liability cannot be evaded by private agreements, all such agreements being *per se* unreasonable in character and void as against public policy. *Lockwood* v. *Railroad Co.*, 17 Wall. 363.

In the only cases where this court was called on to pass on the validity or reasonableness of such agreements in the case of passengers other than those for hire, the court inevitably discovered some consideration, "pecuniary or otherwise," which made it unnecessary to pass on the precise point presented by this appeal. *B. & O. &c. Ry. Co.* v. *Voigt*, 176 U. S. 498, 505.

By the great weight of authority in this country stipulations against liability of common carriers for negligence are void even in the case of gratuitous passengers. *Bryan* v. *Mo. Pac. Ry. Co.*, 32 Mo. App. 228; *Jacobus* v. *Railway Co.*, 20 Minnesota, 125; *F. & P. M. Ry. Co.* v. *Weir*, 37 Michigan, 122; *G. C. & S. F. Ry. Co.* v. *McGown*, 65 Texas, 643; *Mob. & Ohio* v. *Hopkins*, 41 Alabama, 486; *Ala. Gt. S. Ry. Co.* v. *Little*, 71 Alabama, 614; *Rose* v. *D. M. V. Ry. Co.*, 39 Iowa, 246; *Ill. & Ont. Ry. Co.* v. *Reed*, 37 Illinois, 484; *Fol. W. & W. Ry. Co.* v. *Beggs*, 85 Illinois, 80; *Annas* v. *M. N. Ry. Co.*, 67 Wisconsin, 46; *Penna. R. R. Co.* v. *Henderson*, 51 Pa. St. 351 (drovers' pass case, but followed up to full extent in *Penna. R. R. Co.* v. *Butler*, 57 Pa. St. 335); *B. P. & W.* v. *O'Hara*, 9 Am. & Eng. R. R. Cases, 317, Pa., 1881; *Camden & Atl. Ry.* v. *Bausch*, 7 Atl. Rep. 731; *Burnett* v. *Railway Co.*, 176 Pa. St. 45; *Vette* v. *Harmon*, 102 Fed. Rep. 17; *Roesner* v. *Herman*, 8 Fed. Rep. 782; *Flinn* v. *P. W. & B. Ry. Co.*, 1 Houston (Del.), 471 (drover's pass case, but well considered and shows court of

same opinion as to purely gratuitous passenger); *O. & M. Ry. Co.* v. *Selby*, 47 Indiana, 471, 487; *Ind. Central R. R. Co.* v. *Mundy*, 21 Indiana, 48; *L. M. & A. &c. R. R. Co.* v. *Faylor*, 126 Indiana, 126; *Welsh* v. *Railroad Co.*, 10 Ohio St. 76; *Curran* v. *Railroad Co.*, 19 Ohio, 1; *Knowlton* v. *Erie R. R. Co.*, 19 Ohio, 261.

This last case was decided against the passenger, as the contract was made in New York, but decided (p. 263) that the Ohio law is otherwise. The text-writers are almost unanimous in opposition to the carriers' right to limit liability on a free pass. Redfield on Carriers, 268; Thompson's Law of Carriers, p. 200, §§ 4, 7, 9; Sherman's Redfield on Negligence, § 268, *et seq.;* Cooley on Torts, 686; Wharton on Negligence, 589, 592, 641; 1 Parsons on Contracts, 771, note; Schouler on Bailments and Carriers, 2d ed. § 656.

The contrary decisions are: *Wells* v. *Railroad Co.*, 24 N. Y. 181; *Perkins* v. *Railroad Co.*, 24 N. Y. 196; *Bissell* v. *Railway Co.*, 25 N. Y. 443; *Kinney* v. *Railway Co.*, 32 N. J. L. 407; *Quimby* v. *B. & M. Ry. Co.*, 150 Massachusetts, 365; *Muldoon* v. *S. C. Ry. Co.*, 35 Pac. Rep. 422; *Griswold* v. *N. Y. & N. E. Ry. Co.*, 53 Connecticut, 371 (a *quasi*-employé case); *Payne* v. *Terre Haute R. R. Co.*, 157 Indiana, 617.

Of the foregoing the one New Jersey and all three of the New York decisions were by divided courts. Moreover, in the New York cases and the Massachusetts case distinctions were sought to be made between ordinary negligence and gross negligence, and between the negligence of the corporation itself and that of its agents.

It is not contended that a public carrier necessarily has its duties to the public increased in proportion to the special benefits derived from the public in a charter of incorporation, but its charter does place certain duties and obligations on it. *Gaet* v. *Express Co.*, McArthur & M. 138; *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *C. M. & St. Paul R. R. Co.* v. *Solan*, 109 U. S. 135.

Even those States which permit a common carrier to limit

its liability to gratuitous passengers require an express contract to that effect by the passenger and the party setting it up must prove its execution by proof conforming to the ordinary rules of evidence. *Amerian Transportation Co.* v. *Moore*, 5 Michigan, 368; *Cooper* v. *Berry*, 21 Georgia, 526; *Roberts* v. *Riley*, 15 La. Ann. 103.

Plaintiff in error had a right to assume the ticket had been paid for. There is no presumption that she knew it was gratuitous. Schouler on Bailments and Carriers, § 468, p. 497, and cases cited. And this notwithstanding the face of the ticket or document refers the reader to the back. *Malone* v. *Boston & W. R.*, 12 Gray, 388; *Railroad Co.* v. *Mfg. Co.*, 16 Wall. 318.

Plaintiff's right of action sounds in tort, but the defendant's exemption from liability is wholly contractual. The burden was on defendant who has failed wholly to show any contract.

If a carrier claims that by contract his common law liability has been limited, the burden is on him clearly to show it, and all such contracts will be interpreted most strictly against the carrier. Assent will not be presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded. In the absence of satisfactory proof showing that the shipper by assent and acquiescence has agreed to limit the liability of the carrier, the presumption is that he intended to insist on his common law rights. Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment can be set up to absolve the carrier from his common law liability. *P. C. & St. L. R. Co.* v. *Barrett*, 36 Ohio St. 448; *Rosenfeld* v. *Peoria R. R.*, 103 Indiana, 121; *Jennings* v. *Grand Trunk*, 127 N. Y. 438; *Amn. T. Co.* v. *Moore*, 5 Michigan, 368; *Edsall's Case*, 50 N. Y. 661; *Louisville Ry. Co.* v. *Nicholai*, 4 Ind. App. 119; *New Jersey Steam Nav. Co.* v. *Merchants Bank*, 6 How. 344; *Mich. Cent. R. Co.* v. *Hale*, 6 Michigan, 243; *Missouri Pacific* v. *Ivy*, 17 Texas, 409; *Seyboldt* v. *N. Y. &c. Ry. Co.*, 95 N. Y. 562; *Brewer* v. *N. Y. C.*

Ry. Co., 124 N. Y. 59; *Coppock* v. *Long Island R. Co.*, 89 Hun, 186.

So strong is this principle that in *Mauritz* v. *Railroad Co.*, 23 Fed. Rep. 765, it was held that a passenger unable to read the language in which a ticket is printed and to whom no explanation is made by the agent is not bound by special terms and conditions, as it was not, *per se*, negligence in him not to know them. *Blossom* v. *Dobb's Express*, 43 N. Y. 269; *Cam. & A. R. Co.* v. *Baldauf*, 16 Pa. St. 67; *Perkins* v. *N. Y. Central*, 43 N. Y. 269; *Boylan* v. *Hot Springs*, 132 U. S. 146, do not apply.

In this case the evidence established that the plaintiff, while she knew she was traveling on "transportation" procured in conjunction with an advertising contract, never had had the transportation in her possession, and did not know there was any stipulation on the back thereof, did not assent to same, and authorized no one to do so for her.

This takes the case out of the principles laid down in *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440.

The circumstances under which the passes were issued and the testimony of Mr. and Mrs. Boering are conclusive on the points that plaintiff did not authorize her husband to procure any transportation whatever for her, and he was in no sense her agent and she had no notice of the stipulation on the back of the pass issued to her husband in her name, but retained by him.

It would appear, therefore, that, even if the stipulation were not void on the ground of public policy, the trial court erred in admitting it in evidence. Am. & Eng. Ency. 2d ed. under Agency; *McLaren* v. *Hall*, 26 Iowa, 297.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the brief, for defendant in error:

There is nothing to distinguish this case from *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440.

Whether the female plaintiff had actual knowledge of the

conditions in the pass and their effect was immaterial. *Muldoon* v. *Seattle Railway Co.*, 10 Washington, 310. For even though the conditions by their terms require that the party using the pass should sign the same, if he does not in fact sign the same, yet uses the pass, he will be estopped to deny that he made the agreement specified thereon. *Quimby* v. *Boston & Maine R. R. Co.*, 150 Massachusetts, 365; *Illinois Central R. R. Co.* v. *Read*, 37 Illinois, 486.

If the cause of action in this case for a breach of a contract to carry is that of the wife alone, as held by the Court of Appeals of the District of Columbia in *Rockwell* v. *Traction Company*, 17 App. D. C. 369, 380, then it logically follows that the right to contract for such carriage was her own individual right, and that her husband, in attending to her "transportation," was acting as her agent, and bound her by accepting for her a complimentary pass containing the condition of exemption.

The power of a husband to act as the agent of his wife in relation to her separate or individual personal or property rights is well settled. *Voorhees* v. *Bonesteel & Wife*, 16 Wall. 16; *Aldridge* v. *Muirhead*, 101 U. S. 397; *Weisbrod* v. *Chicago, etc., Ry. Co.*, 18 Wisconsin, 35, and other cases cited in 1 A. & E. Ency. Law, 2d ed. 947.

If, on the other hand, the conclusion of the same court in the case of *Howard* v. *C. & O. Railway Co.*, 11 App. D. C. 300, 337, holding that the right of action for personal injuries sustained by the wife is not the statutory property of the wife, be, as we think it is, a correct statement of the law of this district on that subject, then, at the time this cause of action arose and suit thereon was instituted, the common law rule prevailed in this district and the female plaintiff could not have sued without joining her husband in such action, as she did do. Any damages recovered or reduced to possession as a result of such joint action during the coverture would have been the property of the husband alone. This right to the proceeds of the litigation carries with it the right of the hus-

band to release the entire right of action for damages, whether after judgment or before suit brought. *Anderson* v. *Anderson*, 11 Bush (Ky.), 327; *Ballard* v. *Russell*, 33 Maine, 196; *S. C.*, 54 Am. Dec. 620; *Southworth* v. *Packard*, 7 Massachusetts, 95; *Beach* v. *Beach*, 2 Hill (N. Y.), 260; *S. C.*, 38 Am. Dec. 584; *Long* v. *Morrison*, 14 Indiana, 597, and other cases cited in 15 A. & E. Ency. Law, 2d ed. 859; 24 A. & E. Ency. Law, 2d ed. 297.

If the husband could release the wife's right of action for damages before or after suit brought it is difficult to see why he could not, by a pre-release in the form of a condition upon a free pass containing an exemption from liability, waive or bar her right to recover for personal injuries sustained while traveling on such pass.

The validity of a pre-release of an action for personal injuries was considered and sustained by this court in *B. & O. &c. Ry. Co.* v. *Voigt*, 176 U. S. 498.

Mr. Justice Brewer delivered the opinion of the court.

This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company. Her husband was joined with her as plaintiff, but no personal injury to him was alleged. The defence was that she was riding upon a free pass, which contained the following stipulation: "The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise." A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District, 20 D. C. App. 500, and thereupon the case was brought here on error.

The contention of the plaintiffs is that the company was liable in any event for injuries caused by its negligence to one

riding on its trains; and further, that if it were not liable for such negligence to one accepting a free pass containing the stipulation quoted, it was liable to Mrs. Boering, because it did not appear that she knew or assented to the stipulation. The trial court submitted to the jury the question whether she was, in fact, a free passenger, and as the verdict was in favor of the defendant, that question of fact was settled in favor of the company. Under those circumstances the recent decision of this court in *Northern Pacific Railway Company* v. *Adams*, 192 U. S. 440, disposes of the first contention.

With reference to the second contention, the testimony of the two plaintiffs showed that the husband had attended to securing transportation; that he obtained passes for himself and wife, and that they had traveled on these passes before; that she knew the difference between passes (she called them "cards") and tickets, for on that day her husband had purchased a ticket for a friend who was traveling with them, and she had seen him use both ticket and passes. They further testified that she had not had either pass in her possession, and that her attention had not been called to the stipulation. Now, it is insisted that the exemption from liability for negligence results only from a contract therefor; that there can be no contract without knowledge of the terms thereof and assent thereto, and that she had neither knowledge of the stipulation nor assented to its terms; that therefore there was no contract between her and the company exempting it from liability for negligence. Counsel refer to several cases in which it has been held that stipulations in contracts for carriage of persons or things are not binding unless notice of those stipulations is brought home to such passenger or shipper. We do not propose in any manner to qualify or limit the decisions of this court in respect to those matters. They are not pertinent to this case. They apply when a contract for carriage and shipment is shown. When that appears it is fitting that any claim of limitation of the ordinary liabilities arising from such a contract should not be recognized unless both parties to the

contract assent, and that assent is not to be presumed, but must be proved. Here there was no contract of carriage, and that fact was known to Mrs. Boering. She was simply given permission to ride in the coaches of the defendant. Accepting this privilege, she was bound to know the conditions thereof. She may not, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted. A carrier is not bound, any more than any other owner of property who grants a privilege, to hunt the party to whom the privilege is given, and see that all the conditions attached to it are made known. The duty rests rather upon the one receiving the privilege to ascertain those conditions. In *Quimby* v. *Boston & Maine Railroad*, 150 Massachusetts, 365, a case of one traveling on a free pass, and in which the question of the assent of the holder of the pass was presented, the court said (p. 367):

"Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire* v. *New York Central Railroad*, 98 Massachusetts, 239; *Hill* v. *Boston, Hoosac Tunnel & Western Railroad*, 144 Massachusetts, 284; *Boston & Maine Railroad* v. *Chipman*, 146 Massachusetts, 107."

So in *Muldoon* v. *Seattle City Railway Company*, 10 Washington, 311, 313:

"We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them."

See also *Griswold* v. *New York &c. Railroad Company*, 53

Connecticut, 371; *Illinois Central Railroad Company* v. *Read*, 37 Illinois, 484, 510. As was well observed by Circuit Judge Putnam in *Duncan* v. *Maine Central Railroad Company*, 113 Fed. Rep. 508, 514, in words quoted with approval by the Court of Appeals in this case:

"The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

We see no error in the record, and the judgment of the Court of Appeals is

Affirmed.

GAGNON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 163. Argued February 29, 1904.—Decided March 21, 1904.

The inherent power which exists in a court to amend its records, and correct mistakes and supply defects and omissions therein, is not a power to create a new record but presupposes an existing record susceptible of correction or amendment.

An order, entered *nunc pro tunc* thirty-three years after an unrecorded judgment naturalizing an alien is alleged to have been rendered, may be attacked collaterally on the ground that the court had no jurisdiction to enter such an order, when no entry or memorandum appears in the record or files at the time alleged for the original entry of the judgment.

In the absence of jurisdiction to make such an order, the fact that notice of the application therefor was given to the Attorney General does not give the court jurisdiction.

THIS was a petition filed in the Court of Claims in 1894 and amended in 1902, to recover the value of one-half of certain property taken in 1866 from the firm of which the petitioner was a member by Indians then in amity with the United States.

The facts found in the case were substantially as follows: Charles Gagnon was a British subject. In March, 1858, he declared before the District Court of Woodbury County, Iowa, his intention to become a citizen of the United States. He

alleged that in 1863 he was admitted by the District Court of Richardson County, in the Territory of Nebraska, as a citizen of the United States, but no entry of this fact appeared in the records of that court for the year 1863.

It appeared Hosford & Gagnon, under which firm name they traded, owned horses and cattle of the aggregate value of $15,500 and in 1866, without just cause or provocation on their part, Indians belonging to the defendant tribes, then in amity with the United States, took them away. Hosford filed his claim for one-half of the amount and obtained judgment, which has been satisfied. Gagnon's claim was for the remaining half.

It further appeared that in the prosecution of his claim Gagnon failed to produce his certificate of naturalization, or a duly authenticated copy thereof. To meet the requirements of the law, providing that only citizens of the United States can recover under the Indian Depredation Act, Gagnon relied exclusively on a record of the District Court for the first judicial district of the State of Nebraska, (successor of the District Court of the Territory,) purporting to enter *nunc pro tunc* a judgment of naturalization of the territorial court as of the date of September 25, 1863.

No paper, memorandum or entry of any kind was found in the records of the court tending to show that a certificate of naturalization had been issued to Gagnon in that year. It also appeared that the persons who held the offices of judge and clerk of the territorial court in 1863 were both dead.

The record of the state court recited that it had been made to appear "by competent evidence" that the alleged application for naturalization had been granted by the territorial court, but that the "judgment of naturalization was never recorded, and if recorded the record is lost and cannot be found in the records of this court, and it being legal and proper that said record should be supplied, and this court being willing that said error and omission be corrected, it is ordered and adjudged that said judgment so rendered by this court at its

September term, 1863, be entered at large on the journal of this court as of the date when it should have been entered, to wit, on the 25th day of September, 1863, and that the clerk issue to the said Charles Gagnon the proper certificate of naturalization," etc.

It further appeared that on March 19, 1897, Gagnon's attorneys wrote the Attorney General that application would be made to the District Court of Richardson County, Nebraska, on March 29, 1897, "for restoration of certain lost records relative to the naturalization of said Gagnon."

Upon the facts thus found the Court of Claims decided that Gagnon was not a citizen of the United States at the time the depredation was committed, and the petition was dismissed. 38 C. Cl. 10. Thereupon an appeal was taken to this court.

Mr. George A. King and *Mr. William E. Harvey*, with whom *Mr. William B. King* was on the brief, for appellant:

This court has decided where the claims of partners depend upon a difference of personal status between the members of the partnership they can be severally prosecuted by each partner for his separate interest. *United States* v. *Burns*, 12 Wall. 246, 254.

Immediately upon the admission of Nebraska as a State the legislature passed the act of June 15, 1867, Laws, 1867, p. 58, making the District Courts of the State successors to the District Courts of the Territory, and see § 905, Rev. Stat.

While in some of the older jurisdictions the practice has grown up of requiring written applications for naturalization, there was no statute requiring it when this claimant was naturalized in 1863.

It has been held since the earliest times that naturalization proceedings are conclusive where they were had in a court of competent jurisdiction. *Spratt* v. *Spratt*, 4 Pet. 393, 407; *People* v. *Rose*, 30 Barb. 588, and cases cited on p. 604; *People* v. *McGowan*, 77 Illinois, 644, and cases cited on p. 646; *State* v. *Hoeflinger*, 35 Wisconsin, 393, 400; *United States* v. *Gleason*,

78 Fed. Rep. 396; *S. C.*, 90 Fed. Rep. 778; *Campbell* v. *Gordon*, 6 Cranch, 176; *Ex parte Cregg*, 2 Curt. 98; Fed. Cas. No. 3380. For the conclusive effect everywhere of judgments affecting the status of persons, *Hilton* v. *Guyot*, 159 U. S. 113, 167. See also *State* v. *MacDonald*, 24 Minnesota, 48; *In re Christern*, 11 J. & S. 523; *In re Coleman*, 15 Blatch. 406; 6 Fed. Cas. No. 2980.

The Court of Claims undertook to pass upon the validity of the proceedings in the District Court, in a collateral proceeding, and upon evidence *aliunde*, but the validity of a judicial record cannot be questioned by a court not sitting in review, except upon the ground that the court lacked jurisdiction. *Voorhees* v. *Bank of the United States*, 10 Pet. 449, 474; *Cooper* v. *Reynolds*, 10 Wall. 308, 315; *Robinson* v. *Fair*, 128 U. S. 53, and cases cited on p. 86; *United States* v. *Arredondo*, 6 Pet. 691, 709; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718; *Ex parte Watkins*, 7 Pet. 568, 572.

If the record was improperly supplied it was not a matter of usurpation of jurisdiction but error. The Court of Claims has no jurisdiction to correct error of a state court, and least of all to correct it upon evidence *aliunde*.

The record of the naturalization of the claimant in the district court of the Territory as certified by the clerk of the district court of the first judicial district of the State, successor to the territorial court, imports verity. That court is sole custodian of its own records. The record, no matter when made, or no matter after what distance of years it was supplied, imports absolute verity and is binding upon all other courts within the United States.

The absolutely binding character of a judicial record and the extent to which it imports absolute verity are principles elementary in the law. Art. IV, § 1, Const. U. S.

Whether it be a question of the power of the court to supply a record of proceedings unrecorded by the clerk, or to supply a lost record, the authorities are equally clear. The leading case in this court is *In re Wight*, 134 U. S. 136. See also *Gon-*

zales v. *Cunningham*, 164 U. S. 612, 623; *United States* v. *Vigil*, 10 Wall. 423; *Lincoln Nat. Bank* v. *Perry*, 66 Fed. Rep. 887; *Blythe* v. *Hinckley*, 84 Fed. Rep. 244; *Fuller* v. *Stebbins*, 49 Iowa, 377; *Kaufman* v. *Shain*, 111 California, 16, and cases cited on p. 19; *Balch* v. *Shaw*, 7 Cush. 282; *Frink* v. *Frink*, 43 N. H. 508, and cases cited on p. 514; *Borrego* v. *Territory*, 8 N. M. 446, 491; *S. C.*, 46 Pac. Rep. 349, 362, and cases cited; *State* v. *Major*, 38 La. Ann. 642; *Hershy* v. *Baer*, 45 Arkansas, 240; *State* v. *King*, 5 Iredell (27 N. Car.), 203; *Parsons* v. *McBride*, 49 N. Car. (4 Jones's Law) 99; *Perry* v. *Adams*, 83 N. Car. 266; *Taylor* v. *McElrath*, 35 Alabama, 330, and cases cited on p. 332; *Souvais* v. *Leavitt*, 53 Michigan, 577; *Van Etten* v. *Test*, 49 Nebraska, 725.

In *In re Wight*, 134 U. S. 136, this court in a criminal case sanctioned an order supplying the record at a subsequent term. If such an amendment can be made at one term later no limit can be drawn upon the exercise of the power. In *United States* v. *Vigil*, 10 Wall. 423, a record supplied after two years was held good. In *Balch* v. *Shaw*, 7 Cush. 282, 284, the correction was made fourteen years after the time the proceedings took place.

In *Rugg* v. *Parker*, 7 Gray, 172, a record was made *nunc pro tunc* after 20 years; in *Lawrence* v. *Richmond*, 1 J. & W. 241, after 23 years; in *Taylor* v. *McElrath*, 35 Alabama, 330, after 20 years; in *Parsons* v. *McBride*, 49 N. Car. (4 Jones's Law) 99, after 36 years.

The cases cited show that each court must necessarily be the judge of what it has decided and adjudged and when it orders an amendment of the record the presumption of other courts must necessarily be, that it does not undertake to order its clerk to record what it never had decided. *Sprague* v. *Litherberry*, 4 McL. 442, 449; 22 Fed. Cases, No. 13,251; *Inhabitants of Limerick*, 18 Maine, 187.

In Indiana the rule is stricter than in other jurisdictions. *Schoonover* v. *Reed*, 65 Indiana, 313, 316, and the rulings are in conflict with those cited including *In re Wight*, 134 U. S. 136.

It is suggested in the opinion below that there has usually been shown to be a cause pending on which to found an order restoring the record. But none of the cases makes any distinction of this sort, or limits the power to those in which there is a pending cause. In *United States* v. *Hill*, 120 U. S. 169, it was held that a proceeding for naturalization is not a "cause" in the strict sense of the term but a special and peculiar case of which the courts have jurisdiction, where only the party asking for the right or privilege is before the court. And see *Ex parte Watkins*, 3 Pet. 193, 207.

Mr. Assistant Attorney General Thompson, with whom *Mr. Assistant Attorney Peyton* was on the brief, for the United States.

Mr. Justice Brown delivered the opinion of the court.

This case raises the simple question whether thirty-three years after a judgment naturalizing an alien is alleged to have been rendered but not recorded, or if recorded, the record lost, a common law court has jurisdiction to enter such judgment of naturalization *nunc pro tunc*, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered. If there be no jurisdiction to enter such judgment, it may be attacked collaterally.

The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice, and was recognized by this court in *In re Wight*, 134 U. S. 136; *Gonzales* v. *Cunningham*, 164 U. S. 612, 623, and *United States* v. *Vigil*, 10 Wall. 423. It is also conferred upon courts of the United States by Rev. Stat. secs. 899, 900 and 901. This power, however, must be distinguished from that discussed by the court in *Bronson* v. *Schulten*, 104 U. S. 410, wherein we held that the authority of the court to set aside or modify an exist-

ing judgment or order ceased with the expiration of the term, and from that time all final judgments and decrees passed beyond its control, and that if such errors existed they could only be corrected by writ of error or appeal to a superior tribunal. An exception was there made of certain mistakes of fact not put in issue or passed upon, such as that a party died before judgment, or was a married woman, or was an infant and no guardian appeared or was appointed, or that there was error in the process through the default of the clerk. In the Federal courts the power to amend is given in general language in the final clause of Rev. Stat. section 954, which declares that such courts "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." As above indicated, however, this power has been restricted to amendments made during the progress of the case, or at least during the continuance of the term in which the judgment is rendered.

This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission or some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or otherwise lost, it can only be rebuilt, and the word "repair" is wholly inapplicable to its subsequent reconstruction. The word "repair," as the word "amend," contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise. In the cases of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common law and maritime courts.

The power to recreate a record, no evidence of which exists,

has been the subject of much discussion in the courts, and the weight of authority is decidedly against the existence of such power. We have examined a large number of authorities upon this point, and while they do not altogether harmonize in their conclusions, the practice in some States being much more rigid than in others, we have found none which supports the contention that a record may be created to take the place of one of which no written memorandum was made or entered at the time the original judgment was supposed to have been rendered. The following cases contain instructive discussions of the principles involved, but an epitome of them would subserve no useful purpose. *Bilansky* v. *Minnesota*, 3 Minnesota, 427; *Schoonover* v. *Reed*, 65 Indiana, 313; *Smith* v. *Hood & Co.*, 25 Pa. St. 218; *Missouri* v. *Primm*, 61 Missouri, 166; *Brown* v. *Coward*, 3 Hill (S. Car.), 4; *Lynch* v. *Reynolds*, 69 Kentucky, 547; *Coughran* v. *Gutcheus*, 18 Illinois, 390; *Frink* v. *Frink*, 43 N. H. 508; *Rugg* v. *Parker*, 7 Gray, 172; *Balch* v. *Shaw*, 7 Cush. 282.

The power of the court to amend existing records is also considered at length in the following cases from the Federal courts: *Tilghman* v. *Werk*, 39 Fed. Rep. 680; *Whiting* v. *Equitable Life*, 60 Fed. Rep. 197, 200; *Odell* v. *Reynolds*, 70 Fed. Rep. 656, 659; *Blythe* v. *Hinckley*, 84 Fed. Rep. 228, 244.

It may be gathered from these cases that, if a memorandum be entered upon the calendar that a certain document has been filed, such document, if lost, may be supplied by a copy in the hands of counsel; or where a judgment or order has been entered upon the calendar, which does not appear upon the journal, the court may order a new one to be entered *nunc pro tunc*. In such cases there is often a memorandum of some kind entered upon the calendar, or found in the files, and there is no impropriety in ascertaining the fact even by parol evidence, and supplying the missing portion of the records. But the exercise of a power to recreate a record where no memorandum whatever exists of such record is evidently a dangerous one, and, although such power may have been occasionally

given by the legislature in cases of overwhelming necessity, as, for instance, by the "lost record act" passed by the general assembly of Illinois after the great fire in Chicago in 1871, (Laws of Illinois, 1871–2, p. 650,) such power has not been hitherto supposed to be inherent in courts of general jurisdiction. As the evidence upon which such restoration is made cannot be inquired into, if the jurisdiction to recreate the record exists, it might well happen that, upon the testimony of a single interested witness, the court would order a new record to be entered after a lapse, as in this case, of over thirty years, and when the judge and clerk have both died, and there was no possibility of contradicting the testimony of such single witness.

Additional complications may also be properly referred to in this case in the fact that the declaration of intention was made before another court in another State, and that the territorial court which is alleged to have entered the judgment of naturalization had itself been abolished and a state court substituted in its place. Did the jurisdiction exist to make this order of naturalization, there is nothing to prevent any person from applying to any competent court for a similar judgment of naturalization, or even a judgment for damages, and to have the same entered *nunc pro tunc* as of any date it would be for his interest to have it rendered. It is true that in this case notice was given to the Attorney General by the petitioner of his proposed application to the court for the restoration of "certain lost records," but if the jurisdiction to enter this judgment *nunc pro tunc* did not exist, it could not be given by this notice.

As there was no competent evidence of the citizenship of the petitioner, there was no error in the action of the court below, and its judgment is therefore

Affirmed.

COSMOPOLITAN MINING COMPANY *v.* WALSH.

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

No. 134. Argued January 20, 21, 1904.—Decided March 21, 1904.

If a case does not really involve the construction or application of the Constitution of the United States in the sense in which that phrase is employed in the Judiciary Act of 1891, this court is precluded from examining the merits on writ of error.

Whether the case should go to the Circuit Court of Appeals or be brought directly to this court must be determined from the record and there is no authority for the trial judge making a certificate that the application and construction of the Constitution of the United States were involved in the action.

The contention that under the laws of a State it was essential to the legality of service upon an alleged agent of a corporation that the corporation should have been doing business within the State and the agent residing within the county named as his place of residence in the appointment does not require the construction of the Constitution of the United States but simply calls for the construction of the constitution and laws of the State or the application of the principles of general law.

THE Cosmopolitan Mining Company was incorporated under the laws of the State of Maine in June, 1884, for the purposes of "buying, selling, leasing, working, developing and improving gold, silver, copper or other mines, and purchasing and holding such other property as may be necessary or convenient." Soon after such incorporation the mining company—as we shall hereafter call the plaintiff in error—became the owner of mining claims, consisting of lodes and millsites, situated in the county of Ouray, Colorado.

The constitution of Colorado (art. XV, sec. 10) provided that "no foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served." The statutes of the State required that before

a foreign corporation should be permitted to do any business in Colorado it should make a certificate, signed by its president and secretary, duly acknowledged, and file the same with the Secretary of State and in the office of the recorder of deeds in each county in which business was to be carried on, designating the principal place where the business of such corporation was to be conducted in the State, and also naming an authorized agent or agents in the State, residing in the principal place of business of the corporation, upon whom process might be served. Mills' Ann. Stat. sec. 499. In compliance with the foregoing requirements the mining company filed on February 10, 1886, a certificate in the office of the Secretary of State of Colorado and in the office of each of the recorders of Ouray and Cumberland Counties, designating the county of Ouray as the principal place where the business of the corporation was to be carried on, and naming J. M. Jardine as the agent upon whom process might be served.

In the months of April and May, 1895, actions were brought in the county court of Ouray County by the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell and William C. Fulton, to recover from the mining company sums aggregating about $1,250, alleged to be due for labor performed and merchandise furnished to the mining company in the State of Colorado in the years 1893 and 1894. In each complaint it was alleged that the mining company was a corporation "duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado, in the city of Ouray, in said Ouray County." The Begole action was first instituted, and an attachment was issued and levied upon the real property of the mining company in Ouray County, being the mining claims heretofore referred to. In the complaints in the Ashenfelter and Fennell actions the fact of the levy of an attachment in the Begole case was recited, and the court was asked to make Ashenfelter and Fennell parties plaintiff in that action, and to give them like remedies against the mining

company "as the law gives to the original plaintiff in said action." Writs of attachment were also issued in the Ashenfelter and Fennell actions, and were levied in the same manner as was the writ of attachment in the Begole case. In each of the three actions last referred to a copy of the writ of attachment and of the summons and complaint were served in San Miguel County, Colorado, upon J. M. Jardine, described in the return of the sheriff as the "duly authorized agent for the within-named company" (the Cosmopolitan Mining Company). The complaint in the Fulton case contained no reference to the levy of an attachment in the Begole action, and the plaintiff did not ask to be made a party to the action. Although a writ of attachment was issued in the Fulton case, it was not shown to have been levied. A copy, however, of the writ as also of the summons and complaint, was served upon Jardine, described as in the returns in the other cases.

Judgments were entered in each of these county court actions, and in each judgment there was embodied an order "that the attachment herein be sustained, and a special execution issue." On the files, in the Begole action, was placed what was termed a "pro rating order," entitled in the Begole action, and therein was recited the recovery of judgments in the Ashenfelter, Fennell and Fulton actions, and that it appeared to the court that property belonging to the defendant company "was attached for the purpose of satisfying such judgments as might be obtained by the several plaintiffs against the said company." There was also contained therein direction to the sheriff of Ouray County "to sell the above described property or so much thereof as shall be necessary to satisfy said several judgments, together with the costs and interest thereon." Special writs of execution were issued, and the attached property was sold to one J. C. Marsh, as trustee for the several judgment creditors. In each case it was stated on the return on the writ of execution that the particular judgment had been fully satisfied.

Marsh received a certificate of purchase, and afterwards

assigned the same to Stephen A. Osborn, and on May 25, 1896, the period of redemption having expired, a sheriff's deed was executed and delivered to Osborn. On June 16, 1896, Osborn conveyed the property to Walsh, the defendant in error herein.

On March 1, 1897, Walsh brought an action against the mining company and Jardine in the District Court of Ouray County, Colorado, to quiet his title to the property thus acquired. It was alleged that the mining company was a corporation of the State of Maine, organized for the purpose, among others, of carrying on the mining business in the county of Ouray and State of Colorado, and that by certificate, dated December 16, 1885, and recorded January 21, 1886, Jardine had been "duly appointed as the authorized agent of the defendant company, upon whom process might be served." The proceedings in the Begole, Ashenfelter and Fennell actions were set forth, as also the acquisition by Walsh under the same title of the property in question. It was averred that the defendants claimed an interest in the property and it was prayed that they might be required to set up such claims, and that it might be adjudged that the defendants did not have any interest in the property. Return was made of service of the summons and complaint on Jardine individually, and on the mining company, "by delivering to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom service would be served." Jardine filed a disclaimer of interest, and judgment was entered against the mining company by default. In that judgment it was recited that entry of the default of the mining company had been made "for the failure of the said defendant to plead as required by law, after due service of summons upon it in manner and form as by law provided;" that the plaintiff had been sworn as a witness in the case; and that the court had heard the testimony given by the plaintiff and inspected the records, deeds and documents offered in evidence. After next finding the facts to be as they were averred in the complaint of Walsh, the court decreed as follows:

"It is, therefore, considered, adjudged and decreed by the court that the said defendants have not, nor have either of them, any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan Mining Company, in and to said premises is wholly without right or justification in law. That the plaintiff is the owner and in the possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them."

The present action was brought on November 3, 1900, in the Circuit Court of the United States for the District of Colorado by the mining company, to recover possession of the real property purported to have been sold under the judgments in the county court actions. Diversity of citizenship of the parties was alleged in the complaint, and the property in controversy was averred to exceed $2,000 in value. It was further charged that the plaintiff had been ousted of the possession of the property claimed by it on May 25, 1896, the date of the sheriff's deed under the sales on execution. The answer contained a general denial, and special defences, one of which set out the various proceedings in the county court actions brought by Begole *et al.* and the other proceedings by which title to the property in dispute was claimed to be vested in Walsh. The judgment rendered in the action to quiet title was also specially pleaded, and there were averments of facts alleged to constitute estoppel. A replication and amended replication were filed to this answer. It was alleged in substance that prior to the service made upon Jardine, in the actions referred to in the answer of Walsh, the mining company was not doing business in the State of Colorado, and that in those actions no service of process had been made upon it, hence the Colorado courts acted without jurisdiction, and consequently "the plaintiff has been and is being deprived of its property, viz: The property sought to be recovered in this action without notice, hearing, opportunity to be heard, or due

process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States."

The action was tried to a jury. The case in chief for the mining company consisted of documentary evidence, exhibiting title in the mining company to the property in controversy at the date of the alleged ouster. The evidence for the defendant consisted of a certified copy of the statutory designation of Jardine as agent of the mining company, the judgment records in the various actions relied upon, tax deeds covering two of the millsites enumerated in the complaint, and oral testimony. Objection was made to the admission in evidence of the judgment records substantially upon the following grounds: 1. That the records of the judgments in the county court actions did not on their face show the appointment of Jardine as the agent of the mining company, and therefore there was nothing in the records to show that service had been made upon a proper agent of the corporation. 2. That even if the fact of the statutory designation by the corporation of Jardine as its agent could be incorporated into the records and considered, as it was not shown that at the time of the service the corporation was doing business in the State, jurisdiction over the company was not acquired by the service upon Jardine. 3. That in any event, as the service of process in the county court actions had been had upon Jardine in another county than the one mentioned in the statutory appointment as the place of residence of Jardine, the service was void. 4. That as there was then no evidence of personal service on the corporation through its agent, the mere levy of a writ of attachment was insufficient to confer jurisdiction and to authorize the court to enter judgment and direct a sale of the attached property. These objections, it was insisted, established that the judgments recovered against the corporation were rendered without due process of law and in violation of the Constitution of the United States. The offer of the judgment record in the action to quiet title was also objected to because it was not shown that the company was doing business in Colorado at the time

of service of Jardine, and therefore the service on him was void, and further because the court in its judgment or decree did not purport to direct a conveyance but simply attempted by such judgment or decree to establish title. Treating the actions in the county court as being *in personam* and not *in rem*, the objections were finally overruled by the trial judge, and all the judgment records were admitted in evidence except the record in the *Fulton* case. The judgment records in the county court actions were admitted on the ground that it sufficiently appeared from the records that the mining corporation at the time the actions were brought was doing business in the State of Colorado. The record in the *Fulton* case was excluded because of a deficiency in this particular. The court admitted the records in the action to quiet title because it appeared that the mining company was alleged in the complaint not only to have been authorized to carry on business in the State of Colorado, but to have been formed for that purpose, and its appointment of a statutory agent was a consent to be served through such agent.

Following the introduction of these records and in support of the defence of estoppel, evidence was offered on behalf of the defendant tending to show the expenditure made by him in connection with the property subsequent to his acquisition of title, but the court held the same to be inadmissible.

In rebuttal, the plaintiff offered in evidence from the record in the Begole action a writing signed by Jardine, in effect notifying the court that he did not reside in Ouray County, and disclaiming being an agent of the mining company, and also asking the court to quash the service made on him of the summons and writ of attachment. The paper was not admitted in evidence and an exception was taken to its exclusion. Two witnesses were next examined on behalf of the mining company for the purpose of establishing that the company maintained no office and was not doing business in the county of Ouray at the time of the service of process in the actions referred to in the answer. No attempt, however, was made to

prove that there had been an express revocation of the statutory designation of Jardine as agent to receive service of process. The testimony of the two witnesses above referred to tended to show that the mining company had never any established office in Ouray other than that of its statutory agent, while he resided in Ouray; that the mines of the company were situated some six or seven miles from Ouray, and had been worked up to a short time before the bringing of the actions which resulted in a sale of the property. But one witness—the sheriff of the county—testified concerning the operation of the mines, and he was not shown to possess definite knowledge as to when operations ceased. No testimony was introduced to show whether the suspension of operations, if entire, was intended to be permanent or was merely temporary. The court overruled a motion on behalf of the defendant to strike out the testimony of these witnesses, but in doing so observed that it would instruct in view of the testimony.

Thereupon counsel for the plaintiff asked the court to direct the jury to find for the plaintiff except as to two millsites which were covered by tax deeds to Walsh, and to the overruling of this motion the mining company excepted. The court then of its own motion instructed the jury as follows:

"Gentlemen of the Jury: In the view the court takes of this case, it becomes a question of law, and the court will instruct you to find a verdict in favor of the defendant and that the defendant is entitled to possession of the demanded premises."

On the verdict, and after overruling a motion for a new trial, judgment was entered. A writ of error from this court was thereupon allowed by the trial judge, who made and signed a certificate reciting "that in the pleadings in this action as well as in the rulings of this court in admitting and refusing to admit evidence, and in giving and refusing to give instructions to the jury as set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz., of the part of the Four-

teenth Amendment to the same which provides for due process of law."

Mr. Carlton M. Bliss, with whom *Mr. William H. Moody*, *Mr. John A. Perry* and *Mr. George C. Preston* were on the brief, for plaintiff in error.

Mr. Charles S. Thomas and *Mr. Charles J. Hughes, Jr.*, with whom *Mr. Gerald Hughes*, *Mr. William H. Bryant* and *Mr. Harry H. Lee* were on the brief, for defendant in error.

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

We are asked in this case to review directly the judgment of a Circuit Court of the United States, and our right to do so, if at all, depends on that clause of section 5 of the Judiciary Act of 1891, which authorizes the taking of appeals or writs of error from District or Circuit Courts direct to this court "in any case that involves the construction or application of the Constitution of the United States." Of course, if the case at bar does not really involve the construction or application of the Constitution of the United States, in the sense in which that phrase is employed in the Judiciary Act of 1891, we are precluded from examining the merits upon this writ of error. In order to determine whether the case is one which should have gone to the Circuit Court of Appeals and not have been brought directly to this court, we must look into the record, without regard to the certificate given by the trial judge. Indeed, we know of no authority for the making of such certificate.

Before coming to the record, however, we shall briefly advert to the legal principles which must control.

In *Carey* v. *Houston & Texas Central Ry.*, 150 U. S. 170, the record exhibited the following controversy: Stockholders of the railway company filed a bill in equity in a Circuit Court of the

United States, praying, among other relief, the setting aside of a certain decree of foreclosure and sale, basing the claim upon the grounds of collusion and fraud and want of jurisdiction in the court which had entered the decree. A final decree was entered in the cause dismissing the bill and appeals were allowed both to the Circuit Court of Appeals and to this court. The appeal to this court was based upon the contention that the cause involved not only the question of the jurisdiction of the court below, but also the question of the construction or application of the Constitution of the United States. The appeal was dismissed, and in the course of the opinion, speaking through Mr. Chief Justice Fuller, it was said (pp. 179, 181):

"The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction, (the judgments of the latter being subject to the supervisory power of this court through the writ of certiorari as provided,) and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court.

* * * * * * * *

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the Circuit Court decided no question of the construction or the application of the

Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained."

In *In re Lennon*, decided at the same term, 150 U. S. 393, the construction given in the *Carey* case to the provisions of section 5 of the Judiciary Act of 1891 was reiterated. In that case an appeal had been taken directly to this court from an order of the Circuit Court of the United States denying an application for a writ of *habeas corpus* sued out to obtain relief from an imprisonment upon a conviction for contempt. The jurisdiction of the committing court over the cause in which the order of commitment had been made, as well as over the person of the party sentenced for contempt, was assailed. The direct appeal to this court, however, was dismissed for want of jurisdiction. After pointing out that the objection for want of jurisdiction in the court below was without any foundation, the court, speaking through Mr. Chief Justice Fuller, said (p. 400):

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was

involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

It is obvious, under the construction of the Judiciary Act of 1891, announced in the cases just referred to, that this cause does not involve the construction or application of the Constitution of the United States, and therefore was not entitled to be brought directly to this court from the Circuit Court of the United States. When the proceedings at the trial are taken into view it is clear that the contentions which were urged did not require the construction of the Constitution of the United States, but simply called for the construction of the constitution and laws of the State of Colorado or the application of the principles of general law. The real contention of the mining company was that under the laws of Colorado it was essential to the legality of the service upon its alleged agent that the corporation when the service was made should have been doing business within the State, and that the agent should have been resident within the county named in the appointment as his place of residence. It was not disputed that, as authorized by its charter, the mining company had bought mines within the State of Colorado; that it had thereafter appointed, as required by the laws of Colorado, an agent within the State upon whom service of process might be made, and that there had been no direct revocation of such agency. Moreover, it was not disputed that the mining company had worked the mines in question up to a short time before the bringing of the actions in the county court of Ouray County, and that the liabilities enforced in those actions were contracted in Colorado and grew out of the operation of the mines in question. No evidence was introduced tending to show that the company had permanently ceased the operation of its mines in Colorado and withdrawn from that State; and the undisputed fact was that when the county court actions were brought it still owned the property which it had acquired as authorized by its charter.

No claim was made that the sale of the property under the

executions in the county court actions was void under the Constitution of the United States because wanting in due process of law, if the service on the agent was valid under the law of Colorado or the principles of general law applicable to the facts disclosed at the trial. The primary and fundamental contention of the mining company was therefore this and nothing more: that under the circumstances disclosed the service upon the statutory agent was unauthorized either by the law of Colorado or the principles of general law; and hence that it had not lost its title to the property. The claim asserted under the Constitution of the United States was, therefore, merely conjectural and amounted to this only, that if under the law of Colorado or under the general law the service on the alleged agent was void, that it would be a violation of the Constitution of the United States to give effect to judgments based on such service. Not only the statement we have made from the record, but the argument at bar, makes this a demonstration. Thus, in the discussion at bar, it was stated that it was not claimed that the State of Colorado could not without a violation of the Constitution of the United States have exacted that the authority conferred by a foreign corporation upon an agent to receive service of process should continue for the purpose of the enforcement of obligations contracted by the corporation, although the corporation had ceased to do business within the State, but that as the Colorado law when properly construed did not so provide, therefore the service was invalid, and the sale of the property of the mining company based on such service was void. This, however, as we have already shown, amounts but to the concession that the substantial controversy which the case presented involved the mere determination of what was the law of Colorado on the subject. The rulings of the court below as to the admissibility of evidence and its final direction of a verdict involved necessarily deciding that the service upon the agent was valid by the law of Colorado, or the principles of general law applicable thereto, and its action in so doing in nowise involved the con-

struction or application of any provision of the Constitution of the United States.

Writ of error dismissed.

MR. JUSTICE BREWER is of opinion that this court has jurisdiction, that the judgment of the Circuit Court was right, and should be affirmed.

TINKER *v.* COLWELL.

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

No. 160. Argued February 26, 1904.—Decided March 21, 1904.

The personal and exclusive rights of a husband with regard to the person of his wife are interfered with and invaded by criminal conversation with her, and such an act constitutes an assault even when the wife consents to the act, as such consent cannot affect the rights of the husband against the wrongdoer; and the assault constitutes an injury to the husband's rights and property which is both malicious and willful within the meaning of subdivision 2 of section 17 of the Bankruptcy Act of 1898, and a judgment obtained by the husband on such a cause of action is not released by the judgment debtor's discharge in bankruptcy.

THE plaintiff in error applied to the Supreme Court of the State of New York for an order discharging of record a certain judgment of that court obtained against him by the defendant in error. The application was denied, 6 Am. Bankruptcy Rep. 434, and the order denying it was affirmed by the appellate division of the Supreme Court, 65 App. Div. (N. Y.) 20, and subsequently by the Court of Appeals, 169 N. Y. 531, and the latter court thereupon remitted the record to the Supreme Court, where it remained at the time plaintiff in error sued out this writ to review the order of the Court of Appeals.

The application was made under section 1268 of the New York code, which provides that any time after one year has

elapsed since a bankrupt was discharged from his debts, pursuant to the act of Congress relating to bankruptcy, he may apply, after notice to the plaintiff in the judgment, and upon proof of his discharge, to the court in which the judgment was rendered against him for an order directing the judgment to be cancelled and discharged of record. The section further provides that if it appear on the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing the judgment to be cancelled and discharged of record.

The application in this proceeding was made upon a petition by plaintiff in error, which showed that Frederick L. Colwell, the plaintiff in the action, had, on February 9, 1897, recovered a judgment for $50,000 and costs against the petitioner for damages for his criminal conversation with the plaintiff's wife; that the judgment was duly docketed in the county of New York on that day; that on September 13, 1899, petitioner filed his petition in the District Court of the United States for the Southern District of New York, praying that he might be adjudged a bankrupt, and on that day he was adjudged a bankrupt by the District Court, pursuant to the act of Congress relating to bankruptcy; on February 2, 1900, the petitioner was discharged by the District Court of the United States from all debts and claims which were made provable by the act of Congress against his estate, and which existed on September 13, 1899; that the judgment above mentioned was not recovered against him for a willful and malicious injury to the person or property of the plaintiff, within the meaning of the act of Congress, and that by virtue of the discharge in bankruptcy the petitioner had been duly released from that judgment.

In granting the discharge under the bankrupt act (which was opposed by the plaintiff in the judgment) the district judge refused to pass upon the question whether the judgment was thereby released, although it appears that he thought it was. 99 Fed. Rep. 79.

Mr. Nelson Smith for plaintiff in error:

The discharge of the plaintiff in error in bankruptcy released him from the payment of the judgment in question, it not having been recovered in an action for any of the causes mentioned in the exceptions of section 17*a* of the Bankrupt Act as the same existed at the time the discharge was granted. Bradenburg on Bankruptcy, 264.

As the enacting clause of this section is general that a discharge shall release a bankrupt from all his provable debts, save such as are expressly excepted, the exceptions to it must be strictly construed and the burden is on the defendant in error to show that his debt falls within the exceptions. *United States* v. *Dickinson*, 15 Pet. 141, 165; *Spiers* v. *Parker*, 1 T. R. 141; 1 Sedgwick on Construction of Statutes (2d ed.), 50; Potter's Dwarris on Statutes, 118.

The debts excepted are judgments recovered in actions for fraud or for willful and malicious injuries to the person or property of another. This means that the gravamen of the action must be for fraud or for malice as the case may be. *Burnham* v. *Pidcock*, 58 App. Div. (N. Y.) 273, 275; *S. C.*, 5 Am. B. R. 590; *Matter of Rhutassel*, 2 Am. B. R. 697; *S. C.*, 96 Fed. Rep. 597; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson*, 6 Am. B. R. 657; *S. C.*, 111 Fed. Rep. 361, 363.

The gravamen of the action, in which this judgment was recovered, was not for a willful and malicious injury to the person or property of the defendant in error, but, on the contrary, was for the violation of his marital rights—the loss of *consortium* with his wife. 2 Greenleaf Ev. sec. 51, and cases cited; *Barnes* v. *Allen*, 1 Abb. Ct. of App. Dec. 111, 117; *In re Tinker*, 99 Fed. Rep. 80; *Biganette* v. *Paulet*, 134 Massachusetts, 123, 125. See *Weedon* v. *Timbrel*, 5 T. R. 357, and cases in which it has been followed in England and in this country. *Chambers* v. *Caulfield*, 6 East. Rep. 244; *Winter* v. *Henn*, 4 C. & P. 494; *Bartelott* v. *Hawkes*, 7 Peak's Cases, 7; *Wilton* v. *Webster*, 7 C. & P. 198; *Harvey* v. *Watson*, 7 M. & G. 644.

Malice is not an ingredient of an action for criminal conversation. 1 Saund. on Pl. & Ev. (5th Am. ed.) 874, 881; Abb. Trial Ev. (2d ed.) 863, 867.

The only evidence required to support such an action is proof of the plaintiff's marriage, and the defendant's sexual intercourse with his wife. *Berdan* v. *Turney*, 99 California, 649; *Wales* v. *Minor*, 89 Indiana, 118, 121.

The strict construction of the exceptions of the statute requires that the fraud or malice be actual fraud or actual malice, and not fraud or malice implied by law; so held in the construction of the word *fraud* in the bankrupt law of 1867. *Hennequin* v. *Clews*, 111 U. S. 676; *Strang* v. *Bradner*, 114 U. S. 555. See bankrupt law of 1867 respecting the effect of a discharge.

This conversation by the plaintiff in error with the wife of the defendant in error was not an injury to his person. Nothing short of an immediate physical touching can be considered a personal injury. *Mitchell* v. *Rochester Ry. Co.*, 151 N. Y. 107, 109; *Victorian Railway Commissioners* v. *Coultas*, L. R. 13 App. Cas. 222, 224–226; *Lehman* v. *Bklyn. City R. R. Co.*, 47 Hun, 355.

The criminal conversation complained of was not an injury to the property of the defendant in error. The husband's right of *consortium* is not property or a property right. An action for the loss of it does not survive, and is not assignable. *Cregin, Adm.*, v. *Bklyn. Crosstown R. R. Co.*, 83 N. Y. 595, 596, 597.

This case is not affected in any way by the amendment of the Bankruptcy Act of February 5, 1903. Collier on Bankruptcy (4th ed.), p. 845; Supplement 1903, 57th Congress, U. S. Compiled Statutes, 410.

Mr. Thomas McAdam, with whom *Mr. George Newell Hamlin* was on the brief, for defendant in error:

Within the meaning of the Bankruptcy Act, section 17, subdivision 2, the judgment in the action sought to be cancelled is a judgment in an action for "injuries to the person

or property of the judgment creditor." *Re Blumberg*, 1 Am. B. R. 634.

All torts or wrongs which in their nature involve willfulness and malice were meant to be included in the phrase—actions "for willful and malicious injuries to the person or property of another."

The word "injury" as here used can only mean the invasion of a legal *right* of another; in other words, a wrong done to a person in violation of his *right;* and such is its common interpretation.

Under the general interpretation of the word "injury," it means any legal wrong which will give a cause of action for damages to the one whose rights, person or property are injured thereby. *Parker* v. *Griswold*, 17 Connecticut, 302; *Wrightman* v. *Devere*, 33 Wisconsin, 575; *Penn. R. Co.* v. *Marchant*, 119 Pa. St. 561; *Northern R. Co.* v. *Carpentier*, 13 How. Pr. (N. Y.) 222; *Woodruff* v. *North Bloomfield Grav. Men. Co.*, 18 Fed. Rep. 781.

The word "injury" is of broader significance than the expression "defraud." *Delamater* v. *Russell*, 4 How. Pr. (N. Y.) 234; 1 Ch. Pl. 137; 2 Kent's Com. 129; 3 Black. Com. 138.

At common law, an action in trespass *vi et armis* was the usual form of remedy by a husband for the seduction of his wife, for the reason that a wife could not give her consent, and force was in consequence implied. *Woodward* v. *Walton*, 2 B. & P. N. N. 476; *Guy* v. *Livesey*, Cro. Jac. 501; *Parker* v. *Bailey*, 4 D. & R. 215; 16 E. C. L. 195; 1 Saunders on Pleading & Ev. (5th Am. ed.) 875; *Bedan* v. *Turney*, 99 California, 649; *Wales* v. *Miner*, 89 Indiana, 118; *Moore* v. *Hammoris*, 119 Indiana, 510; *Jacobson* v. *Siddal*, 12 Oregon, 280; Bouvier Law Dict. vol. 2, p. 748.

Criminal conversation is a personal injury or wrong to the husband, an invasion of his rights. *Delamater* v. *Russell*, 4 How. Pr. 234; *Strauss* v. *Schwarzwallder*, 4 Bas. 627; *Bedan* v. *Turney*, 99 California, 653; 1 Selw. *Nisi Prius* (13th ed.), 7; *Rigaut* v. *Gallisard*, 7 Mod. 81; *S. C.*, 2 Salk. 552; *Birt* v. *Bar-*

low, 1 Doug. 171. It is also an invasion of his property rights as he is entitled to the services of his wife, and this is a right of property. *Cregin* v. *Railroad*, 75 N. Y. 192; 83 N. Y. 595; *Groth* v. *Washburn*, 34 Hun (N. Y.), 509.

It tends to deprive the husband of the wife's services to himself or in the bearing and proper nurture of and example to his children. *Lundt* v. *Hartrunft*, 41 Illinois, 9; *Colwell* v. *Tinker*, 169 N. Y. 531.

This section of the bankruptcy law has been construed and held to expressly except judgments in actions for violations of personal rights, which are relative in their nature. Judgments for damages for the alienation of a wife's affections are not barred by a discharge in bankruptcy, *Leicester* v. *Hoadley*, 71 Pac. Rep. 318; *Erline* v. *Sargent*, 23 Ohio Cir. Ct. Rep. 180; or for the seduction of a daughter, *In re Freche*, 109 Fed. Rep. 620; *In re Maples*, 105 Fed. Rep. 919.

As to the element of maliciousness, see cases last cited. Bigelow on Torts, 12; *United States* v. *Reed*, 86 Fed. Rep. 309; 2 Burrill's Law Dict. 175; *Commonwealth* v. *York*, 9 Metc. 93, 104; *Wiggins* v. *Coffin*, 3 Story, 1; *Etchberry* v. *Levielle*, 2 Hilt. (N. Y.) 40; *Rounds* v. *Delaware, etc., R. Co.*, 3 Hun (N. Y.), 335; *Bromage* v. *Prosser*, 4 Barn. & Cress. 247; *Commonwealth* v. *Shelling*, 16 Pick. (Mass.) 340; *Wheeler* v. *State*, 109 Alabama, 60; *Times Pub. Co.* v. *Carlisle*, 94 Fed. Rep. 766; *Darry* v. *People*, 10 N. Y. 136; *Wilson* v. *Noonan*, 35 Wisconsin, 352; *United States* v. *King*, 34 Fed. Rep. 302.

It is immaterial whether defendant does or does not know that the woman is married. When he engages in intercourse with a woman not his wife, he is bound to take notice of her domestic relations, and he voluntarily assumes the hazard of being held responsible for any injuries that may result. *Wales* v. *Miner*, 89 Indiana, 118; *Calcraft* v. *Harborough*, 4 C. & P. 499; 19 E. C. L. 494. Hence it follows, therefore, that criminal conversation, being a wrong to the husband, is malicious, being malicious is also willful, because malice implies willfulness. *State* v. *Robbins*, 66 Maine, 324; *Funderburk* v. *State*, 75 Miss-

issippi, 20. See also *Rounds* v. *Delaware, etc., R. Co.*, 3 Hun (N. Y.), 335; aff'd 64 N. Y. 129; *State* v. *Clark*, 29 N. J. L. 98; *Highway Commissioners* v. *Healey*, 54 Michigan, 181; *Newell* v. *Whitingham*, 58 Vermont, 341; *Chapman* v. *Commonwealth*, 5 Whart. (Pa.) 429; *Fuller* v. *Chicago, etc., R. Co.*, 31 Iowa, 204. "Willfully" means intentionally. Bouvier, vol. 2, 656; *Northern Railway* v. *Carpentier*, 13 How. Pr. (N. Y.) 22.

In any event the burden is on the plaintiff in error to show the lack of malice and willfulness in the acts upon which the judgment was predicated, and that the judgment was not for an injury to person or property.

The mere statement, in the petition, "that the said judgment was not recovered for a willful or malicious injury to the person or property *within the meaning of the said acts of Congress*, is a conclusion of law and not a statement of fact, *Whitton* v. *Tomlinson*, 160 U. S. 243, and cannot be deemed to be admitted by a failure to deny it. *Ritchie* v. *McMullen*, 159 U. S. 241; *Pullman Palace Car Co.* v. *Missouri Pac. R. Co.*, 11 Fed. Rep. 636; *Dillon* v. *Barnard*, 21 Wall. 437.

As to the sufficiency of evidence that a particular debt or judgment is released by discharge in bankruptcy, the nature of the action in which the judgment is rendered is determined by the record, and when it is necessary to consider whether the judgment is released by a discharge in bankruptcy, the fact must be determined by the record and not by any allegation or proof outside of it. *Burnham* v. *Pidcock*, 58 App. Div. (N. Y.) 276; *Hargadine, McKittridge D. G. Co.* v. *Hudson*, 111 Fed. Rep. 261; *In re Bullis*, 7 Am. B. R. 238; *Turner* v. *Turner*, 108 Fed. Rep. 785.

As to the distinction between a proviso and an exception, see *Spiers* v. *Parker*, 1 T. R. 141; 1 Barn. & Adl. 199; *Thiebault* v. *Gibson*, 12 Meeson & Welsby, 88, 740; *Rowell* v. *Janvrin*, 151 N. Y. 60; *Simpson* v. *Ready*, 12 M. & W. 736, 740; *Jones* v. *Yxen*, 1 Ld. Raym. 120; *United States* v. *Cook*, 17 Wall. 168; *Commonwealth* v. *Hart*, 11 Cush. 130.

A judgment such as this is in the nature of a fine or penalty.

In re Cotton, Fed. Cas. No. 3269; *Johnson* v. *Disbrow*, 47 Michigan, 59; *Johnson* v. *Allen*, 100 N. Car. 131; *Cornelius* v. *Hamberg*, 150 Pa. St. 359.

This element of damage—that of a punitive nature—does not depend upon compensation to the plaintiff, but rests upon the principle that for a malicious and reprehensible act the defendant may well be punished, and the law's condemnation of the fault be given voice.

In determining the character of the debts of a bankrupt, the court will look beyond the form of the judgment and consider the nature of the liability upon the original cause of action. *Turner* v. *Turner*, 108 Fed. Rep. 785; *Boynton* v. *Ball*, 121 U. S. 457, 466.

The purpose of the Bankruptcy Act was to relieve failing honest debtors from their money obligations, and not to free tortious debtors from liability for their wrongs. *Desler* v. *McCauley*, 35 Misc. (N. Y.) 411; *Turner* v. *Turner*, 108 Fed. Rep. 785.

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

The question herein arising is, whether the judgment obtained against the defendant, petitioner, for damages arising from the criminal conversation of the defendant with the plaintiff's wife, is released by the defendant's discharge in bankruptcy, or whether it is excepted from such release by reason of subdivision 2, section 17, of the bankruptcy act of July 1, 1898, which provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretences or false representations, or for willful and malicious injuries to the person or property of another; . . ."

The averment in the petition, that the judgment was not recovered for a willful and malicious injury to the person or

property of the plaintiff in the action, is a mere conclusion of law and not an averment of fact.

If the judgment in question in this proceeding be one which was recovered in an action for willful and malicious injuries to the person or property of another, it was not released by the bankrupt's discharge; otherwise it was.

We are of opinion that it was not released. We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful. A judgment upon such a cause of action is not released by the defendant's discharge in bankruptcy.

The assault *vi et armis* is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children.

Subsequently the action of trespass on the case was sustained for the consequent damage, and either form of action was thereafter held proper.

Blackstone, in referring to the rights of the husband, says (3 Black. Com. edited by Wendell, page 139):

"Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. . . . 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual

courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary."

Speaking of injuries to what he terms the relative rights of persons, Chitty says that for actions of that nature (criminal conversation being among them) the usual and perhaps the more correct practice is to declare it trespass *vi et armis* and *contra pacem.* 1 Ch. Pl. (2 vol. ed.) 150, and note *h.*

In *Macfadzen* v. *Olivant,* 6 East. 387, it was held that the proper action was trespass *vi et armis,* for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost and was deprived of her comfort, society and fellowship against the peace and to his damage. Lord Ellenborough, C. J., among other things, said:

"Then the question is, whether this be an action on the case or an action of trespass and assault? And it is said that the latter description only applies to personal assaults on the body of the plaintiff who sues; but nothing of the sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant *per quod servitium amisit;* and also by a husband for a trespass and assault of this kind upon his wife *per quod consortium amisit.*"

In *Rigaut* v. *Gallisard,* 7 Mod. Rep. 81, Lord Holt, C. J., said that if adultery be committed with another man's wife, without any force, but by her own consent, the husband may have assault and battery, and lay it *vi et armis,* and that the proper action for the husband in such case was a special action, *quia*—the defendant his wife *rapuit,* and not to lay it *per quod consortium amisit.*

In *Haney* v. *Townsend,* 1 McCord's Rep. 206 (decided in 1821), it was held that case as well as trespass *vi et armis* is a proper action for criminal conversation, the court holding that no doubt trespass was a proper form of action for the injury done by seducing a wife, but that case was also a proper action.

In *Bedan* v. *Turney*, 99 California, 649, decided in 1893, it was held that the criminal intercourse of the wife with another man was an invasion of the husband's rights, and it was immaterial whether this invasion was accomplished by force or by the consent of the wife; that the right belonged to the husband, and it was no defence to his action for redress that its violation was by the consent or even by the procurement of the wife, for she was not competent to give such consent; that it was not necessary that the husband should show that it was by force or against her will. The original form of the action was *trespass vi et armis*, even though the act was with the consent of the wife, for the reason, as was said by Holt, C. J., in *Rigaut* v. *Gallisard*, 7 Mod. Rep. 81, "that the law will not allow her a consent in such case to the prejudice of her husband."

In *M'Clure's Executors* v. *Miller*, 11 N. C. Rep. (4 Hawks) 133, note, page 140, trespass was held to be the proper form of action in such a case, and that a single act of adultery, though never manifested in its consequences, is an invasion of the husband's rights, and the law redresses it. It is also said that the husband has, so to speak, a property in the body and a right to the personal enjoyment of his wife. For the invasion of this right the law permits him to sue as husband.

For the purpose of maintaining the action, it is regarded as an actual trespass upon the marital rights of the husband, although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife, and it is in this view (that it is a trespass upon the rights of the husband) that it is held that the consent of the wife makes no difference; that she is incapable of giving a consent to an injury to the husband. 7 Mod. Rep. 81.

In *Wales* v. *Miner*, 89 Indiana, 118, decided in 1883, it was held that in an action of *crim. con.* the wife was incapable of consenting to her own seduction so as to bar her husband's right of action.

In *Bagaoutte* v. *Paulet*, 134 Massachusetts, 123, it was held the action could be maintained whether the conversation was

with or without the consent of the wife, and although the act caused no actual loss of the services of the wife to the husband.

Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right.

In *Delamater* v. *Russell*, 4 How. Pr. (N. Y.) 234, it was held that the act complained of (criminal conversation) was an injury to the person of the plaintiff; that it was an invasion of his personal rights, and although the action was brought for depriving the plaintiff of the comfort, society, fellowship, aid and assistance of the wife, yet it was an action brought for an injury to and an invasion of the plaintiff's personal rights.

The plaintiff in error refers to the case of *Cregin* v. *Brooklyn Crosstown Railroad Company*, 75 N. Y. 192; same case upon second appeal, 83 N. Y. 595, for the purpose of showing that the right to the society of the wife is not property, and therefore cannot be regarded as within the words of the bankruptcy act. The case does not decide that the right to the wife's society and comfort is not a property right on the part of the husband. It was a case brought by the husband against the railroad company for injuries negligently inflicted on the person of his wife by the company, and after the action was brought the husband died, and an application was made to revive the action in the name of the administrator of the husband. The court held that the action survived under the provisions of the state statute. 2 Rev. Stat. N. Y. 447, section 1. The case then went to trial and the judge submitted to the jury the question of damages arising for the loss of the services of the wife and of her society, and it was held to be error by the Court of Appeals, because, while the right to the services of the wife was property, the right to her society, etc., was not property within the meaning of the statute providing for the

survival of the cause of action, for the reason that the statute only provided for the survival of those rights the loss of which diminished the estate of the deceased; that the loss of the services of the wife did diminish the estate of the deceased, but that the loss to the husband of the wife's society and aid, etc., did not diminish his estate, and therefore the right of action consequent thereon did not survive the deceased. The question in the case at bar neither arose nor was referred to in the opinions delivered in that case.

We think it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband.

We think such an act is also a willful and malicious injury to the person or property of the husband, within the meaning of the exception in the statute.

There may be cases where the act has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.

In *Bromage* v. *Prosser*, 4 Barn. & Cres. 247, which was an action of slander, Mr. Justice Bayley, among other things, said: "Malice, in common acceptation, means ill will against a

person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . ."

We cite the case as a good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned.

In *In re Freche*, (U. S. District Court, District of New Jersey, 1901) 109 Fed. Rep. 620, it was held that a judgment for the father in an action to recover damages for the seduction of his daughter was for a willful and malicious injury to the person and property of another, within the meaning of section 17 of the bankrupt act, and was not released by a discharge in bankruptcy. Kirkpatrick, District Judge, in the course of his opinion, said:

"From the nature of the case, the act of the defendant Freche which caused the injury was willful, because it was voluntary. The act was unlawful, wrongful and tortious, and, being willfully done, it was, in law, malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant Freche must be presumed to have had in mind when he committed the offence. 'Malice,' in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is mani-

fested by his injurious acts. While it may be true that in his unlawful act Freche was not actuated by hatred or revenge or passion towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."

In *Leicester* v. *Hoadley*, (Supreme Court of Kansas, 1903) 71 Pac. Rep. 318, it was held that a judgment obtained by a wife against another woman for damages sustained by the wife by reason of the alienation of the affections of her husband is not released by the discharge of the judgment debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

It was further held that injuries so inflicted are willful and malicious, and are to the person and property of another, within the meaning of section 17 of the United States bankrupt law.

In *United States* v. *Reed*, 86 Fed. Rep. 308, it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.

It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Commonwealth* v. *Williams*, 110 Massachusetts, 401.

We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged.

Howland v. *Carson*, 28 Ohio St. 625, is cited by plaintiff in error. The question arose under the old bankruptcy act, which provided (Rev. Stat. § 5117) that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, should be discharged by proceedings in bankruptcy, etc. It was held in the case cited that a judgment for the seduction of his daughter in favor of the father, where the seduction was not induced or accomplished under a promise of marriage fraudulently made for the purpose, was not a debt created by fraud, within the meaning of the bankruptcy act. We do not perceive the least similarity in the case to the one now before the court, nor could we say that such a debt was one created by fraud.

It is also argued that, as the fraud referred to in the exception is not one which the law implies, but is a particular fraud involving moral turpitude or intentional wrongdoing, so the malice referred to is not a malice implied in law but a positive and special malice upon which the cause of action is founded, and without proof of which the action could not be maintained. It is true that the fraud mentioned in the bankruptcy statute of 1867 has been held to be a fraud involving moral turpitude or intentional wrong, and did not extend to a mere fraud implied by law. *Hennequin* v. *Clews*, 111 U. S. 676, 681; *Forsyth* v. *Vehmeyer*, 177 U. S. 177. The reason given was that the word was used in the statute in association with a debt created by embezzlement, and such association was held to require the conclusion that the fraud referred to meant positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not a fraud which the law might imply and which might exist without the imputation of bad faith or immorality.

Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the court in the above cited cases released was of such a nature that it did not impute either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action, such as the one before us, the malice which is implied is of that very kind which does involve moral turpitude. This case is not, therefore, controlled in principle by the above cited cases.

The *People ex rel. &c.* v. *Greer*, 43 Illinois, 213, is also cited. The court there did hold that, under the Illinois insolvent law, an insolvent debtor was discharged from a judgment obtained by the father for the seduction of his daughter. The law discharging the debt extended by its terms to all tort feasors except where malice was the gist of the action, and the court said malice was not the gist of the action in question. The case is not opposed to the views we have already expressed.

It is not necessary in the construction we give to the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious. It might be conceded that the language of the exception could be so construed as to make the exception refer only to those injuries to person or property which were accompanied by particular malice, or, in other words, a malevolent purpose towards the injured person, and where the action could only be maintained upon proof of the existence of such malice. But we do not think the fair meaning of the statute would thereby be carried out. The judgment here mentioned comes, as we think, within the language of the statute reasonably construed. The injury for which it was recovered is one of the

grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit such an injury to be released by a discharge in bankruptcy.

An action to redress a wrong of this character should not be taken out of the exception on any narrow and technical construction of the language of such exception.

For the reasons stated, we think the order of the Court of Appeals of New York must be

Affirmed.

MR. JUSTICE BROWN, MR. JUSTICE WHITE and MR. JUSTICE HOLMES, dissent.

FARGO *v.* HART.

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

No. 154. Argued February 24, 25, 1904.—Decided March 21, 1904.

While a State can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce between the States, it cannot tax the privilege of carrying on such commerce, nor can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere.

A state assessment upon an express company of another State proportioned to mileage is bad when it appears that the total valuation is made up principally from real and personal property, not necessarily used in the actual business of the company, and which is permanently located in the State where the company is incorporated.

The transmission of such an assessment by a state board to the auditors of the several counties may be enjoined.

Where the assessment is void as made, and a question is raised in the bill whether any assessment can be levied, an offer to give security to the satisfaction of the court for the payment of any sum ultimately found due is sufficient without a tender of any sum.

THE facts are stated in the opinion of the court.

Mr. Lewis Cass Ledyard for appellant:

The constitutionality of the state law has been sustained but this suit involves whether in the practical administration of the law the taxing authorities are not depriving express companies of rights secured by the Constitution. The system of taxation is that which has become known as the "unit system." Adopted by the States, and sustained by this court as a method of taxing railroad property (*Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421), and sleeping car companies (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18) it has been extended to the property of telegraph companies (*Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1), and by the decisions above referred to was sustained in its application to express companies. Its principal features are the valuation of the entire property of the company, wherever located, as a unit profit-producing plant, the aggregate market value of all the stock and bonds of the company being taken to establish the value of its entire property, and it was held that a fair proportion of this value, so ascertained, might be imputed to the property of the company within the taxing State, and that such fair proportion might be determined upon a mileage basis, thus imputing to the property within the State a proportion of the value of the total property equal to the proportion between the number of miles operated in such State and the total number of miles everywhere operated by the company which has a fixed and permanent situs.

The business in which they are engaged is in its nature not the operation of a plant, but the rendering of services. They

have no means of transportation of their own, but employ the facilities of railroad companies and other carriers for the forwarding of goods. The only property which they have in actual use in the business itself consists of horses, wagons, safes and office furniture, and these instrumentalities have, in fact, a definite and ascertainable value, as property, which is the same as that which may be attributed to similar horses, wagons, safes and office furniture owned by other people, and it was therefore claimed that to impute to them an enormously enhanced value based upon the value at which the business of the company and all its assets could be sold, as evidenced by the market value of its securities, would be, in substance and in fact, to import into the taxing State values not within its jurisdiction, and that an assessment upon property within the State at such enormously enhanced values would be, in substance and in fact, a taxation of property situated without the State.

No State can tax tangible property owned by a non-resident, and having an actual situs without the State. Such taxation is a taking of property without due process of law. *Louisville, etc., Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 171; *Adams Exp. Co.* v. *Ohio*, 166 U. S. 185; *Pittsburgh, etc., Ry. Co.* v. *Backus*, 154 U. S. 421; *Cleveland, etc., Ry. Co.* v. *Backus*, 154 U. S. 439. It matters not whether legislative authority exists for the illegal act, or whether it is done in pretended pursuance of such authority, or whether it is confessedly a barefaced exercise of arbitrary power. It is the thing itself which may not be done. *Reagan* v. *Farmer's L. & T. Co.*, 154 U. S. 362, 390; *Cummings* v. *National Bank*, 101 U. S. 153; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The court below erred in holding that no fraud was proved on the part of the State Board, and that its determination, either as to the value of the company's property or the company's right to include its ocean mileage, could not be impeached except for fraud. *Hart* v. *Smith*, 159 Indiana, 182,

and cases cited on p. 196; *State* v. *London &c. Co.*, 80 Minnesota, 277, 284.

As to the bonds, stocks, securities, to say nothing of real estate and chattels, they are tangible property, capable of having an actual situs where they exist. *New Orleans* v. *Stempel*, 175 U. S. 309; *Blackstone* v. *Miller*, 188 U. S. 189.

As to jurisdiction, in a suit of this nature, one may sue for all and the citizenship of the parties to the record alone will be considered. *Stewart* v. *Dunham*, 115 U. S. 61; *Hotel Co.* v. *Wade*, 97 U. S. 13; *Payne* v. *Hook*, 7 Wall. 425; *Society of Shakers* v. *Watson*, 68 Fed. Rep. 736; *Smith* v. *Swormstedt*, 16 How. 302; *President & Trustees of Bowdoin College* v. *Merritt*, 54 Fed. Rep. 62. But diversity of citizenship is not the only ground of jurisdiction. Federal questions are involved, and the complainant had a right to resort to the Federal Courts upon that ground alone.

Mr. Cassius C. Hadley, with whom *Mr. Charles W. Miller*, Attorney General of the State of Indiana, *Mr. L. G. Rothschild* and *Mr. William C. Geake* were on the brief, for defendant in error:

There is no authority for a court of equity to enjoin any clerical officer from extending assessments for taxation upon the duplicates. There is no authority in the rules of equity whatever for enjoining either the auditor of State or the auditor of a county from performing what the law enjoins upon him. The auditor of State simply certifies down the assessments made by the state board of tax commissioners to the auditors of the counties, and the auditor of the county places such assessment upon the tax duplicates that are to be placed in the hands of the collecting officers. *Smith* v. *Smith*, 159 Indiana, 388, and cases cited on p. 389.

To enjoin the collection of a tax it is necessary for the complainant to pay, or make an unconditional tender of such part of the taxes as is undisputed, or what can be seen to be due from the face of the bill, or shown to be due by affidavits. *State Rail-*

road Tax Cases, 92 U. S. 575, 616; *National Bank* v. *Kimball*, 103 U. S. 732; *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, 552; *Albuquerque Bank* v. *Perea*, 147 U. S. 87, 90; *Northern Pac. R. Co.* v. *Clark*, 153 U. S. 252, 272; *City Council* v. *Sayre*, 65 Alabama, 564, 566; *County of Los Angeles* v. *Ballerino*, 99 California, 593; *Bundy* v. *Summerland*, 142 Indiana, 92; *Morrison* v. *Jacoby*, 114 Indiana, 84, 93; *Studabaker* v. *Studabaker*, 152 Indiana, 89, 97; *Lewis* v. *Boguechitto*, 76 Mississippi, 356; *Palmer* v. *Township*, 16 Michigan, 176, 178; *County Commrs.* v. *Union Mining Co.*, 61 Maryland, 545, 556; *Ottawa Glass Co.* v. *McCaleb*, 81 Illinois, 556; *Northern Pac. R. Co.* v. *Patterson*, 10 Montana, 90, 103; *Welch* v. *City of Astoria*, 26 Oregon, 89; *Union Pac. R. Co.* v. *Ryan*, 2 Wyoming, 408; *Huntington* v. *Palmer*, 8 Fed. Rep. 449; *People's Nat. Bank* v. *Marye*, 191 U. S. 272; *Copper Co.* v. *Scherr*, 50 W. Va. 533, 540; *Covington* v. *Town of Rockingham*, 93 N. Car. 134, 140; High on Injunctions (3d ed.), § 497; 2 Beach on Injunctions, § 1208; 1 Spelling Inj. and Extra. Rem. (2d ed.) § 662; 2 Cooley on Taxation (3d ed.), 1424–1426; *State ex rel.* v. *West. Union Tel. Co.*, 165 Missouri, 502, 517; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412, 426.

It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must pay what is conceded to be due or what can be seen would be due on the face of the bill or be shown by affidavits whether conceded or not, before the preliminary injunction should be granted. Cases cited *supra* and see also *Hagaman* v. *Commissioners*, 19 Kansas, 394; *Chicago &c. R. R. Co.* v. *Board*, 67 Fed. Rep. 413.

The state board of tax commissioners, having fixed the valuation and assessed the property, their action in this behalf is final, and cannot be avoided or set aside, except for fraud on the part of the state board of tax commissioners, which would render the assessment void. *State* v. *Adams Exp. Co.*, 144 Indiana, 549.

This plan of taxation is fair and just. If such a plan were

followed in all the taxing jurisdictions in which appellant has lines and routes, appellant would not be subject to excessive or double taxation.

Under these provisions of the statute the state board is given jurisdiction over the subject matter, to value and assess the mileage of the express companies having lines and routes within the State and acting thereunder they made such assessment and rendered their finding, which, in its nature, is that of a judgment, and is final. This is especially true as against a collateral attack. *Cleveland, Cin. &c. Ry. Co.* v. *Backus*, 133 Indiana, 513, and cases cited on p. 541; *P. C. I. & St. L. Ry. Co.* v. *Backus*, 133 Indiana, 625, 652; *S. C.*, 154 U. S. 421, 434; *Youngstown Bridge Co.* v. *Kentucky &c. Bridge Co.*, 64 Fed. Rep. 441, and cases cited; *McLeod* v. *Receveur*, 71 Fed. Rep. 455, 458; *Stanley* v. *Supervisors*, 121 U. S. 535, 550; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194, 229; *Marsh* v. *Arizona*, 164 U. S. 599, 610; *Van Nort's Appeal*, 121 Pa. St. 118, 129.

The evidence wholly fails to sustain the contention of appellant respecting the ownership, situs and use of the stocks and bonds owned by appellant.

As to burden of proof in regard to stocks and bonds not being used in business being on the company, see *Adams Exp. Case*, 166 U. S. 185, 222; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, and cases cited pp. 22, 23; *Marye* v. *B. & O. R. R.*, 127 U. S. 117; *West. Un. Tel. Co.* v. *Taggart*, 141 Indiana, 281, 300; *S. C.*, 163 U. S. 1, 29.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree of the United States District Court dismissing the plaintiff's bill and supplemental bills. The bill was brought by the president of the American Express Company, a joint stock company of New York, on behalf of himself and the other members of the company, to enjoin the auditor of the State of Indiana from certifying an assessment for 1898 to the auditors of the several counties of the State.

Supplemental bills sought the like remedy in respect of the assessments for the following years through 1901. The ground of relief is that the assessments will result in unconstitutional interferences with commerce among the States and also are contrary to the Fourteenth Amendment. The plaintiff's case may be stated in a few words. The American Express Company is engaged in commerce among the States, including Indiana. It has real estate of a market value of nearly two million dollars, which is outside of Indiana and which it says is not used in its business, and fifteen million and a half dollars' worth of personal property in New York as to which it says the same; over three million dollars' worth of real estate used in connection with the business and about a million and a half dollars' worth of personal property used in the business, of which there was less than eight thousand dollars' worth in Indiana. It has paid the local taxes on this last. The total value of the property for 1898 was $22,059,055.35. The market value of what for brevity we may call its stock was $21,600,000. The state board of tax commissioners has undertaken to tax the property of the company under the law which was upheld in *American Express Co.* v. *Indiana*, 165 U. S. 255; *Adams Express Company* v. *Ohio State Auditor*, 165 U. S. 194; *S. C.*, 166 U. S. 185; *Adams Express Company* v. *Kentucky*, 166 U. S. 171, by treating the whole business as a unit and assessing the company on a proportion of the total value of its property determined by the ratio of the mileage in Indiana to the total mileage of the company, excluding its ocean mileage for foreign express business, which the company says should have been included. The company relies on the fact that it made a return to the board setting forth in detail what its property was, where it was situated and how used, and that the value and nature of the property was not disputed; and it contends that when these facts appeared the board was not at liberty to spread the whole value over the whole line equally and tax by mileage. The auditor in his answer sets up that the said sum of fifteen and a half million dollars in securities is used by

the company as a part of the necessary capital of its business and denies that the board assesses personal property not used in connection with its business. Thus he admits by implication that the above sum did enter into the assessment made, and this would be obvious unless we should assume the intended tax to be wholly arbitrary, as the assessment was at the rate of four hundred and fifty dollars a mile for seventeen hundred and ninety-eight and a fraction miles, amounting to $809,253, as against less than eight thousand dollars' worth of tangible property in the State. There are some differences of detail between the State and the company as to the precise value of the stock, etc. But the foregoing facts present the general question.

The contention of the company in its extreme form is that the State had no right to tax it anything for the years when its stock was of less market value than its property, because that ratio showed that the whole value of the company was in its tangible assets, and that the intangible property spoken of in the *Adams Express Company* case was nothing. It says that in any year that property was so small as to warrant only a nominal tax. We lay this contention on one side. It was admitted at the hearing before the board of tax commissioners that an appreciable sum properly might be assessed on the mileage basis, and therefore the board was warranted in assuming the fact. It was admitted at the argument before this court that the low market value of the stock was due in part to the ignorance of the public as to the assets of the company. On this concession the market value of the stock was not a test of the value of the business. The statement is confirmed by the continued rise in the stock since, up to $225 in April, 1902. And apart from these admissions the board well might have hesitated to believe that the company was carrying on a business, which it gave no signs of intending to stop, at a loss, and was paying its regular dividends out of investments alone. We lay on one side also the question of ocean mileage. Without dwelling on the sudden change in the returns which added

nearly one hundred and thirty thousand miles in 1898, with comparatively slight explanation, of the admitted differences between the ocean and land carriage, we cannot say that the tribunal having the duty and sole jurisdiction to find the facts exceeded its powers in not allowing the item.

We come, then, to the real question of the case: whether, the tax provided for by the statute being a tax on property, it sufficiently appears that the board took into account property, which it had no right to take into account in fixing the assessment at the large sum which we have mentioned. We already have stated reasons for assuming that the personal property in New York did enter into the valuation. We may add that it appears by a stipulation as to facts, that "the minutes of said state board of tax commissioners" are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings, and therefore that we have before us all the evidence that was put in as well as a report of what was said. There was no indication of dispute concerning the amount, value and place of the company's personal property. The protests of the company alleged that there was no dispute as to the facts. If the company had been mistaken common fairness required that it should be informed and allowed to give further evidence of the undoubted truth. The ground taken before the board, and insisted on in argument before us, was that the property ought to enter into the valuation, because wherever situated it was used in the business; if not otherwise, at least as giving the credit necessary for carrying the business on. We shall assume that the question before us is narrowed to whether that ground can be maintained. The pleadings and proceedings leave no alternative open, and no other could be pressed consistently with the candor to be expected from the officers of a State, in face of a constitutional question and dealing with great affairs. For present purposes it does not matter whether the sum taken for division on a mileage proportion was reached by taking the value of the stock or the value of the tangible

assets of the company. For if the former was the starting point it appears from what we have said that the tangible assets gave the stock its value. The use of the value either of total stock or total assets is only as a means of getting at the true cash value of property within the State. *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 26, 27; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 25.

The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. *Western Union Telegraph Company* v. *Taggart*, 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or prop-

erty outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense. *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus*, 154 U. S. 421, 431; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 23. The same principle applies to personal property which the State would not have the right to tax directly. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 227; *S. C.*, 166 U. S. 185, 222, 223. In *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus* there was reason to suspect an infraction of constitutional rights, but the Secretary of State testified that there was no assessment of property outside the State, 154 U. S. 434, and therefore the court could not say that there was more than a possible overvaluation by the board. Of course if the board did not go beyond its jurisdiction its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the *Express Companies'* cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account.

We come back to the question whether the taking of personal property outside the State into the assessment can be justified on the ground that it gives credit necessary for the business in the State. The testimony was that the property was not necessary for that purpose, and in fact was not used. We may

assume that the board was of a different opinion, so far as that was concerned, and still we may hold its action unjustified. It will be seen that we are dealing with much more attenuated relations than when there is a physical line of rails or wires to be valued, every mile of which is a necessary condition of the use of the rest of the lines beyond, and therefore a reflex condition of the value of the line behind it. The case is stronger even than one of terminals having a large value as real estate independent of their use to the road. The express business added nothing to the value of the bonds in New York. Conversely, the utmost extent to which those bonds entered into the value of property in Indiana was in so far as they helped to make the public believe that the express company could be trusted and therefore increased its good will. That they made a part of the public more willing to buy interests in the company because they were an assurance against personal liability was no concern of Indiana. But it is obvious that merely from the point of view that the express company could be trusted by the public with the carriage of goods or money the good will could not be measured by the assets. In the first place the public knew nothing of the amount. This appears as to even the more instructed portion of the public which bought interests in the concern, and *a fortiori* as to the general run of shippers. For if even the buyers of the stock of the company would pay only in the neighborhood of the value of the tangible assets it is apparent either that they did not know what the assets were, as was stated by the appellant's counsel, or else that the good will taxed was worth nothing, and either view is equally fatal to the grounds for the tax.

But again, suppose that the state of the assets of the company had been published in every newspaper in Indiana, can it be imagined that it would have had an appreciable effect upon the company's business? Certainly it is absurd to say that the business of such companies will bear an exact or any proportion to the stocks and bonds which they may own. Unless we are much mistaken, most people who want to send

things by express employ a company simply because it is there, and they see its sign is out. The only effect that knowledge of the capital of the company could have would be to produce the conviction that the company was safe to employ. Assume that something is to be added to the good will of a company because it is safe, and that the good will, or a part of it, of the express business in Indiana may be considered in assessing its property there, this is very different from measuring the good will by the capital, when the facts appear as they do in this case. The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States. The result has been that, taking the value of the stock as stated by the defendant to have been 125 for 1898, the State of Indiana assessed the company for nearly twice the total good will of its business, measuring that good will by the difference between the tangible assets and the total value of the stock. The injustice grew less flagrant as the stock rose, but in the year 1901 the assessment still was nearly double what the State had a right to assess, assuming that, without transcending its constitutional power, it had a right to assess its proportion by mileage of the total good will.

We have explained why in our opinion this cannot fairly be treated as a mere case of overvaluation, but is an assessment made upon unconstitutional principles. Under such circumstances it was impossible for the company to tender any sum, because it was impossible for it to say what, if anything, it ought to pay. It denied that under the Constitution it ought to pay anything, and it is plain that for the year 1898 at least it properly could have been assessed but a comparatively trifling sum. The contention of the company was serious and plausible. It made the only offer it could, which was to give security for the payment of whatever amount should be adjudged to be due. "If there was no right to assess the particular thing at

all, . . . an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction." *People's National Bank* v. *Marye*, 191 U. S. 272, 281. See also *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *California* v. *Central Pacific Railroad*, 127 U. S. 1; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 112.

The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without jurisdiction, according to the decision of the Supreme Court of Indiana. *Hart* v. *Smith*, 159 Indiana, 182. We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. *State Railroad Tax Cases*, 92 U. S. 575. But it was recognized in the passage just quoted from *The People's National Bank* v. *Marye*, that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194. It avoids the necessity of suits against the officers of each of the counties of the State, and we are of opinion that the bill may be maintained. *Union Pacific Ry.* v. *Cheyenne*, 113 U. S. 516; *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Board of Public Works*, 172 U. S. 32.

Decree reversed.

The Chief Justice, Mr. Justice Brewer and Mr. Justice Day, dissented.

RIPPEY *v.* TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 273. Argued March 11, 1904.—Decided March 21, 1904.

This court follows the state court as to the validity of a state statute under the constitution of the State, and the question here is whether the State Constitution in authorizing the law encounters the Constitution of the United States.

A State has absolute power over the sale of intoxicating liquors and may prohibit it altogether, or conditionally, as it sees fit. *Mugler* v. *Kansas*, 123 U. S. 623.

The provisions in articles 3384–3394, Revised Statutes, and articles 402–407, Penal Code of Texas, as to the submission to the people of the question of prohibiting or allowing the sale of liquor in different sections of the State, are not contrary to any of the provisions of the Fourteenth Amendment of the Constitution of the United States, because they discriminate in favor of a vote for prohibition.

THE facts are stated in the opinion of the court.

Mr. Geo. Clark, with whom *Mr. D. C. Bollinger*, *Mr. Francis M. Etheridge* and *Mr. Rhodes S. Baker* were on the brief, for plaintiff in error:

I. Under the constitution of the State of Texas, relating to the question of local option, the legislature of said State is deprived of all power to prohibit the sale of intoxicants in any locality, but such power is vested exclusively in the voting citizenship of each particular locality, town, city, justice precinct, county, or some subdivision thereof, to determine, by a majority vote at an election called for that purpose, whether or not the sale of intoxicants, except for mechanical or sacramental purposes, shall be prohibited in the particular locality. And by the terms of the constitution itself the legislature is only vested with authority to prescribe regulations for such elections whereby the wishes of any particular locality may be determined according to the law. In other words, it is a rare instance of pure democratic government in a government

of representative republicanism. Constitution of Texas, art. XVI, sec. 20; *Dawson* v. *State*, 25 Tex. Ct. of App. 672; *Ex parte Bains*, 39 Tex. Crim. Rep. 62.

II. The statutes of the State of Texas presumably passed in pursuance of the constitutional provision, are violative of the Federal Constitution, in the following particulars, to wit: (1) Because art. 3395 of the Revised Statutes of the State of Texas abridges privileges and immunities of the citizens of the State of Texas and of the United States; (2) Because said article in its operation deprives many citizens of the United States and of the State of Texas, and especially the plaintiff in error, of liberties and property, without due process of law; (3) Said art. 3395 denies to many citizens in the State of Texas the equal protection of the law; (4) Because said art. 3395 and accompanying legislation herein before set out, constitute class legislation, in that a certain class of citizenship is favored and an equally large class is discriminated against therein; and such discrimination involves the exercise of the most important functions of citizenship; and the case is not one in which the legislature was authorized to make discriminations by classes under the Constitution of the United States; (5) Because said statutes hereinbefore set out contravene the provisions of the Constitution of the United States as construed by the Court of Criminal Appeals of the State of Texas, in that they deny equal rights to a large portion of citizenship of the State of Texas, if not a majority, and bestow exclusive privileges upon a large class of other citizens of said State, which exclusive privileges are not in consideration of public services rendered; (6) Because said statutes, and especially art. 3395 operate to deny to the citizens the equal protection of the law, in that they discriminate against those who vote against prohibition and in favor of those who vote for prohibition; and operate to disfranchise for a period, at least of two years, all citizens within the territory to be affected, who are opposed to prohibition, and deny them the right for such period of time to legislate upon the question, while upon the contrary it confers

that right upon those who favor prohibition to vote therefor as often as they shall see fit; (7) Because said statutes, especially art. 3395 further deny the equal protection of the law, in that they provide that the failure to carry prohibition in a town or city shall not prevent an election from being immediately thereafter held for the entire justice's precinct, or county in which said town or city is situated, and deny to those citizens who oppose local prohibition the privilege of so voting in the event prohibition should carry in the town or city; (8) Because said statutes further deny the equal protection of the law, in that they provide in the event prohibition shall fail to carry by vote in the town or city, that immediately thereafter those in favor of prohibition may inaugurate an election for an enlarged district to be selected by them, which shall include the said town or city, and in the event the election so held in such enlarged territory shall be carried in favor of prohibition, the same shall operate as an abrogation and repeal of the previous election held in said town or city. And because said statutes further provide that if at an election prohibition should carry in a town or city, it cannot be defeated by an inauguration of a subsequent election in an enlarged district; and upon the contrary provides that when prohibition has been carried at an election in a town, city or precinct, such prohibition shall not be repealed except at an election ordered and held for such town, city or precinct earlier than two years thereafter; (9) Because said statutes further deny the equal protection of the law, in that they provide that when prohibition has been carried at an election in the entire county, no election shall thereafter be ordered in any subdivision of said county until after prohibition has been defeated in the entire county; and in disregard and denial of equal protection they further provide that should an election fail to carry prohibition in the county, those in favor of prohibition may immediately thereafter inaugurate an election for any and all such portions of the county as they may choose; and in the event prohibition carries in any such subdivision so immediately inaugurated, such election

shall have the effect of abrogating the previous election held in the entire county. Constitution U. S., art. 14, sec. 1; *Railway Co.* v. *Ellis*, 165 U. S. 150; *Connolly* v. *Pipe Line Co.*, 184 U. S. 540; *Penbina Mining Co.* v. *Pennsylvania*, 125 U. S. 188, 189; *Duncan* v. *Missouri*, 152 U. S. 382; *Missouri* v. *Lewis*, 101 U. S. 22; *Marchant* v. *Pennsylvania*, 153 U. S. 389; *Barbier* v. *Connoly*, 113 U. S. 27; *Hayes* v. *Missouri*, 120 U. S. 68; *Magoun* v. *Trust Co.*, 170 U. S. 293; *Kentucky Tax Cases*, 115 U. S. 337; *Railroad* v. *Pennsylvania*, 134 U. S. 237; *McPherson* v. *Blacker*, 146 U. S. 39; *In re Kemmler*, 136 U. S. 436; *Ex parte Jones*, 38 Cr. App. 428; *Ex parte McCarver*, 46 S. W. Rep. 939; *Fraser* v. *McConway*, 82 Fed. Rep. 860; *Juanita Limestone Co.* v. *Fagley*, 187 Pa. St. 197; *In re Day*, 181 Illinois, 80; *Luman* v. *Hitchens Bros. Co.*, 90 Maryland, 27; *Wansel* v. *Hoos*, 60 N. J. L. 526; *People* v. *Hawkins*, 157 N. Y. 526; *State* v. *Hoyt*, 71 Vermont, 64.

Mr. C. K. Bell, Attorney General of the State of Texas, with whom *Mr. T. S. Reese* was on the brief, for defendant in error:

I. The right to engage in the business of selling intoxicating liquors is not a "privilege or immunity of citizens of the United States" within the meaning of section 1 of the Fourteenth Amendment to the Constitution of the United States. *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133; *Giozza* v. *Tiernan*, 148 U. S. 657, 661; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 444; *Crowley* v. *Christenson*, 137 U. S. 86, 91.

The "privileges and immunities" protected are only those flowing from Federal citizenship. *Slaughter House Cases*, 16 Wall. 37.

II. The laws in question do not deprive any person of "liberty or property" within the meaning of the Fifth and Fourteenth Amendments to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623; *Kid* v. *Pearson*, 128 U. S. 1; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33.

III. The laws in question do not deny to any person within

the jurisdiction of the State of Texas the equal protection of the law. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683; *Busch* v. *Webb*, 122 Fed. Rep. 655, 669; *Ex parte Fields*, 39 Tex. Crim. App. Rep. 50; *Rippey* v. *State*, 68 S. W. Rep. 687; 73 S. W. Rep. 15; *Kimberly* v. *Morris*, 10 Tex. Civ. App. Rep. 592, 596.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of selling intoxicating liquors contrary to vote of his precinct prohibiting such sale. This vote was in pursuance of a statute which the plaintiff in error alleges to be contrary to the Fourteenth Amendment of the Constitution of the United States. The question was raised at the outset by a motion to quash, which was overruled subject to exception, the exception was overruled on appeal, and the case was brought here by writ of error.

The Constitution of Texas, art. 16, sec. 20, required the legislature to enact a law by which the majority of qualified voters of any county, justice's precinct, town or city, from time to time might determine whether the sale of intoxicating liquors should be prohibited. The Legislature thereupon enacted what now are articles 3384–3399 of the Revised Statutes, and articles 402–407 of the Penal Code. These all are assailed, but the particular object of attack is art. 3395.

Article 3395 is as follows:

"Art. 3395 [3238]. The failure to carry prohibition in a county shall not prevent an election for the same being immediately thereafter held in a justice's precinct or subdivision of such county as designated by the commissioners' court, or of any town or city in such county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall the holding of an election in a justice's precinct in any way prevent the holding

of an election immediately thereafter for the entire county in which the justice's precinct is situated; but when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justice's precinct, town or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has been carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city of such precinct until after prohibition has been defeated at a subsequent election ordered and held for such entire precinct."

It will be seen that this section discriminates in favor of those who vote for prohibition; and the argument is that since the Legislature was not authorized to pass a prohibitory law, *Dawson* v. *State*, 25 Texas Cr. App. 670, 674, 675, but was required to leave the question to a local vote, it necessarily created a pure democracy to that extent, and therefore could not interfere with the equality of the voters in their right to propose or carry a law. Many questions would have to be answered before so speculative a piece of ratiocination could be followed. But we think it may be dealt with in short space, so far as is necessary to decide this case.

We follow the state court of course, as to the state constitution, and assume that the law is not invalid under that. The question for us is whether, if the state constitution undertakes to authorize such a law, it encounters the Constitution of the United States. It is a question of the power of the State as a whole. *Missouri* v. *Dockery*, 191 U. S. 165, 171. But the State has power to prohibit the sale of intoxicating liquors altogether, if it sees fit, *Mugler* v. *Kansas*, 123 U. S. 623, and that being so it has power to prohibit it conditionally. It does not infringe the Constitution by giving those in favor of the sale a chance which it might have denied. It is true that the greater does not always include the less. A man may give his

property away, yet he may not contract with a carrier to take the risk of the latter's negligently injuring it, or part with it on the valuable consideration of a wager. But in general the rule holds good. It does here. The State has absolute power over the subject. It does not abridge that power by adopting the form of reference to a local vote. It may favor prohibition to just such degree as it chooses, and to that end may let in a local vote upon the subject as much or as little as it may please. There is no such overmastering consideration of expediency attaching everywhere and always to the form of voting, still less is there any such principle to be drawn from the Fourteenth Amendment, as requires the two sides of a vote on prohibition to be treated with equal favor by the State, the subject matter of the vote being wholly within the State's control. The only chance for the plaintiff in error to prevail was under the state constitution. He has no case under the Constitution of the United States.

Judgment affirmed.

ADAMS *v.* CHURCH.

ERROR TO THE CIRCUIT COURT OF MALHEUR COUNTY, STATE OF OREGON.

No. 169. Argued March 3, 1904.—Decided March 21, 1904.

On writ of error the finding of facts made in the Supreme Court of the State is binding upon, and will be the basis of, the decision of this court.

There is no prohibition in the Timber Culture Act of June 14, 1878, 20 Stat. 113, as there is in the Homestead Act, against an entryman who has in good faith acquired a holding under the act, alienating an interest in the lands prior to the issuing of the final certificate.

THIS is an appeal from a decree of the Circuit Court of Malheur County, State of Oregon, entered by direction of the Supreme Court of Oregon.

The action originated in a suit by Steel against Adams to settle the affairs of a copartnership theretofore carried on by the parties, and so far as a Federal question is concerned, involves the right of the plaintiff below to have conveyed to him an interest in a certain tract of land, acquired by Adams under the Timber Culture Act, before the formation of the partnership. 20 Stat. 113. The defendant denies that this tract of land was included in the partnership property. Upon appeal to the Supreme Court of Oregon, upon whose direction the decree was entered, it was found that at the time of the formation of the partnership Adams was the owner of a timber culture claim covering the land in controversy, and the contention of the plaintiff, that it was agreed and understood at the time of forming the partnership that such claim should be conveyed to and become a part of the assets of the firm as soon as Adams should acquire title from the government, was sustained.

The Federal question made is that such agreement is void as against the statutes and policy of the United States.

Mr. R. J. Slater, with whom *Mr. Will R. King* was on the brief, for plaintiff in error:

The necessary rules and regulations under the law which govern this case are contained in the general circular of January 1, 1889, Copp's Land Law, 1890, vol. 2, p. 85, in which § 5 provides for the affidavit required by the act itself, and § 24 provides where, when and before whom the final proofs and affidavits may be made. Section 26 provides what character of proof shall be made and the form thereof, viz., forms 4–093 and 4–385 and 4–386.

The Timber Culture Act and the rules and regulations promulgated by the Commissioner of the General Land Office for the purpose of carrying that law into effect must be read and construed together and the affidavit required by the regulation is as binding as that required by the act. Such rules have the force of law, *United States* v. *Eaton*, 144 U. S. 688,

and a contract such as the one involved in this case cannot be carried out without perjury. *Heischer* v. *Fleischer*, 91 N. W. Rep. 51.

The conclusion of the state court that such a contract is not inhibited by the act and therefore is not contrary to the public policy of the United States and could be enforced after final entry by the applicant is certainly wrong because it is not necessary that an act should expressly forbid the making of the contract. *Harris* v. *Runels*, 12 How. 99; *U. S. Bank* v. *Owens*, 2 Pet. 527; *The Pioneer*, Deady, 72.

Public policy is determined from the Constitution, laws and decisions of the courts of the United States. 15 Am. & Eng. Ency. of Law, 933.

By comparing the timber culture law with the homestead and preëmption laws it is plain that the general policy of the United States in disposing of the public land is to secure to each entryman his entry and to prevent any one individual from securing either directly or indirectly more than one entry under each of the said laws, and any contract which is designed to subvert that general public policy of the Government cannot be enforced in a court of equity. *Anderson* v. *Carkins*, 135 U. S. 483; *Sims* v. *Bruce*, 4 L. D. 369; *United States* v. *Picard*, 5 L. D. 313, distinguished. And see *Oscanyan* v. *Arms Co.*, 103 U. S. 261.

Mr Alonzo H. Stewart, with whom *Mr. Joseph Simon* was on the brief, for defendant in error:

There is nothing in the Timber Culture Act which inhibits the sale of the land after the entryman has complied with the law and completed his entry. No one contends that the application was not made in good faith or that the purpose was not to hold and cultivate the land. Nothing in the case indicates that the entry was made for the purpose of speculation. After making the entry and complying with the law in good faith and without any previous intention or purpose so to do, the entryman contracted to sell to his partnership firm the land

in question and this under the law he had the absolute right to do. See opinion of the Supreme Court of Oregon; *Sims* v. *Bruce*, 4 L. D. 369; *United States* v. *Read*, 5 L. D. 313.

As sustaining this view of the law in analogous cases, see *Arnold* v. *Christy*, 33 Pac. Rep. 619; *Palmer* v. *Marsh*, 24 N. W. Rep. 374; *Richards* v. *Crews*, 11 Oregon, 501; *Hyde* v. *Holland*, 18 Oregon, 337; *Orr* v. *Stewart*, 67 California, 275; *Lang* v. *Morey*, 40 Minnesota, 396.

Upon the question of fact, as to whether Adams contracted to sell to the partnership of Steel and Adams and received the consideration, for the timber culture tract, this court is concluded by the findings of the Supreme Court of Oregon.

It has been repeatedly held, on error to a state court in a chancery case (as also in a case at law) when the facts are found by the court below, that the Supreme Court is concluded by such findings. *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Bartlett* v. *Lockwood*, 160 U. S. 357; *Stanley* v. *Schwalby*, 162 U. S. 255.

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

The finding of facts made in the Supreme Court of Oregon is binding upon this court and will be the basis of decision here. *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658.

It appears that Adams made the entry under the Timber Culture Act before the partnership agreement was entered into, and there is nothing in the record to show that, in taking the preliminary oath required by the statute, he acted otherwise than in good faith, and stated the truth as to the situation and his purpose in making the entry. As recited in the title, the purpose of the act is to encourage the growth of timber on the Western prairies, and it is intended to induce settlers to plant and cultivate trees with a view to receiving a patent of the lands thus improved. Section 2 of the act (20 Stat. 113) requires the person applying for the benefit of the law to

make affidavit that he is the head of a family (or over twenty-one years of age) and a citizen of the United States, or has declared his intention to become such; that the land specified is devoid of timber; that the entry is made for the cultivation of timber for the exclusive use and benefit of the applicant; that the application is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that affiant intends to hold and cultivate the land and to comply with the provisions of the act, and has not made other entry under the law. Before a final certificate can be given or patent issue, eight years must elapse from the date of entry, and if at the expiration of that time, or within five years thereafter, the person making the entry, or in event of death his heir or legal representative, shall prove by two credible witnesses that he, she or they have planted, and for not less than eight years have cultivated and protected, the required quantity and character of trees; that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof there shall be then growing six hundred and seventy-five living and thrifty trees on each acre, a patent shall issue for the land.

It is the contention of the plaintiff in error that these provisions demonstrate the policy of the law to grant the lands in question to the person filing the entry, his heirs and legal representatives, and none other; and that to make the sale of an interest in the lands to another as a partner, as is found to have been done in this case, is void as against public policy. It is pointed out that the final affidavit, required by the rules and regulations of the General Land Office made under authority of section 5 of the act, is to be in the same terms as the preliminary one, and requires the claimant to make oath that his entry was made in good faith, and not for the purpose of speculation or indirectly for the benefit of any other person whomsoever.

This requirement and the general purpose indicated in the

terms of the act, it is argued, bring the case within the reasoning and spirit of *Anderson* v. *Carkins*, 135 U. S. 483. In that case it was held that a court of equity would not grant a decree for specific performance of an agreement to sell the interest of the homesteader made after settlement and before the oath is filed for final certificate. But the homestead act specifically requires that the applicant shall make affidavit before entry is made that it is for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person. Rev. Stat. sec. 2290.

Further, the final proof requires affidavit by the applicant "that no part of such land has been alienated except as provided in section 2288" (Rev. Stat. § 2291), which section limits the right of alienation to "church, cemetery or school purposes, or for the right of way for railroads."

In this state of the law, this court, in the *Anderson* case, in an opinion by Mr. Justice Brewer, sustained the contention in behalf of Anderson "that the homestead is a gift from the Government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term; that the affidavit of non-alienation is as clear an expression of legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal." And that courts of equity would not enforce the performance of such contracts "founded upon perjury and entered into in defiance of a clearly expressed will of the government." But this case is very far from supporting the contention of the plaintiff in error as to the construction of the Timber Culture Act. There is no requirement in the latter

act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the Timber Culture Act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, and the prairies theretofore barren of timber have been supplied with trees to the extent required by the law before the title shall pass from the government. The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the government.

This conclusion is in conformity with the decisions of the Land Department in *Sims* v. *Bruce*, 4 L. D. 309, and *United States* v. *Read*, 5 L. D. 313. In these cases the right of the timber culture entryman to dispose of his holding, acquired by him in good faith, before the final certificate, is fully recognized. It is argued that, conceding these decisions to hold that such entryman can sell his claim after entry and before final proof, it does not follow that he can sell it and agree to prove up the entry claim and obtain a patent with a promise to convey it to another, without violating the policy of the law. But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has

agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. *Myers* v. *Croft*, 13 Wall. 291.

To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.

The decree of the state court is

Affirmed.

TOM HONG, *alias* HOM POE, *v.* UNITED STATES.
TOM DOCK, *alias* HOM DOCK, *v.* UNITED STATES.
LEE KIT *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Nos. 310, 311, 313. Argued January 12, 1904.—Decided March 21, 1904.

Chinese persons who were in this country prior to May 5, 1892, and who from 1891 to 1894, carried on a mercantile business under a corporate title, although the business was not conducted in their individual names, and who had books of account and articles of partnership, were merchants within the meaning of section 6 of the act of May 5, 1892, as amended by the act of November 3, 1893, and were not required to register under the terms of that act, and cannot be deported for failing so to do, when found without registration certificates.

When the Government allows many years to elapse before commencing prosecutions, allowances may be made which will excuse the failure to procure the books of accounts and articles of partnership.

THESE cases were considered together and are appeals from an order entered in the District Court of the United States for the Eastern District of New York, affirming an order

made by a United States commissioner, directing the deportation of the appellants from the United States to China upon the ground that they were found within this country without certificates of registration, as required by the act of May 5, 1892, as amended November 3, 1893. 1 Comp. Stat. 1901, 1322.

The complaint charges that the appellants, being Chinese laborers, not entitled to remain in this country without certificates of registration, did willfully and knowingly fail to obtain the certificates required by law, and, having unlawfully come within the United States, were found without certificates of registration within the jurisdiction thereof, in the Eastern District of the State of New York.

Testimony was heard in the cases, and at the conclusion of the hearings the commissioner made an order finding each of the appellants a Chinese laborer, without a certificate of registration as required by law, and not a merchant doing business within the meaning of the act of 1892 as amended 1893, and not lawfully entitled to remain in this country.

In each of the cases the commissioner, in addition to the judgment just recited, filed a finding, which was made part of the record by order of the District Court, as follows:

"In the matter of Lee Kit, Tom Hong and Tom Dock.

"Before B. L. Benedict, U. S. Commissioner.

"In these three cases it is urged on one side that the decision of the Circuit Court of Appeals of this circuit, in the case of *United States* v. *Pin Kwan*, requires the commissioner to decide that these three Chinese persons were not merchants within the meaning of the statute in 1894, and that being now laborers without certificate of residence they must be deported. On the other side it is urged that the decision of the court in that case was only that the merchant's certificate that Pin Kwan had was not the certificate required by law, and could not be effective to allow his remaining here, and that the discussion of the effect and weight of evidence which the court itself had said it was error to admit (a certificate being the sole proof

admissible) goes merely to show what the court thought of the evidence in that case which differed from the present one. Admitting the distinction I do not think the United States commissioner is at liberty to disregard carefully expressed language of the Circuit Court of Appeals for the circuit, even though a dictum of the court as to the precise question before it. The proofs furnished in this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894, but not to show a real interest of each in the business as partners; they do not to my mind clearly establish facts which would bring these persons within the statute as merchants. It follows that an order for deportation for each one must be made.

"I certify the foregoing to be a true copy of an original decision made by me in the cases of *The United States* v. *Lee Kit*, *The United States* v. *Tom Hong* and *The United States* v. *Tom Dock*, upon application for orders of deportation of the said Lee Kit, Tom Hong and Tom Dock, made on the 18th day of December, 1902, and remaining on file in my office.

[L. S.] "B. LINCOLN BENEDICT,
"*U. S. Comm.*"

Mr. Terence J. McManus, with whom *Mr. Frank S. Black* and *Mr. Russell H. Landale* were on the brief, for appellants. *Mr. Max J. Kohler*, by leave of the court, filed a brief in aid of appellants on behalf of the Chinese Charitable and Benevolent Association of New York.

Mr. Solicitor General Hoyt for the United States.[1]

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

The contention of the appellants that their right to remain in the United States is enlarged by the treaty with China of

[1] These cases were argued simultaneously with, on the same briefs, and by the same counsel as *Ah How* v. *United States*, reported *ante*, p. 65. See that case for abstracts of arguments.

December, 1894, considered with § 1 of the act of April 29, 1902, c. 641, 32 Stat. 176, continuing all laws then in force so far as the same are not inconsistent with treaty obligations in its effect upon the acts of 1892, as amended in 1893, is disposed of by the case of *Ah How* v. *United States*, decided at this term, *ante* p. 65.

For the first time in the history of legislation, having for its purpose the exclusion of certain Chinese from the country, or their deportation when here in violation of the statutes of the United States, and the admission of certain others to the country, or giving the right to remain, Congress, by the act of May, 1892, as amended November 3, 1893, defined those theretofore designated generally as merchants or laborers:

"SEC. 2. The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

It is contended by the appellants that as by section six of the act as amended November 3, 1893, it is made the duty of certain Chinese laborers within the limits of the United States to apply to the collector of their respective districts within six months after the passage of the act for a certificate of registration, and in default of compliance with the terms of the act, to be subject to arrest and deportation, unless, for certain reasons given in the statute excusing them, they have been

unable to procure the certificate required by law; and as section two of the same act specifically defines what is meant by a "laborer," that only such as come within the statutory provision as "laborers" are liable to deportation upon an affirmative finding of this fact as to the person apprehended.

On the part of the Government, it is contended that when a Chinese laborer is apprehended under this act and found without a certificate, and claiming to have been a merchant during the period of registration, he is subject to deportation unless it is affirmatively shown to the satisfaction of the commissioner or court that he was a merchant, as defined by the statute, during such period of registration.

We do not find it necessary to determine this question in the cases now before us, for in the opinion of the court the testimony shows that the appellants were "merchants" within the definition laid down by the law. The testimony shows, without contradiction and by disinterested witnesses other than Chinese, that the appellants had been in this country for periods varying from ten to thirty years. That in the years from 1891 to 1895 they were carrying on a Chinese grocery in New York, known as the Kwong Yen Ti Company. In that period they bought and sold groceries, kept books of account and had articles of partnership. It is a fact that the testimony does not disclose, as to any of them, that the business was conducted in his name, as the literal interpretation of the law would seem to require, but it was carried on in a company name, which did not include that of any of the partners. The fact of buying and selling at a fixed place of business in a real partnership was established without contradiction.

It is true that after the lapse of so many years the appellants, when taken before the commissioner, were unable to produce the books or articles of copartnership of the firm. But some allowance must be made for the long delay in their prosecution by the Government, and the natural loss of such testimony years after the firm's transactions were closed.

The commissioner was doubtless influenced by the intimation in the *Pin Kwan Case*, 100 Fed. Rep. 609, to the effect that the statutory requirements as to the conduct of the business in the name of the parties necessitated the appearance of the name in the style in which the business was conducted. But this would be too narrow a construction of the statute. The purpose of the law is to prevent those who have no real interest in the business from making fraudulent claims to the benefits of the act as merchants. The interest in the business must be substantial and real and in the name of the person claiming to own it, but the partner's name need not necessarily appear in the firm style when carried on, as is usual among the Chinese, under a company name, which does not include individual names. The main purpose is to require the person to be a *bona fide* merchant, having in his own name and right an interest in a real mercantile business, in which he does only the manual labor necessary to the conduct thereof. This conclusion has been reached in a number of Federal cases, in which the matter has been given careful consideration. Perhaps the leading one was decided by the Circuit Court of Appeals for the Ninth Circuit, *Lee Kan* v. *United States*, 62 Fed. Rep. 914, the opinion being delivered by Mr. Justice McKenna, then circuit judge, in which the subject was so fully considered as to leave little to be added to the discussion. See also *Wong Ah Gah* v. *United States*, 94 Fed. Rep. 831; *Wong Fong* v. *United States*, 77 Fed. Rep. 168.

It is true that the findings of the commissioner and in the District Court in cases of this character should ordinarily be followed in this court, and will only be reconsidered when it is clear that an incorrect conclusion has been reached. *Chin Bak Kan* v. *United States*, 186 U. S. 193, 201. But in the present case no new matter seems to have been admitted in the District Court, and the finding made by the commissioner as to these appellants is of an uncertain nature when the judgment is read in connection with the special finding filed by that officer and made part of the record in each case, in which

he says: "The proofs furnished in this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894."

In this state of the record an examination thereof satisfies us that the appellants adduced testimony which established that they were *bona fide* "merchants" within the meaning of the law at the time registration was required of laborers by the act of Congress, and as the orders of deportation were made on the sole ground that appellants failed to show that fact the

Judgments are reversed and appellants discharged.

BACHE *v.* HUNT.

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

No. 177. Argued March 11, 14, 15, 1904.—Decided April 4, 1904.

The question of jurisdiction which the act of March 3, 1891, provides may be certified direct to this court must be one involving the jurisdiction of the Circuit Court as a Federal Court and not in respect of its general authority as a judicial tribunal. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225.

THE facts are stated in the opinion of the court

Mr. F. Spiegelberg for appellant.

Mr. Adrian H. Joline, with whom *Mr. Clarence Brown* was on the brief, for appellee.

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

This case was brought directly to this court as coming within the first of the classes of cases enumerated in section five of

the judiciary act of March 3, 1891, in which that may be done, the Circuit Court having certified that the jurisdiction of the court was in issue, and granted the appeal on that ground.

The case was briefly this: Samuel Hunt, receiver, filed his petition in the Circuit Court of the United States for the Northern District of Ohio in the foreclosure suit of *The Continental Trust Company of New York* v. *The Toledo, St. Louis & Kansas City Railroad Company, Jules S. Bache, Sylvester H. Kneeland and others*, asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, and stock of the railroad company, in the hands of the Farmers' Loan and Trust Company, to be reimbursed for amounts paid by him, or his predecessors, as receiver, in the extinguishment of prior claims which the bonds and stock had been deposited to secure, and seeking a decree that they be delivered to him or sold and the proceeds so delivered, etc. The deposit had been made to secure payment of certain underlying liens, which Kneeland had agreed to pay and discharge, and which he had failed to do, and the receiver had done so out of the moneys and property of the railroad company.

Bache, who was a citizen of and resided in New York, and others were ordered to demur, plead or answer the petition, and copies of the order were mailed to the parties named, including Bache. Bache appeared specially and filed a plea to the jurisdiction of the court over the subject matter because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition by Bache as a judgment creditor of Kneeland against the Toledo, St. Louis and Kansas City Railroad Company, Kneeland and the Farmers' Loan and Trust Company, in which the last-mentioned company had been appointed receiver of the securities forming the subject of the Hunt petition, on the same day on which the Hunt petition was filed; and of his person because of the insufficiency of the method of service of the order. The plea was overruled.

The Circuit Court held that when the receiver used the

moneys of the receivership to discharge the underlying liens, the equitable right accrued to him and to those whom he represented, to be reimbursed out of the securities deposited with the Farmers' Loan and Trust Company; and that as a junior encumbrancer, Bache had never been dismissed from the suit, and as such was before the court for all purposes of the distribution of the proceeds of the sale of the mortgaged property. It appeared that Bache was made one of the original defendants in the foreclosure suit as a junior encumbrancer and entered his appearance; that he afterwards set up his claim, by answer, in that suit, it being the same claim on which his proceeding in the state court was founded; that he filed his claims before the special master under order in that behalf; and that Kneeland was also a party to the cause.

Bache, declining to plead further, the petition was taken as confessed as to him, and a decree was subsequently entered that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of Hunt, as receiver, and his predecessors, was entitled out of the securities in the hands of the Farmers' Loan and Trust Company to be reimbursed in the amounts which had been paid by the receivers in respect of the prior claims; and that said securities be delivered to the railroad company, or, on default of such delivery within thirty days, that they should stand cancelled and of no further force or effect. From this decree the pending appeal was thereupon taken.

It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal

court. *Louisville Trust Company* v. *Knott*, 191 U. S. 225; *Blythe* v. *Hinckley*, 173 U. S. 501.

Tested by this rule our jurisdiction fails, and the appeal must be

Dismissed.

YAPLE *v.* DAHL-MILLIKAN GROCERY COMPANY.

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

No. 181. Submitted March 15, 1904.—Decided April 4, 1904.

Where a creditor has a claim for a balance due against an insolvent debtor afterwards adjudicated a bankrupt, upon an open account for goods sold and delivered four months before the adjudication in bankruptcy, and during said period makes a number of sales of merchandise on credit to the insolvent debtor, which becomes a part of the debtor's estate, and during the same period receives payments of sums on account, from time to time, which payments are received in good faith without knowledge of the debtor's insolvency on the part of the creditor, the sales exceeding in amount during said period the payments made during the same time, he has not received a preference which he is obliged to surrender before his claim shall be allowed. *Jaquith* v. *Alden*, 189 U. S. 78.

THE facts are stated in the opinion of the court.

Mr. W. T. McClintick for appellant, cited *Pirie* v. *Trust Co.*, 182 U. S. 443; 5 Am. Bk. Rep. 814; *McKey* v. *Lee*, 105 Fed. Rep. 923; 45 C. C. A. 127; 5 Am. Bk. Rep. 271; *Morey Mer. Co.* v. *Schiffer*, 7 Am. Bk. Rep. 670; *Gans* v. *Ellison*, 8 Am. Bk. Rep. 153; *Kahn* v. *Exp. & Commission Co.*, 8 Am. Bk. Rep. 157; *Re William Bothwell*, 8 Am. Bk. Rep. 213. The date of payment of a check is when it is paid by the bank and not when it is given out by the bankrupt. *Re Amasa Lyon*, 7 Am. Bk. Rep. 412.

There was no appearance or brief for the appellee.

THE CHIEF JUSTICE: Two questions are propounded by this certificate, namely:

"1. Where a creditor has a claim for a balance due against an insolvent debtor afterwards adjudicated a bankrupt, upon an open account for goods sold and delivered four months before the adjudication in bankruptcy, and during said period makes a number of sales of merchandise on credit to the insolvent debtor, which becomes a part of the debtor's estate, and during the same period receives payments of sums on account, from time to time, which payments are received in good faith without knowledge of the debtor's insolvency on the part of the creditor, the sales exceeding in amount during said period the payments made during the same time, has the creditor under such circumstances received a preference which he is obliged to surrender before his claim shall be allowed under the bankrupt act?

"2. If each of such payments is a preference under the act is it to be set off under section 60*c* of the act by deducting subsequent sales therefrom, carrying forward to the next payment any excess of preferences, but not of sales, treating any excess of preferences as thus ascertained as a sum to be surrendered before the allowance of the creditor's claim?"

The first question is answered in the negative on the authority of *Jaquith* v. *Alden*, 189 U. S. 78; and the second need not be answered.

Certified accordingly.

UNITED STATES *v.* JONES.
UNITED STATES *v.* GILDERSLEEVE.
UNITED STATES *v.* WHEELER.
WHEELER *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 197, 198, 199, 525. Submitted March 18, 1904.—Decided April 4, 1904.

The making of the oath and attaching the same to the accounts of clerks of the Circuit and District Courts of the United States as required by the act of February 22, 1875, is a part of the formality of presenting the accounts and is not to be allowed against the Government in favor of the clerk.

An order of the court requiring a service to be performed is sufficient authority as between the clerk and the Government for the performance of the service and the allowance of the proper fee therefor.

Where no direction of the court can be shown charges cannot be allowed for certificates to copies of orders.

Clause 4 of § 828, Rev. Stat., does not justify charges for administering oaths on the *voir dire* of grand and petit jurors.

THE facts are stated in the opinion of the court.

Mr. Assistant Attorney General Pradt and *Mr. Philip M. Ashford*, for appellant, cited in addition to the cases cited in the opinion of the court, *United States* v. *Shields*, 153 U. S. 88, 91; *United States* v. *Patterson*, 150 U. S. 65, 69; *United States* v. *King*, 147 U. S. 676, 679; *United States* v. *Van Duzee*, 185 U. S. 278; *United States* v. *Dundy*, 76 Fed. Rep. 357; *United States* v. *Taylor*, 147 U. S. 695; *Singleton* v. *United States*, 22 C. Cl. 118.

On the question of jurisdiction of the cross appeal in No. 525, *United States* v. *Adams*, 6 Wall. 101; *United States* v. *Hickey*, 17 Wall. 9; *Walsh* v. *United States*, 23 C. Cl. 1.

Mr. George A. King and *Mr. William B. King* for the appellees in Nos. 197 and 198, cited *Butler* v. *United States*, 87 Fed. Rep. 655; *Puleston* v. *United States*, 85 Fed. Rep. 570;

106 Fed. Rep. 294; *Marsh* v. *United States*, 88 Fed. Rep. 879; 106 Fed. Rep. 474; 109 Fed. Rep. 236; 112 Fed. Rep. 929; *In re Clerks' Charges*, 5 Fed. Rep. 440; *Goodrich* v. *United States*, 42 Fed. Rep. 392; *United States* v. *Jones*, 134 U. S. 483; *McGrew* v. *United States*, 23 C. Cl. 273.

Mr. Charles C. Lancaster, for Wheeler, appellee in No. 199, cross appellant in No. 525, cited *United States* v. *Payne*, 147 U. S. 689; *United States* v. *McDermott*, 140 U. S. 151; *United States* v. *Finnell*, 185 U. S. 236; *Clough* v. *United States*, 55 Fed. Rep. 926.

On the question of jurisdiction of the cross appeal in No. 525, *Walsh* v. *Mayer*, 111 U. S. 31; *Cooke* v. *United States*, 2 Wall. 218; *United States* v. *Ewing*, 140 U. S. 142, 150. See also *United States* v. *Mosby*, 133 U. S. 273; *Ellis* v. *Harrison*, 104 Missouri, 280; 16 S. W. Rep. 198.

THE CHIEF JUSTICE: These are appeals from judgments of the Court of Claims in respect of services alleged to have been rendered as clerks of District or Circuit Courts of the United States. In each case the accounts for services had been duly approved by the Circuit or District Court; certain items had been disallowed by the accounting officers of the Treasury Department; thereupon these suits were brought; and the Court of Claims made findings of fact and conclusions of law. In view of the action of the two courts, and of our previous decisions, the points raised in argument do not seem to require particular discussion.

In No. 197 the judgment of the Court of Claims included, among other items, this: "Administering oaths and affixing jurats to accounts of United States marshals at ten cents for each oath and fifteen cents for each jurat, $91.20."

By the act of February 22, 1875, 18 Stat. 333, c. 95, clerks, marshals and district attorneys are required to render their accounts, duly sworn to, for approval. We agree with counsel for the Government that the making of the oath and attaching the same to the account is a part of the formality of presenting

such accounts, without which they are not properly rendered. This item, therefore, should not have been allowed against the United States in favor of the clerk. *United States* v. *Van Duzee*, 140 U. S. 169; *United States* v. *Jones*, 147 U. S. 672; *United States* v. *Allred*, 155 U. S. 591.

The judgment of the Court of Claims will be modified by the omission of this item, and, as so modified, affirmed.

In No. 198 the Government objects to the allowance of certain charges for transcript of record on writ of error in criminal proceedings, by order of court, on behalf of an indigent defendant; for services in connection with affidavits of poverty; and for issuing subpœnas for grand and petit jurors. As to the transcript, the contention is that section 878 of the Revised Statutes, providing for payment under order of court of fees and costs when defendant under indictment is without means, is exclusive, and does not cover the charge for this service. Here, again, we think the question has been settled, in effect, by what was said in *United States* v. *Barber*, 140 U. S. 164; *United States* v. *Van Duzee, supra;* and *United States* v. *Allred, supra.* It was held that an order of the court requiring a service to be performed was sufficient authority as between the clerk and the Government for the performance of the service and the allowance of the proper fee therefor.

Section 878 was originally enacted in 1846, and should not be held to operate as a prohibition to the extent contended. The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation.

The same considerations dispose of the objection to the second item as to affidavits of defendants in criminal cases of inability to pay costs. And we agree with the Court of Claims in sustaining the charges for issuing subpœnas for grand and petit jurors by order of court, the charge for seals being rejected. The subject is well treated in *Martin* v. *United States*, 26 C. Cl. 160. The judgment will be affirmed.

In No. 199 counsel for United States assign error in the allowance of charges (1) for administering oaths, by order of court, to witnesses for defendants on trial in criminal cases; (2) for administering oaths to affidavits of poverty and affixing jurats; (3) for filing and entering applications for process; (4) for filing and entering motions of indigent defendants for new trial; (5) and for services rendered an indigent defendant, by order of court, in prosecution of a writ of error in a capital case. We assume that all these items relate to indigent defendants, and considering sections 828 and 878 of the Revised Statutes, the act of February 6, 1889, 25 Stat. 655, c. 113, our previous decisions, and what has just been said, we perceive no reason for declining to accept the conclusions of the Court of Claims.

No. 525 is a cross appeal from the judgment brought up in No. 199. We hold that the cross appeal lies in the circumstances, but agree with the disallowance by the Court of Claims of the items involved. Two of these items consisted of charges for certificates to copies of *sci. fa.*, and to copies of orders of court for furnishing meals to jurors. No direction of court as to such certificates was shown. The other item was for administering oaths on the *voir dire* of grand and petit jurors, and we do not think can be justified under the fourth clause of section 828. The judgment will be affirmed.

Judgments will be entered as above indicated.

GREAT SOUTHERN FIRE PROOF HOTEL COMPANY *v.* JONES.

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

Argued February 29, March 1, 1904.—Decided April 4, 1904.

The object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which would be unaffected by local prejudices and sectional views, and it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. *Burgess* v. *Seligman*, 107 U. S. 20.

Without qualifying the principles that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the State, and that the Federal court is bound to accept decisions of the state courts construing state statutes rendered prior to the making of the contract on which the cause of action is based, such duty does not exist in regard to decisions of the state court rendered after the cause of action has arisen, although before the action itself was commenced, when the Federal court in the exercise of its independent judgment reaches a different conclusion from the state court.

For the reasons stated in the opinion of the Circuit Court of Appeals, 86 Fed. Rep. 371, §§ 3184, 3185, of the Revised Statutes of Ohio relating to the filing and enforcement of mechanics' liens, do not deprive the owner of his property without due process of law nor unreasonably interfere with his liberty of contract and are not in these or other respects repugnant to the constitution of that State or the Constitution of the United States.

THE facts are stated in the opinion of the court.

Mr. Gilbert H. Stewart and *Mr. Henry Gumble* for petitioners:

The mechanic's lien law of Ohio of 1894 is unconstitutional because: (*a*) It denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract in relation thereto, of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment, and is not for the equal protection and benefit of the people, and therefore contravenes sections 1 and 2 of the Bill of Rights.

(*b*) It deprives the real estate owner of his property without due process of law, and of the equal protection of the laws, abridges the privileges of citizens of the United States as regards the rights of contract and is therefore unconstitutional and in conflict with sec. 1, art. XIV, of the Constitution of the United States. Boisot on Mech. Liens, § 228; *Lion Hardware Co.* v. *Young*, 55 Ohio St. 423; *Thaxter* v. *Williams*, 14 Pick. 49, 53; *People* v. *Gilson*, 109 N. Y. 398; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 755; *Association* v. *Crescent City Co.*, 1 App. 398; *State* v. *Julow*, 129 Missouri, 172.

The Ohio Supreme Court held that in so far as the law gives a lien on the property of the owners to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner. And for similar cases see *State* v. *Iron Co.*, 55 Ohio St. 442; *Cleveland* v. *Construction Co.*, 67 Ohio St. 197; *Palmer* v. *Tingle*, 9 O. C. C. 708; Overton on Liens, § 553; *Stewart* v. *Wright*, 52 Iowa, 335; *John Spry Lumber Co.* v. *Trust Co.*, 77 Michigan, 199; *Schroeder* v. *Galland*, 134 Pa. St. 277; *Mellis* v. *Race*, 78 Michigan, 80; *Snell* v. *Race*, 78 Michigan, 334; *Waters* v. *Wolfe*, 162 Pa. St. 153, 170; *Meyer* v. *Berlandi*, 39 Minnesota, 438; *O'Neil* v. *St. Olaf's School*, 26 Minnesota, 329; *Laird* v. *Moonan*, 32 Minnesota, 358; *Selma Factory* v. *Stoddard*, 116 Alabama, 251; *Renton* v. *Conley*, 49 California, 187; *McAlpine* v. *Duncan*, 16 California, 127; *Bowen* v. *Aubrey*, 22 California, 571; *Henry* v. *Rice*, 18 Mo. App. 497.

The Supreme Court of Ohio held the mechanic's lien law of 1894 unconstitutional because it invaded the liberty and property rights of the owner, for the privilege of contracting is both a liberty and a property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to make contracts is one of the attributes of property, and when an individual is deprived of such right he is deprived of his property within

the meaning of the Constitution. *Ritchie* v. *The People*, 155 Illinois, 98; *Forer* v. *People*, 141 Illinois, 171; *State* v. *Loomis*, 115 Missouri, 307; *Matter of Jacobs*, 98 N. Y. 98; *Leep* v. *St. L. I. M. & S. Ry. Co.*, 58 Arkansas, 407.

The act of 1894 is obnoxious as class legislation, for it imposes upon the property owner a burden attaching to no one else. It is not uniform in its operation. For other cases involving same principle, see *State* v. *Ferris*, 53 Ohio St. 314; *Hocking Valley Coal Co.* v. *Rosser*, 53 Ohio St. 12; *Gulf, Col. &c. Ry.* v. *Ellis*, 165 U. S. 150; *Ritchie* v. *People*, 155 Illinois, 98; *Godcharles* v. *Wigeman*, 113 Pa. St. 431; *State* v. *Goodwill*, 33 W. Va. 179; *Braceville Coal Co.* v. *People*, 147 Illinois, 66.

It is contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitutional laws, that any one citizen should enjoy privileges and advantages which are denied to all others, under like circumstances; or that one should be subjected to losses, damages, suits or actions from which all others under like circumstances are exempt. *Holden* v. *James*, 11 Massachusetts, 396; *S. & N. Ala. R. R. Co.* v. *Morris*, 65 Alabama, 194, 199; *State* v. *F. C. Coal Co.*, 33 W. Va. 188; *Eden* v. *People*, 161 Illinois, 296; *Ex parte Jentzsch*, 112 California, 468; *People* v. *Gilson*, 109 N. Y. 389; *Pembina Co.* v. *Pennsylvania*, 125 U. S. 181, 188. Such a law is an encroachment on the just liberty of both workman and employed. Cases *supra* and *State* v. *Coal Co.*, 36 W. Va. 856; Brannon on Fourteenth Amendment, 110, 112; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 590.

This law deprives the owner of his property without due process of law. See cases *supra*. "Due process of law" and "the law of the land" are synonymous, and used interchangeably. Cooley's Const. Lim. 3d ed. § 353; *Millett* v. *People*, 117 Illinois, 294.

Due process of law means "that every citizen shall hold his life, liberty, property and immunities under the protection of the *general* rules which govern society." Everything which may pass under the form of an enactment is not, therefore, to

be considered as the law of the land. Cooley's Const. Lim. 3d ed. § 353. Such general public law must be founded on reason. *Harding* v. *People*, 160 Illinois, 439; *Ex parte Newman*, 9 California, 518; *Ex parte Andrews*, 18 California, 678. See dissenting opinion in *Mallory* v. *Abattoir Co.*, 80 Wisconsin, 180. As to due process and equity of law, see also *Barbier* v. *Connolly*, 113 U. S. 31; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 238; *Davison* v. *New Orleans*, 96 U. S. 107; *Kentucky Railroad Tax Cases*, 115 U. S. 33; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *State ex rel. R. & W. Comm.* v. *C. M. & P. R. Co.*, 38 Minnesota, 281; *Minneapolis & E. R. Co.* v. *Minnesota*, 134 U. S. 467.

To authorize A, through the agency of a sub-contractor, to impose an arbitrary, unjust and absolute liability upon B, without his default, and contrary to the express stipulations in the written agreement between them, and without any notice that will enable him to protect himself against such liability, and without his violating any statute or any law, or committing any tort or wrong, is, certainly, to deprive B of his property or rights of property without due process of law, and to deprive him of the equal protection of the laws. *King* v. *Hayes*, 80 Maine, 206; *Ulman* v. *Mayor*, 72 Maryland, 587; *Garvin* v. *Daussman*, 114 Indiana, 429; *Oregon R. & N. Co.* v. *Smalley*, 1 Washington, 206.

Cases cited in opinion of the court below can be distinguished and are not applicable.

The law in question is contrary to the spirit of the Constitution, in violation of the great first principles of the social compact and cannot be considered a rightful exercise of legislative authority. *Calder* v. *Bull*, 3 Dall. 386; *Gulf, Colo. & Santa Fé R. R. Co.* v. *Ellis*, 165 U. S. 150; *Wilkinson* v. *Leland*, 2 Pet. 658; 3 Am. & Eng. Ency. of Law, 674; *Osborne* v. *Nicholson*, 13 Wall. 662; *Gunn* v. *Barry*, 15 Wall. 623; *Walker* v. *Cincinnati*, 21 Ohio St. 41.

The argument that the lien law was read into and made a part of the contracts of the lien claimants and owner was

thereby bound, is without merit. *Norton* v. *Shelby Co.*, 118 U. S. 442; *Lion Hardware Co.* v. *Young*, 53 Ohio St. 423; 3 Am. & Eng. Ency. of Law, 678; *State* v. *Lessees of Public Works*, 3 Ohio Bull. 265; *Meyer* v. *Berlandi*, 39 Minnesota, 438. An unconstitutional law is void, not from the time it is so declared, but from its enactment. *Findlay* v. *Pendleton*, 62 Ohio St. 80, 88.

If the law is unconstitutional it could not be rendered valid by requiring the contractor to give a bond. *Bardwell* v. *Mann*, 48 N. W. Rep. 1120; *Gibbs* v. *Tally*, 133 California, 373; *Shaughnessy* v. *Surety Co.*, 71 Pac. Rep. 701; *Snell* v. *Bradbury*, 72 Pac. Rep. 150.

The Federal courts should follow the state courts and hold the law unconstitutional. The law of 1894 was a radical departure from previous legislation. As to the history of mechanic's lien law legislation in Ohio, see *Bridge Co.* v. *Bowman*, 43 Ohio St. 37; Rockel & White, Ohio Lien Laws, 47, 50; Treadway & Marlatt's Ohio Mechanic's Lien Law, ch. I; *Hampson* v. *State*, 8 Ohio St. 321; *Copeland* v. *Manton*, 22 Ohio St. 398, 403; *Dunn* v. *Rankin*, 27 Ohio St. 132; *Bullock* v. *Horn*, 44 Ohio. St. 420. In *Palmer* v. *Tingle*, 54 Ohio St. 423, the court simply refused to depart from the doctrine uniformly held heretofore that sub-contractors are bound by the contract with the owner. See also *Stark* v. *Simmons*, 54 Ohio St. 435; *Mack* v. *DeGraff &c.*, 57 Ohio St. 463. *Douglas* v. *Pike Co.*, 101 U. S. 677, was distinguished in 79 Fed. Rep. 483. And see also as to following state court decisions Brannon on Fourteenth Amendment, 397; *Burgess* v. *Seligman*, 107 U. S. 20; *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 395; *Forsyth* v. *Hammond*, 166 U. S. 518; *O'Brien* v. *Wheelock*, 95 Fed. Rep. 883, 904.

Should the court not follow in the wake of the Ohio decisions, then there will be one rule for Ohio creditors, and another for those residents of another State, i. e., claimants for mechanic's liens who are residents of States other than Ohio will have a valid lien, while lien claimants residing in Ohio

will not have such, and this "would be unfortunate, to say the least." *Jencks* v. *Quidwick Co.*, 135 U. S. 457; *Knapp* v. *McCafferty*, 177 U. S. 638; *Bucher* v. *Cheshire*, 125 U. S. 555, 582; *McGahey* v. *Virginia*, 135 U. S. 665; *Polk's Lessee* v. *Wendell*, 5 Wheat. 293.

If the previous decisions of the state court are so firmly established as to constitute a rule of property, then the Federal courts are governed by the previous decisions of the state courts. *Louisville* v. *Palmes*, 109 U. S. 244.

It is immaterial that similar laws have been held constitutional in other States. *Bauserman* v. *Blunt*, 147 U. S. 547; *Union Nat. Bk.* v. *Bank of Kansas City*, 136 U. S. 223; *Louisiana* v. *Pilsbury*, 105 U. S. 294; *Morley* v. *Lake Shore &c. R. Co.*, 146 U. S. 162.

The question whether the statute violated the constitutional guaranty is a legal question. It cannot be tortured into a question of general law or of general jurisprudence, of national or universal application. *DeVaughan* v. *Hutchinson*, 165 U. S. 566; *Railroad Co.* v. *Bank*, 102 U. S. 57; *Van Stone* v. *Stillwell &c. Co.*, 142 U. S. 128.

This court has, in effect, decided that when even some matters of general law are regulated by state statute, the Federal courts will follow the decisions of the state courts construing the statute. If it is regulated by the state constitution, there would be equal truth in the proposition, *Hough* v. *Railway Co.*, 100 U. S. 213, as in the absence of statutory regulations by the State in which the cause of action arose; *Lake Shore & M. S. Ry. Co.* v. *Prentice*, 147 U. S. 101; *B. & O. Ry. Co.* v. *Baugh*, 149 U. S. 368; *Hartford Ins. Co.* v. *Chicago &c. Ry.*, 175 U. S. 91; *Loeb* v. *Trustees &c.*, 179 U. S. 472; *Ahrend* v. *Odiorne*, 118 Massachusetts, 261.

Mr. George K. Nash and *Mr. T. J. Keating*, with whom *Mr. Louis G. Addison* was on the brief, for respondents:

This court is not bound to follow the decisions of the Ohio Supreme Court.

The cause of action set out in the amended bill accrued before the decision of the Supreme Court of Ohio was rendered or announced. The former decisions of the Supreme Court of Ohio upon similar contracts and liens, are in conflict with that decision, and the cause of action accrued before such former decisions were reversed by the holding in *Young* v. *The Lion Hardware Company*. The constitutional question is one of general constitutional law, not peculiarly applicable to the constitution of the State of Ohio, but equally applicable to any and all constitutions, including State and Federal. The question is one of general jurisprudence and commercial law. *Burgess* v. *Seligman*, 107 U. S. 20; *Anderson* v. *Santa Anna Township*, 116 U. S. 356.

Decisions of the state court are not necessarily obligatory upon Federal courts where they affect contracts which were valid under the constitution and laws of the State as interpreted and enforced by its highest judicial tribunals at the time they were entered upon. *Rowan* v. *Runnels*, 5 How. 134; *Ohio Life and Trust Co.* v. *Debolt*, 16 How. 432; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Olcott* v. *The Supervisors*, 16 Wall. 678; *Taylor* v. *Ypsilanti*, 105 U. S. 60; *Douglass* v. *County of Pike*, 101 U. S. 677; *Louisville Trust Co.* v. *Cincinnati*, 47 U. S. App. 36, 46; *Township* v. *Ætna Life Ins. Co.*, 138 U. S. 67, 72; *Miller* v. *Ammon*, 145 U. S. 421; *Carroll County* v. *Smith*, 111 U. S. 556; *Gibson* v. *Lyon*, 115 U. S. 439; *Ohio Life* v. *Debolt*, 16 How. 432; *Board of Commissioners of Stanley Co.* v. *Coler*, 190 U. S. 437. For cases in which lien laws had been sustained prior to this contract, see *Railway Company* v. *Cronan*, 38 Ohio St. 122; *Railway Company* v. *McCoy*, 42 Ohio St. 251; *Weil* v. *State*, 46 Ohio St. 450.

The Ohio lien law is not unconstitutional, citing numerous cases which appear at end of opinion p. 550, *post*.

As to class legislation, see *Summerlin* v. *Thompson*, 31 Florida, 369; *Budd* v. *New York*, 143 U. S. 517; *Wunderle* v. *Wunderle*, 144 Illinois, 40; *Hing* v. *Crowley*, 113 U. S. 703, 708; Cooley's Const. Lim. 5th ed. 482; *Barbier* v. *Connolly*, 113

U. S. 27, 31; *State* v. *Powers*, 38 Ohio St. 54; *Kidd* v. *Pearson*, 128 U. S. 1; *New York* v. *Squire*, 145 U. S. 175; *Atkin* v. *Kansas*, 191 U. S. 207; *Holden* v. *Hardy*, 169 U. S. 366.

Mr. Talfourd P. Linn, with whom *Mr. John D. McKennan* was on the brief, also for respondents.

MR. JUSTICE HARLAN delivered the opinion of the court.

The Great Southern Fire Proof Hotel Company, a corporation of Ohio, made a contract with one McClain for the construction of a hotel building and opera house at Columbus, Ohio.

McClain contracted with Jones & Laughlins, Limited, a partnership association organized under the laws of Pennsylvania, for a certain amount of steel to be used in the buildings which he undertook to erect.

Under that contract Jones & Laughlins, Limited, furnished steel of the value of $43,296.74.

Proceeding under certain statutes of Ohio relating to liens for mechanics and others, Jones & Laughlins, Limited, brought suit in the Circuit Court of the United States for the Southern District of Ohio against the Hotel Company, to enforce a lien asserted by them on the hotel building and opera house for the balance due on their contract with McClain. Various persons were made defendants because they asserted claims upon or interest in the property. It was a case in which the jurisdiction of that court depended upon diversity in the citizenship of the parties. Upon final hearing the Circuit Court dismissed the bill on the ground that the statute of Ohio of April 13, 1894, (91 Ohio Laws, 135,) under which Jones & Laughlins, Limited, proceeded, was repugnant to the Constitution of Ohio. 79 Fed. Rep. 477. Upon appeal to the Circuit Court of Appeals, that court, being of opinion that the statute was constitutional, reversed the decree of the Circuit Court. 58 U. S. App. 397; 86 Fed. Rep. 370. The case was

then brought here upon writ of certiorari, and this court, without considering the merits, reversed the judgments of both courts upon the ground that the record did not affirmatively show a case of which the Circuit Court could properly take cognizance, so far as the citizenship of the parties was concerned. In the opinion then rendered we said that under the circumstances the plaintiffs should be permitted to amend their pleadings as to the citizenship of the parties; and, if a case could be presented within the jurisdiction of the Circuit Court, the parties should be allowed to proceed to a final hearing on the merits. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449.

Upon the return of the cause the plaintiffs filed an amended bill of complaint, which cured the defect in its original bill as to the citizenship of the parties. The case went to a final hearing upon the merits, and a decree was rendered in favor of the plaintiffs. That decree was affirmed in the Circuit Court of Appeals. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 116 Fed. Rep. 793. The case is again here upon a writ of certiorari granted upon motion of the Hotel Company.

The statutory provisions, questions as to the constitutionality of which have been raised in this case, are certain sections of the Revised Statutes of Ohio, as follows:

"SEC. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel, or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor or subcontractor, shall have a lien to secure the

payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed.

"SEC. 3185. Such person, in order to obtain such lien, shall, within four months from the time of performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time, the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"SEC. 3185*a*. In all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such

owner, or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery: Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors' material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained." 91 Ohio Laws, 135, 137.

The contention of the Hotel Company is that the statute under which Jones & Loughlins, Limited, proceeded was repugnant to the constitution of Ohio; and that the Supreme Court of Ohio having held in two cases, *Palmer & Crawford* v. *Tingle*, and *Young* v. *Lion Hardware Company*, 55 Ohio St. 423—determined before the bringing of this suit, but after the rights of the parties had been fixed by their contracts—that the statute was inconsistent with the state constitution, the duty of the Federal court was to follow those decisions, even if, in the exercise of an independent judgment on the subject, it was of opinion that the statute was constitutional. Is that view in harmony with the decisions of this court?

The leading case on this subject is *Burgess* v. *Seligman*, 107 U. S. 20, 33. In that case, which was in the Circuit Court of the United States, the rights of the parties depended upon a statute of Missouri, which had not been construed by the highest court of the State at the time those rights accrued under it; and the question arose whether the Circuit Court was entitled to determine for itself what was the true meaning

of the statute. In view of some differences in forms of expression in previous cases, the court deemed it wise to reexamine the subject upon both principle and authority, and to announce the rule by which a Circuit Court of the United States should be guided in case of a conflict of opinion between it and the highest court of the State as to the meaning and legal effect of a local statute upon which the rights of parties depended.

In that case Mr. Justice Bradley, delivering the unanimous judgment of this court, said: "The Federal courts have an independent jurisdiction in the administration of state laws, coördinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coördinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.

But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

So in *Carroll County* v. *Smith*, 111 U. S. 556, in which the principal question was as to the validity, under the constitution of Mississippi, of certain proceedings taken under a railroad charter, the Supreme Court of that State having passed on the question, it was contended that its judgment was binding on the courts of the United States. But this court, speaking by Mr. Justice Matthews, said: "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. *Burgess* v. *Seligman*, 107 U. S. 20, 33." And in *Anderson* v. *Santa Anna*, 116 U. S. 356, 365, it was

distinctly adjudged that where rights have accrued under a state constitution or statute, "before the state court has announced its construction, the Federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment." In *Pleasant Township* v. *Ætna Life Insurance Co.*, 138 U. S. 67, 72, where the rights of one of the parties depended upon the validity of a statute of Ohio, and which statute the Supreme Court of Ohio had held after the rights of the parties had accrued, under their contract, to be in violation of the constitution of that State, this court, although reaching the same conclusion as that announced by the state court, took care to say that the decision of the state court did not conclude this court, and that concurrence with the views expressed by the state court was the result of the exercise of its independent judgment—citing *Burgess* v. *Seligman* as having settled the law upon this subject.

In *Folsom* v. *Ninety-Six*, 159 U. S. 611, 627, which involved a question of the validity of a state enactment, this court referred to *Burgess* v. *Seligman*, and, speaking by Mr. Justice Gray, said: "There not being shown to have been a single decision of the state court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina." In *Barnum* v. *Okolona*, 148 U. S. 393, which involved the validity of certain bonds, and which bonds the highest court of the State had adjudged to be void under a local statute, the court said: "As against a party who became the owner of such bonds before the decision of the Supreme Court of the State was rendered, which was the case here, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound." As late as *Stanly County* v. *Coler*, 190 U. S. 437, 445, relating to the validity of certain municipal bonds, this court reaffirmed the same prin-

ciples. To the same effect are other cases which will be found cited in the opinion of the Circuit Court of Appeals in this case when it was first before that court. *Jones* v. *Great Southern Fire Proof Hotel*, 86 Fed. Rep. 370. The only exception to the general rule announced in the above cases arises when the question is whether a particluar statute was passed by the Legislature in the manner prescribed by the state constitution, so as to become a law of the State. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *Post* v. *Supervisors*, (*Amoskeag Bank* v. *Ottawa*,) 105 U. S. 667; *Wilkes County* v. *Coler*, 180 U. S. 506, 520.

The plaintiffs insist that the Supreme Court of Ohio, in *Railway Co.* v. *Cronin*, 38 Ohio St. 122, and *Railway Co.* v. *McCoy*, 42 Ohio St. 251—which were determined prior to the contract between McClain and the plaintiffs—announced principles which, being applied here, would sustain the validity of the act of 1894. If this were true, then, in conformity with the settled course of decisions in this court, we should hold that the rights of the plaintiffs under their contract could not be affected by a change of decision in the state court. But, as the Circuit Court of Appeals held, the two cases just referred to should not control the decision here. Those cases, it is true, related to statutes giving liens to those who performed labor and furnished materials in the construction of railroads. But it does not appear that any question was raised or determined in them as to the constitutionality of the particular statutes there involved.

On behalf of the Hotel Company, it is contended that the cases of *Hampson* v. *State*, 8 Ohio, 315, *Copeland* v. *Manton*, 22 Ohio St. 398, *Dunn* v. *Rankin*, 27 Ohio St. 132, and *Bullock* v. *Horn*, 44 Ohio St. 420, all prior to the act of 1894, announced general principles which, being accepted, would necessarily lead to the conclusion reached by the Supreme Court of Ohio in the two subsequent cases, above cited, in which section 3184 of that act was held to be in violation of the state constitution. It is, therefore, contended that our interpretation of the con-

stitution of Ohio should be controlled by the rule stated in *O'Brien* v. *Wheelock*, 95 Fed. Rep. 883, 905, which involved the validity of certain municipal bonds as well as the validity of a statute of Illinois passed in 1871, the Illinois constitution then in force being the one adopted in 1870. In that case the court observed that the Illinois act of 1871 not having been construed by the Supreme Court of Illinois before the bonds there in question were issued, it was its duty, under the rule announced in *Burgess* v. *Seligman*, to exercise an independent judgment as to the validity of that act under the state constitution. But in so doing the court said two principles should not be overlooked, namely: "(1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiffs accrued, this court should give effect to any rules of construction that may have been previously established by the highest court of the State when interpreting similar provisions in the Constitution of 1848; (2) that the Federal courts, for the sake of harmony and to avoid confusion, should 'lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt,' and endeavor to avoid 'any unseemly conflict with the well-considered decisions of the state courts' upon questions of local law." We have already shown that it was the duty of the Federal court to lean to an agreement with the state court, and we recognize it to be equally its duty, when the rights of parties depend upon the construction of a state constitution, to give effect to any settled rules for construing that instrument which had been announced by the highest court of the State before such rights accrued. The difficulty in applying this principle here is that, prior to the two cases in 55 Ohio St., the Supreme Court of Ohio had not, we think, established any rules of constitutional construction that would necessarily require us to hold the act of 1894 to be unconstitutional.

In our opinion, neither the decisions of *Palmer* v. *Tingle*, *Young* v. *Lion Hardware Co.*, 55 Ohio St. 423, nor any

other case in the Supreme Court of Ohio precluded the Circuit Court from exercising its independent judgment as to the constitutionality of the statute of Ohio here in question. If, prior to the making of the contracts between the plaintiffs and McClain, the state court had adjudged that the statute in question was in violation of the state constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been rendered after the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the State.

It remains to dispose of the question of the constitutionality of the Ohio statute upon which this suit is based. In its consideration of the subject the Supreme Court of Ohio, in the *Palmer-Young* cases, referred to the Preamble to the constitution of that State, declaring that "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution;" to the first section of the Ohio Bill of Rights providing that "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety;" and to the second section of the state constitution declaring that "all political power is inherent in the people. Government is instituted for their equal protection

and benefit." It then said: "The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the General Assembly." In view of these constitutional provisions, aided by the general rules of law, the state court held the statute to be unconstitutional and void, so far as it gave (*syllabus*) "a lien on the property of the owner to subcontractors, laborers and those who furnish machinery, material or tile to the contractor;" that "all to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner." 55 Ohio St. 423.

The Circuit Court of Appeals expressed its earnest desire, in the interest of harmony of decision, to come to an agreement with the state court, but its sense of duty compelled it to sustain the constitutional validity of the statute upon which the plaintiffs based their claim. Upon a careful consideration of the objections urged to the statute, and after an extended review of the authorities, the Circuit Court of Appeals held that the statute did not deprive the owner of his property without due process of law, nor unreasonably interfere with his liberty of contract; that the restraints put upon the owner by the provisions in favor of sub-contractors and those who furnished materials to be used by the contractor in execution of his contract with the owner, were neither arbitrary nor oppressive; that such provisions were no more onerous than required by the necessity of protecting those who actually do the work or furnish the material by which the owner is benefited; and that as the legislation in question was sanctioned by the dictates of natural justice, and, as must be conclusively presumed, was known to the owner when he contracted for the building of his house, its requirements could only be avoided by pointing out some specific part of the organic law which has been violated by its enactment.

We are constrained to withhold our assent to the views

expressed by the Supreme Court of Ohio, and to express our concurrence with the Circuit Court of Appeals. The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare. The reasons in support of the constitutionality of the statute are cogently stated in the able and elaborate opinion of Judge Lurton, speaking for the Circuit Court of Appeals in this case. *Jones* v. *Great Southern Fire Proof Hotel Co.*, 86 Fed. Rep. 370. As the reports of the decisions of the Circuit Court of Appeals are accessible to all, we will not encumber this opinion with a restatement of the grounds, so fully set forth by that court, on which the validity of the statute must be sustained. We content ourselves with referring to its opinion, and with citing, in the margin[1] some authorities which, in our judgment, support the views expressed by the Circuit Court of Appeals. It results that the decree must be affirmed.

It is so ordered.

MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

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[1] *Van Stone* v. *Stillwell & Bierce Manf'g Co.*, 142 U. S. 128; *McMurray* v. *Brown*, 91 U. S. 257; *Blauvelt* v. *Woodworth*, 31 N. Y. 285; *Glacius* v. *Black*, 67 N. Y. 563; *Donahy* v. *Clapp*, 12 Cush. 440; *Bowen* v. *Phinney*, 162 Massachusetts, 593; *White* v. *Miller*, 18 Pa. St. 52; *Spofford* v. *True*, 33 Maine, 283; *Paine* v. *Tillinghort*, 52 Connecticut, 532; *Treusch* v. *Shryock*, 51 Maryland, 162; *Colter* v. *Frese*, 45 Indiana, 96; *Smith* v. *Newbaur*, 144 Indiana, 95; *Title Guarantee & Trust Co.* v. *Wren*, 56 Pac. Rep. (Ore.) 271; *Mallory* v. *La Crosse &c. Co.*, 80 Wisconsin, 170; *Laird* v. *Moonan*, 32 Minnesota, 358; *Albright* v. *Smith*, 2 S. Dak. 577; *Barnard* v. *McKenzie*, 4 Colorado, 251; *Smalley* v. *Gearing*, 121 Michigan, 190; *Hightower* v. *Bailey*, 56 S. W. Rep. (Ky.) 147; *McKeon* v. *Sumner Building & Supply Co.*, 51 La. Ann. 1961; *Roanoke &c. Co.* v. *Karn*, 80 Virginia, 589; *Henry & Coatsworth Co.* v. *Evans*, 97 Missouri, 47; *Cole Manf'g Co.* v. *Falls*, 90 Tennessee, 466; *Gurney* v. *Walsham*, 16 R. I. 698. See, also, 2 Jones' Liens, 286; Phil. Mech. Liens, 324, § 30, 3d ed.

MUTUAL LIFE INSURANCE COMPANY *v.* HILL.

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

No. 166. Argued March 1, 2, 1904.—Decided April 4, 1904.

A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.

The following propositions have been established by prior decisions of this court in regard to the construction of policies of life insurance issued in other States by New York companies:

1. The State where the application is made, the first premium paid by and the policy delivered to the assured, is the place of contract.

2. The statutory provision of the State of New York in reference to forfeitures has no extra-territorial effect, and does not of itself apply to contracts made by a New York company outside of the State.

3. Parties contracting outside of a State may by agreement incorporate into the contract the laws of that State and make its provisions controlling on both parties, provided such provisions do not conflict with the law or public policy of the State in which the contract is made.

Where a contract contains a stipulation that it shall be construed to have been made in New York without referring to the law of that State requiring notice, and also contains another stipulation by which the assured expressly waives all further notice required by any statute, the latter stipulation is paramount and to that extent limits the applicability of the New York law in reference to notice to policy holders.

On April 28, 1886, George D. Hill, at Seattle, Washington, signed a written application to the Mutual Life Insurance Company of New York (hereinafter called the insurance company) for a policy of $20,000. The application was forwarded to the home office. The insurance company accepted the application, executed a policy and forwarded it to its local agent at Seattle, who there, on June 12, 1886, received the first premium and delivered the policy to Hill. The beneficiary named in the policy was Ellen K. Hill, the wife of the applicant. She died on February 14, 1887, leaving four children, the present defendants in error. A premium receipt for the second annual premium was in 1887 forwarded to the local agent

at Seattle, presented by him to Hill, and not paid. No subsequent premiums were paid, and on December 4, 1890, Hill died.

Thereafter this action was commenced in the Circuit Court of the United States for the District of Washington. The contention of the plaintiffs is that, although the annual premiums for 1887, 1888, 1889 and 1890 had not been paid, the insurance company was nevertheless indebted to them for the full amount of the policy and interest, by reason of the fact that it had failed to give the notice of forfeiture prescribed by chapter 341, Laws, 1876, as amended by chapter 321, Laws, 1877, of the State of New York. The complaint set out a copy of the policy, alleged the payment of the first annual premium, the death of the insured and the relationship of the plaintiffs to the beneficiary. The defendant relied upon the non-payment of the premiums other than the first, and an abandonment of the contract. A demurrer to these defences was sustained and a judgment entered for the plaintiffs, which was affirmed by the Court of Appeals for the Ninth Circuit. 97 Fed. Rep. 263; 38 C. C. A. 159. A writ of certiorari was issued by this court, 176 U. S. 683, the judgment reversed and the case remanded for further proceedings. 178 U. S. 347. An amended answer and a replication were then filed by leave of the Circuit Court. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiffs. This judgment was affirmed by the Court of Appeals, 118 Fed. Rep. 708; 55 C. C. A. 536, and the case was again brought here on certiorari. 188 U. S. 742.

Mr. Julien T. Davies, with whom *Mr. Edward Lyman Short*, *Mr. E. C. Hughes* and *Mr. F. D. McKenney* were on the brief, for plaintiff in error.

Mr. George Turner and *Mr. S. Warburton*, with whom *Mr. Eben Smith* and *Mr. Harold Preston* were on the brief, for defendant in error.

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

A preliminary matter is this: When the case was here before we held that upon the record there was disclosed an abandonment of the insurance contract, by both the insured and the beneficiaries, and on that ground the judgment was reversed. It is now contended that "the only question left open by the mandate of this court was a submission of this question;" that our decision was substantially an adjudication that the plaintiffs had a right to recover unless it was shown that there had been an abandonment of the insurance contract, and that upon this trial it was shown that there had been no such abandonment, the insured having always expressed a wish to continue the policy, the beneficiary named in the policy having died before the second premium became due, and her children, who became entitled thereafter as beneficiaries, being minors and in actual ignorance of its existence. That decision was based upon the averments of the pleadings, and these pleadings were amended after the judgment was reversed and the case returned to the trial court. Clearly the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate

court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration.

Previous decisions in kindred cases have established these propositions: First, the State of Washington was the place of the contract. *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, 232; *Mutual Life Insurance Company of New York* v. *Cohen*, 179 U. S. 262. Second, the statutory provision of the State of New York in reference to forfeitures has no extra-territorial effect, and does not of itself apply to contracts made by a New York company outside of that State. *Mutual Life Insurance Company of New York* v. *Cohen*, *supra*. Third, parties contracting outside of the State of New York may by agreement incorporate into the contract the laws of that State and make its provisions controlling upon both parties, provided such provisions do not conflict with the law or public policy of the State in which the contract is made. *Equitable Life Assurance Society* v. *Clements*, *supra*; *Mutual Life Insurance Company of New York* v. *Cohen*, *supra*. If it were necessary, other cases from this and state courts might be cited in support of these propositions. Applying them, it follows that, as Washington was the place of the contract, the laws of that State control its terms and obligations, unless the parties thereto have stipulated for some other laws. Such a stipulation, it is insisted, is found in this contract. In determining the effect of such a stipulation it must be borne in mind that the applicability of other laws than those of the State of the place of contract is a matter of agreement, and that the agreement may select laws and also limit the extent of their applicability. The case is precisely like one in which

the parties, without mentioning laws or State, stipulate that the contract shall be determined in accordance with certain specified rules.

This insurance policy contains these recitals:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, twenty thousand dollars; upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof;

"The annual premium of eight hundred and fourteen dollars and —— cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

* * * * * * * *

"Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived.

* * * * * * * *

"Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium,

or within six months thereafter, issue a paid-up policy, payable as herein provided for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York."

In the application are these provisions:

"If said policy be issued, the declarations, agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York.

* * * * * * * *

"4th. Policyholders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

The statute of New York, relied upon as controlling, forbids the forfeiture of any life insurance policy unless "a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void."

Now to what extent were the statutes of New York made by these stipulations controlling? It is stated in the application that the contract of insurance is to "be held and construed at all times and places to have been made in the city of New

York." It might with some plausibility be contended that this general provision is limited to the matter which precedes it in the same sentence, to wit, the "declarations, agreements and warranties herein contained." This contention is reinforced by the fact that elsewhere in the contract there is special mention of one statute of New York, to wit, chap. 347, Laws, 1879, which is made controlling in reference to a single matter.

But assuming that the general declaration that the contract is to be held and construed to have been made in the city of New York, would, if there was nothing else, make controlling all the applicable statutes of that State, it is limited by other express agreements of the policy. Among these are that "notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived," and also that "policyholders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception." Language could not be clearer to the effect that the party accepting the policy admits thereby the receipt of every notice in respect to the payment of premium which can be implied from any other part of the policy or required by any statute. The contention is that this express stipulation in reference to notice is nullified by the general provision that the contract is to be construed to have been made in the city of New York. It is urged that the laws of New York control in the construction of any contract made in that State, that they require notice as a condition of forfeiture and forbid a waiver of such notice, and therefore that the agreement in the policy in respect to notice is overthrown by the law of the State. But that assumes that the contract was made in New York, whereas it was in fact made in Washington, and the laws of New York are controlling in any re-

spect only because the parties have so stipulated, and, as we have indicated, the stipulation in respect thereto is to be harmonized with the other stipulations in the contract. The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because when the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents—contracts as well as statutes. *Bock* v. *Perkins*, 139 U. S. 628, and cases cited; *Rodgers* v. *United States*, 185 U. S. 83, and cases cited; *Winebrenner* v. *Forney*, 189 U. S. 148; Sedgwick on the Construction of Statutes and Constitutional Law, 2d ed. p. 360 and note; 2 Parsons on Contracts, 6th ed. p. 501 and note.

Obviously the express stipulation in the policy as to the matter of notice must be held paramount and to that extent limiting the provision of the New York law in reference to notice which was not specially referred to in the contract, and can be invoked only because it is one of the various statutes of New York applicable to insurance policies.

Beyond the proposition that by the terms of the policy the

insured was bound to take notice of the time when the payment of the second premium was due, it was also shown by the testimony that the renewal receipt was forwarded to the local agent at Seattle and by him presented to the insured, so that there was notice in fact as well as notice implied from a receipt of the policy. Under those circumstances the insured failed to pay, and continued such failure for four years prior to his death. Yet, notwithstanding his failure to perform his part of the contract—and performance by the insured underlies the obligation of the insurance company to perform on its part—this action was brought to compel the same performance by the company that would have been due if he had performed. It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. It is true cases arise in which one party is enabled to take advantage of some statutory provision and exact compliance from the other without having himself first complied, and courts may not ignore the scope and efficacy of such statutory provisions, but, nevertheless, a judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing. We have had before us a series of cases coming from the same jurisdiction in which, when the insured had for a series of years neglected to pay their insurance premiums or perform their parts of the insurance contract their heirs or beneficiaries have, on their deaths, sought to obtain judgments against the insurance company for the amounts which would have been due on the policies if the insured had performed their stipulations in respect to the payment of premiums. Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defences to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid. We cite with ap-

proval the decision of the Supreme Court of Washington in a recent case, *Lone, Administrator*, v. *Mutual Life Insurance Company of New York*, decided December 21, 1903, and reported in 74 Pac. Rep. 689, in which, as in this case, the insured made payment of one premium and then lived years without making further payment, and in which the court said, in reference to the New York statutes here relied upon, and the conduct of the insured:

"The statute, it is true, provides that no life insurance company shall have power to declare forfeited or lapsed any policy by reason of the non-payment of any annual premium, unless notice be given in a specified manner, but a statute must be construed, and its provisions enforced, with reference to its objects; and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what, in homely phrase, is termed 'snap judgment' on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness.

* * * * * * * *

"We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract, and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In *Shutte* v. *Thompson*, 15 Wall. 151, where a party was standing upon his statutory right in relation to the notice concerning depositions, the court said that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a

party could waive any provision either of a contract or of a statute intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because under such circumstances he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud.

* * * * * * * *

"From every consideration of justice and fair dealing, we think the respondent should not be allowed to recover in this case."

The judgments of the Circuit Court and of the Circuit Court of Appeals will be reversed, and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial and to proceed further in accordance with the views expressed in this opinion.

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

NEWBURYPORT WATER COMPANY *v.* NEWBURYPORT.

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

No. 182. Argued March 16, 1904.—Decided April 4, 1904.

Where the contention as to want of jurisdiction of the Circuit Court, arising from the alleged absence of constitutional questions, is well founded, it is the duty of this court not simply to dismiss the appeal, but to reverse the decree at appellant's costs with instructions to the Circuit Court to dismiss the bill for want of jurisdiction.

Jurisdiction of the Circuit Court does not arise simply because an averment is made that the case is one arising under the Constitution or laws of the

United States if it plainly appears that such averment is not real or substantial but is without color of merit.

Where the charter of a water company is not exclusive, and is subject to repeal, alteration or amendment at the will of the legislature no deprivation of property without due process of law or impairment of the obligation of a contract can arise from an act of the legislature empowering the city to erect its own waterworks.

Where the legislature of a State authorizes a city to erect its own waterworks but on the condition that it purchase the plant of a company then supplying it, at a valuation to be fixed by judicial proceedings as provided in the act, and the water company institutes proceedings under the act, it cannot thereafter claim that because certain incorporeal rights, franchises and possible future profits were not allowed for in fixing the valuation, that its property was taken without due process of law, and, changing its position, cause its voluntary acceptance to become an involuntary one in order to assail the constitutionality of the legislation in question.

THE Newburyport Water Company, appellant, is a Massachusetts corporation created by special act on April 23, 1880, which act was subject to alteration, amendment or repeal at the pleasure of the legislature.

As authorized by its charter, the water company established a water supply system in the city of Newburyport. On August 17, 1880, the water company entered into a contract with the city to furnish water, for fire purposes, during a term of twenty years, with the privilege to the city of purchasing the waterworks property after the expiration of ten years.

In the year 1893 the legislature passed an act, (chapter 471,) conferring power upon the city, if sanctioned by popular vote, to provide its own water plant, to supply itself and its inhabitants with water, and, if also approved by the voters, to acquire by agreement with the water company its plant. The voters of the city, however, decided not to purchase the plant, but to establish and maintain an independent water supply system. On June 14, 1894, an act, designated as chapter 474, was passed by the legislature, forbidding the city of Newburyport, in the event that the water company, within thirty days after the passage of the act, elected to offer its property for sale to the city, from acting under the authority of chapter 471 of

the acts of 1893, unless the city first purchased the plant of the company. A copy of the act is inserted in the margin.[1]

Availing themselves of the privilege conferred by this act,

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[1] CHAPTER 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows: SEC. 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the Supreme Judicial Court, shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or account of the franchise of said company.

SEC. 2. In case said Newburyport Water Company shall convey its property to the city of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three.

SEC. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from

the stockholders of the water company voted to sell to the city and served notice to that effect upon the mayor. The city, by a popular vote, decided to buy. The water company thereupon, on January 20, 1895, executed and delivered to the city a deed of all its property, both corporeal and incorporeal. In accepting the deed, however, the city served upon the water company the notice printed in the margin.[1]

time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SEC. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the Supreme Judicial Court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SEC. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

[1] To the Newburyport Water Company:

In accepting the conveyance made to the city of Newburyport by the Newburyport Water Company, dated January 29, 1895, and delivered to the mayor on that day by the clerk of that corporation for examination, it is not admitted, on behalf of the city, that any franchise is acquired by the said city under such conveyance, or that the city is under any obligation to make payment on account of any franchise of said corporation by reason thereof.

It is further not admitted or claimed that the four filters, with their gates, pipes, appliances and appurtenances, described in item 2 of said deed as situated upon the second lot of land described in item 1 therein, are used in supplying said city or its inhabitants with water, or that the city is bound to pay for the same or any part thereof.

Under the deed of the water company the city took possession of the plant. The parties being unable to agree as to the sum to be paid, the water company petitioned the Supreme Judicial Court for the county of Essex, to appoint three commissioners to fix the amount, which was done. Hearings were had and the commissioners made an award of $275,000, but no allowance was made for the franchise or right of the water company to lay and maintain pipes in the streets and for its right to collect water rates or for the profits which the company might have made on the contract for furnishing water to the city for fire purposes, had not the sale of the plant to the city taken place. It is stipulated by counsel that the commissioners did not value such contract, "it being their opinion that the same in law could not be valued," and that although the water company offered the contract before the commissioners "no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company," was introduced. The stipulation also recites—

"That counsel for the city in his closing argument asked counsel for the water company if he had waived the claim to have the contract valued, and the latter replied that he did not waive it, and was not prepared to say what use he should make of it. That thereupon counsel for the city proceeded to argue that the contract should not be valued; that the counsel for the water company in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all of the property of the company as one whole."

The report on the award made by the commissioners was

It is further not admitted or claimed that the Newburyport Water Company has any right or authority to convey by said conveyance, or the city of Newburyport to accept or make payment for anything whatever, except according to provisions of chapter 474 of the act of 1894.

Adopted by a unanimous yea vote, six aldermen present and voting.

heard before a single justice of the Supreme Judicial Court, who reserved for the full court whether the award should be recommitted or be accepted. The full court affirmed and accepted the award of the commissioners. 168 Massachusetts, 541. A rehearing was applied for, but while the petition was pending the water company brought the present suit in equity in the Circuit Court of the United States for the District of Massachusetts. After the bringing of such equity suit the petition for rehearing was dismissed.

In the bill of complaint the foregoing facts, except as to the recited provisions referred to as embraced in the stipulation, were set out with much amplitude, and it was alleged that no claim was made before the commissioners or in the state courts (except in the petition for rehearing) that the act of 1894 was repugnant to the Constitution of the United States.

In substance, the grounds for relief propounded in the bill were that as the act of the legislature which gave the privilege to the water company to sell had been construed by the Supreme Judicial Court as not entitling that company, on the sale by it made to the city, to compensation for its franchises and other valuable incorporeal rights, that act as construed amounted to a taking of the property of the water company, against its consent, without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States. The bill based this contention upon the charge that as the legislative act which gave the company the privilege to sell to the city, if it chose to do so, was coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own, the sale by the company was compulsory, since the execution by the city of the authority to erect its own plant would have worked the ruin of the water company. In addition, it was charged in the bill that the failure under the legislative act, of which the company had availed itself, to value the future profits which the company might have derived from its contract to furnish the city with water, impaired the obligation of the contract arising from the

charter, in violation of the contract clause of the Constitution of the United States. Charging that it was the intention of the city to issue bonds for the purpose of raising funds with which to pay the award in question, the bill prayed an injunction and the appointment of a receiver to manage the property claimed by the water company, which it had conveyed to the city, until the controversy was finally determined. The ultimate and substantial relief sought by the bill was, first, a restoration to the water company of the property which it had conveyed to the city, with damages for its detention, and in the alternative that full compensation be awarded. The city, appearing specially for the purpose, moved to dismiss for want of jurisdiction. This, after hearing, was overruled. Thereupon a demurrer was filed to the bill, which, after argument, was overruled. Application was next made for a rehearing on the demurrer, and pending action thereon an answer and replication were filed. The application for a rehearing on the demurrer was overruled. A motion was then made for leave to file a special demurrer to that portion of the bill and prayer in which a right to a decree for compensation was asserted. This was refused, and thereafter, by consent of parties, the following order was made by the court:

"*Ordered:* That the constitutional question, to wit, whether or not the plaintiff has been deprived of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, be first heard; and that all questions as to plaintiff's relief, if any, (including questions of valuation of the property alleged to have been taken,) await the determination of the constitutional question."

Soon afterwards a hearing was had upon the question referred to in said order, and the decision of the court was adverse to the water company. 103 Fed. Rep. 584. After this the court heard argument upon the contention of the water company that the act of 1894 impaired the obligation of its contract with the city, and in consequence violated section 10 of article I of the Constitution of the United States. It was decided that the

failure to value the contract in question "does not tend to prove that the act of 1894 was repugnant to the contract clause of the Constitution." The court having thus decided all the constitutional questions raised by the water company against that company, entered a final decree dismissing the bill. This appeal, directly to this court, was then taken.

Mr. Lauriston L. Scaife and *Mr. Robert M. Morse*, for appellant in this case and for the appellant in No. 183, argued simultaneously therewith:

As to jurisdiction and the question of taking of property without compensation.

The jurisdiction of the Circuit Court is to be determined wholly upon plaintiff's own allegations, and is not limited by defendant's denials, nor does it depend upon the result of the trial of any issues presented by the pleadings of both parties. 1 Gould & Tucker's Notes to Rev. Stat. 101; *Walla Walla Water Case*, 172 U. S. 1, 11; *City Railway Co.* v. *Citizen's Railway Co.*, 166 U. S. 557; *Vicksburg Water Co.* v. *Vicksburg*, 185 U. S. 65, 83.

The suits are of a civil nature in equity. *Moore* v. *Sandford*, 115 Massachusetts, 285; *Chicago &c.* v. *Minnesota*, 134 U. S. 418, 459. As to duress in equity suits, see *Brown* v. *Pierce*, 7 Wall. 205; *Baker* v. *Morton*, 12 Wall. 150; 1 Story's Eq. Jurisprudence, 13th ed. §§ 239, 700. The matter in dispute involves more than $2,000, and even if this were omitted from the bill it could be shown *aliunde*. *United States* v. *Freight Association*, 166 U. S. 290, 310; *Whiteside* v. *Haselton*, 110 U. S. 296.

The appeal was properly made directly to this court. *Walla Walla Water Case*, 172 U. S. 1; *Am. Sug. Ref. Co.* v. *New Orleans*, 181 U. S. 277; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Under the Fourteenth Amendment the plaintiff was deprived by the State of its property without due process of law.

"Due process of law," under the Fourteenth Amendment,

requires compensation to be made or secured to the owner of private property taken under the authority of the State for public use.

This provision controls a taking, whatever may be its form or guise. *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 266; *Scott* v. *Toledo*, 36 Fed. Rep. 395.

Whatever the provisions of the state statute, we are entitled to go behind the form and to show that what was authorized by the statute, as construed by the state court, was, in effect or in substance, a taking of plaintiff's property without compensation, under the form or guise of a sale which was apparently voluntary, but which was in reality compulsory in fact and in law. Cases cited *supra; Thompson* v. *Androscoggin &c. Co.*, 54 N. H. 545, 557; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 155; *Austin* v. *Murray*, 16 Pick. 126; *Lake Shore &c. Co.* v. *Smith*, 173 U. S. 684, 693.

That the court looks at the "essence and effect" of the state statute in determining the constitutional question of a taking is further expressly shown in *Missouri Pac. R. Co.* v. *Nebraska*, 164 U. S. 403.

All the so-called "railroad-rate cases" are based upon the principle that the form of the taking is immaterial, but that statutes apparently constitutional may, under the form of a constitutional regulation of rates, be held by their unreasonableness and injustice, as applied, to be in effect an unconstitutional taking of private property. *Reagan* v. *Trust Co.*, 154 U. S. 362; *Mercantile Trust Co.* v. *Texas &c. Co.*, 51 Fed. Rep. 529; *Ames* v. *Union Pacific Ry. Co.*, 64 Fed. Rep. 165; *Southern Pacific Co.* v. *Board of Railroad Comrs.*, 78 Fed. Rep. 236; *Railway Co.* v. *Dey*, 35 Fed. Rep. 866; *Capital City Gas Light Co.* v. *Des Moines*, 72 Fed. Rep. 849; *Cotting* v. *Kansas City &c. Co.*, 79 Fed. Rep. 679.

A sale which is compulsory in law under a state statute is the equivalent of a taking by the State. *Parks* v. *Boston*, 15 Pick. 198, 208; *Norcross* v. *Cambridge*, 166 Massachusetts, 508, 511.

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law,—different from that required by law,—and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress. *Hamilton Gas Co.* v. *Hamilton*, 146 U. S. 258; *Silsbee* v. *Webber*, 171 Massachusetts, 381, and cases cited; *Thayer* v. *Jaques*, 106 Massachusetts, 291; *United States* v. *Tingey*, 5 Pet. 115, 129, and for subsequent cases in which this case has been cited, see 3 Rose's Notes, 161; *Maxwell* v. *Griswold*, 10 How. 242; *Swift Co.* v. *United States*, 111 U. S. 22, 28; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17; *Boston* v. *Capen*, 7 Cush. 116, 124.

The State by the act of 1894 in effect threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.

The result of competition by the city without purchasing its property must necessarily have caused the ruin of the Water Company. This has been judicially noticed in *Walla Walla Water Case*, 172 U. S. 1, 11; *Gloucester Water Supply Co.* v. *Gloucester*, 179 Massachusetts, 365; *White* v. *City of Meadville*, 177 Pa. St. 651; *Westerly Water Works* v. *Westerly*, 75 Fed. Rep. 181; *Ziegler* v. *Chapin, Mayor, etc.*, 126 N. Y. 342.

The rights of the company were franchises and were thus the property of the Water Company. *Boston &c.* v. *Salem &c.*, 2 Gray, 35, and cases cited; *Williston Seminary* v. *County Commissioners*, 147 Massachusetts, 430; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 327.

No compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the right to the use of the streets and to collect water rates.

Duress may be caused by a declaration of a probable or a certain evil to come, giving to the party threatened a choice of evils. A submission "merely as a choice of evils" does not destroy the involuntary character of the act. *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 22. And the sale thereby became a compulsory one.

That the company gave a deed which was voluntary in form is immaterial. The sale remains compulsory in fact and in law. *Baker* v. *Morton*, 12 Wall. 150; *Swift Co.* v. *United States*, 111 U. S. 22; *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17; *Long Isld. Water Supply Co.* v. *Brooklyn*, 166 U. S. 689; *Missouri Pac. Ry.* v. *Nebraska*, 164 U. S. 403, 417.

That a "taking" for public use under a statute is the equivalent of a "compulsory purchase" has been distinctly held in the following Massachusetts decisions. *Parks* v. *Boston*, 15 Pick. 198, 208; *Norcross* v. *Cambridge*, 166 Massachusetts, 508, 511, 512. See also *Thompson* v. *Androscoggin &c. Co.*, 54 N. H. 545; Lewis on Eminent Domain, 48, 55.

The effect of the right of *eminent domain* against the individual "amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it." Cooley's Const. Lim. 6th ed. 691, citing *Fletcher* v. *Peck*, 6 Cranch, 87, 145; *Bradshaw* v. *Rogers*, 20 Johns. 103; *People* v. *Mayor*, 4 N. Y. 419; *Carson* v. *Coleman*, 11 N. J. Eq. 106; *Young* v. *Harrison*, 6 Georgia, 130; *United States* v. *Minnesota &c. R. R. Co.*, 1 Minnesota, 127; *Railroad Co.* v. *Ferris*, 26 Texas, 588; *Curran* v. *Shattuck*, 24 California, 427; *State* v. *Graves*, 19 Maryland, 351; *Weckler* v. *Chicago*, 61 Illinois, 142, 147.

The legislation, as construed and applied, impaired the obligation of contracts belonging to said company and to the stockholders, in violation of sec. 10, art. I, of the Constitution of the United States, and the plaintiff's rights thereunder.

Mr. Albert E. Pillsbury, with whom *Mr. George H. O'Connell*

and *Mr. Charles A. Russell* were on the brief, for appellee in this case and appellee in No. 183.

As to jurisdiction: The bill does not present a case arising under the Constitution or laws of the United States. *Cooke* v. *Avery*, 147 U. S. 375, 385; *Starin* v. *New York*, 115 U. S. 248, 257.

The case is within the rule that the repugnancy of a state statute or proceeding to the Federal Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require; and, if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. *New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *McCain* v. *Des Moines*, 174 U. S. 168, 181; *Bienville Water Supply Co.* v. *Mobile*, 175 U. S. 109; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, and cases cited; *Owensboro* v. *Owensboro Water Co.*, 191 U. S. 358; *Arbuckle* v. *Blackburn*, 191 U. S. 405, 413.

The principle of estoppel exists and is applicable. One who takes the benefit of a statute is held thereby to have waived any right to thereafter attack it as unconstitutional or otherwise invalid. The present case is directly within this rule; accordingly, the bill presents no Federal question of jurisdiction. *Electric Co.* v. *Dow*, 166 U. S. 489.

The company, by this bill, is taking advantage of its own laches and default in omitting to raise the Federal question in the state court, to secure a consideration of it by this court to which it would not have been entitled in the regular course of procedure. If not entitled to it there, it cannot be entitled to it here.

The principles of waiver and estoppel belong to general jurisprudence, and are of general application, alike in state and Federal courts. *City Railway Co.* v. *Citizens Railway Co.*, 166 U. S. 557, 568. The company, by its own petition, sought the act of 1894, which it now attempts to avoid after taking advantage of it. *Clay* v. *Smith*, 3 Pet. 411; *Chapman* v. *Forsyth*, 2

How. 202; *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 408; *Cole* v. *Cunningham*, 133 U. S. 107, 115; *Ashley* v. *Ryan*, 153 U. S. 436, 441; *Pierce* v. *Somerset Railway*, 171 U. S. 641, 648; *Hale* v. *Lewis*, 181 U. S. 473, and cases cited; *O'Brien* v. *Wheelock*, 184 U. S. 450, 491.

For the law of Massachusetts upon the subject, see *Haskell* v. *New Bedford*, 108 Massachusetts, 208, 213; *Bancroft* v. *Cambridge*, 126 Massachusetts, 438, 442; *Eustis* v. *Bolles*, 146 Massachusetts, 413; *Braintree Water Co.* v. *Braintree*, 146 Massachusetts, 482, 486; *Rockport Water Co.* v. *Rockport*, 161 Massachusetts, 279; *Citizen's Gas Lt. Co.* v. *Wakefield*, 161 Massachusetts, 432, 439; *Hudson Elec. Light Co.* v. *Hudson*, 163 Massachusetts, 346, 348; *Rosenthal* v. *Coates*, 148 U. S. 142, 147; *Robb* v. *Vos*, 155 U. S. 13, 43; *Forsyth* v. *Hammond*, 166 U. S. 506, 517.

Appellant sought in the state court, and was given opportunity, to litigate the rights claimed by it; and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully. *Remington Paper Co.* v. *Watson*, 173 U. S. 443, 451; *Graham* v. *Boston H. & E. R. R.*, 118 U. S. 161, 177; *Manning* v. *Amy*, 140 U. S. 137, 141; *Wilson* v. *Lambert*, 168 U. S. 611, 618; *Mitchell* v. *First Nat. Bank*, 180 U. S. 471, 482; *Bienville Water Co.* v. *Mobile*, 186 U. S. 212, 216; *Connihan* v. *Thompson*, 111 Massachusetts, 270.

The Federal claim is simulated, for the purpose of getting a new trial. The suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court," in the sense of Stat. of March 3, 1875, § 5, 18 Stat. 470; and the bill might have been dismissed below upon this ground. See cases cited *supra* and *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 344, and cases cited.

As to taking of property:

The claim of duress cannot be taken seriously. The element of illegality is wholly wanting; the alleged "threats" ascribed to the legislature and the mayor were either lawful acts in

themselves, or no more than the indication of a purpose to do lawful acts; the mayor's statements do not bind the city; and they disappear in the proof.

Nor, as already noted, would duress, if proved, establish a taking of the company's property, or present any Federal question. At most, it would only entitle the company to avoid its deed and have the property restored.

In addition to cases cited by the Circuit Court on duress or "threats," see *French* v. *Shoemaker*, 14 Wall. 314, 332; *United States* v. *Huckabee*, 16 Wall. 414, 431; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 541; *Silliman* v. *United States*, 101 U. S. 465; *Carver* v. *United States*, 111 U. S. 609; *United States* v. *Des Moines Co.*, 142 U. S. 510, 544; *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193, 200; *White* v. *United States*, 154 U. S. 661; *Thorne Wire Co.* v. *Washburn & Moen Co.*, 159 U. S. 423, 444; *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288, 308; *Wilcox* v. *Howland*, 23 Pick. 167; *Emmons* v. *Scudder*, 115 Massachusetts, 367; *Vegelahn* v. *Guntner*, 167 Massachusetts, 92, 107.

The motives, reasons or state of mind of the stockholders in voting the sale are immaterial. They are bound by the act of the corporation, and their motives are not necessarily to be ascribed to the corporation. *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Leggett*, 135 U. S. 533, 544; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 13; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 508, 516, and cases cited.

The whole case centers in the single question whether a grant to a city, by a legislature having a reserved power to alter or repeal all corporate charters of authority to supply itself with water in competition with a local company operating under a non-exclusive franchise and contract, accompanied with the obligation to buy the company's property, if offered, without payment for its franchise rights, amounts to a *taking* of property held under such franchise; a question settled, in principle, ever since the *Charles River Bridge* case, and now repeatedly determined by decisions which directly cover the whole ground of the company's claim. Of the cases cited by

the Circuit Court, *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 390; *Stein* v. *Bienville Water Co.*, 141 U. S. 67, 81; *Hamilton Gas Co.* v. *Hamilton*, 146 U. S. 258, 268, and *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 685, 696, are directly in point and are conclusive. The only question is of legislative power to authorize competition with a non-exclusive franchise. It is now settled even that an express stipulation in the contract that the city should not compete would have given the company no exclusive right as against the legislature. *Walla Walla Case*, 172 U. S. 1, 15, as cited in 180 U. S. at p. 618; *Browne* v. *Turner*, 176 Massachusetts, 9, 15; and that competition by the city is not excluded where competition by others is not excluded. *Joplin Case*, 191 U. S. 156.

In addition to cases cited by the Circuit Court on the main question of deprivation of property, see *Citizens St. Ry.* v. *Detroit Ry.*, 171 U. S. 48, 53; *Walla Walla Case*, 172 U. S. 1, 14, 15; *San Diego Co.* v. *National City*, 174 U. S. 739, 754; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624; *Skaneateles Water Co.* v. *Skaneateles*, 184 U. S. 354; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Joplin* v. *Southwest Mo. Lt. Co.*, 191 U. S. 150; *Owensboro* v. *Owensboro Water Co.*, 191 U. S. 358; *Stanislaus County* v. *San Joaquin Canal Co.*, 192 U. S. 201; *Kennebec Water Dist.* v. *Waterville*, 97 Maine, 185, 206; *Newburyport Water Co.* v. *Newburyport*, 168 Massachusetts, 541; 553, 554; *Gloucester Water Supply Co.* v. *Gloucester*, 179 Massachusetts, 365, 382; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167.

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

At the threshold we are met with the objection, raised below and urged at bar, that the Circuit Court was without jurisdiction, because the bill on its face did not state a case arising

under the Constitution or laws of the United States, within the intendment of the act of August 13, 1888. 25 Stat. 433. As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the cause was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below with instructions to the Circuit Court to dismiss the bill for want of jurisdiction. *Defiance Water Company* v. *Defiance*, 191 U. S. 184.

If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit. *Underground Railroad* v. *City of New York*, 193 U. S. 416; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *Swafford* v. *Templeton*, 185 U. S. 487; *McCain* v. *Des Moines*, 174 U. S. 168, 181, and cases cited. Whether the Constitution of the United States was and is, in a real and substantial sense, involved depends upon apparently two considerations: First, the proposition that the sale made by the company to the city was compulsory, and hence there was a taking of the property in disregard of due process of law; and, second, that the failure of the commissioners to value the future profits arising from the contract for the furnishing for fires of a water supply to the city impaired the obligations of the company's contract. We

say apparently two, since the questions are virtually one, depending both on the same considerations.

Now, it is conceded that the charter of the water company was not exclusive, and was subject to repeal, alteration or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law or impairment of the obligations of a contract did or could arise from the act of the legislature empowering the city to erect its own waterworks. Having this power, the legislature could therefore have exercised it without compelling the city to buy the plant of the water company, and the bill proceeds upon the theory that if this right had been exerted by the legislature the company would have been ruined, and the value of its property in effect entirely destroyed. This follows, because the averments are based upon the assumption that the conveyance by the company of its property to the city was not voluntary, since, if it had not so conveyed, the exercise by the city of the right to construct its own plant would have destroyed the company's property. The contentions, therefore, as to the Constitution of the United States are based solely upon the proposition that because the legislature sought to protect the company and save its property from ruin by conferring upon it the privilege of selling its property to the city, if it chose to do so, thereby compulsion and consequent violation of the Constitution of the United States arose. In other words, that because there was conferred a benefit upon the corporation, which the legislature need not have bestowed, and which the company availed of, that its property was taken from it forcibly and without its consent. When the contention is thus reduced to its ultimate analysis, it comes to this—that the property of the company was taken from it without its consent, because by the action of the legislature, for the benefit of the company, it was enabled to sell its plant to the city and thus escape a serious loss. Indeed, in reason, the theory upon which the bill is based could not be maintained without deciding that the company had an exclusive contract, and there-

fore that there was a want of power in the legislature to authorize the city to erect its own plant; or, what is tantamount thereto, declaring that, although there was no exclusive right and therefore power in the legislature, to give the city the right to erect its own plant, that body must have abstained from the exercise of its lawful authority, unless it determined to exert it so as to destroy and ruin the company. The power being in the legislature, it was competent for that body to exert it for the benefit and in the interest of the water company, to enable that company, if it chose to sell its plant upon the terms stipulated, and thus avoid the loss which otherwise, the bill avers, would have been entailed. And these considerations take this case out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from or advantage gained over another, by coercing his will by means of threats, even of the doing of a lawful act. The advantage resulting from the power conferred upon the company to sell enured to its benefit, since it saved it from a ruin which otherwise would have been occasioned. No compulsion in any legal sense can be said to have been exerted on the company by the option given it, because the exercise by the company of the option, upon its own theory of the case, saved its property from destruction. To indulge in the assumption that the action of the company was not voluntary would require the assumption that the company would have willingly suffered a most grievous wrong when, by accepting as it did the benefits of the act, such consequences were averted. The Supreme Judicial Court of Massachusetts, in passing upon the award made by the commissioners, aptly said (168 Massachusetts, 554):

"It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company made under the threat of municipal competition and to avoid ruin, might be voluntary only in name. But we have

no reason to assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form."

It is to be observed that in the legislative act which the company accepted, and in furtherance of which it voluntarily conveyed its property to the city, it was expressly stipulated that the value of such property "should be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." It is also worthy of note that before the state courts the only question presented for consideration was the proper interpretation of the statute in question, and whether or not it provided for payment for certain incorporeal rights and franchises which the water company contended should have been allowed for by the commissioners. Having accepted the statute, conveyed its property to the city, provoked the state proceedings to value the property and derived the benefits resulting from the legislation of the State of Massachusetts, the water company may not now, because of disappointment at the result of the interpretation which the statute received at the hands of the state court, change its position and cause its voluntary acceptance to become an involuntary one in order to assail the constitutionality of the legislation in question.

Concluding, for the foregoing reasons, that the rights asserted in the bill under the Constitution of the United States, upon which the jurisdiction of this court depends and upon which also the jurisdiction of the lower court depended, were so attenuated and unsubstantial as to be absolutely devoid of merit, our duty is to direct that the decree of the Circuit Court be reversed at appellant's costs, and that the case be remanded to that court with instructions to dismiss the bill for want of jurisdiction.

And it is so ordered.

GLOUCESTER WATER SUPPLY COMPANY *v.* CITY OF GLOUCESTER.

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

No. 183. Argued March 16, 1904.—Decided April 4, 1904.

Dismissed for want of jurisdiction on the authority of the preceding case.

THE facts are stated in the opinion of the court.

Mr. Lauriston L. Scaife and *Mr. Robert M. Morse*, for appellant.

Mr. Albert E. Pillsbury, with whom *Mr. George H. O'Connell* was on the brief, for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

In the main, this case is like that of *Newburyport Water Company* v. *Newburyport*, just decided.

The Gloucester Water Company was engaged in supplying the city of Gloucester and its inhabitants with water under a non-exclusive charter and a non-exclusive hydrant contract made with the city. Under the authority of a statute enacted in 1895, similar in tenor to the act of 1894 considered in the *Newburyport* case, the Gloucester company sold its plant to the city of Gloucester. After the sale the company petitioned for the appointment of commissioners to value the property. Objections were made by both parties to the award, and the objections were reserved for consideration to the full bench of the Supreme Judicial Court of Massachusetts. That court accepted the award for the sum of $576,544 with interest. 179 Massachusetts, 365. Thereafter the present suit in equity was

instituted in the Circuit Court of the United States for the District of Massachusetts, the bill filed containing substantially similar allegations to those made in the *Newburyport* case. Similar relief was also sought, except that there was no claim that the commissioners had not made an allowance for the unexpired term of the hydrant contract. After the decision in the *Newburyport* case the Circuit Court sustained a demurrer and dismissed the bill on the merits.

For the reasons stated in the opinion delivered in the *Newburyport* case, the decree of the Circuit Court is reversed at appellant's costs, and the case remanded, with instructions to dismiss the bill for want of jurisdiction.

THIRD NATIONAL BANK OF BUFFALO *v.* BUFFALO GERMAN INSURANCE COMPANY.

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

No. 146. Argued January 27, 28, 1904.—Decided April 4, 1904.

The mere statement by a borrower from a national bank, made to the president when the loan is obtained, that his stock in the bank is security for the loan, there being no delivery of the certificates, does not amount to a pledge of the stock, nor does it give the bank any lien thereon as against one subsequently loaning on the stock in good faith and receiving the certificates as collateral.

The provisions of section 36 of the National Banking Act of 1863, empowering the withholding of transfer of the stock of a shareholder indebted to the bank, were not only omitted from the National Banking Act of 1864 but were expressly repealed thereby.

A provision in the charter and by-laws, and a condition in a certificate of stock, of a national bank, forbidding the transfer of stock where the stockholder is indebted to the bank, is void as repugnant to the National Banking Act and in conflict with the public policy embodied in that act, and creates no lien which the bank can enforce by refusing to transfer the stock to a holder for value in good faith.

A condition in a certificate of stock of a national bank which is void under

the National Banking Act will not operate as a notice to one loaning on the stock as collateral, that it is subject to a lien of the bank which will affect the right of the pledgee of having the stock transferred to him.

THE Third National Bank of Buffalo, spoken of hereafter as the bank, was organized on the ninth of February, 1865, and its articles of association contained the following:

"That the board of directors shall have power to make all by-laws that may be proper and convenient for them to make under said act for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to the association either as principal debtor or otherwise without the consent of the board."

In virtue of the authority assumed to be conferred by the foregoing provision, the board of directors adopted in February, 1865, a by-law as follows:

"Transfers of Stock.—SEC. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfers of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all the profits thereof, and dividends and certificates of stock shall contain upon them notice of this provision."

Pursuant to this by-law the stock certificates of the bank were thus framed:

"This is to certify that ——— is the owner of ——— shares of one hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien or liens referred to in section 15 of the by-laws of said bank, in the following words: 'No transfer of the stock of this association shall be made without the consent of the board of directors, by any

stockholder, who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And the said stock is transferable only on the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with the said by-laws."

Emmanuel Levi became the registered holder and owner of 450 shares of the capital stock, evidenced by certificates, in the form just stated. Levi borrowed money from the bank upon his promissory notes, secured by various collaterals. On the first day of October, 1890, he applied for a further loan, which the bank agreed to make, provided the new loan was endorsed by Louis Levi, a son of Emmanuel. At that time, in a conversation between the president of the bank and Levi, it was understood that all the stock held by Levi in the bank should be considered as additional security for his entire loan. When this conversation took place, however, the certificates evidencing Levi's stock were in his possession, and no formal pledge or subsequent delivery of the certificates of stock to the bank took place.

A few months after (on December 3, 1890) Emmanuel Levi borrowed $25,000 from the Buffalo German Insurance Company, hereafter spoken of as the insurance company, and secured this loan by pledging, delivering, and assigning to the insurance company his certificates of stock in the bank. The written contract of pledge gave the insurance company power, in default of payment of the loan at its maturity, to sell the stock at public or private sale after notice and apply the proceeds to the debt. On August 13, 1891, and on May 5, 1892, Levi borrowed additional sums from the insurance company and secured these loans by a pledge and assignment of his remaining stock in the bank. These contracts of pledge also contained a power of sale similar to that conferred by the first contract. In June, 1893, Emmanuel Levi died, and Louis and Rosa Levi were appointed and qualified as his executors. On the ninth of June, 1896, there was due to the insurance com-

pany on the notes of Levi, secured by the pledge of his stock as above stated, the sum of $55,000 of principal, with certain unpaid interest. On that date the insurance company served upon the executors of the estate of Levi a demand for the payment of the debt, accompanied with a notice that if payment were not made the stock would be sold and the proceeds applied to the debt. Payment not having been made, after adequate notice, the attorneys for the bank, the attorneys of the executors of Levi, and one of the executors being present, the stock was sold at public auction, and was bought by the insurance company for the sum of $44,000, that being the highest bid offered. The insurance company thereupon presented to the bank the certificates of stock, the assignment thereof and the evidence of the purchase at auction, and demanded a transfer to its name. This the bank refused on the ground of Levi's indebtedness to it. Subsequently the insurance company filed its bill, praying that the bank be decreed to transfer the stock and pay the dividends which had accrued thereon since the date of the demand to transfer. The bank by its answer set up the debt due by Levi to it, asserting that under the provision of its articles of association and by-laws, as well as under the terms of the certificates of stock and the agreement with Levi, it had the right to apply the dividends on the stock, accrued since the purchase by the insurance company, to its debt, and, indeed, having a prior lien upon the stock for its debt, had the right to withhold the transfer of the stock until the debt due it by Levi or his estate was paid. There was a decree in the trial court in favor of the bank. The case was appealed by the insurance company to the Appellate Division of the Supreme Court, fourth department, in which court the judgment of the trial court was affirmed. 29 App. Div. 137. The insurance company prosecuted its appeal to the Court of Appeals of the State of New York, and in that court the judgments below were reversed and the case was remanded for further proceedings. 162 N. Y. 163. The cause was again tried and resulted in a decree in favor of the insur-

ance company in both the trial court and the Appellate Division of the Supreme Court, and these judgments were affirmed by the Court of Appeals on the authority of its previous opinion. It is to review such decree of affirmance that this writ or error is prosecuted.

Mr. Adelbert Moot, with whom *Mr. George L. Lewis* was on the brief, for plaintiff in error:

The bank, by its articles of association, its by-laws, and the certificate of stock, gave notice to all the world of its claim on the stock. It further obtained an equitable lien on the stock by the arrangement entered into with Levi, which he, or his estate, could not dispute. The insurance company had notice of the bank's claim, in the stock itself, and the insurance company as Levi's assignee, stands in his shoes, and is estopped from claiming any greater rights than he, or his estate, would have had in the stock in question. *Knight* v. *Old National Bank*, 3 Cliff. 429, and cases cited as to effect of similar provisions in charter of the Bank of Washington. See *Brent* v. *Bank*, 10 Pet. 615. See also *Bath Savings Inst.* v. *Nat. Bank*, 89 Maine, 500, and cases cited on p. 504.

The key-note of this case is found in the articles of association, the by-laws of the bank, and above all, the certificate of stock, which calls attention to these very things and prevents any person from buying a share of stock without taking it subject to any demands or any equities against the holder thereof.

The clause in the stock in question is to be deemed as effective as a recital in a deed, and "as conclusive evidence . . . against the parties and all others claiming under them in privity of estate." 1 Greenleaf on Evidence, § 23, and authorities cited in late editions; *Cont. Nat. Bank* v. *Elliot Nat. Bank*, 7 Fed. Rep. 371; *Moores* v. *Bank*, 111 U. S. 156, 164.

An equitable lien differs essentially from a common law lien, which is simply a right to retain possession of the chattel until

some debt or demand due to the person thus retaining is satisfied; and possession is such an inseparable element, that if it be voluntarily surrendered by the creditor, the lien is at once extinguished. 3 Pomeroy's Equity Jurisprudence, §§ 1233, 1234; 1 Pomeroy's Eq. Jur. §§ 165–172.

The National Banking Act does not forbid the transaction in question but expressly permits a bank to take title to or security upon its own stock, and that means either a legal or equitable lien thereon, if "such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." Rev. Stat. U. S. § 5201; *Knight* v. *Old National Bank, supra.*

Even if the by-law and condition in the certificate were violative of the National Banking Act the notice given thereby cannot be ignored by one loaning on the stock. All the provisions of the National Banking Act about loaning money upon the stock of the bank, are regulations of national banks by the Govermnent. If the bank disregards those regulations, the borrower of its money should not be permitted to take advantage of them. *Le Neve* v. *Le Neve,* 3 Atk. 646; *Dunham* v. *Dey,* 15 Johns. 555, 570; *Crocker* v. *Whitney,* 71 N. Y. 161; *Thompson* v. *St. Nicholas Bank,* 146 U. S. 251.

The authorities cited by defendant in error and in the opinions in the state courts do not hold that the insurance company can compel the bank to transfer its stock upon its books until its claim against the Levi estate has been paid.

It is suggested that public policy requires that this court decide that the insurance company is entitled to have the stock transferred on the books of the bank, because otherwise banks will ruthlessly violate provisions of the National Banking Act.

This suggestion is quite as applicable to the cases of real estate mortgages, and cases of certifying checks where deposits have not been made, as it is to cases of this character. But there is no principle of public policy that requires this court to decide this case in favor of the insurance company as against the Bank.

Mr. Arthur W. Hickman for defendant in error:

The provision in the by-law and the stock certificate is unauthorized. *Bank* v. *Lanier*, 11 Wall. 369, 378; *Bullard* v. *National Eagle Bank*, 18 Wall. 589, 598; *Second Nat. Bank* v. *National &c. Bank*, 10 Bush (Ky.), 367, 375; *Conklin* v. *Second Nat. Bank*, 45 N. Y. 655; *Driscoll* v. *West Bradley, C. & M. Co.*, 59 N. Y. 96; *Evansville Nat. Bank* v. *Metropolitan National Bank*, 2 Biss. 527; *McKheimer* v. *National Exch. Bank*, 79 Virginia, 80; *Continental Nat. Bank* v. *Ellicot National Bank*, 7 Fed. Rep. 376; *Orleans N. B. Assn.* v. *Wilts*, 10 Fed. Rep. 330; Cook on Stockholders, 3d ed. § 533; Jones on Liens, 2d ed. § 384; 2 Thompson's Law of Corp. § 2319; 16 Am. & Eng. Ency. 201; Boone on Law of the Banks, § 236; Paine's Banking Laws, 533, citing cases *supra* and *Johnson* v. *Lang*, 103 U. S. 803; *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90, 96; *Bunder* v. *Jackson*, 24 Fed. Rep. 628; *Johnson* v. *Laflin*, 5 Dill. 65, 73; *D. L. & W. R. R. Co.* v. *Oxford Iron Co.*, 38 N. J. Eq. 340.

The bank had no actual pledge of the stock as collateral. It never had possession of the stock which was issued and given to Mr. Levi, and never returned to the bank or placed under its control, or in any way shown to it until the stock was taken to the bank by the officers of the insurance company for the purpose of having it transferred.

To make a valid pledge, there must be delivery, actual or constructive of the pledge by the pledgor or his agent, in the possession of the pledgee or his agent, in order to pass any right of property in the thing pledged. To keep the pledge good, the property pledged must remain in the possession or under the control of the pledgee. *Cortelyn* v. *Lansing*, 2 Cai. Cas. 200; *Garlick* v. *James*, 12 Johns. 146; *Wilson* v. *Little*, 2 Const. 443; 18 Am. & Eng. Ency. of Law, 595; *Black* v. *Bogart*, 65 N. Y. 601; *McComber* v. *Parker*, 14 Pick. 497.

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

It is obvious that the bank had no lien on the stock of Levi

as the result of an express contract of pledge. The mere statement by Levi in a conversation with the president of the bank when the last loan was made to him, that his stock was a security to the bank, did not amount to a pledge of such stock, as there was no delivery of the certificates. As tersely said by the court below:

"If we assume the existence of a contract between the defendant bank and Levi, (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans,) it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge in order to raise a privilege against third persons. *Casey* v. *Cavaroc*, 96 U. S. 467; *Wilson* v. *Little*, 2 N. Y. 443."

We may, therefore, at once lay out of view the provisions of section 5201, Revised Statutes, prohibiting a national bank from making any loan or discount on the security of its shares of stock, and forbidding the purchase or holding by a national bank of such shares of stock, unless necessary to prevent loss on a debt previously contracted in good faith. And putting these provisions aside, we may also pass the consideration of the decisions of this court construing the provisions in question, and holding that they may not be availed of by a debtor of the bank to defeat the enforcement of obligations by him contracted in favor of the bank. *Bank* v. *Matthews*, 98 U. S. 621; *Bank* v. *Whitney*, 103 U. S. 99; *Thompson* v. *Bank*, 146 U. S. 240. This brings us to the real question in the case which is, the validity and effect of the provisions of the charter and by-law of the bank forbidding a transfer of stock where the stockholder was indebted to the bank and the insertion of a condition to the same effect in the certificates of stock which were held by Levi, and which he delivered to the insurance company, as collateral, when he borrowed money from that company. If those provisions were valid it is obvious that the insurance company

took the stock subject to the paramount right which the bank possessed. If, on the other hand, the condition in question was void because repugnant to the text of the national bank law and in conflict with the public policy which that act embodies, it is equally clear that there was no lien in favor of the bank, and the title of the insurance company, derived from its pledge and purchase, was paramount to any assumed right of the bank to refuse to transfer the stock in order to enforce a lien which, it was asserted, the bank possessed as a result of the condition in question. That the provisions referred to were void because coming within the last mentioned category will become apparent from a brief consideration of the national bank law found in the Revised Statutes as elucidated by its evolution from the acts of 1863 and 1864, and as expounded by the previous decisions of this court.

National banks were first created by the act of 1863. 12 Stat. 665. By section 36 of that act it was provided:

"That the capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and shall be assignable on the books of the association in such manner as its by-laws shall prescribe; but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal, debtor, surety or otherwise, to the association for any debt which shall have become due and remained unpaid, nor in any case shall such shareholder be entitled to receive any dividend, interest or profit on such shares so long as such liabilities shall continue, but all such dividends, interests and profits shall be retained by the association and applied to the discharge of such liabilities; and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association."

Section 37 of the same act provided that—

"No banking association shall take, as security for any loan or discount, a lien upon any part of its capital stock, . . .

and no such banking association shall be the purchaser or holder of any portion of its capital stock or of the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith on security which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; or in case of forfeiture of stock for the non-payment of installments due thereon, and stock so purchased or acquired shall in no case be held by such association so purchasing for a longer period of time than six months, if the same can, within that time, be sold for what the stock costs."

The act of 1863 was expressly repealed (sec. 62) by the act of 1864. 13 Stat. 99. The repealing act, however, contained the following:

"*Provided*, that such repeal shall not affect any appointments made, acts done or proceedings had, or the organization, acts or proceedings of any association organized or in the process of organization under the act aforesaid."

The act of 1864, which contained a repealing clause subject to the foregoing proviso, reënacted in completer form the entire law as to national banks. The subjects which had been embraced by section 36 of the act of 1863 were contained in section 12 of the act of 1864, in part, as follows:

"The capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; . . ."

The remaining provisions of the section related solely to the double liability of the shareholders. It hence follows that all the provisions found in section 36 of the act of 1863, empowering the board of directors of a national bank to withhold a transfer in case of a debt due by a stockholder to a bank, were not only omitted from the new act, but were expressly repealed. The provision found in the thirty-seventh section of

the act of 1863, prohibiting an association from making any loan or discount on the security of the shares of its own capital stock, was reëxpressed in a substantially identical, though somewhat more amplified, form of statement in section 35 of the new act. The provisions of the act of 1864, in the particulars in question, are now embodied in sections 5139 and 5201 of the Revised Statutes.

When this history of the legislation is considered it becomes apparent that the clause inserted in the articles of association, in the by-laws and the certificates of stock of the bank here being considered was directly repugnant to the act of 1864, and amounted simply to an attempt on the part of the bank to exercise the power which was granted under the act of 1863, but which was denied by the act of 1864. And this result was long since pointed out by the decisions of this court. In *Bank* v. *Lanier*, 11 Wall. 369, the case was this: The First National Bank of South Bend was organized under the act of 1863. A by-law of the bank provided that "the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the act of Congress." Culver became a stockholder in the bank, certificates having been issued to him as such, stating on their face the limitations on the power to transfer expressed in the by-law just referred to. By an agreement between Culver and the bank it was understood that his stock in the bank should secure the bank against any loss resulting from a deposit of its funds made by the bank with the house of Culver, Penn & Co., of New York, of which Culver was a member. When, however, this agreement was made the certificates of stock were not delivered to the bank, but remained in the possession of Culver. After the passage of the national bank act of 1864, Culver, in violation of his agreement with the bank, sold his stock and delivered the certificates thereof, with power to transfer the same to Lanier and Handy, who requested a transfer of the same. This the bank refused to do on the ground of Culver's agreement, and on the further ground of the provision in the by-law and certificates, which, it was

asserted, but expressed by reference the provisions of the thirty-sixth section of the act of 1863. Two questions were necessary to be decided: *a*, the right of the bank resulting from the understanding with Culver; and, *b*, its right arising from the terms of the by-law and certificate. These questions were ruled adversely to the bank. It was held that the agreement between the bank and Culver was void because it was within the prohibitions of both the thirty-seventh section of the act of 1863 and the thirty-fifth section of the act of 1864, prohibiting a national bank from loaning on the security of its own capital stock, etc. Irrespective, however, of this question, it was expressly decided that, as the act of 1864 had repealed the provision of the act of 1863, subjecting transfers of stock in national banks to debts due by the stockholder to the bank, or permitting the board of directors to provide to that effect, the result of the act of 1864 was impliedly to prohibit a bank from imposing such a condition on the transfer of stock. And the doctrine was applied to a by-law adopted prior to the passage of the act of 1864, because it was held that the continued operation of such a by-law was prevented by the act of 1864, as the right to continue it was not saved by the proviso to the repealing clause of that act. It was pointed out that the provision of the act of 1864, making the stock of national banks transferable like other personal property, was a fundamental departure from the act of 1863, and was based on a rule of public policy initiated by the act of 1864, intended to afford facilities for the transfer of stock in national banks, and thereby to encourage investment in such stock. The same subject was considered in *Bullard* v. *Bank*, 18 Wall. 589. There a by-law and form of certificate, adopted after the enactment of the statute of 1864, reserving the right to refuse to transfer stock in a national bank where the stockholder was indebted to the bank, was again determined to be *ultra vires*, because in conflict with the act of 1864, and such a provision was decided to be inoperative even as against the assignee in bankruptcy of the stockholder. These cases foreclose every

question presented on this record. The cases have been frequently referred to approvingly. *Earle* v. *Carson*, 188 U. S. 42, and authorities there cited. The contention that, although the condition in the certificate was void, nevertheless it operated as a notice to the insurance company, and thereby deprived it of its right to compel the transfer of the stock, but asserts in another form that there was power, by the insertion of such a condition in the certificate of stock to deprive the stock of a national bank of its attribute of sale like any other personal property. The extension wholly ignores not only the text of the law, but the rule of public policy which the national bank act has been decided to embody.

Affirmed.

UNITED STATES *v.* McCOY.

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

No. 148. Submitted January 28, 1904.—Decided April 4, 1904.

Official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts.

On the trial of an action brought by the United States against the sureties on a bond to secure the performance of a contract to carry mail, the Government makes a *prima facie* case on producing a certified copy from the books of the Auditor for the Post Office Department of the contractor as a failing contractor, and showing the amount of his indebtedness, telegrams from the local postmaster to the Postmaster General to the effect that the contractor had abandoned the service, and the finding of the Postmaster General that the contractor was a failing contractor.

THIS suit was commenced by the Government to recover an amount alleged to be due on a bond to secure the performance of a contract to carry mail. The defendants were McCoy, the

contractor and principal in the bond, and his sureties. The cause was put at issue by a general denial and was tried in November, 1899. The Government prosecuted error from a judgment of non-suit which was entered against it. The Circuit Court of Appeals for the Ninth Circuit decided that the trial court was "right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a *prima facie* case for damages on account of the alleged entire failure of McCoy to perform the service provided in the contract." It was, however, held that a *prima facie* right to recover the amount of a fine of five dollars had been established. The judgment was, therefore, reversed and the case remanded for a new trial. 104 Fed. Rep. 669. A second trial took place in May, 1901. At that trial the case made by the Government was as follows: McCoy, being the lowest bidder, was awarded a contract for carrying the mails from July 1, 1890, to June 30, 1894, between the post office at San Francisco and certain railroad stations and steamboat landings, and executed the bond which was sued on. On May 3, 1893, the postmaster at San Francisco telegraphed the Post Office Department that, under a judgment rendered against McCoy, the sheriff had seized the wagons used by him in executing his contract, and would sell them on May 5; that the probable result of this sale would be to render it impossible for McCoy to continue to perform his contract, and that some temporary arrangement would be necessary, and asking instructions in the premises. Three days later, on May 8, the postmaster telegraphed the department that the service had been absolutely abandoned by McCoy, and that a temporary arrangement had been made to last until the department could act. On the day after the receipt of this telegram (May 9) the Post Office Department addressed a letter to McCoy, care of Zevely and Finley, Washington, D. C., giving the substance of the two telegrams above referred to, and asking if McCoy intended to carry out his contract. On May 17 the department telegraphed the sureties on McCoy's bond, informing them that

McCoy had failed to perform his contract, and inquiring if they would assume the service. On the same day the department by telegram informed the postmaster at San Francisco that his action in providing a temporary arrangement for the performance of the service was approved. On May 18 a telegram was received by the department from one of the sureties of McCoy, saying that he, the surety, was unable to perform the contract, and requesting to be relieved from all future liability on the bond, because his signature thereto had been "improperly obtained." On the same day (May 18) a finding was made by the Postmaster General that McCoy was a failing contractor, this finding being evidenced by the following certificate:

"State of California. No. 76,475.

"Regulation wagon service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.00.

"Whereas C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service, he is hereby declared a failing contractor.

"W. S. BISSELL,

"Date, May 18, 1893. *Postmaster General.*"

The department subsequently advertised for proposals for the remaining period of McCoy's term, and the same was let to one Popper, and a contract entered into with him on the subject. Thereupon the Auditor of the Post Office Department stated the account of McCoy as a failing contractor. That account charged on the debit side the sum paid for temporary service from May 5 to August 13, 1893, the date when the new contract was awarded, and also the difference between the amount stipulated to be paid in the McCoy contract and that which the Government had contracted to pay Popper, the new contractor, from August 14, 1893, to June 30, 1894, when the McCoy contract would have terminated. The account, moreover, stated a charge against McCoy of $5, the amount of a fine which had been imposed on him by the department during the third quarter of 1893. McCoy was cred-

ited with the whole sum which he would have earned had he performed his obligations, the balance to the debit being the amount sued for, $5,772.99. After the Government had shown the facts above stated, it rested its case, and the defendants offered no evidence whatever.

The Government then requested an instruction in its favor on the ground that a *prima facie* case of liability had been proven. Exception was taken to the refusal of the court to give this instruction.

The court charged the jury as follows:

"It will not be necessary for you to retire to consider this case. You can render a verdict from your seats. This is an action in which the Government sued to recover damages for breach of a mail contractor's bond—breach of the contract. The action is against the contractor and the sureties upon his bond. The Government claims damages for the total abandonment of the contract without having performed it, and as to that claim all the evidence that has been offered on the part of the Government is insufficient to prove that there was an abandonment, there being no testimony of any witness having knowledge of the fact that the contractor did fail. The evidence includes the statement of account made up by the auditing department of the Government, in which there appears to have been a fine of five dollars imposed upon the contractor for a particular failure, and in accordance with the decision of the Circuit Court of Appeals for this circuit that evidence is sufficient *prima facie* to entitle the Government to recover the five dollars, and the defendants here in open court have admitted liability for that five dollars. Therefore your verdict will be in favor of the Government for the sum of five dollars. I have prepared a verdict which you will select one of your number to sign as foreman, and that will be your verdict in the case."

To this instruction the Government saved an exception. From a judgment in favor of the defendants for all but five dollars of the amount claimed, the Government prosecuted

error. The Circuit Court of Appeals affirmed the judgment upon the authority of the ruling made by it when the case was previously before it. This writ of error was thereupon prosecuted.

Mr. Assistant Attorney General Purdy for the United States:

The various provisions of the United States statutes which are relied upon by the Government as authorizing the introduction of the documentary evidence offered by the Government in this case, and making such documents *prima facie* evidence of the facts therein recited are Rev. Stat. §§ 882, 889, 3849, 3962; Act of June 8, 1872, ch. 335, §§ 245–247, 251, as amended 1874, 1876, 17 Stat. 313, 314; 18 Stat. 235; act of August 3, 1882, ch. 379, § 22, 22 Stat. 216.

The documentary evidence was sufficient. Greenleaf on Evidence, §§ 483, 493; Taylor on Evidence, vol. 3, § 1591; Wharton on Evidence, vol. 1, §§ 639, 640; *United States* v. *Carr*, 132 U. S. 644, 653; *Evanston* v. *Gunn*, 99 U. S. 660, and cases cited on p. 665; *Bingham* v. *Cabot*, 3 Dall. 19, 38.

The certified copy of the records in the auditor's office of the Post Office Department of the account of C. C. McCoy, as failing contractor, for the amount of actual damages sustained by the United States, taken in connection with the other testimony offered, is *prima facie* evidence not only of the fact and the amount of the indebtedness, but also of the time when and the manner in which it arose. *Soule* v. *United States*, 100 U. S. 8, 11; *United States* v. *Stone*, 106 U. S. 525, 530; *United States* v. *Dumas*, 149 U. S. 278, 285. Cases on brief of defendants in error, distinguished.

Mr. E. C. Hughes for defendants in error:

The cases cited by the Government do not control this case, but see *United States* v. *Buford*, 3 Pet. 12; *United States* v. *Jones*, 8 Pet. 375; *Hoyt* v. *United States*, 10 How. 109; *United States* v. *Forsythe*, 6 McLean, 584; *United States* v. *Case*, 49 Fed. Rep. 270, in which it was held that transcripts and

written statements did not make out a *prima facie* case for the Government. See also *United States* v. *Corwin*, 129 U. S. 381; and as to presumptions, see *United States* v. *Carr*, 132 U. S. 644.

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

The assignments of errors and arguments at bar present two questions for decision. First. Were the copies of telegrams sent by the postmaster at San Francisco to the Post Office Department admissible in evidence? And, second, if they were, did the certified copy of the account of McCoy as a failing contractor from the books of the Auditor for the Post Office Department, the telegrams from the postmaster at San Francisco and the finding of the Postmaster General that McCoy was a failing contractor, make out a *prima facie* case for the Government? Concerning the first question it suffices to say that, although it is urged that the telegrams were not admissible because they were merely copies of copies, the originals being on file in the telegraph office from which the messages were sent, the record does not show that any ruling on this subject was insisted on in the trial court, and hence no exception was taken to the introduction of the copies. As the objection that the telegrams were not the best evidence because they were merely copies was susceptible of being cured, if insisted on, it follows that the failure to so insist and reserve the question was a waiver of the objection. It then remains only to consider whether, taking into view the whole case as made by the Government, a *prima facie* right to recover was established. Section 889 of the Revised Statutes is as follows:

"Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evi-

dence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."

The certified account from the books of the Auditor for the Post Office Department which was offered in evidence came clearly within this statute. The items in that account were ascertained and established in the regular course of official action by the department, and represented disbursements made in the ordinary course of business for temporary service and under the new contract, all of which was occasioned by the actual or assumed default of McCoy. The payments shown by the items, therefore, properly appeared on the books of the Treasury Department. The account was clearly therefore competent, at least, for the purpose of showing the amount of the indebtedness, if any, existing. *United States* v. *Stone*, 106 U. S. 525. As, however, the correctness of the items in the account depended upon proof of the fact of the delinquency of McCoy, the contractor, it remains to determine whether the evidence introduced by the Government at the trial *prima facie* established such delinquency; in other words, whether the evidence was sufficient, in the absence of proof to the contrary, to show that McCoy had totally abandoned his contract on May 5, 1893. The solution of this question depends upon the probative force of the official finding by the Postmaster General that McCoy was a failing contractor, based, as it was, upon the official report on the subject made to the department by the postmaster at San Francisco.

In *United States* v. *Dumas*, 149 U. S. 278, the court considered the act of June 17, 1878, 20 Stat. 140, chapter 259, paragraph 1, which provides: "That in any case where the Postmaster General shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion

to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable." The facts were as follows: On August 11, 1888, the then Postmaster General made an order, reciting his "being satisfied" that Dumas had made false returns of business at the office of which he had been postmaster, and declaring that in the exercise of the discretion conferred by acts of Congress the commissions on such returns were withheld, and the compensation of the postmaster was fixed as stated in the order. As a result of this finding by the Postmaster General, an action was subsequently brought against the postmaster and his sureties, and it was decided that the order of the Postmaster General and the certified accounts of the Government, which were produced and which were founded upon such order, were held to be *prima facie* evidence of the balance due the Government.

Moreover, by section 3962 of the Revised Statutes it is provided that—

"The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

And the second section of the act of August 3, 1882, c. 379, 22 Stat. 216, provides as follows:

"SEC. 2. Whenever a contractor for postal service fails to commence proper service under the contract, or, having commenced service, fails to continue in the proper performance thereof, the Postmaster General may employ temporary service on the route, at a rate of pay per annum not to exceed the amount of the bond required to accompany proposals for service on such route, as specified in the advertisement of the route, or at not exceeding *pro rata* of such bond, in cases where service shall have been ordered to be increased, reduced, cur-

tailed, or changed, subsequent to the execution of the contract; the cost of such temporary service to be charged to the contractor, and to continue until the contractor commences or resumes the proper performance of service, or until the route can be relet, as now provided by law, and service commenced under the new award of contract, all acts or parts of acts inconsistent with the provisions of this act being hereby repealed."

These provisions, by necessary implication, declare that whenever the Postmaster General "is satisfied," from evidence presented to him, that conditions exist which justify the imposition of fines or the deciding that a postal contractor has abandoned the performance of his contract, the Postmaster General may act as authorized in such provisions. It would seem to be an appropriate act for the Postmaster General to make distinct official evidence of the fact of such finding, to be filed among the archives of his office. The pertinency of such an official finding was, as has been shown, recognized in the *Dumas* case; and, when coupled, as it is in the case at bar, with the reports upon which the finding in the certificate was based, we think the certificate was legally competent to establish *prima facie* the fact that McCoy had abandoned his contract. It was made the duty of the postmaster at San Francisco, by section 3849 of the Revised Statutes, to "promptly report to the Postmaster General every delinquency, neglect or malpractice of the contractors, their agents or carriers, which comes to his knowledge." The reports embodied in the telegrams in question on their face show that they related to facts which had come to the knowledge of the postmaster, bearing upon the delinquency of McCoy, particularly the ultimate fact of total abandonment by McCoy of his contract. The opinion in *United States* v. *Corwin*, 129 U. S. 381, contains a clear recognition of the competency, as evidence, of official communications of this character, when made to those higher in authority, as supporting and giving evidential weight to findings based thereon. The reports contained in the tele-

grams in question present an application of what is stated in the opinion in the *Corwin* case (p. 385) to be "the well-established rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts."

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

PLATT *v.* WILMOT.

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

No. 167. Argued March 2, 1904.—Decided April 4, 1904.

The provisions of § 394 of the New York Code of Civil Procedure limiting the time within which an action may be brought against a director or stockholder of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created, by the common law or by statute, extends to actions against directors and stockholders of foreign corporations.

Whether a foreign corporation is or is not a moneyed corporation within the meaning of § 394 of the New York Code of Civil Procedure will be determined for the purpose of construing the New York statute of limitations by reference to the meaning given to the term by the legislature and courts of New York rather than of the State under whose laws the corporation is organized.

Although the double liability of a stockholder of a moneyed corporation may be contractual in its nature if it is statutory in origin it is a liability created by statute within the meaning of § 394 of the New York Code of Civil Procedure.

PLAINTIFF in error brings the case here to review the judgment of the United States Circuit Court of Appeals for the

Second Circuit, which affirmed the judgment of the Circuit Court for the Northern District of New York, dismissing the plaintiff's complaint upon the merits. The action was commenced in the last named court by the service of a summons on the defendant on October 1, 1898, and was brought by the plaintiff as receiver of the Commercial National Bank of Denver, Colorado, to recover from the defendant the double liability imposed upon him as stockholder in the Western Farm Mortgage Trust Company of Lawrence, Kansas, hereinafter called the trust company.

The defendant answered the complaint and, among other things, set up the defence of the three years' statute of limitations of the State of New York.

The action was tried in the Circuit Court for the Northern District of New York without a jury, and findings of fact were made by the court upon which the conclusion of law was based that the plaintiff's cause of action was barred by section 394 of the Code of Civil Procedure of the State of New York, being the three years' statute of limitations, and that his complaint should therefore be dismissed with costs.

The court found that the bank of which plaintiff was subsequently appointed receiver had commenced an action against the trust company, and on June 3, 1893, had recovered a personal judgment against it for the sum of $4,930.72, with interest thereon from the date of the recovery of the judgment. Execution had been issued upon said judgment on August 29, 1894, and returned unsatisfied on September 7, 1894.

At the time of the rendition of the judgment and the return of the execution unsatisfied, the defendant was the holder of and has continued since that time to hold twenty shares of the capital stock of the trust company.

By the terms of its articles of association the corporate powers of the trust company were, among others, as follows:

"ARTICLE II. The purposes for which it is formed are to receive deposits of money, bonds and securities; to loan money on real estate and personal security; to negotiate loans on real

estate and other securities; to purchase and sell bonds and notes secured by mortgages and deeds of trusts on real estate; to purchase and sell municipal bonds and the bonds, assets and franchises and securities of other corporations; to issue and sell its debentures and secure the same by pledge of notes, bonds and other securities, real or personal; to guarantee the payment of principal and interest of loans by it negotiated or made and sold; to act as financial agent of any State, municipality, corporation, association, company or person; to purchase, hold, sell and convey such real estate and personal property as it may require for its use; to purchase, hold, sell and convey such real estate and personal property as may be necessary for the security or collection of claims due or owing it; to accept and execute any trust committed to it by any municipality, corporation, association, company, person or other authority."

Judgment dismissing the complaint having been entered, the plaintiff by virtue of a writ of error obtained a review of the judgment by the Circuit Court of Appeals of the Second Circuit, where it was affirmed, without any opinion, upon the authority, as stated in a memorandum by the court, of the case of *Hobbs* v. *National Bank of Commerce*, 96 Fed. Rep. 396.

The constitution and statutes of Kansas provide for the individual liability of the stockholders in a corporation to an additional amount equal to the stock owned by each stockholder, but the provision does not apply to a railroad corporation, nor to corporations for religious or charitable purposes.

Mr. Omar Powell, with whom *Mr. Elijah Robinson* was on the brief, for plaintiff in error:

An examination of the origin and history, and of the phraseology of the enactment will clearly demonstrate that the provisions of § 394 of the New York Code apply only to actions against directors and stockholders of corporations and associations organized under the laws of that State, and hence are not applicable to this action. See Title II, ch. 18, Rev. Stat. N. Y. of 1827; Art. IV, ch. 4, part 3, Rev. Stat. § 44; Suther-

land on Statutory Construction, § 255; § 89, ch. 4, Laws of 1848; § 109 of the Code. And see amendment of 1877 in which form it was enacted as § 394 of the Code. See also ch. 260, Laws of 1838; *Robinson* v. *Bank*, 21 N. Y. 406; ch. 226, 308, Laws of 1849; *Bostwick* v. *Brinkerhoff*, 99 N. Y. 185.

By no recognized rule of construction can there be attributed to the legislature an intention to make this section embrace actions against the directors and stockholders of foreign corporations. Endlich on Interpretation of Statutes, § 113; *United States* v. *Fisher*, 2 Cranch, 390.

Where words have been adopted by the legislature as having a certain definite meaning prior to a particular statute in which they are used, they must be construed in such statute according to the sense in which they have been theretofore used. Sutherland on Stat. Const. § 255; *The Abbottsford*, 98 U. S. 440; *County Seat of Linn County*, 15 Kansas, 379; *United States* v. *Freight Assn.*, 58 Fed. Rep. 58.

Even if the provisions of § 394 extend to actions against directors and stockholders of foreign corporations, of the class in said section designated, still it does not apply to the case at bar, because the Western Farm Mortgage Trust Company is neither a "moneyed corporation" nor a "banking association." See the New York Corporation Law, ch. 563, Laws of 1890; White on Corporations, ed. of 1902, p. 4.

This definition of moneyed corporations in the Revised Statutes continued down to 1892, ch. 687, Laws of 1892, when the phraseology was changed, and this term was defined to mean "a corporation formed under or subject to the banking or insurance law." This change of phraseology did not change the meaning of the law. It was not intended to effect a change.

This amendment was in the nature of a revision, and in such case it will be presumed that the legislature did not intend to change the law, unless the language employed is such as to clearly indicate such intention. *Dominick* v. *Michael*, 4 Sand. 374; *Douglas* v. *Douglas*, 5 Hun, 140; *Crosswell* v. *Crane*, 7 Barb. 191; *Taylor* v. *Delancey*, 2 Cain's Cases in Error, 143, 151.

Even if the provisions of § 394 are applicable to foreign corporations, and the Western Farm Mortgage Trust Company was a moneyed corporation, within the meaning of that term as used in said section, still plaintiff's action would not be barred by said section, because defendant's liability, which plaintiff is seeking to enforce, was created by contract, and therefore is governed by § 382. 2 Morawitz on Corp. §§ 870, 873; Cook on Stockholders, 3d ed. 303; *Hawthorn* v. *California*, 2 Wall. 10; *Carroll* v. *Green*, 92 U. S. 509; *Flash* v. *Connecticut*, 109 U. S. 371; *Richmond* v. *Irons*, 121 U. S. 27; *Bank* v. *Hawkins*, 174 U. S. 364; *Whitman* v. *Bank*, 176 U. S. 559; *Howell* v. *Manglesdorf*, 33 Kansas, 194; *Plumb* v. *Bank*, 48 Kansas, 484; *Achenbach* v. *Coal Co.*, 2 Kan. App. 357; *Corning* v. *McCollough*, 1 N. Y. 47; *Wiles* v. *Suydam*, 64 N. Y. 73; *Conant* v. *Van Schaick*, 24 Barb. 87; *Norris* v. *Wrenchell*, 34 Maryland, 492; *Terry* v. *Colman*, 13 S. Car. 220.

And even if the provisions of § 394 apply to corporations of other States as well as those organized under the laws of New York, and the Western Farm Mortgage Trust Company was a moneyed corporation, within the meaning of that term, as used in said section, and plaintiff's action is not based on contract, still said section does not apply to this action, because the defendant's liability was created neither by the common law nor by any statute.

If defendant's liability was not created by his contract in becoming a stockholder in the corporation, then it was created by the provisions of the constitution of the State of Kansas. *Whitman* v. *Bank*, 176 U. S. 559.

A liability created by a constitutional provision does not come within the provisions of said section 394. *Clark* v. *Water Commissioners*, 148 N. Y. 1.

There was no appearance on brief for defendant in error.

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

The only question which the plaintiff in error presents is

whether or not this action was barred by the New York three years' statute of limitations, and that depends upon whether section 382 or section 394 of the Code of Civil Procedure of that State is applicable.

Section 382 provides that actions of the following nature shall be barred within six years:

"1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.

"2. An action to recover upon a liability created by statute; except a penalty or forfeiture."

Section 394, which the courts below have made applicable to plaintiff's cause of action, reads as follows:

"SEC. 394. This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued."

Several objections are made by the plaintiff in error to the application of section 394 to this case. They are (1) that the section does not apply to a director or stockholder of a foreign corporation; (2) that if it be held that it does extend to actions against directors and stockholders of foreign corporations of the class designated in the section, yet it does not apply to this case, because the trust company is neither a moneyed corporation nor a banking association; (3) that the stockholders' liability in this case is one based upon contract, and is not created either by the common law or by statute.

Taking up these objections in their order, we are brought to a consideration of the one which asserts that section 394 does not apply to directors or stockholders of foreign corporations. We think it does.

A history of the legislation upon this subject in the State of New York, which finally resulted in section 394 of the Civil Code, is given in the opinion in *Hobbs* v. *National Bank of Commerce*, 96 Fed. Rep. 396, by Judge Shipman, and it is also

referred to by Judge Earl, in *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185.

The section as originally enacted was section 44, part 3, chap. 4, title 2, of the Revised Statutes, which chapter related to "Actions, and the Times of commencing them." These statutes took effect (as to the greater part) in 1830. The section in question then read as follows:

"None of the provisions of this chapter shall apply to suits against directors or stockholders of any monied corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created, by the second title of the eighteenth chapter of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

Upon the adoption of the Code of Procedure of 1848 the section became section 89 of that code. The second title of the first part of the Revised Statutes, referred to in the section, among other things, imposed liabilities upon the directors and stockholders of the moneyed corporations authorized by that title. If the statute of limitations above quoted had not been amended, it would have been limited to the liabilities mentioned in such title, and would not have included a case like this.

In 1849 section 89 of the Code of Procedure of 1848 became section 109, and read as follows:

"This title shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached or the liability was created."

The difference in the two sections is plainly seen, and consists in striking out the words as to a liability created by the Revised Statutes, and enlarging the operation of the section

to a "liability created by law." The words "liability created by law," were held in *Brinckerhoff* v. *Bostwick*, 99 N. Y. *supra*, to mean statutory liabilities which, as stated by Judge Earl, (page 192,) "comprehend not only liabilities created by the title and chapter of the Revised Statutes referred to, but also those created by other statutes and the constitution of 1846, (art. 8, § 7)."

In 1877 another amendment was made to the section by leaving out the words "six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created," and substituting therefor the words "three years after the cause of action accrued."

The act was further amended in 1897, and the statute (section 394) reads, after that amendment, in the way it has been quoted above, so that the action must be brought within three years after the cause of action has accrued to enforce a liability created by the common law or by statute.

As to the meaning of this statute, it was held in the *Hobbs Case*, 96 Fed. Rep. *supra*, that the legislature meant to enlarge the former limitation so it should no longer be limited to liabilities created by one set of statutes or imposed upon the officers or stockholders of moneyed corporations or banking associations within the State only, but the terms of the statute were held to be so broad as to include every class of liabilities of such stockholders, whether they were stockholders of foreign or domestic corporations. The statute was held to be a totally different one from that which was originally passed, and the language evinced an intention that it should not be so limited as to apply only in favor of a New York stockholder in a domestic corporation but that on the contrary the statute should also apply to a shareholder in a foreign corporation.

In our view this interpretation by the Circuit Court of Appeals is the correct one. We are of opinion that the amendments were not intended to continue the application of the limitation to those corporations only which were domestic and

were of the kind mentioned in the Revised Statutes, because as amended the statute used language which was inconsistent with that idea. The original reference to the liabilities of directors and stockholders under the second title of the Revised Statutes was stricken out and in place thereof language was used which clearly indicated a purpose to extend the statute to all liabilities of directors or stockholders in any corporation, foreign or domestic, which liabilities were created by common law or by statute, provided the corporation was a moneyed corporation or banking association. We can see no reason why the director or stockholder of a domestic corporation should cease to be liable in three years from the time the cause of action accrued, while if he were a director or stockholder of a foreign corporation his liability should still last for six years, upon a suit commenced in New York.

It is not the case of a state legislature assuming to regulate foreign corporations, and no such attempt has been made. The substance of the legislation is that when suits are brought in the State of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that State in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.

The Federal courts, sitting in the State, will, in cases brought therein, enforce the state statute of limitations in actions of this nature.

This view of the statute is not affected by reason of the language of the Revised Corporation Law of New York, chap. 563 of the laws of 1890. That act is, by its terms, confined to corporations under the laws of New York, but sec. 394 of the Code is a different statute, and, as has been seen, refers to any corporation, foreign or domestic, which may be a moneyed corporation or banking association within the meaning of the law of New York.

The next objection is, that even if the statute referred to

foreign as well as domestic corporations, yet the trust company is not a moneyed corporation within the meaning of the section in question. What is meant by the term "moneyed corporation," in section 394, is shown by the definition of that term given in 1 Rev. Stat. 598, sec. 51, where it is said: "Section 51. The term 'moneyed corporation,' as used in this title, shall be construed to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances."

Although this definition refers to the meaning of the term "moneyed corporation," as used in that title of the Revised Statutes, we think it is plain that the same term used in section 394 of the Code means the same thing as defined in section 51. The legislature used a term which was well known in the legislation of New York and for a long period of years a definite meaning had been given to it in that legislation, and when speaking of limitations of actions in regard to moneyed corporations nothing would be more natural than to assume that the term when thus used should have the same meaning applied to it as had been defined by the legislature when enacting legislation in regard to moneyed corporations. This legislation does not assume to enact what shall be "moneyed corporations," in other States, but its effect is that when actions are brought in the State of New York and the question arises whether a foreign corporation is or is not a moneyed corporation, that question will be solved in such a case as this for the purpose of construing the statute of limitations of the State, by reference to the meaning given to the term by the legislature or courts of New York, rather than by reference to the legislation of another State under which the corporation may have been formed. The question is not what the corporation is, under the legislation of that other State, but whether what it is doing is of that description provided for and designated by the legislation of the State of New York, and if by that legislation it comes within the description of a "moneyed corporation," it must abide thereby so far as re-

gards the statute of limitations of New York and the proper construction to be given it.

Now by reference to the powers granted to the trust company it will be seen that it had power "to receive deposits of money, bonds and securities; to loan money on real estate and personal security; . . ." etc. The powers granted to the trust company bring it distinctly within the definition of the term "moneyed corporation" as used in section 394 of the Code of New York. It had power to loan money not only on real estate but on personal security, and the statute of New York said any corporation having the power to make loans upon pledges or deposits was a moneyed corporation within the meaning of the act.

Again, referring to the Revised Corporation Act of New York of 1890, a moneyed corporation is therein stated to be one formed under or subject to the banking or the insurance law. If a foreign corporation have powers or some of them, which are given a banking association under the law of New York, that foreign corporation is, under the circumstances of this case, a moneyed corporation or banking association within the meaning of the New York statute of limitations now under discussion. This corporation has at least some of those powers, and we think comes within the definition of a banking association, although it also has other powers.

The third objection is that the liability of the stockholder in this case is not created by the common law or by statute, but is contractual in its nature, and is, therefore, governed by section 382, (the material portion of which has already been set forth,) instead of section 394 of the code.

The case of *Whitman* v. *Oxford National Bank*, 176 U. S. 559, is cited to show that the double liability of the stockholder under the Kansas constitution and statutes is of a contractual nature, and, therefore, not within section 394, because it is not a liability created by common law or by statute. In the *Whitman* case it was held that this liability, though statutory in origin, was contractual in its nature; or, in other words, the

stockholder when he subscribed for or purchased his stock entered into a contract authorized by statute. In that case it was also held that the constitutional provision did not stand alone, but that the legislature of Kansas had also acted on the subject matter, and that the constitution and the statutes were to be taken together as making one body of law, and that, therefore, it would serve no good purpose to inquire what rights or remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other.

We think, within the meaning of section 394, this liability was created by statute, as it was by virtue of the statutes that the contractual liability arose. The language of the section plainly includes this case. It is a liability created by the statute, because the statute is the foundation for the implied contract arising from the purchase of or subscription for the stock, the contract being that the holder of the stock shall be liable in accordance with the terms of the statute.

Also, while the liability is contractual in its nature, it arises out of the constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the constitution nor the statute says that the liability is contractual, but, as the constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability upon these facts, and it may be fitly described as the common law.

We think the judgment of the Circuit Court of Appeals is right, and it is

Affirmed.

SLOAN *v.* UNITED STATES.

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

No. 453. Argued March 16, 17, 1904.—Decided April 4, 1904.

Where a suit does not really and substantially involve a dispute or controversy as to effect or construction of the Constitution and laws of the United States upon the determination whereof the result depends, it is not a suit under such Constitution and laws within the meaning of the fifth section of the act of March 3, 1891, 26 Stat. 827, and the jurisdiction of this court cannot be maintained of a direct appeal from the Circuit Court.

Actions brought against the United States in the Circuit Court under the act of August 7, 1882, 22 Stat. 342, for allotments of land in which both the complainants and the United States rely upon the construction of the act of 1882, and the construction of various treaties between the United States and Indian tribes is not substantially or in any other than a merely incidental or remote manner drawn in question, do not involve the construction of such treaties within the meaning of section 5 of the act of 1891, and direct appeals to this court will be dismissed.

THE facts are stated in the opinion of the court.

Mr. Thomas L. Sloan, with whom *Mr. Charles E. Clapp* and *Mr. H. C. Brown* were on the brief, for appellants.

Mr. John L. Webster, with whom *Mr. Solicitor General Hoyt* and *Mr. W. S. Summers* were on the brief, for appellee.

MR. JUSTICE PECKHAM delivered the opinion of the court.

These are appeals by the complainants below directly to this court from the Circuit Court of the United States for the District of Nebraska. They were taken under the provisions of the fifth section of the act of March 3, 1891, 1 U. S. Comp. Stat. 549; 26 Stat. 827, on the ground that the construction of a treaty or treaties of the United States with the Omaha

Indians is drawn in question. The actions were brought some time in April, 1901, under the authority of the acts of Congress approved respectively August 15, 1894, and February 6, 1901, permitting persons, in whole or in part of Indian blood and claiming to be entitled to an allotment of land under any act of Congress, to commence an action in the proper Circuit Court of the United States for the purpose of maintaining their right to such allotment. 28 Stat. 286, 305; amended, 31 Stat. 760.

Under the authority of these statutes the complainants have brought these actions to obtain allotments in the reservation of the Omaha Indians. Their right thereto is based upon the act of Congress, chapter 434, approved August 7, 1882, 22 Stat. 341, the fifth section of which is set forth in the margin.[1]

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[1] ACT OF 1882.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribes in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the

By the act approved March 3, 1893, chapter 209, 27 Stat. pp. 612, 630, the act was amended so as to enlarge somewhat the right to allotments with the consent of the Indians, but the material portion of the act is the original section 5, above quoted.

All of the complainants are of mixed blood, and in their various bills of complaint they insist that they are entitled to allotments under and by virtue of the correct construction of the above act of 1882 and its amendments, and they set up the facts upon which they base their contentions, which included references to the treaties above mentioned. After having stated them, the complainants aver that the defendant, the United States, had theretofore contended that the fourth article of the treaty of March 6, 1865, between the United States and the Indians, confined the right of allotment to the members of the tribe, including their half-breed and mixed blood relatives who were residing with them at the time of the ratification of the treaty, and that neither the complainants nor their ancestors were residing on the reservation at the time, and were therefore not entitled to the land.

Complainants further stated that the United States had also contended that some of the complainants or their ancestors had received allotments of land under and by virtue of the treaty of July 15, 1830, article 10 thereof, and that by the acceptance of such allotments the complainants were not entitled under the statute of 1882 to a second allotment or further participation in the tribal rights of the Omaha tribe of Indians. To these matters of defence the complainants then set up certain facts which they insisted were answers thereto, and that the complainants were therefore entitled under the statute to the allotments claimed by them.

The United States in its answer did make reference to certain

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Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

treaties it had made with the Omaha Indians. The reference was for the purpose of founding an argument for the construction of the act of 1882, in the manner contended for by it. It urged that the complainants were not entitled to allotments because, among other reasons, they did not reside with the Omaha Indians on their reservation at the time of the ratification of the treaty of 1865; and also that those who had received, or whose ancestors had received, allotments under the treaty of 1830 were not entitled to any further allotment under the act of 1882. The treaties referred to in the answer are the treaty of 1830, 7 Stat. 328, 330, art. 10, and the treaty of 1865, 14 Stat. 667, art. 4. The tenth article of the treaty of 1830 is set forth in the margin.[1]

So much of article 4 of the treaty of 1865 as is material upon the question now under consideration is also set forth in the margin.[2]

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[1] TREATY OF 1830.

ARTICLE X. The Omahas, Ioways and Ottoes, for themselves, and in behalf of the Yanckton and Santie bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to wit: Beginning at the mouth of the Little Ne-mohaw River, and running up the main channel of said river to a point which will be ten miles from its mouth in a direct line; from thence in a direct line to strike the Grand Ne-mohaw ten miles above its mouth, in a direct line (the distance between the two Ne-mohaws being about twenty miles); thence down said river to its mouth; thence up, and with the meanders of the Missouri River to the point of beginning, it is agreed that the half-breeds of said tribes and bands may be suffered to occupy said tract of land; holding it in the same manner and by the same title that other Indian titles are held: but the President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding article.

[2] TREATY OF 1865.

ARTICLE IV. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning

It will be observed that this article of the treaty of 1865 provides for assigning the lands therein mentioned, in severalty, to the members of the tribe, including their half or mixed blood relatives, *now residing with them.* That is, at the date of the treaty.

There is another treaty, that of 1854, between the United States and the Omaha Indians, which it is not necessary to refer to at length. In it the Indians cede to the United States certain lands therein described, and they reserve certain other lands to themselves. The sixth article permits the President to assign at his discretion the whole or such portion of the lands reserved to the Indians as he may think proper, to be surveyed into lots, and to be assigned by the President to such Indians as were willing to avail themselves of the privilege and would locate on the same as a permanent home, subject to the conditions named in the article. The treaty is not material upon the question of the right to appeal directly to this court, hereinafter discussed.

Stipulations in regard to the facts in each case were entered into between the parties and testimony also was given upon the various issues between them. The trial court held that the act of 1882 took the place of all previous acts and treaties providing for allotments of land to the Omaha tribe of Indians, including the half or mixed breeds; that the fundamental question was who, under the terms of the act of 1882, were entitled to allotments; that the rights of the complainants

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limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. . . .

must be adjudged according to the intent of the act of 1882, and that if a person had a right within the terms of that act to an allotment, it could not be denied him simply because he could not be brought within the terms of the treaty of 1865; that the act of 1882 did not restrict the persons to whom allotments were to be made under its provisions to those who resided on the reservation in 1865, but it included all who were in fact members of the tribe, whether of mixed blood or not, residing on the reservation in the tribal relation when the act of 1882 was passed, but such right was not possessed by the mixed bloods, who were not living on the reservation as members of the tribe in 1882; that those of mixed blood who had received allotments under the treaty of 1830 were not entitled to any allotments under the provisions of the act of 1882. 118 Fed. Rep. 283; 95 Fed. Rep. 193.

The bills were dismissed on the merits in twenty-three out of the twenty-five actions brought in the court below, while the complainants in two of them recovered judgment for an allotment to each. They were Thomas L. Sloan and Garry P. Myers. Sloan was held entitled to an allotment in his own right as an Indian of mixed blood, living on the Omaha reservation at the time of the passage of the act of 1882, although his grandmother, a daughter of a full blood Indian mother, had received an allotment of three hundred and twenty acres in the Nemaha reservation in 1857, under the treaty of 1830. Myers was held entitled as an Indian of mixed blood and a resident of the Omaha reservation in 1882, the contested question being as to the amount of his allotment, whether it should be eighty or one hundred and sixty acres, and he was held entitled to the latter quantity.

The appellee has made a motion to dismiss these appeals on the ground that the court has no jurisdiction to hear them, as they do not fall within any of the provisions of section 5 of the act of March 3, 1891, and because the respective complainants neither assert nor claim any right to an allotment under or by virtue of any treaty, and the validity or construction of a

treaty is not drawn in question in these cases. We think the motion should be granted.

The actions do not, in our judgment, involve the construction of any treaty within the meaning of section 5 of the statute of 1891. The complainants in their several bills have based their claims to an allotment upon the act of 1882 and upon the proper construction to be given to its language, which construction, they aver, would recognize their rights to an allotment under the treaties referred to. The United States, in defending against the claims made by the complainants, also relies entirely upon the proper construction of the act of 1882. The construction of a treaty is used only as an argument upon the issue directly in question, viz., the construction of the statute. The alleged right to an allotment being based upon the act of 1882, and the defence being also based upon the proper construction of that act, we cannot but regard the case as one simply resting on such act. The construction of these various treaties was not substantially or in any other than a merely incidental or remote manner drawn in question, and therefore a direct appeal to this court cannot be sustained.

We think the appeals come within the principle of *Muse* v. *Arlington Hotel Company*, 168 U. S. 430; *Western Union Telegraph Company* v. *Ann Arbor Railway Company*, 178 U. S. 239, and *Lampasas* v. *Bell*, 180 U. S. 276, which hold that where the suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution or laws, and that jurisdiction cannot under such circumstances be maintained of a direct appeal to this court from the Circuit Court.

In *Muse* v. *Arlington Hotel Company*, it was held that some right, title, privilege or immunity dependent upon a treaty must be so set up or claimed as to require the Circuit Court to pass upon the question of the validity or construction of the treaty in disposing of the right asserted. In order to come

within the act of 1891 the treaty must be directly involved, and upon its construction the rights of the parties must rest. Within these cases it cannot be said that the construction of any treaty is drawn in question herein when the rights of neither party are necessarily dependent upon such construction, but are dependent upon that which may be given the statute of 1882, and when the construction of that statute is independent of that which may be given any of the treaties mentioned, although weight may be given to the treaties in determining the question of the construction of the statute. See also *Starin* v. *New York*, 115 U. S. 248.

The motion is granted and the appeals

Dismissed.

POPE *v.* WILLIAMS.

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

No. 503. Argued March 8, 9, 1904.—Decided April 4, 1904.

While the privilege to vote may not be abridged by a State on account of race, color and previous condition of servitude, the privilege is not given by the Federal Constitution or by any of its amendments nor is it a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162.

While the right to vote for members of Congress is not derived exclusively from the law of the State in which they are chosen but has its foundation in the Constitution and laws of the United States, the elector must be one entitled to vote under the state stutute.

An act of the legislature of a State providing that all persons who shall thereafter remove into the State from any other State, District or Territory, shall make declaration of their intent to become citizens and residents of the State a year before they have the right to be registered as voters, is not violative of the Federal Constitution as against a citizen of another State moving into the enacting State after the passage of the act.

THIS is a writ of error to the Court of Appeals of the State of Maryland, to review its judgment affirming that of the Circuit Court for Montgomery County, which affirmed the proceedings of the board of registry of election district No. 7 of that county,

refusing to register petitioner as a legal voter on the ground of his non-compliance with the Maryland law making it necessary for a person coming into the State, with the intention of residing therein, to register his name with the clerk of the Circuit Court of the proper county, and thereby to indicate the intent of such person to become a citizen and resident of the State.

The act in question was passed March 29, 1902, as chapter 133 of the laws of that year, and as an amendment and supplement to the Public General Laws of the State, title "Elections," sub-title "Registration," as section 25B, and it is reproduced in the margin.[1]

Plaintiff in error on September 29, 1903, presented his ap-

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[1] SEC. 25B. All persons who, after the passage of this act shall remove into any county of this State, or into the city of Baltimore from any other State, District or Territory, shall indicate their intent to become citizens and residents of this State by registering their names in a suitable record book, to be procured and kept for the purpose by the clerk of the Circuit Court for the several counties, and by the clerk of the Superior Court of Baltimore City; such record to contain their names, residence, age and occupation; and the intent of such persons to become citizens and residents of this State shall date from the day on which such registry shall be so entered in such record book by the clerk of the Circuit Court for the county, or of the Superior Court of Baltimore City, as the case may be, into which county or city such person shall so remove from any other State, District or Territory. And no person coming into this State from any other State, District or Territory shall be entitled to registration as a legal voter of this State until one year after his intent to become such legal voter shall be thus evidenced by such entry in such record book, and such entry or a duly certified copy thereof shall be the only competent and admissible evidence of such intent. And the clerk of the Superior Court of Baltimore City and the several courts of the several counties shall immediately, upon the passage of this act, procure a suitable record book for the recording therein of such entries arranged alphabetically under the names of such persons. For every person so registered under the provisions of this section they shall be entitled to demand and receive the sum of twenty-five cents, to be paid to said clerks by the mayor and city council of Baltimore and the county commissioners respectively. A copy of such record, duly certified by said clerks, shall be evidence of the right of such persons to registration as legal voters according to law, and each person so registered shall be entitled to such certified copy upon demand without charge.

plication to the board of registry of election district No. 7, Montgomery County, Maryland, then sitting at a place within such district, to be registered and entered as a qualified voter on the registry of voters of that election district, which application the board refused and declined to comply with, for the sole reason that he had not complied with this law of Maryland. Thereafter the plaintiff presented a sworn petition to the Circuit Court for Montgomery County, in the State of Maryland, praying that court to enter an order to revise the action of the board of registry, and to order and direct that the name of the petitioner should be entered as a qualified voter on the registry of voters of the election district already named. In that sworn petition he alleged that he had on June 7, 1902, with his wife and child, removed from the city of Washington, District of Columbia, into Montgomery County, in the State of Maryland, "having then had and ever since and now having the intention of making the State of Maryland the permanent domicil of himself and his family, and of becoming a citizen of said State; and ever since said June 7, 1902, petitioner has resided in the subdivision of Otterbourne, near Chevy Chase, in said Montgomery County, and in the seventh election district of said county."

The petitioner further showed in his petition that he had made application to the proper board of registry in the election district mentioned, and the board had refused to enter his name as a qualified voter on the ground already stated, of non-compliance with the Maryland statute.

The petitioner admitted "that he did not within a year prior to said application for registration as a qualified voter, or at any time during the year 1902, in any manner, make or register, in the office of or before the clerk of Montgomery County, Maryland, or in a record book kept by said clerk, a declaration of intention to become a citizen and resident of Maryland, such as is required by the aforesaid law to be made by persons who remove into the State of Maryland after March 29, 1902, as a condition precedent to subsequent regis-

tration of such persons as qualified voters. Petitioner, however, claims and asserts that said section 25B of article 33 of the Code of Public General Laws of Maryland affords no justification for said refusal to register your petitioner as a qualified voter, because said alleged law contravenes and is repugnant to the Constitution of the United States and the constitution of Maryland, and is, therefore, null and void."

The petitioner then asserts and sets forth in his petition several grounds which, as he therein alleges, render the state law a violation of the constitution of the State of Maryland, and he also specially sets up and claims that the law is a violation of the Constitution of the United States in the particulars named by him, and which are as follows:

"Said law is repugnant to that portion of section 1 of the Fourteenth Amendment of the Constitution of the United States, which declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,' because by said law it is in effect ordained that male citizens of the United States of the age of twenty-one years and upwards, removing into the State of Maryland after March 29, 1902, with the intention of making said State their permanent domicil, shall not be treated as citizens or residents of Maryland, or given the rights and privileges of citizens of Maryland, until they have been naturalized in the mode prescribed by said law.

"Said law is also repugnant to that portion of section 1 of said Fourteenth Amendment to the Constitution of the United States which prohibits a State from denying any person within its jurisdiction the equal protection of the laws, because said law operates an unjust and unreasonable discrimination against citizens of the United States coming into the State of Maryland to permanently reside therein after March 29, 1902, who may desire to become qualified voters therein.

"Said law is also repugnant to the general spirit of the Constitution of the United States and the fundamental rights

of citizens of the United States, which deny to a State the power to attach unreasonable or burdensome conditions to the free movement of citizens of the United States out of, into and settlement within the confines of any State, District or Territory within the United States."

To this petition there was a general demurrer, which was sustained by the court, which thereupon entered judgment dismissing the petition with costs to the defendants.

Mr. William H. Pope, plaintiff in error, *pro se:*

The deprivation of a political right or privilege dependent upon a state constitution, if such deprivation be grounded upon an abridgement of a right or privilege conferred by the Constitution of the United States, presents a Federal question entitling this court to review the judgment of a state court. *Boyd* v. *Thayer*, 143 U. S. 135.

State citizenship is a right, privilege or immunity of a citizen of the United States. § 1, Fourteenth Amendment; *Slaughter House Cases*, 16 Wall. 36, 80. By the express terms of the Fourteenth Amendment, a State may not abridge the same.

The first sentence of the Fourteenth Amendment is in effect a national naturalization law; and the acquisition of United States and state citizenship is solely regulated by it. The common law and general law of evidence in force at the time of the adoption of the Amendment determine what is residence and how it may be acquired. *United States* v. *Wong Kim Ark*, 169 U. S. 654; *United States* v. *Palmer*, 3 Wheat. 630; *United States* v. *King*, 34 Fed. Rep. 306.

Section 1, Art. I, of the constitution of Maryland confers the voting franchise upon adult male citizens of the United States who have resided in the State one year. The general assembly of Maryland cannot add to these qualifications. *Southerland* v. *Norris*, 74 Maryland, 326. The term "resident," as employed in the clause of the state constitution referred to is synonymous with "citizen." Art. 7, Maryland Bill of Rights: *Anderson* v. *Watt*, 138 U. S. 702.

It is a privilege of a citizen of the United States, of his own volition, instantly to transfer his citizenship from one State to another. *Morris* v. *Gilmer*, 129 U. S. 315; *Slaughter House Cases, supra.* Unlike citizenship of the United States, (in the case of a foreign born person,) no "declaration of intention" is required.

The Federal privilege of state citizenship acquired by plaintiff in error on his removal into Maryland was clearly abridged by the statute here assailed, which operates only against persons, *after their removal into the State of Maryland*, when, by force of the Constitution of the United States, many such persons immediately on removal become residents of the State of Maryland. The statute dates the residence and citizenship *from the time of the making of the declaration of intention required by the statute*, thus in effect annulling the residence and citizenship acquired by force of the Constitution of the United States, and compelling the acceptance of citizenship under the state law. Further, the requirement of attendance at the county seat to make the declaration in question—no matter how far removed from the residence of the would-be-voter, or how great may be the pecuniary injury sustained by loss of time and money, outlay for railroad fares, etc.—is an oppressive and onerous burden, not imposed upon other citizens of the State. It deters and hinders citizens from establishing and exercising such right. See No. 61 of The Federalist, by Alexander Hamilton, p. 281. The statute necessarily abridges the Federal right and privilege, and is therefore unconstitutional. *Crandall* v. *Nevada*, 6 Wall. 36; *Henderson* v. *Mayor*, 92 U. S. 268; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 558.

The declaration of intention required by the Maryland law is a condition and qualification for the acquisition of the right to vote, and not a mere rule of proof. § 2165, Rev. Stat.; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 455; *Sinnot* v. *Davenport*, 22 How. 227, 241.

It is immaterial to the right of the plaintiff in error to claim

the benefit of the Federal privilege that the statute was enacted before his removal into the State. *Southern Pacific Co.* v. *Denton*, 146 U. S. 207, and cases cited.

On the transfer of residence from one State to another a citizen of the United States is vested "with the same rights as other citizens of that State." *Slaughter House Cases, supra.* This necessarily includes the right not to be arbitrarily discriminated against in the acquisition and enjoyment of political rights, because of his removal from another State. The statute may, therefore, properly be held also to be repugnant to the second section of the fourth article of the Constitution of the United States. *Blake* v. *McClung*, 172 U. S. 249.

Mr. John Prentiss Poe, with whom *Mr. Bowie F. Waters* was on the brief, for defendant in error:

So far as the act is claimed to be contrary to the constitution of the State the question is finally set at rest by the decision of the Court of Appeals and that question is not subject to review by this court.

It has long been an established doctrine of this court that the construction by the courts of the several States of their constitution and laws is binding upon this court in all cases except where a Federal question is involved. Guthrie on 14th Amendment, 44; Brannon on 14th Amendment, 395, 419; *Slaughter House Cases*, 16 Wall. 66; *Louisiana* v. *Pilsbury*, 105 U. S. 294; *Gibson* v. *Mississippi*, 162 U. S. 582; *Forsyth* v. *Hammond*, 166 U. S. 519, and cases cited.

The writ of error should be dismissed because it is no longer within the power of the defendants to register the plaintiff, as the registration books are not now and never will or can be in their possession or custody or subject to their control. Maryland Code, Art. 33, §§ 29, 30. The case is now a moot case. *Mills* v. *Green*, 159 U. S. 653; *Schilling* v. *Summerson*, 94 Maryland, 582, 591.

The act does not affect or impair any fundamental and

inalienable rights "of the plaintiff as a citizen of the United States secured or guaranteed to him by that Amendment."

Residence in its legal sense is made up of two distinct elements: *first*, the physical, tangible fact of removal into the State; and *second*, the *quo animo* or intent with which such removal is made. *Mitchell* v. *United States*, 21 Wall. 350.

As to how to prove that a resident is entitled to vote, see *Fenwick* v. *State*, 63 Maryland, 241; *Fisk* v. *Chester*, 8 Gray, 508; Cooley's Const. Law (7th ed. 1903), 524; 11 Am. & Eng. Ency. of Law (2d ed.), title Evidence, page 550, and cases there cited; 6 Am. & Eng. Ency. of Law (2d ed.), title Constitutional Law, page 950, and cases there cited.

The Court of Appeals have decided in several cases that legislation of this sort relating to persons abandoning their homes in Maryland and removing from the State into other States, is constitutional and valid. Act of 1890, ch. 573, sec. 14; Act of 1901, ch. 2; Code, Art. 33, title Elections, § 25*a*; *Shaeffer* v. *Gilbert*, 73 Maryland, 70, 72; *Southerland* v. *Norris*, 74 Maryland, 326; *Sterling* v. *Horner*, 74 Maryland, 573; *McLane* v. *Hobbs*, 74 Maryland, 166; *Bowling* v. *Turner*, 78 Maryland, 595; *Thomas* v. *Warner*, 83 Maryland, 20; *Howard* v. *Skinner*, 87 Maryland, 559.

By their judgment in the present case they have decided that this section 25B is nothing but a lawful regulation of the evidence necessary to prove what constitutes "residence."

Citizenship and suffrage are by no means inseparable; the latter is not one of the universal, fundamental, inalienable rights with which men are endowed by their Creator, but is altogether conventional. Suffrage is not a right of property or absolute personal right. *Anderson* v. *Baker*, 23 Maryland, 531, 629; Cooley's Principles of Constitutional Law, 276; *Gougar* v. *Timberlake*, 148 Indiana, 38; Black's Constitutional Law, 466; Story on Constitution, § 581; *Kinneen* v. *Wells*, 144 Massachusetts, 497; *Stone* v. *Smith*, 159 Massachusetts, 413; 16 Alb. Law J. 272; *United States* v. *Susan B. Anthony*, 11 Blatch. C. C. 202; *Van Valkenburg* v. *Brown*, 43 California, 43;

Minor v. *Happersett*, 21 Wall. 178; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 92 U. S. 542.

Since the Fifteenth Amendment the whole control over suffrage and the power to regulate its exercise is still left with and retained by the several States, with the single restriction that they must not deny or abridge it on account of race, color or previous condition of servitude. *United States* v. *Harris*, 106 U. S. 636, 644; *James* v. *Bowman*, 190 U. S. 127.

There are, it is true, the two provisions, first, that while "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators." Constitution, Art. I, sec. 4; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731; *Logan* v. *United States*, 144 U. S. 263.

As § 25B does not conflict with the Fifteenth Amendment but in express terms applies to "*all* persons," it does not impair, abridge, affect, or even touch any privilege or immunity of the plaintiff in error which is covered by the guaranty of the Fourteenth Amendment. *Williams* v. *Mississippi*, 170 U. S. 213; *Gibson* v. *Mississippi*, 162 U. S. 582; *Giles* v. *Harris*, 189 U. S. 475; *James* v. *Bowman*, 190 U. S. 127. And see also *Scott* v. *Sandford*, 19 How. 393; *Ward* v. *Maryland*, 12 Wall. 418; *Neale* v. *Delaware*, 103 U. S. 370; *Amy* v. *Smith*, 1 Litt. (Ky.) 326; *Lanz* v. *Randall*, 4 Dill. 425; *Short* v. *State*, 80 Maryland, 401.

The protection designed by the clause of the Fourteenth Amendment declaring that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. *Bradwell* v. *State*, 16 Wall. 130; *In re Taylor*, 48 Maryland, 28; *In re Maddox*, 93 Maryland, 728, 729.

As to the privileges and immunities belonging to the citi-

zens of a State, these "must rest for their security and protection where they have heretofore rested," that is, with the State in which the citizen resides. *Slaughter House Cases*, 16 Wall. 74; *Presser* v. *Illinois*, 116 U. S. 266; *Short* v. *State*, 80 Maryland, 401.

By removing into Maryland the plaintiff became a citizen of that State and voluntarily subjected himself to the operation of her laws. Why then shall he not be bound by them?

As to equal protection of the laws the equality extends only to *civil* rights as distinguished from those that are *political* or arise from the form of the government and its mode of administration. Field, J., *Ex parte Virginia*, 100 U. S. 637. Equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo* v. *Hopkins*, 118 U. S. 369.

The clause is not violated by any diversity in the jurisdiction in the several courts as to subject matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress. *Missouri* v. *Lewis*, 101 U. S. 30; *Wurts* v. *Hoagland*, 114 U. S. 615. Class legislation discriminating against some and favoring others is prohibited, but legislation, which in carrying out a public purpose is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment. *Munn* v. *Illinois*, 94 U. S. 134; *Chicago R. R. Co.* v. *Iowa*, 94 U. S. 163; *Barbier* v. *Connolly*, 113 U. S. 27, 32; *Soon Ling* v. *Crowley*, 113 U. S. 703; *Missouri Pacific R. R. Co.* v. *Humes*, 115 U. S. 523; *Kentucky R. R. Tax Case*, 115 U. S. 337; *Presser* v. *Illinois*, 116 U. S. 266; *Hayes* v. *Missouri*, 120 U. S. 71; *Dow* v. *Biedelman*, 125 U. S. 691; *Missouri R. R. Co.* v. *Mackey*, 127 U. S. 209; *Powell* v. *Pennsylvania*, 127 U. S. 687; *Walston* v. *Nevin*, 128 U. S. 582; *Minnesota R. R. Co.* v. *Beckwith*, 129 U. S. 29; *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Marchant* v. *Pennsylvania R. W.*, 153 U. S. 389; *St. L. & San Fran. Ry.* v. *Mathews*, 165 U. S. 24; *Gulf, C. & S. F. R. W.* v. *Ellis*, 165 U. S. 155; *Orient Ins.*

Co. v. *Daggs*, 172 U. S. 557; *Ins. Co.* v. *Warren*, 181 U. S. 73; *Ins. Co.* v. *Mettler*, 185 U. S. 308; *Billings* v. *Illinois*, 188 U. S. 97; *Kidd* v. *Alabama*, 188 U. S. 730; *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Short* v. *State*, 80 Maryland, 402; Brannon on 14th Amendment, ch. 16; on Equal Protection of the Laws, 315, 380; Guthrie on 14th Amendment, 106, 142.

Tests, qualifications, disqualifications, denials, abridgments, distinctions, inequalities, may still lawfully be made at the pleasure of the States, provided only they do not discriminate against the negro.

If they apply equally, impartially and uniformly to white and black citizens alike, they are not condemned by the letter or the spirit of the Thirteenth, Fourteenth and Fifteenth Amendments. They may perhaps cost the States a reduction in their Congressional representation in the proportion in which the number of adult males disfranchised by such state legislation bears to the whole number of its adult male population. But this is the only legal consequence, and there is no warrant for the contention that the Federal judiciary can also declare such legislation absolutely void.

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

This is not a case of a statute of the State having been passed subsequently to the time when the individual had removed from another State or from a Territory or from the District of Columbia into the State of Maryland. There is, therefore, no alteration of any possible rights which the plaintiff in error might have already acquired and which he might claim were taken from him by the passage of such statute. On the contrary, this statute took effect on March 29, 1902, more than two months prior to the removal of the plaintiff in error from Washington in the District of Columbia to Montgomery County, within the State of Maryand. The objections of a Federal nature, which are made by the plaintiff in error, to the validity of the statute are set out in his petition, and are

also contained in the above statement of facts, and are substantially reproduced in his assignment of errors.

We are of opinion that the statute does not violate any Federal right of the plaintiff in error which he seeks to assert in this proceeding. The statute, so far as it concerns him and the right which he urges, is one making regulations and conditions for the registry of persons for the purpose of voting. It was only for the purpose of thereafter voting that the plaintiff in error sought to be registered, and it was the denial of that right only which he can now review. His application for registry as a voter was denied by the board of registry solely because of his failure to comply with the statute. Whatever other right he may have as a citizen of Maryland by reason of his removal there with an intent to become such citizen, is not now in question. So far as appears no other right, if any he may have, has been infringed by the statute. The simple matter to be herein determined is whether, with reference to the exercise of the privilege of voting in Maryland, the legislature of that State had the legal right to provide that a person coming into the State to reside should make the declaration of intent a year before he should have the right to be registered as a voter of the State.

The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor* v. *Happersett*, *supra*, such persons were allowed to vote in several of the

States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Federal Constitution, Art. 1, sec. 2; *Wiley* v. *Sinkler*, 179 U. S. 58. But the elector must be one entitled to vote under the state statute. (Id., Id.) See also *Swafford* v. *Templeton*, 185 U. S. 487, 491. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be understood, however, as intimating that the condition in this statute is unreasonable or in any way improper.

We are unable to see any violation of the Federal Constitution in the provision of the state statute for the declaration of the intent of a person coming into the State before he can claim the right to be registered as a voter. The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the State, by persons coming therein to reside, (and that is as far as it is necessary to consider it in this case,) is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, nor a violation of any implied guaranties of the Federal Constitution. The right of a State to legislate upon the subject of the elective franchise as to it may seem good, sub-

ject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them.

It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against the individual rights of a citizen of the United States removing into the State and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other State. In such case an argument might be urged that, under the Fourteenth Amendment of the Federal Constitution, the citizen from Georgia was by the state statute deprived of the equal protection of the laws. Other extreme cases might be suggested. We neither assert nor deny that in the case supposed the claim would be well founded that a Federal right of a citizen of the United States was violated by such legislation, for the question does not arise herein. We do, however, hold that there is nothing in the statute in question which violates the Federal rights of the plaintiff in error by virtue of the provision for making a declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the State.

The plaintiff in error has no ground for complaint in regard to the decision of the courts below, and the judgment of the Court of Appeals of Maryland is, therefore,

Affirmed.

NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION *v.* BRAHAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 158. Argued February 25, 26, 1904.—Decided April 4, 1904.

Where the plaintiff in error, defendant below, after filing a general issue moves to amend, claiming rights under the Fourteenth Amendment, and on the trial asks an instruction based on his rights thereunder, he is entitled to the instruction if the rights asserted actually exist, and the Federal question is raised in time, and the writ of error will not be dismissed.

The impairment of contract clause of the Federal Constitution cannot be invoked against what is merely a change of decision in the state court, but only by reason of a statute enacted subsequent to the alleged contract and which has been upheld or effect given it by the state court.

Where a corporation has become localized in a State and accepted the laws of the State as a condition for doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the full faith and credit clause in instructing the jury to find according to the local law and not according to the laws of another State, notwithstanding a clause in the contract that it should be construed according to the laws of the latter.

THIS action was brought in the Circuit Court of Louderdale County, Mississippi, to recover interest, claimed to have been usurious, paid by defendant in error to plaintiff in error upon a loan made by the latter to him. The action was brought under section 2348 of the Code of the State of 1892, which provides as follows:

"The legal rate of interest on all notes, accounts and contracts shall be six per centum; but contracts may be made, in writing, for the payment of a rate of interest as great as ten per centum per anuum. And if a greater rate of interest than ten per centum shall be stipulated for, or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

The case was tried to a jury, which, under the instructions of the court, returned a verdict for the defendant in error, upon which judgment was duly entered. The judgment was affirmed by the Supreme Court of the State. 80 Mississippi, 407. This writ of error was then sued out.

The plaintiff in error is a building and loan association, incorporated under chapter 122 of the Laws of the State of New York, passed April 10, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations," and the acts amendatory thereof, to wit—chap. 564, passed June 9, 1875; chap. 96, passed April 1, 1878.

The purpose of the association is to make loans only to its members, and for the further purpose of accumulating a fund to be returned to its members who do not receive advances on their shares.

The management of the association is vested in a board of directors, who have power to make by-laws. There is a president and other officers and a standing committee. The latter passes on all applications for loans. Membership is obtained by holding five or more shares of the association and subscribing for membership. Shares are divided into three classes, instalment shares, paid-up shares and interest bearing paid-up shares. We are only directly concerned with the first class. They are described in the articles of the association as follows:

"SEC. 2. Instalment shares.—Instalment shares shall be issued in monthly series, and shall be dated the first business day of the month, and shall be due and become payable whenever the amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares."

It is provided, article 10, that dues on each instalment share shall be sixty cents per month until the maturity of the shares. There is also a provision for fines and forfeitures. The loan fund and loans are provided for as follows:

"SEC. 1. The loan fund of the association shall consist of

fifty cents of the monthly dues paid in on each share, interest, premiums, fines and forfeitures, and the profits derived therefrom, and shall be loaned to members of the association by the board of directors upon approved applications for loans in the order in which they have been filed.

"SEC. 2. Interest at the rate of not more than six per cent per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month, until the maturity of the pledged shares, and a premium of not more than fifty cents per month will be charged on each one hundred dollars borrowed, which premium must be paid on or before the last business day of the month, for a period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for the first six months to be paid in advance.

"SEC. 3. A member may pay such loan at any time after one year, on giving thirty days' notice in writing to the secretary, upon the payment of the amount borrowed, with interest and premium thereon, and a redemption fee of fifty cents per share. No redemption fee shall be charged on matured shares."

It is also provided that loans on real estate shall be secured by a first mortgage on the property offered for security, by promissory notes, bonds, mortgages and deeds of trust of the applicant, or such other instruments as may be required, "and for every loan of $100 he shall, in addition thereto, transfer to the association at least one share thereof as collateral security."

In 1892 the plaintiff in error had an agent in the city of Meridian, Mississippi, who was authorized to receive applications for stock and loans, and to receive payment of dues, interest and premiums, and to transmit the applications and payments to plaintiff in error at its office in New York. The domicil of the plaintiff in error was and is New York. The defendant in error in 1892 was a citizen of the city of Meridian, and made application through the agent of plaintiff in error

at Meridian for a loan of $2,500, and to subscribe for twenty-five shares of stock, as required by articles of plaintiff in error. The loan was granted by the executive committee under the terms and according to the conditions of the articles of association. Defendant in error made the following payments "as dues, interest, premium and fines on said stock and loan, to wit: Advance premium sent the association at New York, $66.25; paid defendant's agent at Meridian, as shown by the receipt book hereto attached, $668.75, and $2,500 paid the association in New York by draft sent them on November 7, 1893, in full payment of said loan on May 21, 1892."

Defendant in error repaid this loan, but retained his twenty-five shares of stock, and paid his dues thereon for the months of December, 1893, to August, 1894, exclusive, amounting to the sum of $135.

In October, 1894, he withdrew five shares and received from plaintiff in error $73.90, the withdrawal value thereof.

In June, 1894, he made an application for another loan on his twenty shares, which was forwarded to plaintiff in error in New York by C. F. Woods, its agent. The loan was granted by the executive committee, and in consideration of the loan he executed to plaintiff in error a bond, assignment of shares and mortgage of real estate.

The loan was repaid by crediting thereon the sum of $649.70, the withdrawal value of his shares, payment by draft on New York of the sum of $1,473.96; interest, dues, fines and premiums, $868. Part of the latter was paid through the agent and part was sent directly to plaintiff in error.

The bond and mortgage given by defendant in error to secure the loan recited that they were given in consideration of such loan, and expressed as one of their conditions that defendant in error would repay the sum loaned to plaintiff in error "at its office in New York city, with interest for the same at the rate of six per cent per annum until paid, together with a monthly premium of ten dollars and no cents for eight years, or until the earlier maturity of said shares, should they mature

before the expiration of the eight years, and in addition thereto the sum of twelve dollars and no cents for the monthly dues on the said twenty shares, which interest, premium and dues are payable monthly on or before the last business day of every month, at the office of the association in New York city, until the maturity of the said shares, except the said monthly premium, which is to be paid for eight years only, and also all fines which may be imposed by the said association for default in payment of said interest, premium or dues."

To the declaration of defendant in error, plaintiff in error filed the general issue, with notice thereunder that plaintiff in error would give in evidence and prove the facts substantially as above stated. Subsequently, April, 1901, and August, 1901, plaintiff in error made motions for leave to amend its notice under the general issue. The amendments claimed rights under the Fourteenth Amendment of the Constitution of the United States, also under section 10 of article 1 of that instrument, and under section 1, article 4.

Defendant in error moved to strike out the amendments on the ground that they were filed without leave of the court. The motion was granted.

Testimony was introduced and at its conclusion defendant in error asked the court to direct the jury to find for him the excess paid over six per cent on both loans. The instruction was refused. The court, on the contrary, instructed the jury, at the request of plaintiff in error, that the first loan was not usurious. But the court charged the jury that the second loan was usurious, and directed them to find for defendant in error the sum paid by him in excess of six per cent on the loan ($2,000), with interest at six per cent per annum from July, 1899, to date of trial.

Plaintiff in error asked the court to instruct the jury substantially as follows:

1. Defendant in error, as a borrowing shareholder, was entitled to and did share in the profits of the association, and the contract was, therefore, valid and not usurious,

2. The contracts were made and consummated in New York and performable there, and are to be construed by the laws of New York, and under those laws the contract is valid and not usurious.

3. Under the Fourteenth Amendment of the Constitution of the United States, defendant in error had a right to become a member and shareholder of the association, to be a borrower from it upon the terms and conditions of its articles, and make contracts with it performable in the State of New York, and reciprocally defendant in error had the right to make the loan, and entitled under said amendments to have the "contracts considered and their validity determined by the laws of the State of New York," where they were performable; and under section 1, article 4, of the Constitution of the United States, was entitled to have the court give full faith and credit in determining the validity of the contracts with defendant in error, to the public records and judicial proceedings of the State of New York, especially the laws under which the defendant in error was incorporated, and the acts amending the same, and the decision in the case of *Concordia Association* v. *Read*, 93 N. Y. 474, and other decisions, which hold that the contracts are valid and not usurious under the laws of New York.

4. The contract is not usurious under the laws of Mississippi.

5. Section 2348 of the Annotated Code of Mississippi, as sought to be applied, impairs the obligation of the said contracts in violation of section 10, article 1, of the Constitution of the United States.

6. The decision of the Supreme Court of Mississippi in *Sokoloski* v. *New South B. and L. Association*, 77 Mississippi, 155, and the decisions following it having been rendered long after the making of said contracts, in so far as they define the public policy of Mississippi in regard to foreign building and loan associations, are tantamount to judicial legislation, and in violation of section 10, article 1, of the Constitution of the United States.

7. The evidence shows that both loans have been voluntarily paid and settled by defendant in error with full knowledge of all the facts.

8. As to the loan of 1894 the evidence shows that defendant in error, being a shareholder in the association, had a right to demand and receive advances or loans upon his shares upon the terms and conditions set out in the articles of the association, and the association was obliged to grant the same, and the said contract was made in pursuance of said right and application, and that the code of Mississippi does not govern said contract, and is as to said contract "both *ex post facto*, and impairing the obligation of said contract and in violation of sec. 10, art. 1, of the Constitution of the United States; and under sec. 1, art. 4, of said constitution and the laws of New York and the Fourteenth Amendment to said Constitution the said contract of August 30, 1894, is valid and enforcible and not usurious."

The instruction was refused, and plaintiff in error excepted. The jury found for defendant in error for the sum of $677.96, being amount paid in excess of the loan, and for the sum of $93.79 interest. Judgment was entered upon the verdict. It was affirmed by the Supreme Court of the State, as we have said.

Mr. J. S. Sexton and *Mr. A. S. Bozeman*, with whom *Mr. M. Green* and *Mr. G. M. Thompson* were on the brief, for plaintiff in error:

Constitutional rights cannot be stricken down by arbitrarily striking out pleadings seeking to present such questions. *Kipley* v. *Illinois &c.*, 170 U. S. 182. See also *Akin* v. *Kipley*, 176 Illinois, 638.

It is not at all necessary that the Federal questions presented in this case should have been made to appear on the record in direct and unequivocal terms, *in ipsissimis verbis*, but it is altogether sufficient that they should have appeared as they did by clear and necessary intendment. *Crowell* v. *Randell*, 10 Pet. 368; *Murray* v. *Charleston*, 8 Wall. 44. And

see also 16 Pet. 281; 125 U. S. 345; *Saywadr* v. *Denny*, 158 U. S. 180; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Eastern B. & L. Assn.* v. *Williamson*, 189 U. S. 122; *Arrowsmith* v. *Harmoning*, 118 U. S. 194. See also Foster's Federal Practice, 2d ed. § 477; Curtis's Jurisdiction of U. S. Courts, 37, and cases cited in 112 U. S. 123, 129; 119 U. S. 110, 116; 139 U. S. 293, 295; *Des Moines Nav. & R. R. Co.* v. *Homestead Co.*, 123 U. S. 552.

The judgment of the state court cannot be maintained independently of the Federal question and this takes the case out of *Hopkins* v. *McLure*, 133 U. S. 380; *Bacon* v. *Texas*, 163 U. S. 207; *Beatty* v. *Fenton*, 135 U. S. 244. See *Chapman* v. *Goodnow*, 123 U. S. 540, 548; *Roby* v. *Coleheur*, 146 U. S. 153.

The Federal questions raised in the court below, involve a proper construction of the contract obligation of the parties as fixed by the articles of association of the plaintiff in error and the statutes and decisions of the State of New York, together with the statutes and decisions of the State of Mississippi as sought to be applied to the case in hand. The contract and articles of association, and the provisions of ch. 122, 1851, and ch. 564, 1875, of the laws of New York, are the only measure of the rights and obligations of the parties hereto. This is as true when this contract is to be construed by the courts of Mississippi, as if the New York courts were called upon to construe the same contract. 3 Thompson on Corp. § 3046; § 939, Ann. Code, Mississippi, 1902; *Eastern B. & L. Assn.* v. *Williamson*, 189 U. S. 122.

Defendant in error could not borrow money of plaintiff in error under the laws of New York and settle for the same under the laws of Mississippi enacted or announced subsequent to the time when the relations of the parties became fixed. *Bedford* v. *Eastern B. & L. Assn.*, 181 U. S. 227.

As to effect of judicial decisions as impairing the obligation of contracts, see *Pine Grove Township* v. *Talcott*, 19 Wall. 666; Black's Constitutional Law, 2d ed. 605; 15 Am. & Eng. Ency. 2d ed. 1046. As to what the law of the State was, see *Nat.*

B. & L. Assn. v. *Wilson*, 78 Mississippi, 993; *Shannon* v. *Georgia State B. & L. Assn.*, 78 Mississippi, 955; *Sokoloski* v. *Crofton*, 77 Mississippi, 155, 166; *Sullivan* v. *B. & L. Assn.*, 70 Mississippi, 99; *Goodman* v. *Loan Assn.*, 71 Mississippi, 234, 325; Thornton & Blackledge on B. & L. Assns. § 248; Thompson, 2d ed. 192; *Manship* v. *N. S. B. & L. Assn.*, 110 Fed. Rep. 845.

The Supreme Court of Mississippi, by its decision, deprived the appellant association of its "liberty" and "property without due process of law," and also denied it "the equal protection of the laws," contrary to the provisions of the Fourteenth Amendment which operate upon all agencies by which state law is made and enforced, all departments of state government, legislative, executive, *judicial*, and all subordinate agencies. Brannon on Fourteenth Amendment, 111, 315, 319; *Chattanooga B. & L. Assn.* v. *Denson*, 189 U. S. 408, distinguished.

Mr. Edward Mayes, with whom *Mr. R. C. Beckett* was on the brief, for defendant in error:

The Federal question was not properly raised below. *Chapin* v. *Fye*, 179 U. S. 127; *Johnson* v. *New York Life*, 187 U. S. 491; *Railroad Co.* v. *Adams*, 180 U. S. 1; *Kipley* v. *Illinois*, 170 U. S. 182; *Railroad Co.* v. *Purdy*, 185 U. S. 148; *Laten* v. *Missouri*, 187 U. S. 356.

The language of the assignments is a complaint of the rendition of the judgment, and not of the enforcement of a subsequent statute. That impairment of contract provisions apply to statutes only and not to judgments is settled law. *New Orleans, etc., Co.* v. *Louisiana, etc., Co.*, 125 U. S. 18; *Railroad Co.* v. *Plainview*, 143 U. S. 371; *Bacon* v. *Texas*, 163 U. S. 207; *Railroad Co.* v. *Adams*, 180 U. S. 41; *New Orleans Co.* v. *Louisiana Co.*, 185 U. S. 336.

Full faith and credit is not denied where a statute of another State is merely construed and its validity not questioned. *Finney* v. *Guy*, 189 U. S. 335; *Andrews* v. *Andrews*, 188 U. S. 14; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491;

Eastern B. & L. Assn. v. *Williamson*, 189 U. S. 124, 127. Impairing a contract is only by subsequent laws and not by erroneous decisions of the courts. *Weber* v. *Rogan*, 188 U. S. 10. See also 159 U. S. 103; 163 U. S. 278; 172 U. S. 116, 127.

The rule is the same as it is in regard to *ex post facto* laws. There must be a retrospective statute. The judgment of the court must apply a criminal or a penal statute subsequently enacted to a transaction innocent when done. *Kring* v. *Missouri*, 107 U. S. 221; *Pierce* v. *Carskadon*, 16 Wall. 234; *Burgess* v. *Salmon*, 97 U. S. 385; *Dent* v. *West Virginia*, 129 U. S. 114.

This court will not undertake to review the decision of the state court, because so to do would be to review adjudications made on pure questions of fact. This court will not review the decision of a state court on a bare question of fact, even although had that question been determined differently to what it was, and the judgment of the state court had then gone against the plaintiff in error, he would then have been entitled to his writ here. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Railroad Co.* v. *Chicago*, 166 U. S. 226; *Hendrick* v. *Railroad Co.*, 167 U. S. 673; *Turner* v. *State*, 168 U. S. 90; *Gardner* v. *Banestell*, 180 U. S. 362; *Western Union* v. *McCall Pub. Co.*, 181 U. S. 92; *Bement* v. *Harrow Co.*, 186 U. S. 70; *Thayer* v. *Spratt*, 189 U. S. 346; *Building & Loan Assn.* v. *Ebaugh*, 185 U. S. 114.

The question put in issue by plaintiff in error and determined against it was whether the contract was in fact made in New York or in Mississippi and this court is bound by the decision of the state court. See *Hooper* v. *California*, 155 U. S. 648; *Noble* v. *Mitchell*, 164 U. S. 370; *Oil Co.* v. *Texas*, 177 U. S. 46.

Since 1822 the statutes of Mississippi have prohibited the contracting for more than ten per cent per annum interest. Hutchinson's Mississippi Code, p. 641; Code of 1857, p. 370; Code of 1871, sec. 2279; Code of 1880, sec. 1141; Code, 1892, sec. 2348.

Since 1847 it has been the settled law in Mississippi by judicial

declaration of the effect of those statutes, that even after usurious interest has been paid the excess over six per cent could be recovered by action at law. *Bond* v. *Jones*, 8 S. & M. 368; *Dickerson* v. *Thomas*, 67 Mississippi, 777.

Chapter XIII, Laws, 1886, p. 35, was not amendatory of § 1042 of the Code of 1880, and § 849 of the Code of 1892, but a repealing act as decided in *B. & L. Assn.* v. *Pinkston*, 79 Mississippi, 468, which construction is conclusive here. *Tullis* v. *Railroad Co.*, 175 U. S. 348; *Cargill* v. *Railroad Co.*, 180 U. S. 452.

Where a person or corporation comes into a State and establishes an agency and lends out the money of his principal and fixes the papers and collects the payments it is such a doing of business and so localizes it that it is subject to the taxing laws of the State. *New Orleans* v. *Stemple*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *State Board &c.* v. *Comptoir Nat. d'Escompte*, 191 U. S. 388. See also 60 Fed. Rep. 31; 169 U. S. 421; 88 Fed. Rep. 578; 96 Fed. Rep. 578.

If acts subject the business to taxation they should also subject it to the usury laws and other laws and the public policy of the State.

This court will not review a decision of a state Supreme Court which holds a contract void as contrary to public policy. It is immaterial that such public policy is declared in a statute, if the statute antedates the contract. *Parker* v. *Moore*, 115 Fed. Rep. 799; *Farrer* v. *Keach*, 15 Wall. 67; *Rockhold* v. *Rockhold*, 92 U. S. 130; *New York Life* v. *Hendren*, 92 U. S. 287; *Bank* v. *McVeigh*, 98 U. S. 333; *Dugger* v. *Bocock*, 104 U. S. 601; *Sam Francis* v. *Scott*, 111 U. S. 769; *Railroad Co.* v. *Ferry Co.*, 119 U. S. 624; *New Orleans Co.* v. *Louisiana Co.*, 125 U. S. 34.

The decision appealed from is in itself correct. *Sokoloski* v. *Association*, 77 Mississippi, 155; *Crofton* v. *Association*, 77 Mississippi, 166; *Association* v. *Shannon*, 78 Mississippi, 955; *Association* v. *Wilson*, 78 Mississippi, 993; *Association* v. *Tony*, 78 Mississippi, 916; *Association* v. *Pinkston*, 79 Mississippi, 468; *Association* v. *Brahan*, 80 Mississippi, 407; *Association* v. *Shannon*, 80 Mississippi, 643; *Association* v. *Farnham*, 81 Mississippi,

365; *Bedford* v. *Eastern B. & L. Assn.*, 181 U. S. 237. This court declared that nothing but the fact that the law of the place where the debtor is, will make him pay, gives a debt validity. *Blackstone* v. *Miller*, 188 U. S. 189; *Association* v. *Parish*, 96 N. W. Rep. (Neb.) 243; *Skinner* v. *Association*, 35 So. Rep. (Fla.) 67.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court.

It is objected that the Federal questions presented cannot be considered "because they were not raised in time and the proper way," and that the Supreme Court did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the state practice.

The Supreme Court considered that plaintiff in error, by the motions to amend the notice, attempted to "inject" a Federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. The court said: "It was another ingenious but unsuccessful effort to inject the Federal question into the record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have been an issue involving the Federal question, to which an instruction would have been appropriate."

Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time. *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *Rothschild* v. *Knight*, 184 U. S. 334; *Meyer* v. *Richmond*, 172 U. S. 82; *Mallett* v. *North Carolina*, 181 U. S. 589; *Dewey* v. *Des Moines*, 173 U. S. 193. It was also sufficient in form.

The Federal questions presented by the record are reducible to two, to wit: (1) That the decision of the Supreme Court of Mississippi was in effect an impairment of the contract between plaintiff in error and defendant in error. (2) That full faith and credit were not given to the public acts, records and judicial proceedings of the State of New York.

1. This contention is untenable. We said in *Bacon* v. *Texas*, 163 U. S. 207:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, so as to give this court jurisdiction on a writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109."

In the case at bar there was no subsequent statute. There was a change in decision, it is contended, but against a change of decision merely section 10, article 1, cannot be invoked.

2. If the contract between plaintiff in error and defendant in error cannot be regarded as controlled by the law of New York, there is no foundation for the contention that full faith and credit were not given to the public acts and records of New York.

A similar question was presented in the case of *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389. The plaintiff in error in that case was a New York corporation, having its principal place of business in the State of New York. It maintained agents and examiners in the State of Missouri. One of these agents solicited Cravens, at his residence in Missouri, to insure his life in the company. Cravens assented, and made a written application for the policy sued on. The application was made part of the policy and contained the following provisions:

"That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office, in this application.

"That the contract contained in such policy and in this application shall 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 said company in the city of New York."

Four annual premiums were paid in Missouri. The fifth was not paid. Cravens died, and proof thereof was duly made. A controversy arose between the widow of Cravens and the company as to the amount due on the policy. Applying the law of New York, the company contended that there was due only the sum of $2,670 of paid-up insurance, and tendered that amount. The widow contended, applying the law of Missouri, for $10,000, less the amount of unpaid premiums, which left a balance of $8,749.21, with interest at six per cent from the date of the death of Cravens, and suit was brought for that amount. She recovered judgment according to her claim, and the case was brought here.

Describing the contentions of the company, we said that they were reducible to one form, to wit, that the statute of Missouri had been made by the Supreme Court of Missouri the measure of the rights and obligations of the parties against the agreement of the parties that the contract should be considered as having been made in New York, and should be construed and interpreted according to the laws of that State. The Supreme Court of Missouri decided that the statute expressed a condition upon which the company, as a foreign corporation,

was permitted to do business in the State, and also expressed the public policy of the State which parties could not by their contracts contravene. We accepted that interpretation of the statute and affirmed the judgment.

In the case at bar the Supreme Court of Mississippi gave the same effect to the statute of that State as the Supreme Court of Missouri gave to the Missouri statute. The court applied and followed the doctrine of *Shannon* v. *B. & L. Association*, 78 Mississippi, 955, expressed as follows:

"It must be remembered that the State has the power to prescribe the terms on which foreign corporations may do business. It is declared in § 849 of the Code of 1892, last clause, 'such foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.' This is the plain mandate of our law, which must be rigidly enforced by the courts. And the code otherwise provides that (§ 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them, and to enforce this public policy, thus declared by the statute, is not to give extra-territorial operation to our statutes. On the contrary this corporation has come into the State, localized its business here, through local boards scattered all over the State, and must submit such business thus localized to the operation of the laws of the State. To hold otherwise would operate the grossest injustice to our citizens, and would virtually abrogate our statutes against usury."

And again, on p. 974: "Foreign corporations wishing to do business with our citizens, and localizing that business within our State through local boards, must comply with the laws of this State. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the State which created them, if these stipulations violate our laws or public policy. Such laws of such foreign States can have, *ex proprio vigore*, no extra-territorial effect, and it is not

competent for a foreign corporation whose business has been localized in this State, or the borrower, or both, to abrogate, by attempted contract, stipulations whose purpose it is to evade our laws against usury, the laws of this State on that subject.

"This holding in no way interferes with the right of a foreign corporation whose business has not been localized here to make contracts with borrowers, to be governed by the laws of the State of their domicile, if there be no purpose therein to evade the usury laws of this State. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to *Bank of Newport* v. *Cook*, 46 Am. St. Rep. 171. In that note the learned editor points out, on page 202, the distinction to be observed saying: 'The proper answer to this argument is, that mere shams and evasions are not permitted to counteract and annul the law, and where it appears that the purpose of the parties in making the obligation payable in another State was to evade the laws against usury of the State in which it was executed, it will be regarded as infected with usury.' "

These remarks bring the case at bar within the ruling of *N. Y. Life Insurance Co.* v. *Cravens, supra.* The decision of the Supreme Court is, that plaintiff in error had become "localized" in the State, had accepted the laws of the State as a condition of doing business there, and could not, nor could defendant in error, "abrogate by attempted contract stipulations" those laws. See *Hancock Mutual Life Ins. Co.* v. *Warren*, 181 U. S. 73.

In *Chattanooga Building &c. Association* v. *Denson*, 189 U. S. 408, we recognized the right of a State to impose conditions upon foreign corporations doing business in the State to the extent of holding the contracts of the corporation void which were entered into in violation of the conditions.

There is nothing inconsistent with these views in *Bedford*

v. *Eastern B. & L. Association*, 181 U. S. 227. In that case there was a consummated contract, and we held invalid a law enacted subsequently that made the enforcement of the contract depend upon the performance of onerous conditions. There was a question of usury in the case, but Tennessee, under the statute of which State usury was claimed, did not prohibit contracts which made the laws of another State applicable thereto. In that case, therefore, the law of the contract stipulated by the parties could be applied.

Judgment affirmed.

MR. JUSTICE WHITE took no part in the decision of this case.

UNITED STATES *v.* COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 172. Submitted March 3, 1904.—Decided April 4, 1904.

A mortgagee who has foreclosed his mortgage and purchased the property mortgaged at sheriff's sale under a decree of the court is an assignee of the owner of the land within section 2 of the act of June 16, 1880, 21 Stat. 287.

Where there is a finding by the Court of Claims that a relinquishment was made "as required by the rules and regulations of the Land Office," this Court will presume that the Secretary did his duty and received all receipts and whatever was necessary to revest title in the United States to the land cancelled.

THE facts are stated in the opinion of the court.

Mr. Assistant Attorney General Pradt, with whom *Mr. George Hines Gorman* was on the brief, for the United States:

The facts found by the court below do not support the judgment rendered. The findings of fact by the court of claims are a special verdict and determine all matters of fact like the verdict of a jury, *United States* v. *Smith*, 94 U. S. 214; *Stone*

v. *United States*, 164 U. S. 380, and, like every other special verdict, they must contain of and in themselves, without the slightest reference to the testimony, or by any process of piecing together, every essential fact necessary for the resultant judgment. The special verdict is one by which the facts are found and the law is submitted to the judges. A special verdict, in order to sustain the judgment, must pass upon all the material issues made in the pleading, so as to enable a court to say, upon the pleadings and verdict, without looking at the evidence, which party is entitled to a judgment. *Ward* v. *Cochran*, 150 U. S. 507, 608; *Prentiss* v. *Zane's Administrator*, 8 How. 370, 483; *Hodges* v. *Easton*, 106 U. S. 408; *Newbegin* v. *The National Bank*, 26 U. S. App. 712.

The surrender of the duplicate receipt is, by the statute, made an essential prerequisite of the repayment of the purchase money, *Hoffeld* v. *United States*, 186 U. S. 273, 278, and the court nowhere found that the duplicate receipts were ever in the possession of the appellee or ever surrendered by it, as required by the statute.

This mortgagee is not an assignee of the original entryman and is not entitled to the repayment of this purchase money under the provisions of the act of June 16, 1880. The land in question being situated in the State of Montana, the mortgage given upon it is to be construed and dealt with in accordance with the laws of that State on that subject. See Montana Annotated Civil Code, vol. 1, §§ 3810 *et seq.*

Mr. William R. Andrews for appellee:

The allowance of the claim by the Secretary of the Interior is conclusive in the absence of fraud and mistake. *Woolner* v. *United States*, 13 C. Cl. 362; *First Nat. Bank* v. *United States*, 15 C. Cl. 228; *United States* v. *Savings Bank*, 104 U. S. 728; *Dugan* v. *United States*, 34 C. Cl. 469; *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Am. Tobacco Co.*, 166 U. S. 468; *Medbury* v. *United States*, 173 U. S. 492.

Assuming, however, that the allowance of the Secretary is

subject to review, the appellee is the assignee of the original entryman within the meaning of the act. See *Hoffeld* v. *United States*, 186 U. S. 273, holding that the "assigns" contemplated by this act are "voluntary assigns." See also *Barnard* v. *Wilson*, 74 California, 519; *Champion* v. *Hinkle*, 45 N. J. Eq. 164; *Taylor* v. *Kearn*, 68 Illinois, 344.

Relating back to the date of the mortgage the effect is the same as though the mortgagor had then transferred the certificate by absolute assignment.

The appellee is a voluntary assignee of the original entryman, and as such is entitled to the repayment of the purchase money. *Vroom* v. *Ditmas*, 4 Paige Ch. 526; *Poweshiek County* v. *Dennison*, 36 Iowa, 248; *De Haven* v. *Laudell*, 31 Pa. St. 124; *Ritger* v. *Parker*, 8 Cush. (Mass.) 149; Kerr's Supp. to Wiltsie on Mortgage Foreclosures, sec. 582; 1 Wiltsie on Mortgage Foreclosures, p. 697; 2 Jones on Mortgages, p. 548.

The Secretary of the Interior has uniformly held that the right of repayment under section 2, act of June 16, 1880, is restricted to assignees of the land, and does not extend to persons holding an assignment of the claim for the money paid on the entry. Instructions, 21 Land Decisions, 366. This uniform construction of the statute by the executive officer charged with its execution is entitled to great weight. *Edwards* v. *Darby*, 12 Wheat. 210; *United States* v. *Philbrick*, 120 U. S. 52; *United States* v. *Healey*, 160 U. S. 136; *H. & D. R. R. Co.* v. *Whitney*, 132 U. S. 366.

The provision of the act itself, which requires the execution of a relinquishment of all claim to the land, clearly shows that the assignees entitled to repayment are the grantees of the land. It would be an absurdity to require a mere personal assignee, who never claimed any interest in the land, to relinquish all claim to the land.

Mr. Justice McKenna delivered the opinion of the court.

The question involved in this case is whether a mortgagee

who has foreclosed his mortgage and purchased the property mortgaged at sheriff's sale under a decree of the court is an assignee of the owner of the land within section 2 of an act of Congress approved June 16, 1880. 21 Stat. 287.

The section reads as follows:

"SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made the entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office, and in all cases where parties have paid double minimum price for land which was afterwards found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns."

It is provided by the rules of the General Land Office that application for repayment under this section shall be accompanied by a duly executed deed, where the title has become a matter of record, relinquishing to the United States all right and claim to the land under the entry or patent.

The case is this: In 1888 one Amanda Cormack made settlement upon one hundred and sixty acres of land in the Helena land district of Montana, and paid $200, being at the rate of $1.25 per acre. Subsequently, May 10, 1890, she borrowed from the Northwest Guarantee Loan Company $300, and gave her note therefor, due in three years, and secured the note by a mortgage on the land. On January 9, 1890, the said company assigned the note and mortgage to the Commonwealth Title Insurance Company, the appellee. The instruments were all duly recorded.

July 8, 1890, the General Land Office informed the local office that 120 acres of the land entered had been recommended and selected for reservoir purposes, and on August 16, 1894, the Commissioner of the General Land Office cancelled all of the land entered except the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28, as being in conflict with the Box Elder Reservation system. Subsequently appellee brought suit to foreclose said mortgage, and such proceedings were had therein that on August 16, 1897, the mortgaged property was duly sold to appellee for $200, and a sheriff's deed duly executed and delivered to appellee.

Thereafter appellee applied to the Commissioner of the General Land Office for the repayment to him of the sum of $150, being $1.25 per acre paid by Amanda Cormack for the 120 acres cancelled. The application was refused by the Commissioner. The Secretary of the Interior reversed the ruling and allowed the repayment upon the relinquishment by appellee of all claim to the land so cancelled. The relinquishment was duly made and the claim was transmitted to the Treasury Department for final settlement. The Auditor of that Department for the Interior Department passed the claim, but the decision was reversed, and the claim was finally disallowed by the Comptroller.

The Court of Claims rendered judgment for appellee for the amount claimed, to wit, $150. 37 C. Cl. 532.

Section 2 of the act of 1880 was considered by this court in *Hoffeld* v. *United States*, 186 U. S. 273. We there distinguished between a voluntary assignment and one created by operation of law. The former "takes the property," it was observed, "with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a *bona fide* purchaser with respect thereto."

Is a mortgagee within the principle? A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance. By more modern law and

under the statutes of many States a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as "both a lien in equity and a conveyance at law." Pomeroy, § 1191. The interest of a mortgagee in the land is therefore conveyed to him by the mortgagor, and even if under the laws of Montana a mortgage is primarily security for a debt and creates a lien only it is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law, but it is the act of the law consummating the act of the mortgagor. And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagor. And for the purpose of this case we need go no farther in elaboration of the legal attributes of a mortgage. We regard the word "assigns," as used in the statute, as one who derives from the original entryman by the voluntary act of the latter. We regard also the right conferred by the statute as attaching to the land—a kind of warranty upon the part of the United States to restore the consideration paid for the land if the contingencies expressed in the statute occur.

It is insisted, however, that all of the conditions of the repayment have not been complied with; that there has not been a surrender of the duplicate receipt as provided by the statute. *Hoffeld* v. *United States*, *supra*. There is certainly no direct finding to that effect. There is a finding, however, that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so cancelled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office."

We must presume that the Secretary did his duty and exacted the performance of all the statute required, and infer, therefore, that he had received the duplicate receipt, and all that was necessary to fulfill the conditions of the statute and revest the title in the United States to the land cancelled.

Judgment affirmed.

WRIGHT *v.* MINNESOTA MUTUAL LIFE INSURANCE COMPANY.

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

No. 178. Argued March 15, 1904.—Decided April 4, 1904.

An insurance association organized on the assessment plan, with the consent of a majority of the policy holders and the approval of the state superintendent of insurance changed its business from the assessment to the regular premium basis under a state law permitting the change, and providing that nothing in it should impair the obligation of any contract; the original articles provided for their amendment except as to one article which was not altered or affected by the change. In an action brought by two dissatisfied holders of policies issued on the assessment basis to have the company wound up and its assets distributed on the ground that their original contract was impaired by reason of the change permitted by the state statute.

Held, that it is not every change in the charter of a corporation that will work such a departure from the purposes of its creation as to forfeit obligations incurred to it, or prevent its carrying on the modified business.

Held, that there was no vested right in a policy holder to have the original plan continued, that constituted a contract, nor did the state statute impair or operate to impair the obligation of any contract, within the meaning of the impairment clause of the constitution.

THIS case originated in a bill filed in the Circuit Court seeking to declare a dissolution of the insurance company, the sequestration of its assets, and have a receiver appointed with a view to winding up the affairs of the association. On the sixth of August, 1880, an insurance association was organized under the laws of Minnesota, known as the Bankers Association; afterwards, in 1884, its name was changed to the Bankers Life Association of Minnesota. The general purposes of the association were to secure benevolent and fraternal coöperation between its members, and pecuniary assistance, to the families of its deceased members and other designated beneficiaries. Its

general plan of operation was declared to be to assess and collect from its members and to pay over to the beneficiaries certain stipulated sums to be secured to them by sufficient pledges of money, which should be kept invested in United States registered bonds. Male persons, not less than eighteen years nor over fifty-five years of age, approved by the medical director, were eligible to membership upon a deposit of as many dollars as such person was years of age, as a part of the "guaranty trust fund," which fund was to be a pledge to secure payment to be made by the association upon the death of members, and was to belong to the association; also a membership fee equal to half the guaranty deposit, and the proportion of the annual expense assessment for the year was required. It was provided:

"Each member of this corporation shall pay thereto, on the last secular day of September, in each year, an assessment equal to fifteen per cent on his contribution to the 'guaranty trust fund,' to meet the operating expenses, and to be known as his 'annual dues'; and upon the death of any member each surviving member shall also pay to said corporation, on demand, an assessment equal to two per cent on his contribution to said 'guaranty trust fund,' and out of this sum, obtained from said last-named assessment, which shall be known as the 'mortuary assessment,' there shall be paid to such beneficiary as is designated in the membership certificate the sum of money in the said certificate named.

"All assessments upon members of this corporation shall be apportioned among all members thereof *pro rata*, that is to say, in proportion to the amount that each member has paid into said guaranty trust fund. All assessments due or to be paid to this corporation shall be paid to such officers or persons and at such places as the said board of trustees shall name and specify. In order to secure prompt payment of all losses occasioned by death of its members and to avoid unreasonable expense incident to the making and collection of assessments and to promote the convenience of all parties, said assessments

need not be made on account of such death loss separately, but may be made at stated intervals as said board of trustees may direct, to provide for all or any death losses of said corporation that have taken place prior to the making of any such assessment or assessments. Any assessment for the purpose of paying any death losses shall uniformly be two per cent of each surviving member's contribution to said 'guaranty trust fund' for each such death loss, and in case any such assessment shall produce a gross amount in excess of the amount needed to pay such death losses, then such excess may be used to discharge death losses subsequently occurring."

Article X provides as follows:

"All amounts pledged to this company to secure payments of assessment, occasioned by death of the members shall be used only for that purpose and meanwhile the same shall be and remain invested in United States registered bonds, and shall constitute and be known as 'the guaranty trust fund.' Such bonds shall be made payable to this company and shall be transferable or convertible only upon resolution of its board of trustees, and such board shall have the exclusive charge and control thereof.

"All interest realized from such bonds shall meanwhile be used to defray the company's operating expenses.

"This article shall never be amended, or in any way at all changed, without the consent of every member of this company, to be given in writing signed by him, and filed with the company's secretary, and reciting in full the proposed amendment or change."

It was provided that amounts payable to beneficiaries should be collected by the company from its members, and in case of death or default on the part of any member in payment of his assessments, the association might use his deposit in the guarantee fund to pay death losses in such manner as it might deem best, such use not to work a payment of any assessment as against the defaulting member.

Upon the death of a member the beneficiary was to receive

a sum equal to two per cent of the then subsisting guaranty trust fund, not exceeding, however, two thousand dollars upon each full membership, and not exceeding in any case six thousand dollars. Power to amend the articles was vested in the trustees (except as therein otherwise provided), and they were to direct, manage and control the business of the company.

Wright became a member of the company on December 10, 1892, and Truby on March 13, 1893. On December 24, 1898, the board of trustees adopted amended articles of association and by-laws. The amended articles declared that the by-laws shall contain provisions which shall operate to preserve, continue, guard and protect all of the existing rights and privileges of and promises and pledges to persons who were members at the time the amended articles became operative.

Under the new articles a form of policy was issued, known as the "guaranteed option policy." These policies were issued to new holders, and members under the assessment plan were permitted to transfer their membership so as to receive such policies, which required the payment by the insured of a stipulated annual premium in advance. The premiums were figured upon certain tables of mortality, and approximate those which would have been charged by an old line company on the legal reserve basis. This form of policy contained a condition providing that if the fund derived from such policies shall be reduced below the amount of the reserve, the company may require the insured to pay his just proportion of the deficiency within sixty days after written request therefor; or, at the option of the company, such proportion, with compound interest thereon at the rate of four per cent per annum, may be charged as a lien against the policy and any sum which may become payable thereunder. And in another form of policy it was stipulated that if unexpected losses and expenses shall be found to have reduced the funds derived from such policies below the amount of the reserve, the company shall have the right to apportion the deficiency ratably against it and each similar

policy in proportion to its reserve, and the amount so proportioned against each policy to be an indebtedness thereon, bearing interest at four per cent per annum thereon until paid by dividends or otherwise.

Afterwards, at a regular meeting and as provided in the laws of Minnesota, General Laws of Minnesota of 1901, chapter 143, the company, on August 5, 1901, accepted the provisions of the statute making the company a regular reserve company, with a policy on which a stated premium is paid and a fixed sum is payable at death to the beneficiaries of the insured. The name of the company was changed to the Minnesota Mutual Life Insurance Company.

Section 21 of the act provides, among other things, "Any insurance company, not excepting companies transacting life or casualty business on the mortuary assessment or stipulated premium plan, or either thereof, may qualify and be governed by this chapter, anything in its special charter to the contrary notwithstanding. Provided, that nothing herein contained shall impair or operate to impair the obligation of any contract; and provided further, that after such qualification the company qualifying shall be governed solely by the act; and provided further, that nothing in this act contained shall apply to any town insurance, mortuary assessment, or stipulated premium company, unless and until it shall accept and qualify under the provisions hereof; and provided further, that notice of the acceptance of said act be filed with the insurance commissioner."

Section 1 of the by-laws of the reorganized company provides:

"SEC. 1. To the extent necessary to protect and continue the rights and privileges of any member holding a mortuary assessment certificate, and to preserve and secure the fulfillment of all contract obligations to him, and to continue and perpetuate in the company the power and authority to levy assessments and to do and perform all and everything necessary or expedient to enable it to carry out the mortuary assessment con-

tracts in accordance with the terms thereof and with the law and present by-laws in such case made and provided, the present and existing by-laws shall continue in full force and effect."

A large amount of business has been done on the new plan, and the record discloses that the company has kept its contracts, is solvent, and doing business in many States.

Mr. John F. Byers for appellants.

Mr. William D. Mitchell, with whom *Mr. Jared How, Mr. Carl Thayer* and *Mr. Timothy R. Palmer* were on the brief, for appellee.

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

This is a bill on the part of two dissatisfied holders of certificates, issued while the company was doing business on the assessment plan, to wind up the affairs and distribute the assets of what appears, so far as the record discloses, to be a solvent and prosperous mutual insurance company with which others in interest are apparently satisfied. The Federal right alleged to be invaded, and the one adjudicated upon, which gives a right of direct appeal prosecuted from the decree dismissing the bill to this court, is the constitutional guaranty against the impairment of the obligation of a contract contained in section 10 of Article I of the Constitution of the United States. The complaining certificate holders allege that the laws of Minnesota, under which the changes in the plan of the insurance business done by the defendant company were made, from the assessment to the legal reserve, flat premium plan of "old line" insurance, work a violation of that provision. As this is the groundwork of the bill in the Federal court, it becomes necessary to make a case duly invoking protection of rights secured by the Federal Constitution. The statute in question expressly

provides that it shall not operate to impair the obligation of any contract. In view of the argument that the act must necessarily have that effect, we inquire whether there was a contract with the certificate holders that the plan of insurance should never be changed. It is to be observed that the right of amendment of the articles of association, except in one particular, was reserved in the original articles of association. In article 10 it was provided that the amounts pledged to secure payment of assessments occasioned by the death of members should be used only for that purpose, and the same should remain invested in United States registered bonds. This article, it was expressly provided, should never be amended or in any way changed, without the written consent of every member of the company. It appears that in the changes through which this company has passed this article has not been amended, and the fund has remained intact for the uses and purposes stated. It is not every change in the charter or articles of association of a corporation that will work such a departure from the purposes of its creation as to forfeit obligations incurred to it or prevent the carrying on of the modified business. A radical departure affecting substantial rights may release those who had come into the corporation on the basis of its original charter.

There is much discussion in the authorities as to when a charter amendment is of that fundamental character that a majority of the members or stockholders cannot bind the minority by agreeing to a change in the nature of the business to be carried on or the purposes and objects for which the corporation was created. Each case depends upon its own circumstances, and how far the right of amendment has been impliedly or expressly reserved in the creation of corporate rights. It would be unreasonable and oppressive to require a member or stockholder to remain in a corporation whose fundamental purposes have been changed against his will. On the other hand, where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes

which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right. *Nugent* v. *The Supervisors*, 19 Wall. 241, 251; *Picard* v. *Hughey*, 58 Ohio St. 577; *Miller* v. *Insurance Company*, 92 Tennessee, 167, 185; *Supreme Lodge Knights of Pythias* v. *Knight*, 117 Indiana, 489.

In the present case we have by express stipulation the right to amend the articles, with the reservation noted as to article 10. Nor does it appear that the changes were arbitrarily made without good and substantial reason. The testimony in this record discloses that the experience of this assessment insurance company was not anomalous or unusual. It was a case of history repeating itself. Insurance payable from assessments upon members may begin with fine prospects, but the lapse of time, resulting in the maturing of certificates, and the abandonment of the plan for other insurance by the better class of risks, has not infrequently resulted in so increasing assessments and diminishing indemnity as to result in failure. The testimony that such was the history of this enterprise is ample. The changes of 1898 to a plan of issuing, in exchange for certificates and upon new business, a policy having some of the features of old line insurance, seems to have been fully justified by the state of the company's business. And the subsequent change to a policy with straight premiums and fixed indemnity was approved by the majority of the members upon proceedings had under the Minnesota statute, and has resulted in a successful business and a considerable change of the members to the new and more stable plan. It does not appear that any certificate has been unpaid, nor is any failure shown to levy assessments required under the original articles.

It is doubtless true that the assessments have increased owing to the lesser number subject to assessment and the death of

members. What would have been realized from assessments had there been no change of plan is matter of conjecture. The business is still that of mutual insurance, notwithstanding changed methods of operation. The new plan has been legally adopted and approved by the insurance commissioner of the State. The argument for appellants is that, having begun as an assessment company, the plan can never be changed without the consent of all interested. But we have seen that the right of amendment was given in the original articles of association. There was no contract that the plan of insurance should never be changed. On the contrary, it was recognized that amendments might be necessary. There was no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members. We are cited to the statutes of many States authorizing similar changes and transfer of membership, but to no case holding legislative authorization of a change of this character to work the impairment by the State of the obligation of a contract.

The courts are slow to interfere with the management of societies, such as this mutual insurance company. While the rights of members will be protected against arbitrary action, such organizations will ordinarily be left to their own methods of action and management. The changes under consideration were made in good faith and have been accepted by many of the old members as well as those who have taken policies since the changes in plan have been made. In our view of the case the law of Minnesota did not impair the obligation of any contract, nor were the changes in the method and plan of this company beyond its corporate powers. There is much testimony in the record as to the good faith of this proceeding and the motives of the complainants in bringing it, which we do not deem it necessary to consider, as the conclusions announced dispose of the case in favor of an affirmance of the judgment.

Judgment affirmed.

OPINIONS PER CURIAM, ETC., FROM FEBRUARY 23, 1904, TO APRIL 4, 1904.

No. —. Original. *Ex parte.* IN THE MATTER OF ARTHUR P. SCHOFIELD, PETITIONER. February 29, 1904. Motion for leave to file petition for a writ of habeas corpus denied. *Mr. John Burke* and *Mr. Guy C. H. Corliss* for petitioner in support of motion. *Mr. Solicitor General Hoyt* opposing.

No. 485. INTERNATIONAL TRUST COMPANY, PLAINTIFF IN ERROR, *v.* JOHN W. WEEKS, AGENT, ETC. In error to the United States Circuit Court of Appeals for the First Circuit. Motion to dismiss submitted February 29, 1904. Decided March 7, 1904. *Per Curiam.* Dismissed for the want of jurisdiction. *McLish* v. *Roff*, 141 U.S. 661; *Kirwan* v. *Murphy*, 170 U. S. 205, 209; *Kingman* v. *Western Manufacturing Company*, 170 U. S. 675; *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130. *Mr. Eugene P. Carver*, *Mr. Edward E. Blodgett* and *Mr. G. Philip Wardner* in support of motion. *Mr. Robert M. Morse* and *Mr. William M. Richardson* opposing.

No. 512. OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KY., APPELLANT, *v.* CITY OF OWENSBORO, KY. Appeal from the Circuit Court of the United States for the Western District of Kentucky. Submitted February 29, 1904. Decided March 7, 1904. *Per Curiam.* Decree affirmed with costs, on the authority of *City of Joplin* v. *Southwest Missouri Light Company*, 191 U. S. 150. *Mr. William T. Ellis* and *Mr. J. D. Atchison* for appellant. *Mr. Reuben A. Miller*, *Mr. Geo. W. Jolly*, *Mr. Charles S. Walker* and *Mr. Robert S. Todd* for appellee.

No. 191. SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MARY L. BEACH, ADMINISTRATRIX, ETC. In error

to the Supreme Court of the State of North Carolina. Submitted March 18, 1904. Decided March 21, 1904. *Per Curiam.* Judgment reversed with costs, on the authority of *Southern Railway Company* v. *Allison,* 190 U. S. 326, and cause remanded for further proceedings. *Mr. F. H. Busbee, Mr. W. A. Henderson* and *Mr. Charles Price* for plaintiff in error. No appearance for defendant in error.

No. 192. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* TOWN OF PLYMOUTH ET AL. In error to the Supreme Court of Errors of the State of Connecticut. Submitted March 16, 1904. Decided March 21, 1904. *Per Curiam.* Dismissed for the want of jurisdiction, on authority of *Sayward* v. *Denny,* 158 U. S. 180; *Layton* v. *Missouri,* 187 U. S. 356; *Hooker* v. *Los Angeles,* 188 U. S. 314; *Ansbro* v. *United States,* 159 U. S. 695; *New York and New England Railroad Company* v. *Bristol,* 151 U. S. 556. *Mr. William F. Henney* for plaintiff in error. *Mr. Charles E. Perkins* and *Mr. Samuel A. Herman* for defendants in error.

No. 193. M. J. COVENTRY ET AL., PLAINTIFFS IN ERROR, *v.* J. W. DAVIS ET AL. In error to the Supreme Court of the State of Kansas. Submitted March 18, 1904. Decided March 21, 1904. *Per Curiam.* Dismissed for the want of jurisdiction, on authority of *New Orleans Waterworks Company* v. *Louisiana,* 185 U. S. 336; *Sayward* v. *Denny,* 158 U. S. 180. Case reported in state court, 65 Kansas, 557. *Mr. Eugene F. Ware* for the plaintiffs in error. *Mr. J. D. McCleverty* and *Mr. W. P. Dillard* for defendants in error.

Decisions on Petitions for Writs of Certiorari from February 23, 1904, *to April* 4, 1904.

No. 570. PAUL E. BERGER ET AL., PETITIONERS, *v.* GEORGE A. FULLER. February 23, 1904. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James H. Peirce, Mr. George P. Fisher, Jr.*, and *Mr. William Henry Dennis* for petitioners. *Mr. Douglas Dyrenforth* for respondent.

No. 572. NILS O. LINDSTROM, ADMINISTRATOR, ETC., PETITIONER, *v.* INTERNATIONAL NAVIGATION COMPANY. February 23, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Lloyd Hollister* and *Mr. H. Randall Webb* for petitioner. *Mr. Henry Galbraith Ward* for respondent.

No. 576. M. H. MOMSEN, CLAIMANT, ETC., PETITIONER, *v.* NATIONAL DREDGING COMPANY. February 23, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Parker Kirlin, Mr. Harry Pillans* and *Mr. Charles R. Hickox* for petitioner. *Mr. Gregory L. Smith* and *Mr. H. T. Smith* for respondent.

No. 577. CHARLES GRING, PETITIONER, *v.* WILLIAM J. MCILVAINE, OWNER, ETC., ET AL. February 23, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James E. Heath, Jr.*, for petitioner. *Mr. Robert M. Hughes* for respondent.

No. 579. G. B. HUNTER ET AL., PETITIONERS, *v.* DAMPSKIBSSELSKABET "TELLUS," ETC., ET AL. February 29, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Milton Andros* for petitioners. *Mr. Charles Page* and *Mr. E. J. McCutchen* for respondents.

No. 589. TWEEDIE TRADING COMPANY, PETITIONER, *v.* NEW YORK AND BOSTON DYEWOOD COMPANY. February 29,

1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Everett P. Wheeler* for petitioner. *Mr Wilhelmus Mynderse* for respondent.

No. 590. CIMIOTTI UNHAIRING COMPANY ET AL., PETITIONERS, *v.* AMERICAN FUR REFINING COMPANY ET AL. February 29, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. John W. Griggs* and *Mr. Louis C. Raegener* for petitioners. *Mr. Henry Schreiter* for respondents.

No. 591. UNITED STATES, PETITIONER, *v.* SING TUCK OR KING DO ET AL. February 29, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, Mr. Solicitor General Hoyt* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. Robert M. Moore* for respondents.

No. 365. JESSE CARR, PETITIONER, *v.* MODERN WOODMEN OF AMERICA. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Isaac N. Flickinger* for petitioner. *Mr. C. G. Saunders* for respondent.

No. 564. THOMAS A. KELLEY ET AL., PETITIONERS, *v.* CUNARD STEAMSHIP COMPANY (LIMITED). March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William R. Sears* and *Mr. A. B. Browne* for petitioners. *Mr. George Putnam* for respondents.

No. 573. JULIUS KING OPTICAL COMPANY, PETITIONER, *v.* FREDERICK F. BILHOEFER ET AL. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Second Circuit denied. *Mr. H. Albertus West* for petitioner. *Mr. Wm. C. Strawbridge* for respondents.

No. 586. OSCAR HAMPTON STEVENS, PETITIONER, *v.* RICHMOND SMITH ET AL. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. C. McDougal* for petitioner. No appearance for respondents.

No. 587. RUDOLPH H. LANGE, PETITIONER, *v.* UNION PACIFIC RAILWAY COMPANY. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. T. Wells* for petitioner. *Mr. Willard Teller*, *Mr. Clayton C. Dorsey* and *Mr. W. R. Kelly* for respondent.

No. 592. CITY NATIONAL BANK OF GREENVILLE, S. C., PETITIONER, *v.* RICHMOND GUANO COMPANY. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. H. J. Haynsworth* for petitioner. *Mr. Julius H. Heywood* for respondent.

No. 601. ATLANTIC TRANSPORT COMPANY, CLAIMANT, PETITIONER, *v.* FRANCIS E. DODGE ET AL. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioner. *Mr. Wilhelmus Mynderse* for respondents.

No. 602. EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, PETITIONER, *v.* KENNEDY J. HANLEY. March 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr.*

George Turner and *Mr. W. B. Heyburn* for petitioner. *Mr. John R. McBride* and *Mr. M. A. Folsom* for respondent.

No. 612. ATLANTIC LUMBER COMPANY ET AL., PETITIONERS, *v.* L. BUCKI & SON LUMBER CO. ET AL. March 14, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard H. Liggett* for petitioners. *Mr. H. Bisbee*, *Mr. James E. Padgett* and *Mr. George C. Bedell* for respondents.

No. 605. WESTERN UNION TELEGRAPH COMPANY, PETITIONER, *v.* PENNSYLVANIA RAILROAD COMPANY ET AL. March 21, 1904. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. H. D. Estabrook*, *Mr. Rush Taggart* and *Mr. John F. Dillon* for petitioner. *Mr. John G. Johnson* for respondents.

No. 595. RIVERDALE COTTON MILLS, PETITIONER, *v.* ALABAMA AND GEORGIA MANUFACTURING COMPANY ET AL. March 21, 1904. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Thomas H. Watts*, *Mr. Louis D. Brandeis* and *Mr. Wm. H. Dunbar* for petitioner. *Mr. John T. Morgan* and *Mr. Marion Erwin* for respondents.

No. 621. D. N. HOLDEN ET AL., PETITIONERS, *v.* J. A. STRATTON, TRUSTEE. March 21, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Wm. E. Humphrey* and *Mr. P. P. Carroll* for petitioners. *Mr. Frederick Bausman* for respondent.

No. 599. LINDLEY E. SINCLAIR, PETITIONER, *v.* DISTRICT OF COLUMBIA. March 21, 1904. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia

denied. *Mr. C. C. Cole* and *Mr. J. J. Darlington* for petitioner. *Mr. A. B. Duvall* and *Mr. E. H. Thomas* for respondent.

No. 604. WESTERN ASSURANCE COMPANY OF TORONTO, PETITIONER, *v.* WILLIAM H. HALLIDAY ET AL. March 21, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Hartwell Cabell* and *Mr. Jackson H. Ralston* for petitioner. *Mr. Edward L. Taylor, Jr., Mr. Carl T. Webber* and *Mr. A. T. Seymour* for respondents.

No. 619. JOHN P. VIRDIN, ETC., PETITIONER, *v.* STEAMER ANSGAR, ETC.; and No. 620. JOHN P. VIRDIN, ETC., PETITIONER, *v.* OSCAR ELLEFSEN, MASTER, ETC. March 21, 1904. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Horace L. Cheyney* and *Mr. John F. Lewis* for petitioner. *Mr. Frederick M. Brown* for respondents.

No. 598. KELLER TOOL COMPANY ET AL., PETITIONERS, *v.* JOSEPH BOYER. April 4, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Hayward Fairbanks, Mr. Hector T. Fenton* and *Mr. William A. Maury* for petitioners. *Mr. John R. Bennett* for respondent.

No. 610. E. J. ROBERTS, PETITIONER, *v.* THE UNITED STATES. April 4, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cecil H. Smith* and *Mr. Frank Lee* for petitioner.

No 618. THE UNITED STATES EX REL. FRANK B. EDWARDS, LIEUTENANT OF ARTILLERY, UNITED STATES ARMY, PETITIONER, *v.* ELIHU ROOT, SECRETARY OF WAR, ET AL. April 4,

1904. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Joseph W. Catharine* for petitioner. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM FEBRUARY 23, 1904, TO APRIL 4, 1904.

No. 594. ROBERT MILLER, SPECIAL MASTER, ETC., PLAINTIFF IN ERROR, *v.* NORTHERN ASSURANCE COMPANY. In error to the District Court of the United States for the District of Porto Rico. February 23, 1904. Docketed and dismissed with costs, on motion of *Mr. J. S. Flannery* for the defendant in error. No one opposing.

No. 213. SAMUEL FARQUHUAR ET AL., PLAINTIFFS IN ERROR, *v.* EDWARD W. PRESHO ET AL., STREET COMMISSIONERS OF BOSTON. In error to the Supreme Judicial Court of the State of Massachusetts. February 23, 1904. Dismissed with costs, per stipulation. *Mr. Elmer P. Howe* for plaintiffs in error. *Mr. Thomas M. Babson* for defendants in error.

No. 536. L. C. SHATTUCK, APPELLANT, *v.* MARTIN COSTELLO. Appeal from the Supreme Court of the Territory of Arizona. March 1, 1904. Dismissed with costs, on motion of counsel for the appellant. *Mr. William H. Barnes* for the appellant. No appearance for appellee.

No. 184. DELBERT B. GRAY, PETITIONER, *v.* UNION CASUALTY AND SURETY COMPANY. March 4, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit dismissed for the want of prosecu-

tion. *Mr. Ira J. Williams* for petitioner. *Mr. Maurice W. Sloan* for respondent.

No. 179. WARD ROPER ET AL., PLAINTIFFS IN ERROR, *v.* A. C. SCURLOCK ET AL. In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. March 7, 1904. Dismissed with costs, on motion of *Mr. George Clark* for the plaintiffs in error. *Mr. George Clark* for plaintiffs in error. *Mr. C. K. Bell* for defendants in error.

No. 276. AMERICAN PRESS ASSOCIATION, APPELLANT, *v.* DAILY STORY PUBLISHING COMPANY. Appeal from the United States Circuit Court of Appeals for the Seventh Circuit. March 7, 1904. Dismissed on authority of counsel for appellant. *Mr. A. H. Veeder* for appellant. No appearance for appellee.

No. 543. MAURICE RUNKLE, APPELLANT, *v.* WILLIAM HENKEL, UNITED STATES MARSHAL. Appeal from the Circuit Court of the United States for the Southern District of New York. March 7, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles A. Douglas* for appellant. *The Attorney General* for appellee.

No. 639. LEUNG SING, OR LONG SING, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Eastern District of New York. April 4, 1904. Docketed and dismissed and mandate granted, on motion of *Mr. Solicitor General Hoyt* for the appellee. No one opposing.

No. 640. ALEXANDER K. CONEY, APPELLANT, *v.* CONTINENTAL BUILDING AND LOAN ASSOCIATION. Appeal from the District Court of the United States for the Northern District

of California. April 4, 1904. Docketed and dismissed with costs, on motion of *Mr. Thomas H. Clark* for the appellee. No one opposing.

No. 567. HELEN POTTS HALL, APPELLANT, *v.* THE FIRST NATIONAL BANK OF BRIDGEPORT ET AL. Appeal from the Circuit Court of the United States for the District of Connecticut. April 4, 1904. Dismissed, per stipulation. *Mr. Daniel Davenport* for appellant. *Mr. George P. Carroll* for appellees.

INDEX

to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition. *Ib.*

6. *Powers of Congress to enact.*

Congress has the power to establish rules by which interstate and international commerce shall be governed, and by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce. The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce. Under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question. Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. If in the judgment of Congress the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men. When Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. Subject to such restrictions as are imposed by the Constitution upon the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce. *Ib.*

7. *Power of State creating corporation.*

No State can, by merely creating a corporation, or in any other mode, project its authority into other States, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress. *Ib.*

B. Construction of—Opinion by Brewer, J.

1. *Unreasonable restraints only, within—Corporate rights compared with those of individuals.*

(*a*) The act of July 2, 1890, was leveled, as appears by its title, at only unlawful restraints and monopolies. Congress did not intend to reach

CASES DISTINGUISHED.

Anderson v. *United States*, 171 U. S. 604, distinguished from *Montague* v. *Lowry*, 38.

Hopkins v. *United States*, 171 U. S. 578, distinguished from *Montague* v. *Lowry*, 38.

CASES FOLLOWED.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, followed in *Montague* v. *Lowry*, 38, and in *Northern Securities Co.* v. *United States*, 197.

Anderson v. *United States*, 171 U. S. 604, followed in *Northern Securities Co.* v. *United States*, 197.

Barney v. *City of New York*, 193 U. S. 430, followed in *Huntington* v. *City of New York*, 441.

Burgess v. *Seligman*, 107 U. S. 20, followed in *Great Southern Hotel Co.* v. *Jones*, 532.

Cherokee Fund Cases, 117 U. S. 288, followed in *Delaware Indians* v. *Cherokee Nation*, 127.

Gloucester Water Co. v. *Gloucester*, 193 U. S. 580, followed in *Newburyport Water Co.* v. *Newburyport*, 561.

Hopkins v. *United States*, 171 U. S. 578, followed in *Northern Securities Co.* v. *United States*, 197.

Jaquith v. *Alden*, 189 U. S. 78, followed in *Yaple* v. *Dahl-Millikan Grocery Co.*, 526.

Jones v. *Great Southern Hotel Co.*, 86 Fed. Rep. 370, followed in *Great Southern Hotel Co.* v. *Jones*, 533.

Louisville Trust Co. v. *Knott*, 191 U. S. 225, followed in *Bache* v. *Hunt*, 523.

Mallett v. *North Carolina*, 181 U. S. 589, followed in *Leigh* v. *Green*, 79.

Minor v. *Happersett*, 21 Wall. 162, followed in *Pope* v. *Williams*, 621.

Montague v. *Lowry*, 193 U. S. 38, followed in *Northern Securities Co.* v. *United States*, 197.

Mugler v. *Kansas*, 123 U. S. 623, followed in *Rippey* v. *Texas*, 504.

New York v. *Cook*, 148 U. S. 397, followed in *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 17.

Security Land & Exploration Co. v. *Burns*, 193 U. S. 167, followed in *Security Land & Exploration Co.* v. *Weckey*, 188.

United States v. *E. C. Knight Co.*, 156 U. S. 1, followed in *Northern Securities Co.* v. *United States*, 197.

United States v. *Joint Traffic Association*, 171 U. S. 505, followed in *Northern Securities Co.* v. *United States*, 197.

United States v. *Oregon & Cal. R. R. Co.*, 176 U. S. 28, followed in *United States* v. *Northern Pacific R. R. Co.*, 1.

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290, followed in *Northern Securities Co.* v. *United States*, 197.

CHANGE OF VENUE.

See CONSTITUTIONAL LAW, 10.

CHINESE.

Deportation of—Merchants within meaning of act of May 5, 1892.

Chinese persons who were in this country prior to May 5, 1892, and who

CORPORATIONS.

Estoppel to repudiate burdens imposed by statute under which created.

Purchasers of a railroad, not having any right to demand to be incorporated under the laws of a State, but voluntarily accepting the privileges and benefits of an incorporation law, are bound by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporation. *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 17.

See ANTI-TRUST ACT; COMBINATIONS IN RESTRAINT OF TRADE, 2; CONSTITUTIONAL LAW, 1, 4, 10, 11; FEDERAL QUESTION, 3; LOCAL LAW (N. Y.), (N. C.).

COURTS.

1. *Federal—Action in, to restrain holders of judgments of state courts.*

A purchaser of property sold under a decree of foreclosure in a Federal court, in cases where the Federal court by its decree retains jurisdiction to settle all liens and claims upon the property and who is in possession of the property under an order confirming the sale, can maintain an action in the same court to restrain the holders of judgments obtained in the state courts against the former owner, in actions to which the purchaser was not a party, from levying upon and selling the property described in the decree of foreclosure and the order confirming the sale thereunder. *Julian* v. *Central Trust Co.*, 93.

2. *Federal—Jurisdiction to administer laws of State independent of state court's decisions.*

The object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which would be unaffected by local prejudices and sectional views, and it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication (*Burgess* v. *Seligman*, 107 U. S. 20). Without qualifying the principles that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the State, and that the Federal court is bound to accept decisions of the state courts construing state statutes rendered prior to the making of the contract on which the cause of action is based, such duty does not exist in regard to decisions of the state court rendered after the cause of action has arisen, although before the action itself was commenced, when the Federal court in the exercise of its independent judgment reaches a different conclusion from the state court. *Great Southern Hotel Co.* v. *Jones*, 532.

3. *Federal—May restrain proceedings in state court affecting its jurisdiction.*

Where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding § 720, Rev. Stat., restrain

NATIONAL BANKS.

Stock as security for loan where no delivery—Power of bank to withhold transfer of stock of debtor repealed—Notice of lien by bank not effected by void condition in certificate.

The mere statement by a borrower from a national bank, made to the president when the loan is obtained, that his stock in the bank is security for the loan, there being no delivery of the certificates, does not amount to a pledge of the stock, nor does it give the bank any lien thereon as against one subsequently loaning on the stock in good faith and receiving the certificates as collateral. The provisions of section 36 of the National Banking Act of 1863, empowering the withholding of transfer of the stock of a shareholder indebted to the bank, were not only omitted from the National Banking Act of 1864 but were expressly repealed thereby. A provision in the charter and by-laws, and a condition in a certificate of stock, of a national bank, forbidding the transfer of stock where the stockholder is indebted to the bank, is void as repugnant to the National Banking Act and in conflict with the public policy embodied in that act, and creates no lien which the bank can enforce by refusing to transfer the stock to a holder for value in good faith. A condition in a certificate of stock of a national bank which is void under the National Banking Act will not operate as a notice to one loaning on the stock as collateral, that it is subject to a lien of the bank which will affect the right of the pledgee of having the stock transferred to him. *Third National Bank* v. *Buffalo German Ins. Co.*, 581.

NATURAL MONUMENTS.

See PUBLIC LANDS, 1.

NEGROES.

See JURISDICTION, A 4.

NOTICE.

See NATIONAL BANKS.

OATHS.

See CLERKS OF COURT.

OFFICIAL RECORDS.

See EVIDENCE, 2.

PASS.

See CARRIERS.

PATENT FOR LAND.

See PUBLIC LANDS, 1, 3.

public domain, and one who attempts to enter the land on the ground that the original entry was void, acquires no rights against one who initiates a contest in the land office and obtains a relinquishment in his favor from the original entryman. *Hodges* v. *Colcord*, 192.

3. *Northern Pacific Land Grant Acts; rights of railroad acquired under—Effect on power of disposition by Congress.*

The act of July 2, 1864, granting lands to the Northern Pacific Railroad Company did not take any lands out of the disposition of Congress until the line of the road was definitely located by maps duly required by the act, and it has been decided by this court that the Perham map of 1865 even if valid as a map of general route did not operate as a reservation. When Congress by resolution of May 31, 1870, made an additional grant to the Northern Pacific Railroad Company for a branch road to Puget Sound *via* the valley of the Columbia, the United States still had full title not reserved, granted, sold or otherwise appropriated to the lands of the new grant which fell within the lines of the former grant and on completion of the branch road the railroad company was entitled to a patent for such over-lap of said lands as it had earned. (*United States* v. *Oregon & Cal. R. R. Co.*, 176 U. S. 28, followed). *United States* v. *Northern Pacific R. R. Co.*, 1.

4. *Mortgagee as purchaser on foreclosure the assignee of owner within meaning of act of June* 16, 1880.

A mortgagee who has foreclosed his mortgage and purchased the property mortgaged at sheriff's sale under a decree of the court is an assignee of the owner of the land within section 2 of the act of June 16, 1880, 21 Stat. 287. *United States* v. *Commonwealth, etc., Trust Co.*, 651.

5. *Revesting of title in United States—Presumption of performance of duty by Secretary of the Interior.*

Where there is a finding by the Court of Claims that a relinquishment was made "as required by the rules and regulations of the Land Office," this Court will presume that the Secretary did his duty and received all receipts and whatever was necessary to revest title in the United States to the land cancelled. *Ib.*

See JURISDICTION, A 1;
STATUTES, A 2.

RAILROADS.

Duty to erect stations—Power of State to prescribe such duty.

To establish stations at proper places is the proper duty of a railroad company, and it is within the power of the States to make it *prima facie* a duty of the companies to establish them at all villages and boroughs on their respective lines. *Minn. & St. Louis R. R. Co.* v. *Minnesota*, 53.

See ANTI-TRUST ACT;
CARRIERS;
COMBINATIONS IN RESTRAINT OF TRADE, 2;
CONSTITUTIONAL LAW, 2, 5;
CORPORATIONS;
LOCAL LAW (N. C.);
PUBLIC LANDS, 3.