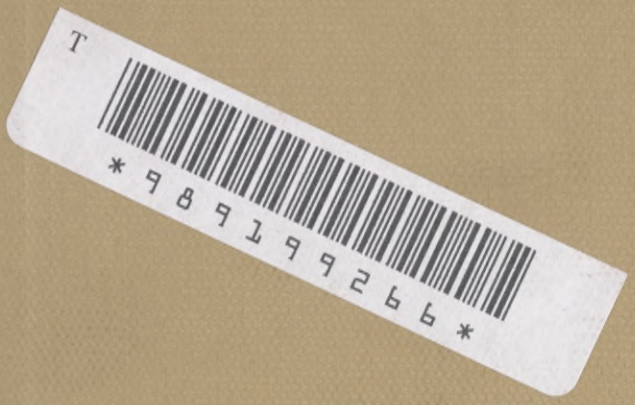

UNITED STATES REPORTS

VOLUME 194

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1903

CHARLES HENRY BUTLER

REPORTER

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

TABLE OF CONTENTS.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1903.

PEOPLE'S GAS LIGHT AND COKE COMPANY *v.* CHICAGO.

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

No. 132. Argued January 20, 1904.—Decided April 4, 1904.

Where the contract claimed to have been impaired was made with one of several corporations merged into the complainant, and concededly affects only the property and franchises originally belonging to such constituent company, divisional relief cannot be granted affecting only such property when the bill is not framed in that aspect but prays for a suspension of the impairing ordinance as to all of complainant's property.

The rule, that a special statutory exemption does not pass to a new corporation succeeding others by consolidation or purchase in the absence of express direction to that effect in the statute, is applicable where the constituent companies are held and operated by one of them, under authority of the Legislature.

Even if the asserted exemption from change of rates existed and had not been lost by consolidation, the bill cannot be sustained where no such contract rights as alleged have been impaired or destroyed by the ordinance.

THE facts are stated in the opinion of the court.

Mr. William D. Guthrie, with whom *Mr. James F. Meagher* and *Mr. William F. Sheehan* were on the brief, for appellant:

The fundamental allegation of the bill was that the ordinance of October 15, 1900, impaired the obligation of the charter

contract which bound the legislature not to authorize the city council of Chicago to compel the People's Company to furnish gas at a less rate than three dollars per thousand feet. The city claimed that it had been duly authorized to pass the ordinance under and by virtue of the City and Village Act of 1872. Hence the controversy. Thus the jurisdiction of the Circuit Court was based solely upon the ground that the suit was one arising under the Constitution of the United States. *Walla Walla Case*, 172 U. S. 1, 10; *Joplin* v. *Light Company*, 191 U. S. 150, 158.

A court of equity has jurisdiction to restrain the enforcement of a void ordinance where such relief will avoid a multiplicity of suits and where there is no sufficient or adequate remedy at law for the protection of property interests. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 381; *Walla Walla Case, supra; Wilkie* v. *City of Chicago*, 188 Illinois, 444, 446; *Cicero Lumber Co.* v. *Town of Cicero*, 176 Illinois, 9, 31, 32; *City of Chicago* v. *Collins*, 175 Illinois, 445, 451; *Chicago Public Stock Exchange* v. *McClaughry*, 148 Illinois, 372, 381, and *Third Avenue R. R. Co.* v. *The Mayor &c. of New York*, 54 N. Y. 159, 161, cited with approval in the recent case of *Hale* v. *Allinson*, 188 U. S. 56, 76. See also *Smyth* v. *Ames*, 169 U. S. 466, at pages 517–518; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 99.

Many millions of the capital of the People's Company have been invested in its plant for manufacturing and distributing gas. The State and city and the inhabitants of Chicago have had the full benefit of the contract. The provision in question is plainly a part, and an important part, of the contract between the State and the People's Company. Such an enactment is a contract and justice and good policy alike require that the protection of the law should be assured to it. *The Binghamton Bridge*, 3 Wall. 51, 74. See also *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 641; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *New Orleans Gas Co.* v. *Louisi-*

ana Light Co., 115 U. S. 650, 670; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674, 680, and other familiar cases to the same effect.

The city's consent in the ordinance of 1858 was equally extensive and embraced "*any* of the streets, avenues, highways, public parks or squares throughout said city." Such a consent extends to every existing and every new street, and is in perpetuity. *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 533, cited with approval in *Illinois Central Railroad* v. *Chicago*, 176 U. S. 646, 666. See also *Chicago Gas Light Co.* v. *People's Gas Light Co.*, 121 Illinois, 530, 538. It was, therefore, the legislature and not the city council that granted the franchise which extended to the whole city.

The complainants were entitled to partial relief, if not to all, that was prayed for.

The demurrer was general and covered the whole bill, and if any part of the bill was good, the demurrer necessarily failed and should have been overruled. Such has long been the established practice in equity. *Tivington* v. *Story*, 9 Pet. 632, 658; *Pacific R. R. of Mo.* v. *Missouri Pac. Ry.*, 111 U. S. 505, 520; *Heath* v. *The Erie Railway Company*, 8 Blatch. 347, 407; *Savannah, F. & W. Ry. Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 79 Fed. Rep. 35, 38; 1 Daniell's Ch. Pr. (6th Am. ed.) p. 579; Story's Equity Pleadings, § 443; Fletcher's Eq. Pleading & Practice, § 204; 1 Foster's Fed. Pr. § 107.

To hold now that the ordinance is nevertheless to operate only in portions of the city, depending upon the history of the pipes through which the gas is supplied, would be to decree what the city council never intended to accomplish and would be judicial legislation beyond the power of any court. *Spraigue* v. *Thompson*, 118 U. S. 90, 95; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 636; *Johnson* v. *State*, 59 N. J. L. 535, 539; *State* v. *O'Connor*, 5 N. Dak. 629, 632; *Jones* v. *Memphis*, 101 Tennessee, 188, 195; *James* v. *Bowman*, 190 U. S. 127, 140.

The presence of a substantial Federal question invests the

Circuit Court with jurisdiction to hear and determine not only the Federal, but every other, question involved in the controversy. *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Horner* v. *United States, No. 2*, 143 U. S. 570, 577; *In re Sawyer*, 124 U. S. 200, 220; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141; *Tennessee* v. *Davis*, 100 U. S. 257, 270; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Omaha Horse Ry. Co.* v. *Cable Tramway Co.*, 32 Fed. Rep. 727, 729; *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 821.

On a direct appeal from a Circuit Court under the act of 1891 in any case that involves the construction or application of the Constitution of the United States, this court is not restricted to the consideration of the Federal question but acquires jurisdiction of the entire case and of all questions involved in it. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Scott* v. *Donald*, 165 U. S. 58, 73; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105, 111; *Chappell* v. *United States*, 160 U. S. 499, 509; *Casey* v. *Houston &c. Ry. Co.*, 150 U. S. 170, 181; *Horner* v. *United States, No. 2*, 143 U. S. 570, 577; *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 32.

Municipal corporations are merely agents of the state government and the power to regulate the price of gas has not been delegated to the city council of Chicago by the legislature of Illinois. Laws of Illinois, 1871, 1872, 227, 234, 259; *Harmon* v. *City of Chicago*, 110 Illinois, 400, 411; *Chicago &c. Co.* v. *Chicago*, 88 Illinois, 221, 223; *Atkins* v. *Kansas*, 191 U. S. 207, 220; *Coquard* v. *Oquawka*, 192 Illinois, 355, 365; *Kiel* v. *Chicago*, 176 Illinois, 137, 141; *Smith* v. *Dowell*, 148 Illinois, 51, 62. See also *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 598; *Citizens' St. Ry.* v. *Detroit Railway*, 171 U. S. 48, 53; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; 22 U. S. App. 570, 590; *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39, 44, affirmed 88 Fed. Rep. 859; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Town of Drummer* v. *Cox*, 165 Illinois, 648, 650; *City of Chicago*

v. *McCoy*, 136 Illinois, 344, 353; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *City of Noblesville* v. *Noblesville Gas &c. Co.*, 157 Indiana, 162, 167; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. Rep. 436, 438; *In re Pryor, Petitioner*, 55 Kansas, 724, 727; *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 628; *Wabaska Electric Co.* v. *City of Wymore*, 60 Nebraska, 199, 202; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 291; *State ex rel. Telephone Co.* v. *City of Sheboygan*, 111 Wisconsin, 23, 38.

Where a municipality has exclusive control over its streets, it may grant rights in them upon such reasonable terms as it may see fit, including a limitation on the charges which the party using the streets may require the public to pay for the services rendered. Such a limitation of charges is merely an exercise of the contractual powers of a municipality, and has nothing whatever to do with its police power, or with any power analogous thereto. *People* v. *Suburban R. R. Co.*, 178 Illinois, 594, 604; *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 420; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 593, 598; *Decatur Gas Light Co.* v. *City of Decatur*, 120 Illinois, 67, 68.

Statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities. Dillon on Mun. Corp. § 54; *East St. Louis* v. *Maxwell*, 99 Illinois, 439, 444; *Hyde Park* v. *Oakwoods Cemetery Asso.*, 119 Illinois, 141, 148; *People* v. *Murphy*, 202 Illinois, 493, 496; *People* v. *Brown*, 189 Illinois, 619, 622; *Village of Ridgway* v. *Gallatin County*, 181 Illinois, 521, 526; *Trausch* v. *County of Cook*, 147 Illinois, 534, 537; *Gunnarssohn* v. *City of Sterling*, 92 Illinois, 569, 573; *Covington* v. *City of East St. Louis*, 78 Illinois, 548, 553; *Town of Ottawa* v. *County of La Salle*, 12 Illinois, 339, 341.

Mr. Granville W. Browning, with whom *Mr. Edgar Bronson Tolman* was on the brief, for appellee:

Appellant has no contract, either by virtue of its charter act of 1865 or of any provision of the gas consolidation act of 1897, whereby the city council is prohibited from reducing the price of gas to a reasonable sum.

The claim by such a company that it has a contract granting it immunity from regulation as to rates will not be allowed unless the surrender by the public is made by explicit and unmistakable language. The surrender will never be sustained by implication and will never be established by ambiguous terms. An ambiguous phrase must always be interpreted in favor of the public. To this effect are the following cases: *Georgia Banking Co.* v. *Smith,* 128 U. S. 174; *Freeport Water Co.* v. *Freeport City,* 180 U. S. 587; *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578; *Charles River Bridge Case,* 11 Pet. 547; *Delaware R. R. Tax Case,* 18 Wall. 225; *Stone* v. *Farmers' L. & T. Co.,* 116 U. S. 307; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *City of Covington* v. *Kentucky,* 173 U. S. 231; *Chi. Mil. & St. Paul Ry.* v. *Minnesota,* 134 U. S. 418.

The legislature has the right to fix the rates charged by those corporations serving the public, as gas companies, water companies, railroads and the like, the only limit being that, as regulated, they must be reasonable. Where the right has been reserved in the city, as in this case, the same rule prevails. *Ga. Banking Co.* v. *Smith,* 128 U. S. 174; *C. B. & Q. R. R.* v. *Iowa,* 94 U. S. 161; *Stone* v. *Farmers' Loan and Trust Co.,* 116 U. S. 307; *San Diego Land Co.* v. *National City,* 174 U. S. 739; *Covington and Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578; *Budd* v. *New York,* 143 U. S. 517; *Freeport Water Co.* v. *Freeport City,* 180 U. S. 557; *Barbier* v. *Connolly,* 113 U. S. 27; *Logansport Gas Co.* v. *City of Peru,* 89 Fed. Rep. 185; *Ruggles* v. *Illinois,* 108 U. S. 526; *Lake Shore* v. *Smith,* 173 U. S. 684; *Wisconsin, M. & P. R. R.* v. *Jacobson,* 179 U. S. 287; *Smyth* v. *Ames,* 169 U. S. 466; *Reagan* v. *Farmers' L. & T. Co.,* 154

U. S. 362; *Spring Valley Water Works* v. *Scottler*, 110 U. S. 347; *Chicago & Gd. Trunk Ry.* v. *Wellman*, 143 U. S. 339; *St. Louis & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 652; *Brass* v. *Stoeser*, 153 U. S. 391.

If the pretended immunity claimed to be derived from the act of 1865 were not wiped out by the terms of section 9, immunities from public regulation enjoyed by constituent companies do not go to consolidated companies or successor companies, or to companies that succeed by purchase, assignment, foreclosure, or any other form of transfer, except by explicit language. Such an immunity is personal to the original corporation and does not pass. Unless there is express language to the contrary in the original charter or in the statute permitting the merger, etc., immunities belonging to the old company do not pass by sale, assignment, foreclosure, merger, etc. *Memphis &c. R. R.* v. *Commissioners*, 112 U. S. 609; *Wilson* v. *Garver*, 103 U. S. 417; *Chesapeake & Ohio R. R.* v. *Miller*, 114 U. S. 176, 184; *Morgan* v. *Louisiana*, 93 U. S. 217; *Dorr* v. *Beidleman*, 125 U. S. 689; *Railroad Co.* v. *Maine*, 96 U. S. 499; *St. Louis &c. R. R.* v. *Berry*, 113 U. S. 465; *Keokuk &c. Ry.* v. *Missouri*, 152 U. S. 301; *Hoge* v. *Railroad Co.*, 99 U. S. 354; *Shields* v. *Ohio*, 95 U. S. 323; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 362; *L. & N. R. R.* v. *Palmer*, 109 U. S. 244; *Norfolk & W. R. R.* v. *Pendleton*, 156 U. S. 667; *St. L. & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 649; *Covington Turnpike Co.* v. *Sanford*, 164 U. S. 586; *Yazoo & Miss. V. Ry. Co.* v. *Adams*, 180 U. S. 1.

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

This was a bill to restrain the city of Chicago from putting in force a general ordinance passed October 15, 1900, providing that corporations, companies or persons manufacturing, selling and distributing gas in the city of Chicago for illuminating or fuel purposes should not charge individual consumers more than seventy-five cents per thousand cubic feet, and providing

penalties for violation of its provisions. The bill was demurred to, and an opinion delivered on hearing on demurrer 114 Fed. Rep. 384.

The opinion took a wider range than the bill as framed called for, because of certain facts not therein set forth, but which were admitted on the argument, and accordingly it was suggested that the bill be amended to bring in these facts, and, this having been done, the demurrer was renewed to the amended bill, whereupon, after argument, the court gave an additional brief opinion, (which appears in the record,) sustained the demurrer and dismissed the bill as amended for want of jurisdiction. Subsequently it was stipulated and agreed by and between the parties that the decree as entered did not correctly recite what was intended by the court, and that it should be amended by striking out the words "for want of jurisdiction," and inserting in lieu thereof the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois." An order was then entered by the court, amending its previous decree *nunc pro tunc* in the particulars named.

The facts presented by the amended bill were these: The People's Gas Light and Coke Company was incorporated by a special act of the general assembly of Illinois, approved February 12, 1855, creating it a corporation, with the usual powers and liabilities, with a capital stock not to exceed $500,000, and with power to manufacture and sell gas in the city of Chicago and "to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council," and by the fourth section it was expressly provided that the company should furnish and supply to the city, for its public uses, at the election of the proper authorities of the city, "a sufficient supply of gas, at a rate not exceeding two dollars per thousand feet, and the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand feet." The city council passed an ordinance, August 30, 1858,

granting the company permission and authority "to lay their gas mains, pipes, feeders and service pipes in any of the streets, avenues, highways, public parks or squares throughout said city, subject at all times, however, to the resolutions and ordinances of the common council of said city." The act of 1855 was amended February 7, 1865, so as to allow an indefinite increase of the capital stock, and by section three of this act all the corporate powers of the corporation were vested in a board of directors and such officers and agents as the board should appoint, with power to the board to "adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State," the section continuing and concluding, "and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

In 1870 a new constitution of the State of Illinois was adopted, providing that no law "making any irrevocable grant of special privileges or immunities shall be passed," Art. II, § 14; that the general assembly should not pass local or special laws "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever," Art. IV, § 22; and that no corporation should be "created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the State, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created," Art. XI, § 1.

June 5, 1897, an act was passed "in relation to gas companies," which authorized and empowered gas companies to

sell, transfer, convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and provided that by complying with the provisions of the act, gas companies doing business in the same city, town or village might consolidate and merge into a single corporation, which should be one of said merging and consolidating corporations. "The companies, parties to the agreement or agreements, which provide for consolidation and merger shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." Laws Illinois, 1897, p. 179, §§ 2, 8.

The ninth and eleventh sections read as follows:

"§ 9. Any corporation purchasing or leasing the real and personal property of any other company or companies, as provided for in section 1, or any consolidated corporation, as authorized by section 2, shall be subject to and shall perform, for each of the companies so entering into said agreement or agreements, the legal obligations now resting upon each of them, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and distinct; and such performance by said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies so selling, leasing or consolidating, of the legal obligations theretofore resting upon each of them respectively: *Provided, however,* that nothing in this act shall be construed as extinguishing said companies entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege, or immunity ever exercised or enjoyed by any of them, may be necessary

for the protection of their respective creditors or mortgagees, or any of them; the separate exercise of their respective powers, and the separate enjoyment of their separate privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require."

"§ 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:

"Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger.

"Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease or such consolidation and merger."

The People's Gas Light and Coke Company under this act became consolidated with some ten other gas companies, most of which were organized under general laws passed in pursuance of the constitution of 1870. One of them, the Chicago Gas Light and Coke Company, was incorporated by special act of February 12, 1849, amended February 9, 1855, but this contained no restriction on the right of the general assembly or the city to regulate the price of gas from time to time.

The bill quoted from the eleventh section of the act of 1897 the clause in reference to the increase of price for gas of the quality furnished consumers during any part of the year immediately preceding purchase or lease, or consolidation and merger, and alleged the fact to be that during the year immediately preceding the acquisition by complainant of the various other gas companies, complainant charged the net rate or price of one dollar per thousand cubic feet, and since the acquisition

of the plants and property of those corporations that complainant had uniformly charged the same net rate or price for gas sold by it in the city, which gas was better in quality and of higher candle power than the gas theretofore sold by the companies acquired; and complainant averred, as matter of law, that the price or rate thus fixed was a fixing and regulating by the State of the price or rate to be charged by complainant for gas supplied subsequent to the acquisition of said other companies.

The bill also set forth an agreement made between the city and the People's Gas Light and Coke Company, July 20, 1899, which recited that agreements had theretofore subsisted between the city and the People's Company, and between the city and certain other gas companies, which companies subsequently became merged into the People's Company, and provided for a continuance of the lighting of the streets on the same terms as it had been done, and for the payment by the People's Company to the city of a certain percentage of the gross receipts of the People's Company from the sales of gas during 1899, including therein the receipts from the operation of the properties of each of the gas companies consolidated with the People's Company, and for the payment by the city of amounts due or to become due to the People's Company or confession of judgment for amounts remaining unpaid; and the bill further set forth certain orders of the city between August 5, 1897, and March 11, 1901, for the laying of pipes and mains by the People's Company in the streets and avenues of the city. Certain mortgages were likewise referred to and it was alleged that bonds thereunder had been sold to parties who purchased the same in the belief that the city was prohibited by its charter from compelling the People's Company to furnish gas at a less rate than three dollars per thousand cubic feet.

The bill also averred that the People's Company, prior to the consolidation, distributed gas chiefly in the west division of the city, although its pipes and mains extended into the south

division, and that the other companies, or nearly all of them, severally had plants and were engaged in manufacturing and distributing gas in various other sections of the city.

On March 5, 1900, the city council passed an ordinance which provided "that no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used."

The jurisdiction of the Circuit Court was invoked on the ground of impairment or deprivation by the ordinance of contract rights of complainant acquired by its charter, and the bill prayed, among other things, "that it may be adjudged and decreed that by said charter of the People's Gas Light and Coke Company, the people of the State of Illinois agreed with the People's Gas Light and Coke Company, that the common council of the city of Chicago should never be authorized to compel the People's Gas Light and Coke Company to furnish gas at a less rate than $3 per thousand cubic feet, and that such contract is a valuable property right of the said People's Gas Light and Coke Company."

The Circuit Court declined to specifically dispose of complainant's contention that by the act of February 7, 1865, the State had contracted that the city should never require the company to furnish gas at a less rate than three dollars per thousand feet, because it held that the limitation or exemption, even if conceded, did not apply to the territory and rights acquired by the merger, and that the bill did not seek divisional relief, and was not framed in that aspect; while most of the consolidated companies were organized under the general incorporation law passed in pursuance of the constitution of 1870, and the right to fix reasonable rates was reserved, the works not having been installed under any explicit contract to the contrary, if such could have been entered into.

As to the clause of the eleventh section of the act of June 5,

1897, providing: "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger," the Circuit Court ruled that this did not fix a rate unalterable by either party, but a rate beyond which the consolidated companies could not go.

The Circuit Court further held that the contention that the State's power to regulate rates had not been delegated to the city was not a Federal question, and that as the ground of impairment or deprivation of contract rights acquired by the charter failed under the bill as framed, the court could not go further and decide that question in this case; while the decree, as it stands, amended by consent, in terms reserved the question to be raised in some other appropriate suit in a proper court.

In these circumstances we are constrained to decline the consideration of that question so far as it relates to the contention that power to regulate was conferred by the general law of Illinois of 1871–2 providing for the incorporation of cities and villages under which the city of Chicago as now constituted was incorporated.

But the decree dismissed the bill "as to the alleged contract rights of complainant," and in so doing the Circuit Court dealt with the alleged fixing of rates by the act of 1897 as well as with the alleged contract of 1865 that the city should not be authorized to fix a rate of less than three dollars, for although, as we have said, it was the impairment or deprivation of the latter which was made the ground of Federal jurisdiction, it was in effect as asserted to have been modified by the act of 1897. We agree with the Circuit Court that the clause of section eleven of the act of 1897, that "such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger," read according to the plain and ordinary signification of

the words, it being a general law applicable to every gas company and to every city in the State, was not intended to fix and did not fix a rate unalterable by either party, but simply a rate above which consolidated companies could not go. This disposes of it as an independent ground of relief, and leaves to be considered the provision of the amended charter of 1865, that "ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet," as affected by the act of 1897. That is to say, was the city cut off from reducing the price below one dollar, conceding the power of the State to do so?

It is contended, on the one hand, that the first part of this provision granted the city the general power to regulate the price after ten years, and that the latter part then ceased to operate as a restriction. And, on the other hand, that the whole clause constituted a contract that the general assembly would not thereafter authorize the city to fix the rate at less than three dollars. But it is expressly conceded that the general assembly possessed the power to regulate the price of gas and to prescribe reasonable rates, and that, as complainant availed itself of the act of 1897, and thereby acquired the plants of other gas companies, it can now only charge the rate it had been charging the year immediately preceding the acquisition of those properties, namely, one dollar per thousand cubic feet.

Assuming, but without intimating any opinion to that effect, that by the amended charter of 1865 the State contracted with the People's Gas Light and Coke Company that the city should not thereafter be empowered to reduce the price of gas below three dollars per thousand feet, the preliminary inquiry is whether by the consolidation that contract was extended to the plants of and territory occupied by the companies absorbed.

The Circuit Court held that it was not so extended, and that as the bill sought relief in respect of the entire plants and territory, the entire system as consolidated, it could not be maintained because there was no such contract which the ordinance impaired or destroyed.

It is said that partial relief might have been accorded unless by the consolidation the alleged exemption was lost, but the bill was not framed in the alternative, and the ordinance itself did not contemplate a divided operation, although if the exemption existed as to part of the system the ordinance would not necessarily be wholly void but might be held inoperative *pro tanto* notwithstanding serious difficulties in so applying it. See *Chesapeake and Ohio Railroad Company* v. *Virginia*, 94 U. S. 718, and cases cited.

Was the alleged exemption extended by the act of 1897, when the other companies were acquired?

Prior to that time the operations of the People's Company were practically confined to the west division of the city, and although it was empowered to lay pipes in any of the streets or avenues, this was only with the city's consent. The city in 1858 authorized the company to do this, but this was "subject at all times" to the city's resolutions and ordinances.

It is true that after the acquisition of the other companies the city compromised with the People's Company in respect of claims for gas furnished, and also ordered the company to lay mains in streets which formerly did not have them, but this action was not equivalent to consent to the extension of the alleged restriction on rates to territory acquired under the merger, with the accomplishment of which the city had nothing to do.

The act of 1897 provided that the consolidated corporation should be subject to the legal obligations of the companies taken over, and most of these were not exempt from the right of regulation, and were obliged to submit to its exercise.

By the state constitution the general assembly was forbidden to make "any irrevocable grant of special privileges or im-

munities," and the general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649; *Norfolk & Western Railroad Company* v. *Pendleton*, 156 U. S. 667; *Covington &c. Turnpike Company* v. *Sandford*, 164 U. S. 578; *Minneapolis & St. Louis Railway Company* v. *Gardner*, 177 U. S. 332; *Georgia Railroad & Banking Company* v. *Smith*, 128 U. S. 174. And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. So that the act of 1897 cannot be construed as extending any prior immunity the acquiring company possessed over the whole system of all the companies consolidated.

And if not, and the Circuit Court was right, as we think it was, in holding that under the present bill complainant's alleged exemption could not be enforced as to so much of the system as originally belonged to it, then the court was justified in declining to discuss whether by the consolidation the alleged exemption was lost altogether.

In short, agreeing with the Circuit Court, we are of opinion that the asserted immunity, (conceding it *arguendo*,) did not extend to so much of the system as passed to the consolidated company from companies not possessing such immunity in their own right; that under this bill relief could not be accorded in respect of part of the sytsem; that no contract that the price of gas should not be reduced below one dollar per thousand feet was created, nor was the alleged original exemption merely modified and extended; and that the decree dismissing the bill because there were no such contract rights as alleged impaired or destroyed by the ordinance was right.

Decree affirmed.

BROWN *v.* SCHLEIER.

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

No. 188. Argued March 18, 1904.—Decided April 4, 1904.

A national bank erected a building on leased property, the lease securing the landlord by a lien on the building and the personal obligation of bank. While a large amount of rent and taxes were unpaid the bank became insolvent, the property was not paying fixed charges; after notice to, and no objections by, the stockholders, and no creditors intervening, the bank conveyed the property with the building back to the landlord in consideration of his releasing the bank and the stockholders from all liabilities accrued and to accrue under the lease.

Held that the proceeding was not *ultra vires*, and that as the judgment of the stockholders and officers had been prudently exercised in good faith the landlord acquired title to the land and building and was not liable to account for the value of the building in an action brought by a creditor who had knowledge of, and had not protested against, the conveyance when made.

It is exceedingly disputable whether it is an abuse of discretion justifying reversal by this court, for the Circuit Court to deny a motion to file an amended bill after judgment entered.

THIS suit was brought by the predecessor of appellant in the Circuit Court of the United States for the District of Colorado to set aside a lease of certain lots in the city of Denver, Colorado, and the subsequent surrender and cancellation of said lease, as *ultra vires* of the power of the National Bank of Denver, and for an accounting, and that the amount found due on the accounting be decreed a prior lien upon the lots and the building erected thereon by the bank. The case was presented upon bill and demurrers. The demurrers were sustained and the bill dismissed. 112 Fed. Rep. 577. The ruling was affirmed by the Circuit Court of Appeals. 118 Fed. Rep. 981.

The People's National Bank of Denver was incorporated on the first of August, 1889, as a national bank under the National Banking Act. Its capital stock was $300,000, and its corporate existence to be twenty years. In September, 1889, the appellee Schleier was the owner of lots 1, 2, 3 and 4 in block 75

in the city of Denver, and on that day made a lease thereof to the bank for the period of ninety-nine years from the first day of November, 1890, with an option to extend the term for a further period of fifty years, at an annual rental of $13,975, payable monthly. The bank covenanted to remove at its expense buildings located on the lots within a designated period and to erect thereon a building four stories in height, at a cost of not less than $100,000, which should at once become part of the realty. The bank also covenanted to keep the building and premises in repair and pay all taxes thereon. And it was covenanted that in case of default in the payment of rent, taxes, or performance of other conditions, for the period of fifteen days, Schleier should have the right, after thirty days' notice, to sell and dispose of the lease and all the right and title of the bank thereunder, or to maintain personal actions for the rent or taxes he might have to pay. The heirs, representatives and assigns or successors of the parties were entitled to the benefits of the lease and were bound by its covenants.

The bank erected a building on the lots at an expense of $305,735.30, completing the same January, 1891. The building contained necessary offices for the use of the bank, which were occupied by it until it ceased to do business. The building also contained other offices and rooms which the bank rented to parties not connected with it, and to the People's Savings Bank, a corporation organized under the laws of Colorado.

On July 19, 1893, the bank being unable to pay its depositors, it was placed in the hands of the Comptroller of the Currency, and one J. B. Lazier was appointed receiver thereof, who remained in charge of its affairs until August 21, 1893. On that day the bank agreed to make a voluntary assessment to restore the impairment of its capital, and the receiver was discharged. The directors and officers of the bank then took charge of its business and conducted it until the appointment of the receiver herein.

The bill alleges that the affairs of the bank were very "much involved, mixed and commingled" with those of the People's Savings Bank, and by reason thereof the latter was unable to proceed with its business, and made a general assignment of its assets to Fermor J. Spencer, who has ever since remained in charge and control thereof. As such assignee he sued the People's National Bank and recovered a judgment for the sum of $475,825.71, which has not been paid.

In January, 1897, the bank commenced to take steps looking to a voluntary liquidation and surrender of its charter, and on or about April 27, 1897, the stockholders published a notice of the bank's intention to go into liquidation, and fixed June 27 as the last day on which claims could be presented. Prior to that day Spencer, having commenced suit against the bank for an accounting and adjustment of the matters between the banks, served a summons therein, and also having given notice to the Comptroller of the Currency of the United States of the claims and demands of the savings bank, an agreement was entered into between Spencer and the People's National Bank, whereby he agreed to refrain from taking any further steps in said suit until January 1, 1898, without prejudice by reason of the delay. The bank on its part agreed in consideration of the delay that it would "take no further action of any kind or nature whatsoever to the prejudice of the savings bank," or any action for the surrender of its charter or the disposal of its property, "to the prejudice of the savings bank."

On September 20, 1897, the People's National Bank called and gave notice of a special meeting of its stockholders, for the purpose of considering the proposition to turn over its building to Schleier, the owner of the land, and at the meeting held October 27, 1897, in pursuance of the notice, it was resolved so to do in consideration of a release by Schleier, to the bank and its stockholders from all liability which might thereafter accrue under the terms of the lease. The lease was thereupon cancelled and the premises surrendered to Schleier. This

is alleged by appellant to have been in violation of the statutes of the United States and contrary to the principles of equity governing the distribution and disposition of assets in the payment of dividends on dissolution of insolvent corporations.

It is also alleged, on information and belief, that the notice of the stockholders' meeting stated that the income of the property was less than the fixed charges, and that it was so stated at the stockholders' meeting by the officers of the bank and by Schleier's attorneys and agents, but such was not the case. On the contrary, it is alleged on information and belief, that the income of the property, even in the condition which the neglect of the bank had brought it, was sufficient to pay the rents and all charges due under the lease and keep the building in good order and repair.

The grounds of the demurrers were want of equity and laches. The demurrers were sustained and the bill ordered to be dismissed.

The judgment of dismissal was entered December 30, 1901. On February 1, 1902, appellant tendered an amended bill of complaint and moved for leave to file the same. The motion was denied. This action is assigned as error as well as the ruling on the demurrers.

Mr. James H. Brown, with whom *Mr. Harper M. Orahood* was on the brief, for appellant.

Mr. John M. Waldron, with whom *Mr. R. D. Thompson, Mr. G. C. Bartels* and *Mr. J. H. Blood* were on the brief, for appellee.

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

The bill prayed for a decree declaring the lease between the bank and Schleier and the instruments surrendering and cancelling the same to be declared void and "*ultra vires* of the acts

of Congress of the United States in respect to the powers of national banks to acquire, own and hold real estate or to be or become indebted in the exercise of corporate powers, and that no title or right, legal or equitable, could be acquired under the same or either thereof by the said defendant Schleier to the said bank building and the appurtenances thereunto belonging." An accounting was also prayed, and that the amount found due declared a lien upon the building and lots, and they be sold to satisfy the lien. The Circuit Court of Appeals regarded the bill as charging, not only the initial, but the dominant and determining wrong to be the lease, that being Schleier's participation in the alleged diversion of the bank's funds, constituting him a trustee for creditors. It was, therefore, natural for the court to observe the theory of the bill was that the lease was void, and that Schleier was liable for the damages which the creditors of the bank sustained in consequence of its execution without lawful authority. The court discussed that theory, and decided (1) that the power conferred by section 5137 of the Revised Statutes upon national banks to purchase real estate needed for their accommodation in the transaction of their business included the power of leasing property whereon to erect buildings suitable for their wants; (2) assuming the transaction to have been *ultra vires*, the complainant (appellant) was not by virtue of his office as receiver "authorized to challenge or impeach it."

Appellant now says that the conception of the bill by the Circuit Court of Appeals was incorrect, and "not only limits, but completely reverses the theory of the bill, in a manner totally inconsistent with the admitted allegations." And appellant concedes "that only the government may complain of an executed *ultra vires* conveyance of real estate to a corporation," and rests his case upon "loss of the moneys and assets of the bank—in the form of the bank building—to which Schleier claims title through the conveyance and surrender on October 30, 1897, under the terms of his lease to the bank."

We may take appellant at his word and omit extended discussion of the first proposition, although he has indulged in much argument which confuses his concessions. For instance his counsel say: "While denying the sufficiency of the lease to lawfully bind either the bank or its title to its $305,000 capital assets, we say, very well then! Since in the completed building in the actual possession of the bank, it still had an asset, the then depositors, now judgment creditors of this bank, represented by this appellant receiver, want to know why Schleier, who is not an innocent purchaser for value, without notice, should not be held liable to account for this asset, the building?"

But pronouncing Schleier not an innocent purchaser, denominating the building an asset of the bank, does not change the issues in the case. It is only another way of presenting them. Why should Schleier account for the building? Necessarily either because of the execution of the lease or its surrender. Of its execution we need not make much comment. The lease certainly was not different from any other interest in real estate acquired *ultra vires*—no more vulnerable to attack, no more a diversion of funds. Whether it would be a gain or loss—an antithesis made much of in argument to distinguish between the lease and an absolute conveyance—was a matter of judgment. It seems now to have been a folly for the bank to have put its whole capital in a building. But, may be, that is the confident conclusion which can be formed after experience. The judgment of the bank in making the lease and erecting the building seems not to have been thought by creditors to have been improvident, and the Comptroller of the Currency did not disapprove. The bill alleges that the Comptroller of the Currency, in the year 1893, deemed an assessment of twenty per cent sufficient to redeem the bank from embarrassment and establish it as a solvent concern; and its chief creditor, the People's Savings Bank, whose affairs, the bill avers, had become "commingled and mixed" with those of the bank and thereby associated with its fortunes,

must have had absolute confidence in the value of the building, even though it represented diverted funds. If depreciation came afterwards, it was a misfortune. Under the concession of appellant, therefore, the validity of the lease must be assumed as against him, and the inquiry confined to the validity of the surrender; and that depends upon the condition of the bank at the time it was done. In other words, the lease, with its benefits or burdens, and the condition of the bank at the time of its surrender, must be the test of the action of the bank officers and the rights of creditors.

The bank was insolvent, taxes on the property were unpaid and three months' rent was due. Under the terms of the lease, Schleier could pay the taxes, and for reimbursement and the satisfaction of the rent could sell the lease and all the right, title and interest of the bank therein, or maintain personal actions for such taxes and rent. Schleier, therefore, for what was then due and for his monthly accruing rent, had not only a lien upon the property, but had as well the personal obligation of the bank. Against this liability what had the bank? The bill alleges nothing but the lease, and to that no value is assigned. Its revenue did not exceed its obligations. It is true it is alleged that the building had been allowed to get out of order, and that notwithstanding its condition the rents from it would have paid the charges against it. But the fact establishes nothing definite. What can be inferred from it? Such disproportion between the value received by Schleier and that received by the bank as to shock the conscience, establish fraud, and that the surrender of the lease was an illegal preference? The situation must be kept in mind. The bank was and had been insolvent. It was compelled to go into liquidation; it was in arrears for rent and taxes, and was confronted with ever-recurring liabilities which it might not be able to discharge. Certainly could not discharge unless it remained a going concern, which was not possible. Under such circumstances the settlement with Schleier does not seem to have been even bad judgment. And it was openly done—adver-

tised in advance to all who were interested to prevent, and the reason for it declared to be that the income of the property was less than the fixed charges; in other words, had no value—represented only liabilities. No one intervened. Creditors did not, and this suit was not brought until December, 1900—three years after the surrender of the lease. The conclusion is irresistible that the judgment of the stockholders in surrendering the lease was honestly and prudently exercised. This is fortified by the prayer of the bill. Appellant does not ask to have the surrender of the lease set aside and the bank restored to its relations and obligations to Schleier. He asks that the bank be relieved from all obligations and the cost of the building imposed as a charge upon the real estate.

It is unnecessary to discuss the ruling of the Circuit Court on the motion to file an amended bill. The bill tendered was fuller and more explicit than either the original bill or the amendments thereto, but it alleged nothing which would affect the legal conclusions from the facts to which we have adverted. And we may observe that it is exceedingly disputable whether it is an abuse of discretion to deny a motion to file an amended bill after final judgment has been entered.

Decree affirmed.

INTERSTATE COMMERCE COMMISSION *v.* BAIRD.

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

No. 409. Argued March 7, 8, 1904.—Decided April 4, 1904.

The object of construction is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers.

Although not in accord with its technical meaning, or its office when properly used, a frequent use of the proviso in Federal legislation is to introduce new matter extending, rather than limiting or explaining, that which has gone before.

Under the proviso in § 3 of the act of February 19, 1903, a direct appeal may be taken to this court from a judgment of the Circuit Court in a proceeding brought by the Interstate Commerce Commission, under the direction of the Attorney General, to obtain orders requiring the testimony of witnesses and the production of books and documents.

Relevancy of evidence does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact.

Where a company owned by a railroad purchases coal at the mines or breakers under a contract fixing the price to the vendor on the basis of a percentage of the average price received at tidewater in another State, it being claimed that this transaction was the means whereby the railroad gave preferential rates to the companies selling the coal, the Interstate Commerce Commission may, in a proceeding properly instituted, inquire into the manner in which the business is done, and compel, through the Circuit Court, the testimony of witnesses and the production of the contracts relating thereto.

Where coal companies who had organized a competing line to tidewater made contracts with railroad companies for the purchase of the collieries by the railroad companies, which resulted in the abandonment of the proposed competing line, the contracts are relevant evidence bearing upon the manner in which rates were fixed, and their production before the Commission in an investigation, properly commenced, as to the reasonableness of coal rates, should be ordered by the Circuit Court.

Compelling the giving of such testimony and the production of such contracts does not deprive the witnesses of any rights under the Fourth and Fifth Amendments to the Constitution of the United States.

THIS is an appeal from an order made in the Circuit Court of the United States for the Southern District of New York in the matter of the petition of the Interstate Commerce Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The petition recites that the Attorney General of the United States, at the request of the Interstate Commerce Commission, instructed the United States District Attorney for the Southern District of New York to present the petition and institute proper proceedings for the enforcement of the provisions of the acts to regulate interstate commerce as amended, and to invoke the aid of the court in requiring the attendance and testimony of witnesses and the production of books, papers and documents, pursuant to the provisions of said acts. The case

grows out of a complaint of William Randolph Hearst, filed on November 2, 1902, with the Interstate Commerce Commission, against the Philadelphia and Reading Railway Company, Lehigh Valley Railroad Company, Delaware, Lackawanna and Western Railroad, Central Railroad Company of New Jersey, New York, Susquehanna and Western Railroad Company, Erie Railroad Company, New York, Ontario and Western Railway Company, Delaware and Hudson Company, Pennsylvania Railroad Company and Baltimore and Ohio Railroad Company.

In the complaint it was charged: That the defendants are common carriers, engaged in the transportation of passengers and freight between points in different States of the United States, and are particularly engaged in the transportation of anthracite and bituminous coal mined in Pennsylvania, Maryland and West Virginia, and shipped as interstate traffic over said lines, and are carriers subject to the provision of the act of February 4, 1887, to regulate commerce, and the acts amendatory thereto; that the rates charged and exacted by the defendants for the transportation of anthracite coal in carloads from points in the anthracite coal region of Pennsylvania to New York city and New York harbor points and internal points of destination in the State of New York, to Boston and other points in the New England States, to Baltimore and other points in the State of Maryland, and to Washington, in the District of Columbia, are unreasonable and unjust, and subject consumers and producers of such coal, who are not common carriers or corporations owned and controlled by common carriers, to undue and unreasonable prejudice and disadvantage in favor of and to the undue and unreasonable preference and advantage of said defendants and companies under their control, in violation of sections 1 and 3 of the act to regulate commerce; that the rates charged and exacted by the defendants for the transportation of anthracite coal are relatively unreasonable and unjust, and unjustly discriminating against the interests of dealers and consumers of that com-

modity as compared with the rates contemporaneously charged by said defendants for transportation of bituminous coal for much longer distances and to the points of destination above mentioned, and also as compared with the defendants' rates and charges on other carload freight generally, all of which is a violation of §§ 1, 2 and 3 of the act to regulate commerce; that the defendant companies—Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, New York, Susquehanna and Western Railroad Company and the Philadelphia and Reading Railway Company—are, in the absence of agreement, natural competitors in the business of transporting anthracite coal from the coal fields of Pennsylvania to tide-water at New York, two of said defendants—the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey—being substantially parallel lines; that in 1896, 1897, 1898, 1899, 1900 and 1901 the six defendants last named, by an agreement and combination with one another, pooled and have during the year 1902 pooled freights and freight traffic in anthracite coal, so as to divide the same between their different lines in agreed proportions, in violation of § 5 of the act to regulate commerce. The prayer of the petition was that the defendants be required to make answer to the charges, and, after hearing, for an order or orders commanding the said defendants, and each of them, wholly to cease and desist from each and every of the alleged violations of the act to regulate commerce, and for such further order or orders and action by the commission as its duty under the act and the cause of petitioner and others similarly situated may require. Answers were filed by the railroad companies, taking issue with the allegations of the petition and denying violation of the law. In the course of the hearing certain witnesses refused to produce contracts and answer questions when required so to do by order of the commission, which refusal gave rise to the petition to the Circuit Court. The character of the testimony required by the order of the commission is sufficiently

set forth in the opinion hereinafter given. To the petition answers were filed too lengthy to abstract, and in substance setting forth the right of the defendants to refuse the production of the papers and documents and to decline to answer the questions because the same did not relate to any subject which the commission had the right to investigate and the contracts relate to the private business of persons not parties to the proceedings before the commission; that the witnesses are protected in their right to refuse to produce the contracts or answer the questions by the Fourth, Fifth and Tenth Amendments to the Constitution of the United States; that the contracts were not relevant to the subject matter of investigation before the commission. The Circuit Court placed its decision on the latter ground, and dismissed the petition of the Interstate Commerce Commission.

Mr. William A. Day, assistant to the Attorney General, and *Mr. John G. Carlisle* for appellant:

On the motion to dismiss. This appeal can be prosecuted.

Suits by the Interstate Commerce Commission, whether they are at law or in equity, are not prosecuted in the name of the United States, and therefore, while the act of February 11, 1903, specifically referred to suits brought to enforce the act, yet it could have no practical application to them; and in order to remedy this defect the act of February 19, 1903, was passed.

See also § 12 of the act to regulate commerce as amended March 2, 1889, and February 10, 1891. This is a proceeding of the same nature as that provided for in § 16 of the act to regulate commerce and in § 3 of the act of February 19, 1903. As to meaning of word "case" and the construction of this statute, see *Interstate Com. Com.* v. *Brimson,* 154 U. S. 447; *Rich* v. *Keyser,* 54 Pa. St. 86, 89; Endlich on Interp. 534; *Hunter* v. *Martin,* 1 Wheat. 304, 337. As to effect of proviso, see *Minis* v. *United States,* 15 Pet. 423; *Ches. & Pot. Tel. Co.* v. *Manning,* 186 U. S. 238, 242; *Austin* v. *United States,* 155 U. S. 417, 431; *Georgia Banking Co.* v. *Smith,* 128 U. S. 174,

181. The word "provided" is not always used to introduce a technical proviso but new legislation; for instances, see 17 Stat. 195; 18 Stat. 72; 18 Stat. 351; 18 Stat. 525; 31 Stat. 1023.

This case is also appealable under § 5 of the Court of Appeals act of 1891 as it involves the construction or application of the Constitution of the United States. *Cornell* v. *Green*, 163 U. S. 75, 78; *Filhiol* v. *Maurice*, 185 U. S. 108, 110; *Penn Mut. Life* v. *Austin*, 168 U. S. 685, 695; *Holder* v. *Aultman*, 169 U. S. 81, 88; *Loeb* v. *Columbia Township*, 179 U. S. 472, 479; Desty's Fed. Proc. notes under § 5 of the act of 1891. Cases on appellee's brief distinguished as they involved the construction of provisions of law materially different from § 5 of the act of 1891.

As to the merits, the commission has jurisdiction to hear this complaint even if complainant is not a shipper of coal himself. The act expressly so provides. The commission was making a general investigation under § 12 of the act and the Hearst complaint was simply the occasion of the investigation.

The test of relevancy in a proceeding before this commission is not the strict test applied to trials at common law. "Relating to" as used in the statute is a broader term even than "relevant to." The commission must in its examinations take a broad range if it is to fulfill the purposes of its creation. *Brimson's Case*, 154 U. S. 473; *Interstate &c.* v. *Cincinnati &c. Ry. Co.*, 167 U. S. 479, 506; *Tex. & Pac. Ry.* v. *Interstate &c.*, 162 U. S. 212, 233.

Even if the contracts relate to sale and not to transportation of coal, the carriers cannot object to their production, as they themselves have blended the two subjects so that an investigation of one involves the other. See for instance *Powell* v. *Pennsylvania*, 127 U. S. 678, 685. The contracts, however, are not for sales as they purport to be but for transportation. There is nothing in the contention that by being compelled to testify the constitutional rights of witnesses would be invaded. *Brown* v. *Walker*, 161 U. S. 608.

Mr. John G. Johnson, with whom *Mr. Francis I. Gowen* and *Mr. F. H. Janner* were on the brief, for appellees Thomas and Baird.

Mr. Adelbert Moot, with whom *Mr. George F. Brownell* was on the brief, for appellees Richardson and Sturges.

Mr. Walter W. Ross for appellees Truesdale, Chambers and Post.

Mr. J. D. Campbell submitted a brief for appellees Baer and Brown.

Mr. Robert W. de Forest and *Mr. Robert Thorne* submitted a brief for appellee Waterman:

This court has no jurisdiction. No constitutional question is involved as in the *Brimson Case,* 154 U. S. 447. This direct appeal is not authorized under § 5 of the act of March 3, 1891. No question of jurisdiction of the Circuit Court has been certified to this court. No construction or application of the Constitution can be said to have been involved in the judgment below, nor did the Circuit Court construe the Constitution, nor was it requested to construe it. *Cornell* v. *Green,* 163 U. S. 78; *Ansbro* v. *United States,* 159 U. S. 698; *Lampasas* v. *Bell,* 180 U. S. 276; *Muse* v. *Arlington Hotel Co.,* 168 U. S. 430; *Carey* v. *Houston & Texas Central,* 150 U. S. 170; *Defiance Water Co.* v. *Defiance,* 191 U. S. 184; *Arbuckle* v. *Blackburn,* 191 U. S. 405; *W. U. Tel. Co.* v. *Ann Arbor R. Co.,* 178 U. S. 276, 282.

The constitutional question must be the controlling question in the case. *Carter* v. *Roberts,* 177 U. S. 496, 500; *Casey* v. *Houston & Tex Cent.,* 150 U. S. 170, 181.

This case is not unlike the case of a "supervisory" order in bankruptcy proceedings, that is not a final order, *Wisall* v. *Campbell,* 93 U. S. 347; *Cauro* v. *Crane,* 94 U. S. 441; or an

order dissolving an injunction pending suit, *McCollum* v. *Eager*, 2 How. 61, 64; or the case of a discretionary order refusing to open a decree, *Brockett* v. *Brockett*, 2 How. 238, 240; or an order refusing to let one intervene as a party, *Ex parte Cutting*, 94 U. S. 14. It is a merely interlocutory order so no appeal will lie. *McGourkey* v. *Railway Co.*, 146 U. S. 536, 545; *Van Stone* v. *S. & B. Mfg. Co.*, 142 U. S. 128, 134. Nor is this a case. The party setting the proceedings in motion has no rights to assert. *Osborn* v. *Bank*, 9 Wheat. 819. An appeal does not lie unless the party appealing has an interest. *Bryant* v. *Thompson*, 128 N. Y. 426, 434; *Nat. Ex. Bk.* v. *Peters*, 146 U. S. 570.

If a statute does not authorize the appeal the United States cannot maintain an appeal in this court. *United States* v. *Railway*, 105 U. S. 624. Nor can an official succeed upon appeal when he is not legally aggrieved, even if other officials are aggrieved, who do not appeal. *Cherokee Co. Com.* v. *Wilson*, 109 U. S. 626. A party not legally affected by a decision cannot appeal; or trustees of bondholders, *F. L. & T. Co.* v. *Waterman*, 106 U. S. 269; or a receiver, *Close* v. *G. Cemetery*, 107 U. S. 474. An unaffected party generally cannot appeal. See *Brown* v. *Smart*, 145 U. S. 459, and cases there cited. The commission have and can have no legal "controversy" with the parties here, and by submitting the case to the commission for decision upon further evidence without instituting this proceeding Mr. Hearst has shown he has no "controversy" to bring here, so no "controversy" is brought before this court by the appeal and it must be dismissed. *Little* v. *Bowers*, 134 U. S. 547, 652, and cases cited p. 558.

This appeal is not authorized by the acts of February 11, 1903, or February 19, 1903. In construing these acts the court must determine whether Congress intended that in any proceeding under the direction of the Attorney General in the name of the commission an appeal would lie to this court. As to the principles of construction applicable to the Constitution and laws of United States, see *Ogden* v. *Saunders*, 12 Wheat. 213;

Petri v. *Commercial Bank*, 142 U. S. 650; *McKee* v. *United States*, 164 U. S. 293; *Smith* v. *Townsend*, 148 U. S. 494, and cases cited; *United States* v. *Union Pac. R. Co.*, 91 U. S. 72, 79; *Van Patten* v. *Chi. M. & St. P. R. Co.*, 81 Fed. Rep. 547; *Smythe* v. *Fiske*, 23 Wall. 374, 384. The intention of the lawmaker is the law. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59.

The clause of section 3 of the act of February 19, is in the form of a proviso. The ordinary purpose of a proviso in a statute is to qualify or restrict the statute, or the particular section thereof to which it is attached. Sutherland on Statutory Construction, § 223; *Minis* v. *United States*, 15 Pet. 423; *Savings Bank* v. *United States*, 19 Wall. 227, 236. It is ordinarily applicable only to such statute or section, and should be construed with reference thereto. *Lehigh* v. *Meyer*, 102 Pa. St. 479. It will not be deemed from doubtful words to be intended to enlarge or extend the act or provision on which it is engrafted. *In re Webb*, 24 How. Pr. 247, 249. The form used indicates that the clause is intended to apply only to § 3 to which it is attached.

The last amendment is confined to suits brought in the name of the United States. History of the legislation should be looked at to get its intent. *Am. Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Smythe* v. *Fiske*, 23 Wall. 374, 380; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

The object of the act of March 3, 1891, was to relieve this court of just such work as this appeal involves. *McLish* v. *Roff*, 141 U. S. 665. The motion to dismiss should be granted. *Interstate &c.* v. *Atchison &c. Co.*, 149 U. S. 264.

On the merits. Hearst had no interest in the contracts and could not demand their production. Greenleaf, § 298. See *Haddock's Case*, 4 I. C. C. R. 322; *Brimson's Case*, 154 U. S. 478. The D. L. & W. road has the right to engage in buying, selling and mining of coal as well as its transportation. Laws of Pennsylvania, 1832, p. 316; 1849, p. 648; 1855, p. 110; 1869, p. 31.

As to the jurisdiction of the commission, see 1 Supp. U. S. Rev. Stat. 529; *Interstate &c.* v. *C. N. O. & C. Ry. Co.*, 167 U. S. 506.

The contracts were only for the purchase of coal, not for its transportation from one State to another.

A contract made between citizens of Pennsylvania providing that the owner will sell a part or all of the coal which he digs from his mines to the purchaser at a certain price under which it is delivered at the mines in that State is wholly a domestic transaction governed exclusively by the domestic law, if such law is not in conflict with the Constitution of the United States. The coal which is the subject of the contract is a part of the general mass of property of that State and subject to its jurisdiction.

The purchase of the coal at the mines was a domestic transaction and subject exclusively to the laws of Pennsylvania, and the commission exceeded its jurisdiction when it directed the witnesses, at the request of Hearst, to produce such contracts for his inspection, or when it directed the witnesses to produce papers showing the cost of such coal, or to answer questions as to the cost of producing coal or selling it.

When, however, the coal started on its "final movement for transportation" from Pennsylvania to New Jersey—or any other State—the rate charged for its transportation became a proper subject of inquiry before the commission, under proper circumstances. The witnesses did not refuse to give any evidence on that subject.

But when the coal arrived at its destination in another State it forthwith became intermingled with the property of such State and subject to its jurisdiction, and the Commission was without jurisdiction to require the witnesses to answer questions as to the selling price of coal.

These principles are firmly established by the decisions of this court. *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Beet*, 156 U. S. 577; *Coe* v. *Errol*, 116 U. S. 517; *Hopkins* v. *United States*, 171 U. S. 578; *United States* v. *Knight*, 156

U. S. 1; *Kelley* v. *Rhoads*, 188 U. S. 1, and cases cited on p. 5; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82.

Congress could not give the commission power to inquire into the intra-state business of common carriers. It is clear that it did not intend to do so; see § 12, limiting inquiries to "common carriers, subject to the provisions of this act."

When the act is read as a whole, it shows it was not intended to give the commission the power to inquire into the business of coal mining companies, or of coal mining, or of selling coal, even if coal mining corporations turn out to be railroad corporations, or corporations owned by railroads, where that is permitted, as in Pennsylvania. *Com.* v. *Erie*, 132 Pa. St. 591; 139 Pa. St. 457. See Purd. Dig. ed. Kay & Bro. 1895, vol. 1, 49 pl. 202. The new constitution of Pennsylvania did not affect preëxisting chapter. *Hays* v. *Commonwealth*, 82 Pa. St. 524.

The business of such corporations engaged in mining and selling coal in Pennsylvania, whether that business is regarded as appertaining to real estate, *Brine* v. *Ins. Co.*, 96 U. S. 627, or domestic commerce touching personal property, *United States* v. *Knight*, 156 U. S. 1, 11, is all domestic business subject to the laws of the State of Pennsylvania, and not subject to the provisions of the Interstate Commerce Act. *Penna. R. R.* v. *Duncan*, 11 Pa. St. 352; *Gloninger* v. *Railroad Co.*, 139 Pa. St. 324; *Ahe* v. *Rhoads*, 84 Pa. St. 324; *Williamsport Pass. Ry.* v. *Williamsport*, 120 Pa. St. 1, 11.

The constitutional rights of appellees are invaded by this attempt to take their private papers from them for inspection of Hearst. *Boyd* v. *United States*, 116 U. S. 627.

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

A motion is made to dismiss the appeal upon the ground that no direct appeal lies to this court from the order of the Circuit Court. The act of February 19, 1903, (Comp. Stat.

1901, Sup. for 1903, p. 365,) to further regulate commerce with foreign nations and among the States, § 3, closing paragraph, enacts, "*Provided*, That the provisions of an act entitled 'An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,' shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

The second section of the act of February 11, 1903, (Comp. Stat. of 1901, Sup. for 1903, p. 376,) provides, "That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts [having reference to the anti-trust act of 1890 and the act to regulate commerce mentioned in the preceding section] wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

In support of the motion to dismiss it is argued that the language of the proviso of section 3, above quoted, "shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission," must be read in connection with preceding paragraphs of the section, which provide for bringing actions by direction of the Attorney General in the Circuit Courts of the United States, and do not include proceedings of the character of the present action to compel the production of books and papers and the giving of testimony by witnesses called before the commission.

It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. *Minis* v. *United*

States, 15 Pet. 423; *Austin* v. *United States*, 155 U. S. 417, 431; *White* v. *United States*, 191 U. S. 545, 551. It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before.

In *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, the subject was under consideration, and Mr. Justice Brewer, delivering the opinion, while recognizing the restrictive office of a proviso as stated by Mr. Justice Story in *Minis* v. *United States*, 15 Pet. 423, 445, added: "While this is the general effect of a proviso, yet in practice it is not always so limited. As said in *Georgia Banking Company* v. *Smith*, 128 U. S. 174, 181: 'The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of the statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.' "

The provision in the statute under consideration being intended to enlarge rather than limit the application of previous terms should not receive so narrow a construction as to defeat

its purpose. It extends the terms of the act of February 11, 1903, to "any case" brought under the direction of the Attorney General in the name of the Interstate Commerce Commission. The second section of the act of February 11, has reference, it is true, to a suit in equity under certain acts wherein the United States is complainant, and the argument is that the extension of the terms of this act in the act of February 19 is only to suits in equity. But for some reason Congress, in the act under consideration, saw fit not to limit the terms of the extension to suits or proceedings provided for in section 3 of the act of February 19, or to suits in equity, but broadly extended the rights and privileges of the act of February 11, to "cases" of the character designated. We cannot assume that this use of the broader term was without purpose. Before the passage of this act this court had held that a petition filed under section twelve of the interstate commerce act against a witness duly summoned to testify before the commission, to compel him to testify or to produce books, documents and papers relating to the matter in controversy, makes a case or controversy to which the judicial power of the United States extends. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447. The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers. We cannot read these statutes without perceiving the manifest purpose of Congress to facilitate the disposition of cases brought under the direction of the Attorney General to enforce the provision of the anti-trust and interstate commerce statutes. The present proceeding is not merely advisory to the commission, but, as was said in *Interstate Commerce Commission* v. *Brimson, supra,* a judgment rendered will be a final and indisputable basis of action as between the commission and the defendant, and furnish a precedent for similar cases. While it has for its object the obtaining of testimony in aid of proceedings before the commission, it is evident that important questions may be in-

volved touching the power of the commission and the constitutional rights and privileges of citizens. Congress deemed it imperative that such cases, affecting the commerce of the country as well as personal rights, should be promptly determined in a court of last resort.

If the appeal in the first instance was to the Court of Appeals the judgment of that court would not be final under the act of March 3, 1891, and in such case this court would still be required to consider the cases on final appeal. We think it was the purpose of the act to eliminate an appeal to the Circuit Court of Appeals and to permit the litigation to be shortened by a direct appeal to this court.

We pass now to the merits of the controversy. The record in this case is voluminous, and much of the discussion before the commission is printed. We shall endeavor to classify and consider the questions made so as to indicate our holdings with a view to a proper judgment in the case.

It is urged that the complainant before the commission did not show any real interest in the case brought, and that the proceeding should for that reason have been dismissed. It is provided in the act to regulate commerce, sec. 13, that "any person, firm, corporation," etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof may apply to said commission by petition, etc. And certain procedure is provided for—and (said commission) "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made," and the section concludes: "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." In face of this mandatory requirement that the complaint shall not be dismissed because of the want of direct damage to the complainant, no alternative is left the commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the commission.

Power is conferred upon the commission, under section 12 of the act as amended March 2, 1889, and February 10, 1891, (3 U. S. Comp. Stat. of 1901, p. 3162,) to inquire into the management of the business of all common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created.

In making the orders which were the basis of the application to the Circuit Court and in the petition filed therein it is set forth that the commission at the time when the witnesses refused to produce the contracts required, was engaged "in the discharge of its duty to execute and enforce the provisions of the act to regulate commerce and in the exercise of its authority to inquire into the business of common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which said business is conducted, and to obtain from said common carriers full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created; and your petitioner is of the opinion that said contracts are not only material and relevant to the issues on trial in said proceeding, but that the production thereof as required by it, as aforesaid, is necessary to enable your petitioner to discharge its duty and execute and enforce said provisions of said act to regulate commerce and to inform your petitioner as to the manner and method in which the business of said common carriers is conducted, and to enable your petitioner to obtain the full and complete information necessary to enable your petitioner to perform the duties and carry out the objects for which it was created."

But in the present case, whatever may be the right of the commission to carry on an investigation under the general powers conferred in section 12, this proceeding was under the

complaint filed, and we will examine the testimony offered with a view to its competency under the allegations made by the complainant.

Coming now to the specific items of testimony, which the Circuit Court in dismissing the petition considered irrelevant to the controversy, we will first consider the so-called coal purchase contracts.

It is unnecessary for the present purpose to go into detail as to the provisions of these contracts. In the main they were made with coal companies owned principally by the railroad companies, and contain the same general provisions. Among others, the purchase price of anthracite coal above a certain size is to be 65 per cent of the average price, computed monthly, at certain tide points, of coal of the same quality and size. All the coal mined by the contracting operators is sold, shipments to be made as called for by the purchasers.

While the contracts were produced for inspection, the witnesses refused to permit them to be given in evidence. The Circuit Court held them to be irrelevant upon the ground that they related solely to an interstate transaction—the sale of the coal in Pennsylvania—and had nothing to do with interstate commerce. It appears that the railroad companies proceeded against in the complaint are engaged in carrying coal from the anthracite coal regions to tidewater. The contracts are between certain coal companies and independent operators engaged in mining coal in that region. The testimony shows that the coal companies making the contracts are principally owned by the railroad companies. For what purpose this separate ownership is maintained it is not necessary now to inquire. The fact of such ownership is undisputed, and for the present purpose it may be conceded that the ownership is lawful under the laws of the State of Pennsylvania.

The railroads are all engaged in interstate commerce, and into their affairs and methods of doing business the commission might be, and is, lawfully authorized by the commerce act to make investigation. In speaking of this power as under-

taken to be vested in the commission, this court said in the *Brimson* case, 154 U. S. 447, 472: "It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations or preferences by carriers engaged in interstate commerce, in respect to property or persons transported from one State to another, is a proper regulation of interstate commerce, or that the object that Congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several States. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same observation may be made in respect to those provisions empowering the commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation."

In *Interstate Commerce Commission* v. *Cincinnati, New Orleans &c. Railway Co.*, 167 U. S. 479, 506, this court held that the commission had no power to fix rates. In the course of the opinion it was said: "It [the commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which the same is conducted."

The testimony shows that much of the coal purchased under these contracts is sold in Pennsylvania, but a considerable portion is carried to tidewater. The coal is purchased by

companies owned by the railroads, for which payment is made on the basis of 65 per cent of the general average price received at tidewater by the sale of sizes above pea coal, leaving 35 per cent for the purchaser, from which he must pay transportation charges and cost of sale. Here is a railroad company engaged at once in the purchase of coal through a company which it practically owns and the transportation of the same coal through different States to the seaboard. Why may not the Interstate Commerce Commission, under the powers conferred, and under this complaint, inquire into the manner in which this business is done? It has the right to know how interstate traffic is conducted, the relations between the carrier and its shippers and the rates charged and collected. We see no reason why contracts of this character, which have direct relation to a large amount of its carrying trade, can be withheld from examination as evidence by the commission. These contracts were made by the officials of the railroad companies, who were also officials of the coal companies, after protracted conferences. Upon the ground that they pertained to the manner of conducting a material part of the business of these interstate carriers, which was under investigation, we think the commission had a right to demand their production. And, further, it was claimed that, while these contracts were in form purchases of coal, their real purpose was to fix a rate for transportation to the carriers, who were in fact paid for the only interest they had in the coal—the right to receive pay for its transportation—by the percentage retained from the selling price after deducting charges and expenses in marketing the coal.

It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established. This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court. If the railroad companies in fact re-

ceived their compensation for carriage from the sum retained by the coal companies as was claimed, then whether they realized more or less than their published rates depended upon the price of coal. Taking the prices at times as shown in the statements filed with the commission, it is apparent that the 35 per cent was less than published rates, and if that was the sum received for transportation, would work a discrimination against coal companies not having such contracts and paying the full rate. On the other hand, if the coal companies paid the full rate, and failed to realize as much from the percentage of the selling price retained they would be losing money, and as they were owned by the railroad companies the loss would be ultimately theirs and not the coal companies. It may be that the commission or the courts will untimately find that these contracts do not fix the compensation received by the carriers, and that, as claimed, the full rate is paid by these purchasing companies, and if there is a loss on these contracts it is made up in other business; but, as we have said, the question concerns the relevancy of proof and not whether it finally establishes the issue made, one way or the other. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Relevancy is that "quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit." 1 Bouvier Law Dic. Rawle's Revision, 866.

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.

It is contended in the answers filed in the Circuit Court that to require the production of these contracts would be to compel

the witnesses to furnish evidence against themselves which might result in forfeiture of estate in violation of the Fifth Amendment to the Constitution; would subject the parties to unreasonable searches and seizure of their papers contrary to the Fourth Amendment, and would require them to produce papers pertaining wholly to intrastate affairs in violation of the reserved rights of the people of the States, and beyond the power of the commission, whose duties are limited to investigations pertaining to interstate commerce.

At the hearing the constitutional objections do not seem to have been relied upon; those argued pertained to the relevancy of the proof and the rights of persons not before the court to be protected from the publication of their private contracts. As to the constitutional objection based upon the Fifth Amendment, the act as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. The full consideration of the subject and the decision of this court in *Brown* v. *Walker*, 161 U. S. 591, renders further consideration of this objection unnecessary.

The origin and interpretation of the Fourth Amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Justice Bradley in the leading case of *Boyd* v. *United States*, 116 U. S. 616. In that opinion the learned Justice points out the analogy between the Fourth and Fifth Amendments, and the object of both to protect a citizen from compulsory testimony against himself, which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose. In the course of the opinion it is said: "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and

Fifth Amendments run almost into each other." And see *Adams* v. *People of the State of New York*, 192 U. S. 585, decided at this term.

As we have seen, the statute protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure. Indeed, the parties seem to have made little objection to the inspection of the papers, the contest was over their relevancy as testimony. Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly the courts should protect non-litigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it.

As to the so-called Temple Iron Company contracts: It appears that in 1889 certain operators in the anthracite coal region organized a competing railroad, with a view to carrying their product from the coal regions to market at tidewater. It became evident that this company was likely to succeed, and to construct a competing railroad from the coal fields to the sea. With a view to acquiring its property, five of the leading railroad carriers purchased the collieries whose proprietors were developing the new scheme. To pay for these the charter of the Temple Iron Company was purchased and its capital stock increased. The company issued a large amount of stock and bonds, and the contracting railroad companies agreed among themselves and with the Guaranty Trust Company of New York, as trustee, to guarantee a six per cent dividend upon the Temple Iron Company stock and the payment of principal and interest of the bonds. This ended the building of an independent line, and the transportation of coal from the collieries is distributed among the carriers interested.

It is argued that these contracts, if given in evidence, will tend to show a pooling of freights, in violation of the fifth

section of the commerce act. While this testimony may not establish such an arrangement as is suggested, it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained. Furthermore, we think the testimony competent as bearing upon the manner in which transportation rates are fixed, in view of determining the question of reasonableness of rates, into which the commission has a right to inquire. To unreasonably hamper the commission by narrowing its field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established by Congress.

An appeal is also prosecuted from the refusal of the Circuit Court to order the witnesses Eben B. Thomas and William H. Truesdale to answer certain questions respecting the prices and sale of coal. Upon the principles already discussed we think these questions had legitimate bearing upon the matters into which the commission was making inquiry.

We are of the opinion that the Circuit Court erred in holding the contracts for the purchase of coal by the companies or directly by the railroad, where a percentage of the price was agreed to be paid for the coal, to be irrelevant, and in refusing to order their production as evidence by the witnesses who are parties to the appeal, and likewise erred as to the Temple Iron Company contracts, and in refusing to require the witnesses aforesaid to answer the questions stated in the petition, and the order appealed from is reversed, and the cause is remanded to the Circuit Court for further proceedings in accordance with this opinion.

MR. JUSTICE BREWER dissents.

MINNESOTA *v.* NORTHERN SECURITIES COMPANY.

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

No. 433. Argued January 7, 8, 1904.—Decided April 11, 1904.

Consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, this court must, upon its own motion, so declare, and make such order as will prevent the Circuit Court from exercising an authority not conferred upon it by statute.

A State is not a citizen within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts.

Under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character.

While an allegation in a complaint filed in a Circuit Court of the United States may confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits, if, notwithstanding such allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction then, by the express command of the act of 1875, its duty is to proceed no further. And if the suit, as disclosed by the complaint could not have been brought by plaintiff originally in the Circuit Court, then, under the act of 1887–1888 it should not have been removed from the state court and should be remanded.

The intention of the Anti-Trust Act of July 2, 1890, 26 Stat. 209, was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under § 4 of the act, by District Attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.

A State cannot maintain an action in equity to restrain a corporation from violating the provisions of the act of July 2, 1890, on the ground that such violations by decreasing competition would depreciate the value of its public lands and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in § 7 of the act.

Article IV of the Constitution of the United States only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations.

THE facts are stated in the opinion of the court.

Mr. W. B. Douglas, Attorney General of the State of Minnesota, and *Mr. M. D. Munn*, with whom *Mr. George P. Wilson* was on the brief, for appellant:

As to removal to and jurisdiction of the Circuit Court: The action was removed on the joint petition of all the defendants, on the ground that it arose under the Constitution and laws of the United States, and that the right upon which it was based and on which a recovery by plaintiff depended, would be defeated by one construction of the Constitution or said laws, and sustained by an opposite construction. Diverse citizenship did not form a basis for such removal, *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, and could not rightfully be presented as a ground therefor.

As to the doing of business by the Northern Securities Company within Minnesota and attempt to vacate service of summons, see *Goldey* v. *Morning News Co.*, 156 U. S. 518; *Wabash Western Railway* v. *Brow*, 164 U. S. 271.

The Circuit Court has jurisdiction of all civil actions in part arising under or depending upon the construction of the Constitution, laws or treaties of the United States. 24 Stat. 552; 25 Stat. 433; *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482; *Ames* v. *Kansas*, 111 U. S. 462; *Gold-Washing and Water Co.* v. *Keyes*, 96 U. S. 203; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 507; *Cummings* v. *Chicago*, 188 U. S. 410.

Read in the light of section 5 of the Court of Appeals Act—chap. 517 of the laws of 1891—it is equally clear that jurisdiction is assumed to exist in the Circuit Courts and an appeal authorized "in any case that involves the construction or application of the Constitution of the United States."

The Supreme Court of the United States is without original jurisdiction of this controversy. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

Assuming the facts to be as stated in the affidavit of the president of the Securities Company, above referred to, to the effect that the Securities Company is not the owner of any property situated in Minnesota and never transacted any business therein, the courts of Minnesota cannot acquire jurisdiction to hear and determine the issues involved herein, a jurisdiction over the person of the Securities Company cannot be obtained. *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News Co.*, 156 U. S. 518; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; *Cabanne* v. *Graf*, 87 Minnesota, 510; *Conley* v. *Matheson Alkely Works*, 190 U. S. 406.

The Northern Pacific and Great Northern Railway companies are necessary parties with the Securities Company, and being residents of different States and not engaged in doing business in any single State, jurisdiction of the person of all the defendants cannot be obtained elsewhere than in this court, in which the Securities Company has voluntarily appeared. *Minnesota* v. *Northern Securities Company, supra.*

Under *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 270, and *Minnesota* v. *Northern Securities Co.*, unless a Federal question is deemed to exist in this record which gives to the Circuit Court jurisdiction over the subject matter of the action, under our dual form of government, a State will be deprived of the right to invoke the jurisdiction of any court in the land for the purpose of enforcing its laws or protecting its proprietary interests from unlawful acts done in violation of the laws of the State or Nation.

Two Federal questions are clearly set forth in appellant's bill of complaint. Whether the State to protect its proprietary interests had a cause of action against the defendants arising in part under the Federal Anti-Trust Act; and whether the state Anti-Consolidation and Anti-Trust Acts (rightly con-

strued) had been violated. This presents a controversy between the appellant and the defendants, the correct determination of which involves or depends upon the construction and the application of the commerce clause as well as Article IV of the Constitution of the United States.

An issue was tendered in which the appellant alleged the commission of certain acts by the defendants which were specifically asserted to be not only seriously injurious to its proprietary interest, but in violation of the Federal Anti-Trust Act, and the learned trial court in its decision actually construed the act adversely to one contention of appellant and this construction rendered it unnecessary for the court to construe the act with reference to the other questions submitted. In this portion of the decree the court construed the act as excluding the appellant from invoking equity jurisdiction for its enforcement. Again, upon the argument in this court appellant's contentions upon both propositions were strenuously opposed by counsel for appellees.

It is therefore submitted that the pending controversy is one in part "arising under and depending upon the construction of the laws of the United States." Cases cited *supra*, and *Cummings* v. *Chicago*, 188 U. S. 410; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *N. P. Railway Co.* v. *Townsend*, 190 U. S. 270.

The test as to jurisdiction of the Circuit Court is clearly stated in the opinion of the court in *Gold-Washing & Water Co.* v. *Keyes*, *supra*, and affirmed in the case of *Shoshone Mining Co.* v. *Rutter*, *supra*, see p. 507; *Railroad Company* v. *Mississippi*, 102 U. S. 141; *Chapman* v. *Goodnow*, 123 U. S. 540; *Kaukauna Co.* v. *Green Bay & Canal Co.*, 142 U. S. 254, and cases cited; *O'Neil* v. *Vermont*, 144 U. S. 323.

If this construction of the act of Congress obtains in the application of the rule invoked, it is clear from the record that the State has suffered, and will continue from year to year to suffer, damages to its proprietary interests which will be difficult, if not impossible, to measure, running into mil-

lions of dollars. *Parker* v. *W. L. C. & W. Co.*, 2 Black, 551, and cases cited; *Clark* v. *Smith*, 13 How. 194; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518.

Upon the proposition that a State may sue to redress injuries which are strictly analogous to those suffered by private individuals, see *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Am. Bell Tel. Co.*, 128 U. S. 315, 317; *Missouri* v. *Illinois*, 180 U. S. 240; *Kansas* v. *Colorado*, 185 U. S. 125.

The violation of the Minnesota Anti-Consolidation and Anti-Trust Act, rightfully construed, involves, as applied to this controversy, the construction and the application of Article IV of the Federal Constitution, as well as the commerce clause. For history of the clause, see Elliott's Debates, vol. 4, 123, vol. 5, 487, 504.

The gravamen of the charge in appellant's complaint is that the defendants created a corporate device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactments of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded.

The test of jurisdiction must necessarily be determined by a correct answer to the question: What issues were fairly tendered for determination by the bill of complaint? If this be not the test, the trial court, by misconstruing a statute, has the power to eliminate from the record a jurisdictional question and deprive a party of the right of appeal.

The question of whether or not the case was properly removed from the state to the Federal court, is in itself a Federal question. *Railroad Company* v. *Koontz*, 104 U. S. 15. The determination of this question in itself gives the right of appeal to this court direct.

The case having been appealed to this court, and this court,

on its own motion, having questioned the correctness of the removal from the state to the Federal court, that establishes the jurisdiction of this court on appeal over the entire case should this court determine that the case was properly removed from the state to the Federal court. *Oakley* v. *Goodnow*, 118 U. S. 44; *Scott* v. *Goodnow*, 165 U. S. 58; *Carter* v. *Texas*, 177 U. S. 442.

Mr. John G. Johnson, and *Mr. George B. Young*, with whom *Mr. M. D. Grover* and *Mr. C. W. Bunn* were on the brief, for appellees:

On the question of removal to and jurisdiction of the Circuit Court:

The cause was properly removed to the Circuit Court, and upon such removal that court acquired jurisdiction of it as a "suit arising under the Constitution and laws of the United States."

As to the test of such a suit as determined by Chief Justice Marshall, see *Osborn* v. *Bank*, 9 Wheat. 738, 822, in which it was held that a cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Under this construction, the judicial power of the United States extends effectively and beneficially to that most important class of cases which depends on the character of the cause. See also *Cohens* v. *Virginia*, 6 Wheat. 264, 379.

The following cases were decided under the act of 1875: *Gold-Washing Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Kansas*

Pacific v. *Atchison R. R.*, 112 U. S. 414; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Starin* v. *New York*, 115 U. S. 248, 257; *Southern Pacific R. Co.* v. *California*, 118 U. S. 109, 112; *Metcalf* v. *Watertown*, 128 U. S. 586; *Shreveport* v. *Cole*, 129 U. S. 36, 41; *Beck* v. *Perkins*, 139 U. S. 628. In the act of 1887–8, Congress used the same terms as in the act of 1875, in the same sense and reënacted them as thus construed.

And this court has never intimated that the criterion declared by Chief Justice Marshall and adopted and applied by itself in so many cases was erroneous in itself or had been rendered inapplicable to any class of cases by the amending act of 1887–8. The following cases originated after the latter act: *Cooke* v. *Avery*, 147 U. S. 375, 384; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, 143; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571, 580; *Patton* v. *Brady*, 184 U. S. 608, 611; *Swafford* v. *Templeton*, 185 U. S. 487, 494; *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526.

As it is the proper function of the plaintiff's pleading to state his own case and not that of the defendant, to give jurisdiction the Federal question must appear in plaintiff's statement of his own case, or of his own claim, and that is all that is required.

In a few cases there are expressions—inadvertent, no doubt—to the effect that the plaintiff's declaration must show that he asserts a right under the Constitution or some law of the United States,—as if only such suits were suits arising under the United States Constitution or laws. But this is directly opposed to the cases already cited and others that will be cited.

If such a requirement were essential to jurisdiction, one whose property was wrongfully seized by a United States marshal or revenue collector, or whose property was taken or his person or property injured by a Federal railway corporation, could have no redress in the Federal courts. His right of property or of personal security is not derived from the United States Constitution or laws, and when he asserts either

in a declaration he is not asserting a right under the United States Constitution or laws.

For trespass against a marshal, see *Bock* v. *Perkins*, 139 U. S. 628; *Sonnentheil* v. *Brewing Co.*, 172 U. S. 401. And compare *Walker* v. *Collins*, 167 U. S. 57. Against an internal revenue collector, see *Venable* v. *Richards*, 105 U. S. 636; *Harding* v. *Woodcock*, 137 U. S. 43.

The bill presents Federal questions both in its aspect of a bill by the State as a sovereign to enforce its local statutes, and as a landowner and shipper for relief under those statutes. And these questions are the same whether the State sues as sovereign or as property owner and shipper or in both of these capacities.

For cases analogous to the one at bar, see *South Carolina* v. *Coosaw Mining Co.*, 45 Fed. Rep. 804; 47 Fed. Rep. 225; 144 U. S. 550, cited with approval in *In re Debs*, 158 U. S. 564; *Ames* v. *Kansas*, 111 U. S. 449; *Harding* v. *Woodcock*, 137 U. S. 43; *South Carolina* v. *Port Royal &c. Ry. Co.*, 56 Fed. Rep. 333; *People* v. *Rock Island &c. Ry. Co.*, 71 Fed. Rep. 753; *Minnesota* v. *Duluth &c. Ry. Co.*, 87 Fed. Rep. 497; *Tennessee* v. *Union Bank*, 152 U. S. 454.

The cause was properly removed because of the plaintiff's assertion of right and claim of relief under the Constitution and laws of the United States.

Besides the claims of the State under the full faith and credit clause of Article IV of the Constitution, and its claim under the swamp land granting acts of Congress, the State asserts a right as a property owner and as engaged in interstate commerce to carry on that commerce free from obstruction by combinations in restraint of commerce or by monopolies of such commerce—substantially the same right as that asserted by the United States in the *Debs Case*, 158 U. S. 564, 583. A citizen's right to carry on interstate commerce is a constitutional right. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57; *Reid* v. *Colorado*, 187 U. S. 137. And there can be no doubt that a State has the same right as a citizen.

The bill plainly asserts a right under the Constitution as well as under the Anti-Trust Act, and this gives jurisdiction. Whether the bill sufficiently alleges continuous or threatened injury to that right to make a case for the relief prayed or for any equitable relief is not a question of jurisdiction, but a question for the court to decide in the exercise of jurisdiction. *Swafford* v. *Templeton*, 185 U. S. 487, 493; *Southern Pacific R. Co.* v. *California*, 118 U. S. 112; *Hax* v. *Caspar*, 31 Fed. Rep. 499; *Lowry* v. *Chicago, B. & Q. R. Co.*, 46 Fed. Rep. 83.

The Circuit Court in a case like this, upon acquiring jurisdiction of the cause by reason of the Federal questions presented by the bill on the constitutionality of the state legislation and on the claim of rights under the Constitution and laws, has jurisdiction to decide, not only these Federal questions, but every question, Federal or non-Federal, that may be presented by the bill or arise upon the other pleadings or the evidence. *Osborn* v. *Bank of United States, supra.* It may decide the cause on these non-Federal grounds, without deciding or even considering the Federal questions presented by the bill. And this is the proper course where the Federal questions are constitutional questions. *Santa Clara Co.* v. *Southern Pacific R. R.*, 118 U. S. 394, 410. Its jurisdiction remains the same although the plaintiff should fail to establish by proofs the facts alleged as showing a right under the Constitution or laws or otherwise raising a Federal question, for the jurisdiction is determined by the averments of the bill. *Southern Pacific R. Co.* v. *California*, 118 U. S. 109, 112; *City Ry. Co.* v. *Citizens R. R. Co.*, 166 U. S. 537, 562.

And the fact that the Federal questions may receive little or no attention in the argument in this court, or even in the Circuit Court, does not affect the jurisdiction of either court. It may pass by the questions argued and decide the Federal questions.

Mr. Justice Harlan delivered the opinion of the court.

By a statute of Minnesota passed March 9, 1874, it was pro-

vided that no railroad corporation or the lessees, purchasers or managers thereof should consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line; nor should any officer of such corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads were parallel or competing lines should, when demanded by the party complainant, be decided by a jury as in other civil issues. Laws, Minnesota, 1874, p. 154.

A subsequent statute, passed March 3, 1881, provided that any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, might lease or purchase, or become owner of or control, or hold the stock of, any other railroad corporation, when the respective railroads could be lawfully connected and operated together "so as to constitute one continuous main line, with or without branches," § 1; and that any railroad corporation, whose lines of railroad, within or without the State, might be lawfully connected and operated together to constitute one continuous main line, so as to admit of the passage of trains over them without break or interruption, "could consolidate their stock and franchises so as to become one corporation." § 2. But by the same statute it was provided that no railroad corporation should consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights of property thereof, which owned or controlled "a parallel or competing line." § 3. Laws of Minnesota, 1881, p. 109.

At a later date, 1899, the Legislature of Minnesota passed another statute relating principally to such restraints upon trade and commerce as interfered with competition among those engaged therein. That statute contained these provisions:

"SEC. 1. Any contract, agreement, arrangement or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article [or] utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility, is hereby prohibited and declared to be unlawful.

"That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole, or in part, its franchise, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business or the management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity, or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State or of the several States, such union, combination, agreement, arrange-

ment or contract is hereby prohibited and declared to be unlawful. . . .

"SEC. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this State, which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust, as defined in section one of this act, shall, in addition to the penalty prescribed in section two of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this State. . . .

"SEC. 6. That for the purpose of carrying out the provisions of this act any citizen of this State may, and it is hereby declared to be the duty of the Attorney General, to institute, in the name of the State, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three hereof." Gen. Laws, Minnesota, 1899, c. 359.

These statutes being in force, the State of Minnesota instituted this suit in one of its own courts 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, which, having filed its articles of incorporation with the Secretary of State of Minnesota, became subject to the laws of that State relating to railroad corporations; and James J. Hill, as President of the Northern Securities Company, and individually.

What is the nature of the case as disclosed by the complaint filed in the state court?

The complaint alleged—

That the Great Northern Railway Company and the North-

ern Pacific Railway Company each owned or controlled and maintained a system of railways connecting the Great Lakes and the Pacific Ocean, their main roads constituting, substantially, parallel and competing lines;

That pursuant to an agreement between the defendant Hill and other stockholders of the Great Northern Railway Company (representing a controlling interest in the stock of that company) and J. Pierpont Morgan and other stockholders of the Northern Pacific Railway Company (representing a controlling interest in the stock of that company) the Northern Securities Company was incorporated solely as an instrumentality through which the stock, property and franchises of the Great Northern and Northern Pacific Railway companies should be consolidated in effect, if not in form, and the management and control of their business affairs, respectively, including the fixing of rates and charges for the transportation of passengers and freight over any and all the lines of railway of each of those companies, as well within as without the State, be vested in and controlled by the Securities Company, and all competition in freight and passenger traffic between the two systems of railway, within and without the State, to be suppressed and removed; that by means of such arrangement it was sought and intended to ignore, evade and violate the laws of the State prohibiting as well the consolidation of the stock, property or franchise of parallel or competing lines of railway therein, and the control or management thereof, as all combinations in restraint of trade or commerce within the State, and between the people of Minnesota and the people of other States and countries; and, that if the Securities Company was allowed to hold and control the stocks of the constituent railway companies and to carry out the purpose and object of its incorporators, as well as its own, "full faith and credit will not be given to the public acts of this complainant and it will be deprived of a further right guaranteed to it by the Constitution of the United States;"

That the said scheme had been consummated, and said two

railway systems were now under the absolute management and control of the Securities Company, and "by reason thereof all competition between said lines has been destroyed and a monopoly in railway traffic in Minnesota (as well as without said State) has been created, to the great and permanent and irreparable damage of the State of Minnesota, and to the people thereof, and in violation of its laws, *and of the laws of the United States* in such case made and provided, viz: The act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies;'" and

That the carrying out the above agreements and plan of consolidation and monopoly, and in every step taken to consummate it, the officers and directors of each of said railway companies were severally fully advised and consented thereto, and, unless restrained by this court, the Securities Company would continue to manage and control the business and affairs of the Great Northern and Northern Pacific Railway companies, and to suppress all competition between them for freight and passenger traffic, as well as to monopolize railway traffic in that State, to the irreparable damage of the State and the people thereof.

The substantial relief asked was a decree declaring, among other things, the alleged agreement and combination to be unlawful, and all acts done and to be done in pursuance thereof contrary to and in violation of the laws of Minnesota *and of the United States;* prohibiting the Securities Company, its agents and officers, from acquiring, receiving, holding, voting or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company, or from exercising any management, direction or control over the constituent companies; and enjoining those railway companies from recognizing or accepting the Northern Securities Company as the holder or owner of any shares of the capital stock of either of those companies, or from effecting any combination or agreement

that would disturb their independent integrity, management and control, respectively, or that would directly or indirectly destroy free and unlimited competition between them by interchange of traffic, poolings of earnings, division of property or otherwise.

The Securities Company, appearing specially for that purpose, filed its petition for the removal of the case into the Circuit Court of the United States upon the ground that the suit was of a civil nature, in equity, involved, exclusive of costs, the sum of two thousand dollars, and was *one arising under the Constitution and laws of the United States.*

The state court approved the required statutory bond for removal, and made an order, reciting that the case was removed to the Federal court.

The Northern Securities Company, appearing specially for that purpose, gave notice of a motion to have the service of summons upon it vacated. Notice was also given of a like motion as to the service of summons upon defendant Hill in his capacity as President of that company. Subsequently, the company, and defendant Hill as its President, gave notice that the above notices were withdrawn, and they accordingly entered their appearance in the cause.

At a later date the defendants severally answered, and the State filed its replication to each answer. Proofs were taken, and the cause having been heard, the bill was dismissed upon the merits. 123 Fed. Rep. 692.

After the cause was argued here the parties were invited to submit briefs upon the question whether the Circuit Court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own

motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382; *Robertson* v. *Cease*, 97 U. S. 646; *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Parker* v. *Ormsby*, 141 U. S. 81; *Mattingly* v. *Northwestern Va. R. R.*, 158 U. S. 53, 57; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453; *Continental National Bank* v. *Buford*, 191 U. S. 119; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194.

We proceed, therefore, to inquire whether the Circuit Court could take cognizance of this case upon removal from the state court and make a final decree upon the merits.

Of course, the Circuit Court could not take cognizance of the case as one presenting a controversy between citizens of different States; for the State of Minnesota is not a citizen within the meaning of the Constitution or the acts of Congress. *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482, 487.

But the first section of the Judiciary Act of 1887-8, 24 Stat. 552, c. 373; 25 Stat. 433, c. 866, provides, among other things, that the Circuit Courts of the United States may take original cognizance of all suits of a civil nature at law or in equity, arising under the Constitution or laws of the United States, where the matter in dispute, exclusive of costs, exceeds in value the sum of two thousand dollars. And the second section provides for the removal from a state court of "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States . . . of which the Circuit Courts of the United States are given original jurisdiction by the preceding section."

In *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 461, which involved the scope and meaning of the acts of 1887-8, in respect of cases arising under the Constitution or laws of the United States, this court, after referring to section one, said: "But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given

original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States *on removal* by the defendant under this section to such suits *as might have been brought* in that court *by the plaintiff under the first section*. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States." *Mexican Nat. Railroad* v. *Davidson*, 157 U. S. 201, 208; *Metcalf* v. *Watertown*, 128 U. S. 586. And in *Chappell* v. *Walerworth*, 155 U. S. 102, 107, the court, referring to *Tennessee* v. *Union & Planters' Bank*, said that it was there adjudged, upon full consideration, that, under the act of 1887–8, "a case (not depending on the citizenship of the parties, nor otherwise specially provided for,) cannot be removed from a state court into the Circuit Court of the United States, *as one arising under the Constitution, laws or treaties of the United States*, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or, in the subsequent pleadings." To the same effect are *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482, 487; *United States* v. *American Bell Tel. Co.*, 159 U. S. 548, 553; *Oregon Short Line* v. *Skottowe*, 162 U. S. 490, 494; *Texas & Pacific Railway Co.* v. *Cody*, 166 U. S. 606, 608; *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 258; *Walker* v. *Collins*, 167 U. S. 57, 59; *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185; *Western Union Tel. Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239. These cases establish, beyond further question in this court, the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character. "If it does not appear at the outset," this court has quite recently said, "that the suit is one of which the Circuit Court at the time its jurisdiction

is invoked could properly take cognizance, the suit must be dismissed." *Third St. & Suburban Ry.* v. *Lewis*, 173 U. S. 457, 460.

We must then inquire whether the complaint presents a case arising under the Constitution or laws of the United States, in respect of which the original jurisdiction of the Circuit Court could have been invoked by the State.

The real purpose of the suit was to annul the agreement and suppress the combination alleged to exist between the defendant corporations upon the ground that such agreement and combination were in violation, first, of the laws of Minnesota, and, second, *of the Anti-Trust Act of Congress*. If relief had been asked upon the ground alone that what the defendant corporations had done and would, unless restrained, continue to do, was forbidden by the statutes of Minnesota, the Circuit Court of the United States could not have taken cognizance of the case; for confessedly such a controversy would not have been one between citizens of different States, nor could such a suit have been deemed one arising under the Constitution or laws of the United States.

The contention, however, is that a case arising under the laws of the United States was presented by the allegation in the complaint that the combination and consolidation between the Great Northern and Northern Pacific Railway Companies and their control of their affairs and operations by the Northern Securities Company, were also in violation of the Anti-Trust Act of Congress of July 2, 1890. An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense, confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, and *Pacific Electric Ry. Co.* v. *Los Angeles*, *post*, page 112, decided at present term. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction then, by the

express command of the act of 1875, its duty is to proceed no further. That is manifest from the fifth section of that act, which provides: "That if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or *removed thereto*, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit *or remand it to the court from which it was removed* as justice may require, and shall make such order as to costs as shall be just." 18 Stat. 470. That provision has not been superseded by any subsequent legislation.

Does the present suit really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court? That is to say, could the suit, as disclosed by the complaint, have been brought by the State originally in that court? If it could not, then, under the act of 1887–8 and the adjudged cases, it should not have been removed from the state court and should be remanded.

By the first section of the Anti-Trust Act every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared to be illegal. The second section condemns the monopolizing or attempting to monopolize, or combining or conspiring to monopolize, any part of such trade or commerce. By the third section, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce in any Territory of the United States or 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 any foreign States, or between the District of Columbia and any State or States or foreign nations, is declared to be illegal. A violation of the provisions of each section is made a misdemeanor, punishable by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Of course, a criminal prosecution under the act must be in the name of the United States and in a court of the United States—the District Attorney who conducts the prosecution being subject to the direction of the Attorney General as to the manner in which his duties shall be discharged. Rev. Stat. 362.

The fourth, sixth, seventh and eighth sections of the act are as follows:

"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. 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 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.

"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." 26 Stat. 209.

It thus appears that the act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. It is not a criminal proceeding, (§§ 1, 2, 3,) nor a suit in equity in the name of the United States to restrain violations of the Anti-Trust Act, (§ 4,) nor a proceeding in the name of the United States for the forfeiture of property being in the course of transportation, (§ 6,) nor an action by any person or corporation for the recovery of threefold damages for injury done to business or property by some other person or corporation. (§§ 7, 8.)

But it is said that as the act of Congress was for the benefit of all the States and all the people, this case is to be deemed one arising under the laws of the United States, and, therefore, cognizable by the Circuit Court, because one of the objects of the State of Minnesota by its suit is to protect certain of its proprietary interests, which, it is alleged, would be injured by violations, on the part of the defendants, of the act of Congress. Let us see what, in that view, is the case as presented by the complaint.

The complaint alleged that the State is the owner of more than three million acres of land, of the value of more than fifteen millions of dollars, obtained, by donation, from the United States, and that "the value of said lands, and the

salability thereof, depends, in very large measure, upon having free, uninterrupted and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway companies."

The bill also alleges "that many of said lands are vacant and unsettled and located in regions not at present reached by railway lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway companies, respectively, to extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory, as well as to obtain traffic therefrom; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies for existing, as well as new, business; that under the consolidation and unity of control hereinafter set forth such rivalry will cease, and many of the lands now owned by the State of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of the State, and that said lands cannot be so sold, or the income of the State increased thereby, without the construction of railroad lines to or adjacent to the same."

It was further alleged that the State is the owner of, and has maintained at large expense, a state university, hospitals for the insane, normal schools for teachers, a training school for boys and girls, schools for deaf, dumb, blind and feeble-minded persons, a state school for indigent and homeless children, and a state penitentiary; that a great portion of the supplies of every kind for such institutions must, of necessity, be shipped

over the different lines of railway owned and operated by the Northern Pacific and Great Northern Railway companies; that the amount of taxes which the State must collect, and the successful maintenance of its public institutions, as well as the performance of its governmental functions and affairs, depend largely upon the value of the real and personal property situated within the State and the general prosperity and business success of its citizens; and that such prosperity and business depend very largely upon maintaining in the State free, open and unrestricted competition between the railway lines of those two companies.

The injury on account of which the present suit was brought is at most only remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a State by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such State; not such a direct, actual injury as that provided for in the seventh section of the statute. If Minnesota may, by an original suit, in its name, invoke the jurisdiction of the Circuit Court, because alone of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by interstate carriers within its limits, then every State upon like grounds may maintain, in its name, in a Circuit Court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view, every individual owner of property in a State may, upon like general grounds, by an original suit, irrespective of any direct or special injury to him, invoke the original jurisdiction of a Circuit Court of the United States, to restrain and prevent violations of the Anti-Trust Act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the Anti-Trust Act. We cannot suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the States or by

individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under the fourth section of the act, by District Attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes. At any rate, the interpretation we have given of the act is a more reasonable one. It is a safe and conservative interpretation, in view as well of the broad and exclusive power of Congress over interstate and international commerce as of the fact that, so far as such commerce is concerned, Congress has prescribed a specific mode for preventing restraints upon it, namely, suits in equity under the direction of the Attorney General. Of the present suit the Attorney General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the fourth section of the Anti-Trust Act.

The State presents still another view of the question of jurisdiction. Its complaint alleges that if the Securities Company be allowed to hold and control the stocks of the Great Northern

and Northern Pacific Railway companies and to carry out the purpose and object of its incorporation, full faith and credit will not be given to the public acts of the State. This, it is contended, presents a case arising under Article IV of the Constitution, providing that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." It is said by the state's counsel that the "gravamen of the charge in appellant's complaint is that the defendants created a corporation device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactment of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded." We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a State other than that in which the court is sitting. Even if it be assumed that the word "acts" includes "statutes," the clause has nothing to do with the conduct of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States.

What was the duty of the Circuit Court when it ascertained that the suit was not one of which it could take cognizance? The answer is indicated by the clause of the Judiciary Act of March 3, 1875, to which we have adverted.

For the reasons stated, we are of opinion that the suit does not—to use the words of the act of 1875—really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court for the purposes of a final decree. *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243.

That being the case, the Circuit Court, following the mandate of the statute, should not have proceeded therein, but should have remanded the cause to the state court.

The decree of the Circuit Court is reversed and the case is sent back with directions that it be remanded to the state court.

BEAVERS *v.* HENKEL.

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

No. 535. Argued March 9, 10, 1904.—Decided April 11, 1904.

Statutory provisions must be interpreted in the light of all that may be done under them. In all controversies, civil and criminal, between the Government and an individual, the latter is entitled to reasonable protection.

The Fifth Amendment is satisfied by one inquiry and adjudication, and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found.

The place where such inquiry must be had, and the decision of the grand jury obtained, is the locality in which by the Constitution and laws the final trial must be had.

On July 23, 1903, a grand jury of the Circuit Court of the United States for the Eastern District of New York found and returned an indictment under section 1781, Rev. Stat., charging George W. Beavers, an officer of the government of the United States, with having received money for procuring a contract with the government for the Edward J. Brandt-Dent Company. A warrant for the arrest of the official was issued to the marshal of the district and returned "not found." Thereupon a complaint supported by affidavit was filed in the District Court of the United States for the Southern District of New York, alleging the finding of the indictment, the issue

of the warrant, the return "not found," and that Beavers was within the Southern District of New York. Upon this complaint a warrant was issued, Beavers was arrested and brought before a commissioner. A hearing was had before that officer, and upon his report the District Judge of the Southern District signed an order of removal to the Eastern District. Before this order could be executed Beavers presented his petition to the Circuit Court of the United States for the Southern District of New York for a writ of *habeas corpus*. After a hearing thereon the application for discharge was denied, and thereupon an appeal was taken to this court.

Mr. Max D. Steuer, with whom *Mr. Bankson T. Morgan* and *Mr. William M. Seabury* were on the brief, for appellant:

When the defendant was arraigned it was the duty of the commissioner to inquire as to the identity of the accused, whether a crime had been committed, and whether there was probable cause to believe the defendant guilty of the crime charged.

Section 1014, Rev. Stat. establishes the practice of the State where the examination is held as the practice in conformity to which the examination must be conducted. Proceedings instituted thereunder are in all respects similar to criminal proceedings instituted before a committing magistrate in the State where the arrest is made and should be governed and controlled by the rules of procedure in force in the State where the arrest is made. *Re Dana*, 68 Fed. Rep. 886, 893; *United States* v. *Rundlett*, 2 Curt. 42; *United States* v. *Case*, 8 Blatchf. 251; *United States* v. *Horton*, 2 Dill. 94; *United States* v. *Brawner*, 7 Fed. Rep. 86, 90; *United States* v. *Martin*, 17 Fed. Rep. 150, 156; *Re Burkhardt*, 33 Fed. Rep. 25, 26; *United States* v. *Greene*, 100 Fed. Rep. 941.

See as to procedure in New York, §§ 188, 194, 195, 201, 207, New York Code Criminal Procedure.

Authority to issue *subpœnas duces tecum* is conferred upon committing magistrates by § 613.

From these provisions of the state code it appears that it is the duty of the committing magistrate to determine *for himself* whether or not a crime has been committed, and whether, from the evidence adduced before him, there is sufficient cause to believe the defendant guilty thereof.

For history and growth of these provisions, see *In re Dana*, 68 Fed. Rep. 886, 894, and cases cited.

In *United States* v. *Greene*, 100 Fed. Rep. 941; 108 Fed. Rep. 816, it was held that an indictment was not conclusive evidence of the fact stated therein, even though indorsed with the names of witnesses, and in *Green* v. *Henkel*, 183 U. S. 241, no doubt was suggested by this court as to the correctness of these views. Since those decisions an attempt was made to have Congress amend the law so as to provide that a certified copy of an indictment should of itself be competent and sufficient evidence to justify a removal.

The proposed amendment was at the time extensively commented upon and public hearings were had, and after full investigation and discussion Congress refused to make the proposed amendment. *Congressional Record*, April and May, 1900; *New York Law Journal*, April 28, 1900; *New York Evening Post*, April 24, 1900; *New York Sun*, April 25, 1900, May 4 and 5, 1900; *New York Times*, May 7, 1900.

The effort of the Government in this case is to effect a change in the law by judicial construction which the legislative branch of the Government deliberately refused to make.

As to *Alexander's Case*, 1 Lowell's Dec. 530, holding that an indictment was evidence outside of the jurisdiction where it was found, see *contra*, *United States* v. *Pope*, 24 U. S. Int. Rev. Rec. 29.

And as to this point see *United States* v. *Haskins*, 3 Saw. 265; *Ex parte Clark*, 2 Ben. 540; *United States* v. *Dana*, 68 Fed. Rep. 886; *United States* v. *Rogers*, 23 Fed. Rep. 658; *United States* v. *Fowkes*, 49 Fed. Rep. 50; *In re Buell*, 3 Dill. 120; Opinions of Miller and Love, JJ., in 1 Wool. C. C. 423.

No statutory provision exists making a copy of an indict-

ment evidence in another jurisdiction and until such statute is passed it is not evidence. *Ex parte Bollman*, 4 Cranch, 75.

As to the minutes of the grand jury which found the indictment where the disclosure is necessary to protect the rights of the accused they are open to judicial inquiry. *United States* v. *Coolidge*, 2 Gall. 363; *Burdick* v. *Hunt*, 43 Indiana, 381; *Low's Case*, 4 Greenl. 439; *Hunter* v. *Randall*, 69 Maine, 183.

In New York and other States a defendant may be entitled to an inspection of the minutes of the grand jury in a proper case, even when he contends that the evidence on which the indictment was found is insufficient in law to sustain it. The fact that the defendant was indicted without preliminary examination is a strong inducement to the court to look with favor on such an application. *People* v. *Molineux*, 27 App. Div. 60; *People* v. *Naughton*, 38 How. Pr. 430; *People* v. *Bellows*, 1 How. Pr. (N. S.) 149; *State* v. *Broughton*, 7 Ired. 96; State v. *Horton*, 63 N. Car. 595; *United States* v. *Reed*, 2 Blatchf. 435; *People* v. *Northey*, 77 California, 634.

As to effect of evidence before grand jury, see *People* v. *Ristenblatt*, 1 Abb. Rep. 268; *People* v. *Strong*, 1 Abb. N. S. 241; *United States* v. *Kilpatrick*, 16 Fed. Rep. 765; 1 Whart. Cr. L. § 493; *In re Woods*, 95 Fed. Rep. 288.

The alleged hearing accorded to the defendant was a mockery and a sham. Every rule and principle of evidence and justice was violated. The indictment, unindorsed as it was with the name of a single witness, was held to be conclusive evidence against the accused.

The defendant is entitled to have the most favorable inferences drawn from the refusal of the commissioner to allow the questions propounded to be answered. Having offered in good faith to establish facts before the commissioner, and having been denied an opportunity, he is entitled before an appellate tribunal to the presumption that such facts exist. *Scotland County* v. *Hill*, 112 U. S. 186; *Powell* v. *Pen*, 127 U. S. 688; *Rockefeller* v. *Merritt*, 76 Fed. Rep. 914; *Ankeny* v. *Clark*, 148 U. S. 355.

The conduct of the prosecution in preventing the introduction of the primary evidence shown to be conveniently accessible, and the rulings of the commissioner in support thereof, create a presumption that the testimony of the witnesses, if produced, would have been favorable to the accused. *Tayloe* v. *Riggs*, 1 Pet. 591; *Hughes' Case*, 2 East. P. C. 1002; Greenleaf on Ev. § 82.

The indictment cannot be regarded as equivalent to an affidavit of the facts alleged therein.

An affidavit or complaint entirely upon information and belief, without properly setting forth the sources of the affiant's knowledge and the grounds for his belief, is insufficient. *Re Blum*, 9 App. Div. 571; *Blodgett* v. *Race*, 18 Hun, 131; *Blythe* v. *Tompkins*, 2 Abb. Pr. 468; *People* v. *Cramer*, 22 App. Div. 129; *Comfort* v. *Fulton*, 13 Abb. Pr. 276; *United States* v. *Sapinkow*, 90 Fed. Rep. 654; *Ex parte Hart*, 63 Fed. Rep. 249; *Re Commissioners*, 3 Woods, 502; *United States* v. *Burr*, 2 Wheel. Cr. Cases, 573; *United States* v. *Collins*, 79 Fed. Rep. 65; *Johnson* v. *United States*, 87 Fed. Rep. 187; *United States* v. *Polite*, 55 Fed. Rep. 59; *Ex parte Dimoning*, 74 California, 164.

Even if evidence had been presented before the commissioner, the fact that the petition for the writ alleged that the accused was not within the Federal district where and when the crime charged in the indictment is alleged to have been committed in itself entitled the petitioner to the writ of *habeas corpus* as a matter of right.

Upon probable cause being shown, the writ of *habeas corpus* cannot be denied the petitioner, for it then becomes a constitutional right. Rev. Stat. § 755; Church on *Habeas Corpus*, § 94; Hurd on *Habeas Corpus*, 2d ed. 204; *Ex parte Des Rochers*, 1 McAll. 86; *In re Winder*, Fed. Cas. No. 17,867; *Ex parte Early*, 3 Ohio Dec. 105; *Ex parte Campbell*, 20 Alabama, 89; *Nash* v. *People*, 36 N. Y. 607.

If facts are duly alleged in a duly verified petition for a writ of *habeas corpus*, they may be regarded as true, even after the

granting of the writ and a return thereto, unless denied by the return or controlled by other evidence. *Whitten* v. *Tomlinson*, 160 U. S. 242; *Kohl* v. *Lehlback*, 160 U. S. 292; *Cuddy, Petitioner*, 131 U. S. 280. *A fortiori* the allegation should be regarded as true before the issuance of the writ.

The defendant could only be tried in the district wherein the crime was committed. Amendment 6, U. S. Const. The place of the commission of the offense is for the purpose of the preliminary hearing a jurisdictional fact and might be controverted upon *habeas corpus* proceedings, even though such a jurisdictional fact had been previously established by a final judgment of a court of general jurisdiction. *Noble* v. *Union River Logging Co.*, 147 U. S. 165, 173; *Scott* v. *McNeal*, 154 U. S. 534; *Roderigas* v. *East River Savings Inst.*, 63 N. Y. 460, 464; *People* v. *Board of Health*, 140 N. Y. 1; *Miller* v. *Amsterdam*, 149 N. Y. 288; *McLeon* v. *Jephson*, 123 N. Y. 142; *Neilson, Petitioner*, 131 U. S. 176, 182; *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371.

The commissioner in proceedings under section 1014 does not hold a "court," *Todd* v. *United States*, 158 U. S. 278, nor is he in the constitutional sense a judge, *Rice* v. *Ames*, 180 U. S. 371, 378. He is a mere ministerial officer upon whom, while acting as a committing magistrate in such proceedings, is imposed the exercise of duties which are judicial in character. *United States* v. *Schumann*, 2 Abb. U. S. Reps. 523; *United States* v. *Jones*, 134 U. S. 483; *United States* v. *Erwing*, 140 U. S. 142; *Re Ellerbe*, 13 Fed. Rep. 530; *In re Mason*, 43 Fed. Rep. 510; *Ex parte Perkins*, 29 Fed. Rep. 900; *In re Perkins*, 100 Fed. Rep. 953; *United States* v. *Hughes*, 70 Fed. Rep. 972. He cannot punish for a contempt committed in his presence. *Ex parte Perkins*, 29 Fed. Rep. 900; *Re Mason*, 43 Fed. Rep. 510. And see *Ex parte Dole*, 7 Phila. 595; *United States* v. *Allred*, 155 U. S. 595; Black on Judgments, § 283; *People* v. *Schuyler*, 69 N. Y. 242, 247.

In case of courts martial and delinquency courts and other tribunals of limited and inferior jurisdiction, whether the rec-

ords recite jurisdictional facts or not, their judgments are open to impeachment by extrinsic evidence, showing want of jurisdiction. *People ex rel. Frey* v. *Warden*, 100 N. Y. 20, 26; *Adams* v. *S. & W. R. R. Co.*, 10 N. Y. 328; *Mills* v. *Martin*, 19 Johns. 7; *People* v. *Cassells*, 5 Hill, 164; Greenleaf on Evidence, 470; *Ex parte Watkins*, 3 Pet. 207; *Hardin* v. *Jordan*, 140 U. S. 401.

The legal effect of a warrant issued by the chief executive of a State in an interstate rendition proceeding is that it is but *prima facie* sufficient to hold the accused, and the jurisdictional facts recited in such warrant are subject to be rebutted by proof on *habeas corpus*. *Cockran* v. *Hyatt*, 188 U. S. 691, 711; *Robb* v. *Connolly*, 111 U. S. 624; *People ex rel. Cockran* v. *Hyatt*, 172 N. Y. 176; *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182; *Ex parte Todd*, 57 L. R. A. 566; *Matter of Cook*, 49 Fed. Rep. 823; *Ex parte Hart*, 63 Fed. Rep. 260; *Work* v. *Connington*, 34 Ohio St. 64; *Matter of Manchester*, 5 California, 237; 15 Am. & Eng. Ency. of Law (2d ed.), 204. Whether or not the accused committed the acts complained of while actually present within the demanding State, is jurisdictional, and it is competent in such cases to show in *habeas corpus* proceedings by parol evidence that the accused was not within the demanding State when the alleged acts were committed, however regular the extradition papers may be. *In re Mohr*, 73 Alabama, 508; *Wilcox* v. *Nolze*, 34 Ohio St. 320; *Hartman* v. *Aveline*, 63 Indiana, 344; *Jones* v. *Leonard*, 50 Iowa, 106; *Hibler* v. *The State*, 43 Texas, 197.

The accused did not waive his right to raise this question by writ by reason of failure to offer such proof before the commissioner. The question of the jurisdiction of the court may be raised at any stage of a criminal proceeding in the same or in another tribunal. It is never waived by a defendant, and he is not barred from raising it, even because of negligence or delay. Bishop's New Cr. Proc. § 316, par. 2; Hughes' Cr. L. Proc. § 2509; *United States* v. *Rogers*, 23 Fed. Rep. 658; *United States* v. *Crawford*, 47 Fed. Rep. 566; *Dred Scott* v. *Sandford*, 19

How. 402; *In re Webb*, 89 Wisconsin, 354; *Mexican Bank* v. *Davidson*, 157 U. S. 208.

Mr. Assistant Attorney General Purdy for the appellee:

A writ of *habeas corpus* and certiorari ancillary thereto cannot be used to perform the office of a writ of error. *Ornelas* v. *Ruiz*, 161 U. S. 502; *Terlinden* v. *Ames*, 184 U. S. 270; *Wright* v. *Henkel*, 190 U. S. 40, 57; *Greene* v. *Henkel*, 183 U. S. 249.

A writ of certiorari does not enlarge the office of a writ of *habeas corpus*, but is employed in connection with such writ in order that the court may ascertain from the record whether *jurisdictional questions* have been disregarded, and the defendant is restrained of his liberty without due process of law. *Ex parte Lang*, 18 Wall. 163; *Ex parte Virginia*, 100 U. S. 339.

The indictment sufficiently charges the defendant with the commission of a crime against the United States under § 1781, Rev. Stat.

The complaint made before the United States Commissioner was based entirely upon information and belief, and contained proper allegations showing the sources of information and the grounds of complainant's belief. *Rice* v. *Ames*, 180 U. S. 371, 374.

Section 1014, Rev. Stat., when properly construed, is intended, in case of indictment, to furnish the Government a convenient and summary method of securing the appearance of the defendant before the United States court in which the indictment was found. *In re Ellerbe*, 13 Fed. Rep. 530; *United States* v. *Yarbrough*, 122 Fed. Rep. 293; *Greene* v. *Henkel*, 183 U. S. 258.

If in a proceeding under § 1014, the defendant after indictment is entitled to a preliminary examination for the purpose of establishing probable cause, a certified copy of the indictment and proof of identity of the defendant, are sufficient to make out a *prima facie* case sufficient to sustain a finding of the Commissioner of the existence of probable cause. *In re*

Dana, 68 Fed. Rep. 891; *United States* v. *Greene*, 100 Fed. Rep. 941; *United States* v. *Greene*, 108 Fed. Rep. 816; *Bryant* v. *United States*, 167 U. S. 104; *Otieza* v. *Jacobus*, 136 U. S. 330; *Horner* v. *United States*, 143 U. S. 207; *In re Wood*, 95 Fed. Rep. 288; *Price* v. *McCarthy*, 32 C. C. A. 162; *S. C.*, 89 Fed. Rep. 84.

In the case at bar the Government has followed a practice well recognized for many years by the Federal courts in nearly every district in the United States, and while it may be that if it is once admitted that in *all* procedings under § 1014 the defendant is entitled to *a preliminary examination for the purpose of establishing probable cause*, that the defendant would be entitled as of right to introduce evidence bearing upon such question, it is sufficient to say that in the case at bar *the appellant did not avail himself of such opportunity* in any direct and proper manner.

A certified copy of the indictment and proof of identity are sufficient to establish probable cause, and authorize a warrant of removal. See *United States* v. *Aaron Burr*, Fed. Cas. No. 14,692; *United States* v. *Newcomber*, Fed. Cas. No. 15,869; *In re Clark*, Fed. Cas. No. 2797; *In re Bailey*, Fed. Cas. No. 730; *United States* v. *Jacobi*, Fed. Cas. No. 15,460; *United States* v. *Shepard*, Fed. Cas. No. 16,273; *In re Alexander*, Fed. Cas. No. 162; *United States* v. *Hendricks*, Fed. Cas. No. 15,313; *In re Buell*, Fed. Cas. No. 2102; *United States* v. *Pope*, Fed. Cas. No. 16,069; *In re Doig*, 4 Fed. Rep. 193; *In re Ellerbe*, 13 Fed. Rep. 530; *United States* v. *Rogers*, 23 Fed. Rep. 658; *United States* v. *White*, 25 Fed. Rep. 716; *In re Wolf*, 27 Fed. Rep. 606; *In re Graves*, 29 Fed. Rep. 66; *United States* v. *Fokes*, 53 Fed. Rep. 13; *S. C.*, 49 Fed. Rep. 50; *In re Beshears*, 79 Fed. Rep. 70; *United States* v. *Lee*, 84 Fed. Rep. 626; *In re Belknap*, 96 Fed. Rep. 614; *In re Richter*, 100 Fed. Rep. 295; *Greene* v. *Henkel*, 183 U. S. 249; *United States* v. *Yarbrough*, 122 Fed. Rep. 293.

A certified copy of the indictment, together with proof of identity of the defendant having been offered by the Government, a *prima facie* case of probable cause was established and

the finding of the Commissioner upon this question is not subject to review on a writ of *habeas corpus*. *Greene* v. *Henkel*, 183 U. S. 249, 261.

The appellant upon the hearing before the Commissioner did not offer any competent evidence to rebut the case presented by the Government. The appellant's whole contention before the Commissioner was directed toward an effort to prove that the proceedings before the grand jury which returned the indictment were illegal and void, and that consequently no valid indictment had in fact been returned against George W. Beavers. A brief examination of the record will clearly disclose this fact.

A magistrate, acting pursuant to § 1014, Rev. Stat., is justified in treating the instrument as an indictment found by a competent grand jury, and is not compelled or authorized to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment. *Greene* v. *Henkel*, 183 U. S. 249.

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

This case turns upon the efficacy of an indictment in removal proceedings. The government offered no other evidence of petitioner's guilt. His counsel state in their brief:

"The controlling questions to be discussed on this appeal are whether the indictment offered in evidence before the commissioner can be regarded as conclusive evidence against the accused of the facts therein alleged; whether it was competent at all as evidence of such facts, and whether such indictment was entitled to be accorded any probative force whatever."

At the outset it is well to note that this is not a case of extradition. There was no proposed surrender of petitioner by the United States to the jurisdiction of a foreign nation, no abandonment of the duty of protection which the nation owes to all

within its territory. There was not even the qualified extradition which arises when one State within the Union surrenders to another an alleged fugitive from its justice. There was simply an effort on the part of the United States to subject a citizen found within its territory to trial before one of its own courts. The locality in which an offense is charged to have been committed determines under the Constitution and laws the place and court of trial. And the question is what steps are necessary to bring the alleged offender to that place and before that court.

Obviously very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made, while here the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial. It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial rather than a mere ministerial act.

In the light of these considerations we pass to an inquiry into the special matters here presented. Article 5 of the amendments to the Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces,

or in the militia, when in actual service in time of war or public danger."

While many States in the exercise of their undoubted sovereignty, *Hurtado* v. *California*, 110 U. S. 516, have provided for trials of criminal offenses upon information filed by the prosecuting officer and without any previous inquiry or action by a grand jury, the national Constitution, in its solicitude for the protection of the individual, requires an indictment as a prerequisite to a trial. The grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged. Blackstone says (vol. 4, p. 303):

"This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes."

The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into

court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury, should be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause. And the place where such inquiry must be had and the decision of a grand jury obtained is the locality in which by the Constitution and laws the final trial must be had.

While the indictment is *prima facie* evidence it is urged that there are substantial reasons why it should not be regarded as conclusive. An investigation before the grand jury, it is said, is generally *ex parte*—although sometimes witnesses in behalf of the defendant are heard by it—and the conclusion of such *ex parte* inquiry ought not to preclude the defendant from every defence, even the one that he was never within the State or district in which the crime is charged to have been committed, or authorize the government to summarily arrest him wherever he may be found, transport him perhaps far away from his home and subject him among strangers to the difficulties and expense of making his defence. It is unnecessary to definitely determine this question. It is sufficient for this case to decide, as we do, that the indictment is *prima facie* evidence of the existence of probable cause. This is not in conflict with the views expressed by this court in *Greene* v. *Henkel*, 183 U. S. 249. There it appeared that after an indictment had been found by a grand jury of the United States District Court for the Southern District of Georgia the defendants were arrested in New York; that on a hearing before the commissioner he ruled that the indictment was conclusive evidence of the existence of probable cause, and declined to hear any testimony offered by the defendants. Upon an application to the district judge in New York for a removal he held that the indictment was not conclusive, and sent the case back to the commissioner. Thereupon testimony was offered

before the commissioner, who found that there was probable cause to believe the defendants guilty, and upon his report the district judge ordered a removal. We held that under the circumstances it was not necessary to determine the sufficiency of the indictment as evidence of the existence of probable cause, and that as the district judge found that probable cause was shown, it was enough to justify a removal.

It is further contended that—

"There was no jurisdiction to apprehend the accused, because the complaint on removal was jurisdictionally defective, in that it was made entirely upon information, without alleging a sufficient or competent source of the affiant's information and ground for his belief, and without assigning any reason why the affidavit of the person or persons having knowledge of the facts alleged was not secured."

This contention cannot be sustained. The complaint alleges on information and belief that Beavers was an officer of the government of the United States in the office of the First Assistant-Postmaster General of the United States; that as such officer he was charged with the consideration of allowances for expenditures and with the procuring of contracts with and from persons proposing to furnish supplies to the said Post Office Department; that he made a fraudulent agreement with the Edward J. Brandt-Dent Company for the purchase of automatic cashiers for the Post Office Department and received pay therefor; that an indictment had been found by the grand jury of the Eastern District, a warrant issued and returned "not found," and that the defendant was within the Southern District of New York. This complaint was supported by affidavit, in which it was said:

"Deponent further says that the sources of his information are the official documents with reference to the making of the said contract and the said transactions on file in the records of the United States of America and in the Post Office Department thereof and letters and communications from the Edward J. Brandt-Dent Company with reference to the said contract,

and from the indictment, a certified copy of which is referred to in said affidavit as Exhibit A, and the bench warrant therein referred to as Exhibit B, and from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said Southern District of New York in the past few days and from the certificate of the United States marshal for the Eastern District of New York, endorsed on said warrant."

This disclosure of the sources of information was sufficient. In *Rice* v. *Ames*, 180 U. S. 371, a case of extradition to a foreign country in which the complaint was made upon information and belief, we said (p. 375):

"If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

The indictment alone was, as we have seen, a showing of probable cause sufficient to justify the issue of a warrant.

With reference to other questions we remark that, so far as respects technical objections, the sufficiency of the indictment is to be determined by the court in which it was found and is not a matter of inquiry in removal proceedings, (*Greene* v. *Henkel*, *supra*,) that the defendant has there no right to an investigation of the proceedings before the grand jury, or an inquiry concerning what testimony was presented to or what witnesses were heard by that body. In other words, he may not impeach an indictment by evidence tending to show that the grand jury did not have testimony before it sufficient to

justify its action. Such seems to have been the purpose of most, if not all, of the testimony offered by the petitioner in this case. As his counsel stated during the progress of the examination before the commissioner: "We hold that we have an absolute right in a proper proceeding to expose what took place before the grand jury. We don't do it at all in order to make a disclosure of what transpired before a secret body. We do propose to show what transpired before that grand jury so as to show that there was not any evidence upon which that body could have found an indictment, a legal, valid, lawful indictment, against George W. Beavers. We have no other purpose in calling this witness or any other witness who appeared before the grand jury." But the sufficiency of an indictment as evidence of probable cause in removal proceedings cannot be impeached (if impeachable at all) in any such manner. Neither can a defendant in this way ascertain what testimony the government may have against him and thus prepare the way for his defence. There are no other questions that seem to us to require notice.

We see no error in the record, and the judgment is

Affirmed.

HOUGHTON *v.* PAYNE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 372. Argued March 10, 1904.—Decided April 11, 1904.

Contemporaneous construction is a rule of interpretation but it is not an absolute one and does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of a department of the Government, however long continued by successive officers, must yield to the positive language of the statute.

Periodical publications as defined in the Post Office bill of March 3, 1879, do not include books complete in themselves and which have no connection with each other, simply because they are serially issued at stated intervals more than four times a year, bound in paper, bear dates of issue and numbered consecutively; and the Postmaster General can ex-

clude them from second class mail notwithstanding they have been heretofore transmitted as such by his predecessors in office.

The terms "periodical" and "periodical publication," as used in the act of March 3, 1879, are used in their obvious and natural sense, and denote the well-recognized and generally understood class of publications commonly called by the name of "periodical."

The provisions of § 14, act of March 3, 1879, are not descriptive of the kind of publication which is to be admitted to the class of periodical publications provided for by §§ 7 and 10 of said act, but are express limitations added to the description in those sections.

The provisions of § 14 are not to be taken to determine what is a periodical publication, but to ascertain whether, being such a publication as is contemplated by § 10, it also answers the additional conditions there imposed.

The fact that publishers may have made contracts for the future delivery of their publications at prices founded on confidence in the continuance of the certificate of admission to the mails at second class rates, issued under a former administration of the Post Office Department, does not entitle them to an injunction restraining the present administration from ascertaining the true character of the publication and charging the legal rate accordingly.

THIS was a bill in equity originally filed in the Supreme Court of the District of Columbia by the firm of Houghton, Mifflin & Co., against the Postmaster General, praying that a certain publication, known as the Riverside Literature Series, be entered and transmitted through the mails as second class mail matter, and for an injunction to restrain the cancellation of a certain certificate of entry, previously issued, allowing such transmission.

The answer denied that the Riverside Literature Series constituted a periodical within the meaning and intent of the statute; that, although complying with the external characteristics and conditions of second class mail matter, nevertheless, internally and in substance, they have not the characteristics of second class matter, but have the peculiarities of books, and are in fact books.

The case was heard upon the pleadings and an exhibit of the series, and a decree rendered in accordance with the prayer of the bill. 31 Wash. L. R. 178. An appeal was taken to the Court of Appeals of the District of Columbia, which reversed the decree and dismissed the bill. 31 Wash. L. R. 390.

Mr. William S. Hall and *Mr. Holmes Conrad* for appellants, in this case and in No. 373:

As to discretion of Postmaster General, see *Payne* v. *Pub. Co.*, 20 App. D. C. 581; R. S. §§ 161, 406, 3909, 3932, 3936; H. R. bill 4910, to amend § 14 of the act of March 3, 1879, and remarks of Mr. Cannon thereon, Cong. Rec. Feb. 2, 1888, vol. 19, 911; April 24, 1894, amendment proposed to Post Office bill, Cong. Rec. vol. 26, part 5, 4050; January 7, 1897, H. R. bill 4566, the "Loud Bill" to amend postal laws, Sen. Rep. 54 Cong. 2d sess. No. 1517. Not until after the defeat of the Loud Bill was regulation § 276 amended.

The bill does not seek to control the judgment of the Postmaster General in any matter calling for the exercise of judgment. For statutes prior to 1879 regulating mail matter of this nature, see Statute of 1845, ch. 43, § 16; of 1852, § 2; of 1863, ch. 71, § 20; of 1872, ch. 335, reënacted Rev. Stat. § 3875 *et seq.* As to proper rule of construction, see *Platt* v. *Union Pacific*, 99 U. S. 58. The broad and beneficent purpose of Congress expressed in the act of March 3, 1879, is confirmed and accentuated by the act of July 16, 1894, 28 Stat. 104. As to what periodical publications were supposed to include in 1879, see 15 Op. Atty. Gen. 346. The construction contended for would not result in free admission of foreign novels in view of the Tariff Acts of 1890, ch. 1244, par. 657; 1894, ch. 349, par. 562. A long established construction of an executive department should not be disregarded where contracts have been made and liabilities incurred on the faith thereof.

Where the language of an act is so clear as not to be open to construction, its construction cannot be changed by long continued practice of the department; but if there is doubt as to the meaning of the act, then such a practice would be persuasive, if not controlling. *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Hill*, 120 U. S. 169; *United States* v. *Finnell*, 185 U. S. 236, 244; *United States* v. *Alabama Railway Co.*, 142 U. S. 621; *Del Monte* v. *Last Chance*, 171 U. S. 55, 62.

The object of the Postmaster General can only be accomplished by an amendment of the statute. *Morrill* v. *Jones*, 106 U. S. 466. Courts will not intervene in cases that are pending in a Department. *Johnson* v. *Towsley*, 13 Wall. 86; *Brown* v. *Hitchcock*, 173 U. S. 473, 477; *Carrick* v. *Lamar*, 116 U. S. 423, 426; *Moore* v. *Robins*, 96 U. S. 530, 535; *Sandford* v. *Sandford*, 139 U. S. 642, 647. A legal error by the Postmaster General does not bind the courts. *School of Healing* v. *McAnnulty*, 187 U. S. 94, 109.

If it is held that these publications do come within the statute, the question is wholly within the control of the Postmaster General and is not subject to review by the courts. *Noble* v. *Union River L. R. R.*, 147 U. S. 165, 170; *United States* v. *Wright*, 11 Wall. 648.

Mr. Tracy L. Jeffords, with whom *Mr. Charles F. Moody* and *Mr. E. Van Buren Getty* were on the brief, for appellants in No. 481:

Congress has sole and exclusive power over the entire postal system of the United States. *Jackson* v. *United States*, 96 U. S. 727; *Morrill* v. *Jones*, 106 U. S. 466; *Campbell* v. *United States*, 107 U. S. 407.

These publications are second class mail matter and are entitled to be so classified and carried.

Former Postmaster Generals have so construed the statute of 1879 and such construction was proper, and the practice should not be disturbed. *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Richardson*, 28 Fed. Rep. 61; *Packard* v. *Richardson*, 17 Massachusetts, 144; *The Queen* v. *Cutbush*, 2 Q. B. 379; *United States* v. *Philbrick*, 128 U. S. 52; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; *The Laura*, 114 U. S. 411; *United States* v. *Hill*, 120 U. S. 169.

The cancellation of appellants' second class mail certificates deprives them of their property without due process of law. The right to use the mail is a property right. *Hoover* v. *McChesney*, 81 Fed. Rep. 472.

Mr. John G. Johnson and *Mr. Henry H. Glassie*, special assistants to the Attorney General, for appellee in this case and in Nos. 373 and 481:

In this case the court is not dealing with a burden upon the citizen but with a governmental grant of privilege and benefit, and doubt, if any, must be resolved in favor of the Government. *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 146; *Hannibal &c. R. R. Co.* v. *Packet Co.*, 125 U. S. 260, 271.

The determination by the Postmaster General that these publications are not periodicals is the determination of a matter of fact committed to his jurisdiction; such finding is therefore final and conclusive, this notwithstanding *School of Healing* v. *McAnnulty*, 187 U. S. 94; *Payne* v. *Nat. Ry. Pub. Co.*, 20 App. D. C. 581.

As to how far mandamus or injunction can be exercised over or against an executive officer, see *Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *Stokes*, 3 How. 87; *New Orleans* v. *Paine*, 147 U. S. 261, 264; *Noble* v. *Union River L. Co.*, 147 U. S. 165, showing that they will not issue for error; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 325; *Gaines* v. *Thompson*, 7 Wall. 347; *Dunlap* v. *Black*, 128 U. S. 40, 45; *Litchfield* v. *Richards*, 9 Wall. 575, 577; *In re Isaac L. Rice*, 155 U. S. 396, 403.

Whatever the power of the court may be as to whether an executive officer is acting within his jurisdiction, his ascertainment of questions of fact is conclusive. *Gardner* v. *Bonestell*, 180 U. S. 362, 370; *Japanese Emigrant Case*, 189 U. S. 86, 98; *Johnson* v. *Drew*, 171 U. S. 93, 99; *Burfenning* v. *Railway Co.*, 163 U. S. 321; *Smelting Co.* v. *Kent*, 104 U. S. 636, 645.

It is a familiar principle that distinguishes refusing to set aside a finding because one does not think it was reasonable and setting a finding aside because no reasonable person could have found it. *Bridge* v. *Directors &c.*, L. R. 7 Eng. & Ir. App. 221, 233. See also *Railway Co.* v. *Wright*, L. R. 11 App.

Cas. 152; *B. & O. R. R. Co.* v. *Griffith*, 159 U. S. 603; *Morande* v. *Texas & Pacific*, 184 U. S. 173, 186.

There is no question here of denying any one the use of the mails; it is only a question of rate charged for such use.

The Postmaster General has the power and it is his duty to charge the legal rate on all matter transmitted through the mail and neither he nor the court is bound by the determination made by former Postmasters General in this respect. *United States* v. *McDonald*, 7 Pet. 114; *Wisconsin Central* v. *United States*, 164 U. S. 190; *United States* v. *Harmon*, 147 U. S. 268. And see *Fairbank* v. *United States*, 184 U. S. 284, 308.

There was no want of power, and Congress has never sanctioned the suggestion of any such want.

Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute. *United States* v. *Union Pacific*, 91 U. S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24; *Mitchell* v. *Grant &c. Co.*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707; *United States* v. *Freight Association*, 166 U. S. 293, 318.

The courts cannot undo judicially what the Postmaster General has already done administratively. *United States* v. *Wright*, 11 Wall. 648.

The fact that the matter was admitted at one time as second class matter does not estop the United States. *The Floyd Acceptances*, 7 Wall. 666; *Wisconsin Central* v. *United States*, 164 U. S. 190, 210; *United States* v. *Kirkpatrick*, 9 Wheat. 727, 735; *Whiteside* v. *United States*, 93 U. S. 247, 257; *Hawkins* v. *United States*, 96 U. S. 689.

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

This case depends upon the construction of the following sections of the Post Office appropriation bill of March 3, 1879, 20 Stat. 355, 358:

"Sec. 7. That mailable matter shall be divided into four classes:

"First. Written matter;

"Second. Periodical publications;

"Third. Miscellaneous printed matter;

"Fourth. Merchandise."

Matter of the second class is thus described:

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in section twelve and fourteen.

"SEC. 11. Publications of the second class except as provided in section twenty-five, when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall be entitled to transmission through the mails at two cents a pound or fraction thereof, such postage to be prepaid, as now provided by law.

"SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject: *Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to

literature, the sciences, arts or some special industry, and having a legitimate list of subscribers: *Provided, however,* That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And by the act of March 3, 1885, 23 Stat. 385, it was provided that second class matter (saving that excepted in section 25) shall, on and after June 1, 1885, be entitled to transmission through the mails at one cent a pound or fraction thereof.

Section 17 declares that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, etc., and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof.

Are the publications of the Riverside Literature Series periodicals, and therefore, belonging to the second class of mail matter, and entitled to transmission at the rate of one cent a pound; or books, as designated in the third class, and subject to postage at the rate of one cent for each two ounces?

The publications are small books, $4\frac{1}{2}$ by 7 inches, in paper covers, and are issued from the office of publication either monthly or quarterly, and numbered consecutively. Each number contains a single novel or story, or a collection of short stories or poems by the same author, and most, if not all of them, are reprints of standard works by Thackeray, Whittier, Lowell, Emerson, Irving, or other well known writers, and from a literary point of view are of a high class. Each number is complete in itself and entirely disconnected with every other number. Upon the front page of the cover appears, at the top, the words "Issued Monthly," followed by the number of the serial and the date of issue. Below, the words "Riverside Literature Series" are prominently displayed, and in the center of the page appears the name of the book. Each number complies with the conditions of section 14, upon which the publication may be admitted to the second class, namely,

it is regularly issued at stated intervals, at least quarterly, and bears a date of issue and is consecutively numbered. It is issued from a known office of publication; is formed of printed paper sheets, without board, cloth or leather, or other substantial binding, and is published for the dissemination of information of a public character; or devoted to literature, etc. The bill also avers that the series has a legitimate list of subscribers, but does not aver that they were reading subscribers in the ordinary sense of the term. This distinction, however, is not pressed by the Government. If the fact be that this series becomes a periodical by a compliance with the conditions of section 14, under which it is entitled to be transmitted as second class mail matter, we shall be compelled to say that the decree of the court below was wrong.

But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary meaning of the term. A periodical is defined by Webster as "a magazine or other publication which appears at stated or regular intervals," and by the Century Dictionary as "a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself." By section 10 newspapers are included within the class of periodical publications, although they are not so regarded in common speech. By far the largest class of periodicals are magazines, which are defined by Webster as "pamphlets published periodically, containing miscellaneous papers or compositions." A few other nondescript publications, such as railway guides, ap-

pearing at stated intervals, have been treated as periodicals and entitled to the privileges of second class mail matter. *Payne* v. *Railway Pub. Co.*, 20 D. C. App. 581. Publications other than newspapers and periodicals are treated as miscellaneous printed matter falling within the third class.

While it may be difficult to draw an exact line of demarkation between periodicals and books, within which latter class the Riverside Literature Series falls, if not a periodical, it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding, (although this is by no means essential,) but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity

is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation in his library. It is true that in this subdivision of section 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding.

Great stress is laid by counsel upon the original interpretation of the term "periodical," as applied to these books, which it is said was continued without change under different administrations and by several successive Postmasters General, and from 1879, the date of the passage of the act, until 1902, when the certificates granted by the former Postmasters General were revoked by the defendant and a different classification made of the publications now in issue, that the attention of Congress was repeatedly called to the evils and to the large expense incurred by the Government by the admission of publications of this description to mail matter of the second class; that Congress seriously considered these representations,

and committees made voluminous report thereon, yet Congress persistently refused to change by legislation the ruling of the Postmasters General in that regard.

We had occasion to consider this subject at length in the case of *United States* v. *Alabama R. R. Co.*, 142 U. S. 615, 621, in which we held that this court would look with disfavor upon a change whereby parties who have contracted with the Government on the faith of a former construction might be injured; especially when it is attempted to make the change retroactive, and to require from a contractor a return of moneys paid to him under the former construction. This case is not open to the same objections. No contract with the Government is set up whereby the latter agreed to carry these publications as second class mail matter. Much less is any repayment demanded of money paid by the Government under the prior construction. The action of the Government consists merely in the revocation of a certificate or license admitting these publications as mail matter of the second class. No vested right having been created by such certificate, no contract can be said to be impaired by its revocation. *Salt Co.* v. *East Saginaw*, 13 Wall. 373; *Grand Lodge* v. *New Orleans*, 166 U. S. 143, 147. It was said, in that case, that the construction is one which, though inconsistent with the literalism of the act, certainly consorted with the equities of the case. Whereas in the case under consideration, if we are to believe the statements of counsel, which are not denied, the carriage of these publications as second class mail matter entails annually an enormous loss upon the Government and constitutes an odious discrimination between publishers of books and publishers of the so-called periodicals.

But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Finnell*, 185 U. S. 236. Contemporaneous construction is a rule of inter-

pretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute. As was said in the *Graham* case (p. 221), "if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise and with its meaning evident there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *United States* v. *Temple*, 105 U. S. 97; *Swift Co.* v. *United States*, 105 U. S. 691; *Ruggles* v. *Illinois*, 108 U. S. 526." While it might well happen that by reason of the relative unimportance of the question when originally raised a too liberal construction might have been given to the word periodical, we cannot think that if this question had been raised for the first time after second class mail matter had obtained its present proportions, a like construction would have been given. Some consideration in connection with the revocation of these certificates may properly be accorded to the great expense occasioned by this interpretation, and the discrimination in favor of certain publishers and against others, to which allusion has already been made. We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained, and we are therefore of opinion that the judgment of the Court of Appeals was correct, and it is

Affirmed.

MR. JUSTICE HARLAN (with whom concurred the CHIEF JUSTICE) dissenting.

The Chief Justice and myself are unable to concur in the opinion of the court.

It was admitted at the bar that for more than sixteen years prior to May 5, 1902, the Post Office Department had acted upon the identical construction of the statute for which the appellants contend. During that period many different Postmasters General asked Congress to amend the statute so as to exclude from the mails, as second class matter, such publications as those issued by the appellant, and which, under the present ruling of the Department, are declared not to belong to that class of mailable matter. Again and again Congress refused to so amend the statute, although earnestly urged by the Department to do so.

Representative Cannon, now Speaker of the House of Representatives, in a speech in opposition to the proposed change of the statute, explained the reasons that induced Congress to pass the act of March 3, 1879, c. 180, Rev. Stat. Supp. 454. He said: "Before speaking on the merits of this bill, I wish to say to the gentleman from Georgia that, according to my recollection, by legislation advisedly had, prior to 1879, while I was a member of the Committee on the Post Office and Post Roads, this class of literature was allowed to pass through the mails, the policy of that legislation being to encourage the dissemination of sound and desirable reading matter among the masses of the people of the country at cheap rates, both as to the cost of the books themselves and as to the postage. The question was discussed, unless my memory greatly misleads me, and the legislation was advisedly had. Under this legislation the best classes of literature, for instance, the Waverley Novels, Dickens's works, and the new translation of the Bible, have been sent by publishing houses unbound, stitched, so that they could be sold to the people at ten cents a volume. As a consequence of this you may now find in the homes of our farmers and laboring men throughout the length and breadth of the country in this cheap form, issued at ten cents per volume, a class of literature to which, prior to the adoption of this policy, some people in very good circumstances could scarcely have access." Cong. Rec. vol. 19, p. 911.

The result is that after the Department had for sixteen years construed the statute to mean what the appellants say it plainly means, and after Congress had uniformly refused, upon full investigation, to comply with the requests of Postmasters General to so amend the statute that it could be interpreted as the Government now insists it should always have been interpreted, the Post Office Department ruled, on May 5, 1902, that the appellants' publications, known as the "Riverside Literature Series," could not go through the mails as second class matter. This ruling was made notwithstanding a Post Office official, having power to act in the premises, had issued to the appellants a certificate declaring that the "Riverside Literature Series" had been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails as second class matter.

Thus, by a mere order of the Department that has been accomplished which different Postmasters General had held could not be accomplished otherwise than by a change in the language of the statute itself, which change, as we have said, Congress deliberately refused to make after hearing all parties concerned and after extended debate in each House.

It has long been the established doctrine of this court that the practice of an Executive Department through a series of years should not be overthrown, unless such practice was obviously and clearly forbidden by the language of the statute under which it proceeded. In *United States* v. *Finnell*, 185 U. S. 236, 244, which case related to certain fees claimed by a clerk of a court of the United States, this court said: "It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it

would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 U. S. 219; *Wisconsin C. R'd Co.* v. *United States*, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Johnson*, 124 U. S. 236, 253; *United States* v. *Alabama G. S. R'd Co.*, 142 U. S. 615, 621. Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests."

In our judgment, the appellants properly construe the statute. We think it obviously means just what the Department held it to mean for more than sixteen years. But the very utmost that the Government can claim is that the statute in question is doubtful in its meaning and scope. The rule in such a case is not to disturb the long-continued practice of the Department in its execution of a statute, leaving to Congress to change it, when the public interests require that to be done. But the Department, after being informed repeatedly by Congress that the change asked by Postmasters General would not be made, concluded to effect the change by a mere order that would make the statute mean what the practice of sixteen years, and the repeated action of Congress, had practically said it did not mean and was never intended to mean. This is a mode of amending and making laws which ought not to be encouraged or approved.

It is suggested that the ruling of the Department was changed because of the increased expense attending the carrying, as second class mailable matter, of such publications as those of the appellants. But how could the fact of such expense justify a change in the settled construction of a statute? That was a matter to which the attention of Congress was specially and frequently called, and yet it refused to modify

the language of the statute. It was not the function of the Postmaster General to sit in judgment on the policy of legislation and to determine the extent to which Congress should authorize the expenditure of public moneys. The question of expense was entirely for the legislative branch of the Government.

Something has also been said as to the discretion committed to the Post Office Department in determining what is and what is not second class mailable matter. But what about the discretion with which previous Postmasters General had been invested, when for many years they uniformly held that such publications as the plaintiffs' were second class mailable matter? Is the discretion of one Postmaster General to be deemed of more importance than the discretion of five of his predecessors in office?

In our opinion the law is for the appellants, and it should have been so adjudged.

SMITH *v.* PAYNE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 481. Argued March 10, 1904.—Decided April 11, 1904.

What are periodicals and second class matter decided on authority of *Houghton* v. *Payne*, *ante*, p. 88.

THIS was also a bill, filed by the firm of Street & Smith, to enjoin the Postmaster General from cancelling certain certificates of entry admitting the publications of complainant firm to the mail as second class mail matter. This case took the same course as the preceding one.

Mr. Tracy L. Jeffords, with whom *Mr. Charles F. Moody* and *Mr. E. Van Buren Getty* were on the brief, for appellants.

Mr. John G. Johnson and *Mr. Henry H. Glassie*, special assistants to the Attorney General, for appellee.[1]

MR. JUSTICE BROWN delivered the opinion of the court.

Plaintiffs are the publishers of several different series of novels under the names of The Columbia Library, The Bertha Clay Library, The Magnet Detective Library, The Medal Library, The Undine Library, The Eden Series, The Arrow Library, and some others. The books of these series are apparently of an inferior class of literature, and are numbered consecutively; but the only thing to indicate that they are issued periodically is a notice upon the outside of the back cover in small type that they are weekly or semi-monthly publications.

The considerations moving us to affirm the decree of the Court of Appeals in the case of *Houghton* v. *Payne*, just decided, apply with much greater persuasiveness to this case, and the decree dismissing the bill is, therefore

Affirmed.

MR. JUSTICE HARLAN and The CHIEF JUSTICE dissent in this case for the reasons stated in their dissenting opinions in *Houghton* v. *Payne, ante*, p. 88, and *Bates & Guild Co.* v. *Payne, post*, p. 106.

[1] For abstracts of arguments, see p. 88, *ante*

BATES & GUILD CO. *v.* PAYNE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 373. Argued March 10, 1904.—Decided April 11, 1904.

Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing.

As to what is second class mail matter, *Houghton* v. *Payne*, p. 88, followed.

THIS was a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication, known as "Masters in Music," received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, theretofore made by him, denying it entry as such. This case took the same course as the preceding ones. 31 Wash. L. Rep. 395.

Mr. William S. Hall and *Mr. Holmes Conrad* for appellant.

Mr. John G. Johnson and *Mr. Henry H. Glassie*, special assistants to the Attorney General, for the appellee.[1]

MR. JUSTICE BROWN delivered the opinion of the court.

The first number of Masters in Music was issued in January, 1903, and an application was immediately made to the Postmaster General for its admission to the mails as second class mail matter. The application was denied, and plaintiff immediately, and before the issue of another number, filed this bill. The publication purports to be a "monthly magazine,"

[1] This case was argued simultaneously with, and on the same briefs as, *Houghton* v. *Payne*. See p. 88, *ante*, for abstracts of arguments.

salable at twenty cents per number, and to subscribers at two dollars a year. The first number is devoted to the works of Mozart and contains a portrait, a biography of four pages, an essay of ten pages upon his art and thirty-two pages of his music. The preliminary page contained a notice to the effect that "Masters in Music will be unlike any other musical magazine. Each monthly issue, complete in itself, will be devoted to one of the world's great musicians, giving thirty-two pages of engraved piano music, which will comprise those compositions or movements that represent the composer at his best, with editorial notes suggesting the proper interpretation; a beautiful frontispiece portrait, a life, and estimates of his genius and place in art, chosen from the writings of the most eminent musical critics. The text will thus constitute an interesting and authoritative monthly lesson in musical history; its selections of music will form a library of the world's musical masterpieces, and all at slight cost. . . . The announcement of the contents of the February issue, which will treat of Chopin, will be found on another page."

The Postmaster General placed his refusal to allow this magazine to be transmitted as second class mail matter upon the ground that each number was complete in itself; had no connection with other numbers save in the circumstance that they all treated of masters in music, and that these issues were in fact sheet music disguised as a periodical, and should be classified as third class mail matter.

Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of section 14, cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications

as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. In the case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 104, the Post Office authorities were held to have acted beyond their authority in rejecting all correspondence which the plaintiff upon the subject of the treatment of diseases by mental action; but while it was said in that case that the question involved was a legal one, it was intimated that something must be left to the discretion of the Postmaster General.

It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in *Burfenning* v. *Chicago, St. Paul &c. R. R.*, 163 U. S. 321, 323: "Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reëxamined." (Citing cases.) See also *Johnson* v. *Drew*, 171 U. S. 93; *Gardner* v. *Bonestell*, 180 U. S. 362.

But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment

and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur* v. *Paulding*, 14 Pet. 497, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."

In *Marquez* v. *Frisbie*, 101 U. S. 473, which was a bill in equity to review the decision of the Land Department in a preëmption case, Mr. Justice Miller remarked (p. 476): "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive." In *Gaines* v. *Thompson*, 7 Wall. 347, it was held that the court would no more interfere by injunction than by mandamus to control the action of the head of a department; and in *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, it was said that the courts will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose. See also *Redfield* v. *Windom*, 137 U. S. 636.

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and

the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.

In the case of Masters in Music the question really is whether a pamphlet, complete in itself, treating of the works of a single master, with a greater part of the pamphlet devoted to specimens of his genius, shall be controlled by the cover, which declared that these numbers will be issued monthly, at a certain subscription price per year. Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final. The decree of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE HARLAN (with whom concurred The CHIEF JUSTICE) dissenting.

The Chief Justice and myself are of opinion that the publication here in question is second class mailable matter, and can-

not concur in the opinion and judgment of the court. Our reasons for dissenting are stated in the opinion filed by us in *Houghton* v. *Payne*, just decided.

But there are some things in the opinion of the court in this case to which we shall advert. It is said that the case is one of doubt. Now, it was admitted at the bar by the Government that the publication known as "Masters in Music" would be carried in the mails as second class matter if the question be decided in accordance with the construction placed upon the statute by the Department for more than sixteen years continuously prior to the present ruling of the Department. We had supposed it to be firmly settled that the established practice of an Executive Department charged with the execution of a statute will be respected and followed—especially if it has been long continued—unless such practice rests upon a construction of the statute which is clearly and obviously wrong. In *United States* v. *Philbrick*, 120 U. S. 52, 59, which involved the construction placed by an Executive Department upon an act of Congress, this court said: "Since it is not clear that that construction was erroneous, it ought not now to be overturned." So in *United States* v. *Healey*, 160 U. S. 136, 145, the court said that it would accept the uniform interpretation by the Interior Department of an act relating to the public lands, "as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure." The authorities to that effect are numerous. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *Hahn* v. *United States*, 107 U. S. 402; *United States* v. *Graham*, 110 U. S. 219; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Philbrick*, 120 U. S. 52; *United States* v. *Johnson*, 124 U. S. 236; *United States* v. *Hill*, 120 U. S. 169; *United States* v. *Finnell*, 185 U. S. 236; *United States* v. *Ala. G. S. R. R. Co.*, 142 U. S. 615; *Hewitt* v. *Schultz*, 180 U. S. 139, 157. Some of them are cited in the opinion of the court in *Houghton* v. *Payne*. The rule of construction which this court has recognized for more than three-quarters of a century is now overthrown. For, it is adjudged that the prac-

tice of the Post Office Department, covering a period of sixteen years and more, need not be regarded in this case, although the construction of the statute in question is admitted to be doubtful. We cannot give our assent to this view.

PACIFIC ELECTRIC RAILWAY COMPANY *v.* LOS ANGELES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 175. Argued March 7, 1904.—Decided April 11, 1904.

The jurisdiction of the Circuit Court is established when it is shown that complainant had, or claimed to have a contract with a State or municipality which the latter had attempted to impair, and so long as the claim is apparently made in good faith and is not frivolous, the case can be heard and decided on the merits.

Whether presented on motion to dismiss or on demurrer the question of jurisdiction depends primarily on the allegations of the bill and not upon the facts as they may subsequently turn out.

Under the act of California of March 11, 1901, a street railway franchise can only be granted in case of failure of the successful bidder to comply with the provisions of the act as to payment within the prescribed period to the next highest bidder at the original competitive opening of bids, and an ordinance attempting to grant the franchise to another is void and the grantee acquires no rights thereunder, nor is such an ordinance a contract within the meaning of the impairment of contract clause of the Federal Constitution.

THIS is an appeal directly from the Circuit Court. The appellant asserts rights under the Constitution of the United States, in that a contract alleged to exist between it and the council of the city of Los Angeles, granting appellant a franchise under the statute hereinafter mentioned, was impaired by the action of the council. Also that the property of appellant was taken without due process of law.

By an act of the legislature of the State of California, passed March 11, 1901, (Statutes of California, Extra Session Thirty-third Legislature, 1900, p. 265,) it is provided that every franchise or privilege to operate street railroads upon the public streets or highways, shall not be granted by the respective governing bodies of any city and county, city or town, except upon certain conditions, to wit, the applicant for the franchise must file with "the governing or legislative body" any application, and thereupon said body may, in its discretion, if the application be accompanied by a petition signed by the owners of three-fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, advertise the fact of the application and that it (the governing body) proposes to grant the same. The advertisement must be in some newspaper published in the municipality wherein the franchise is to be exercised, and must state that bids will be received for such franchise, and that it will be awarded to the highest bidder. The advertisement must state a number of other matters, but as no point is made upon them they are omitted.

In pursuance of the statute appellant made application to the council of the city of Los Angeles for an electric street railroad franchise. The application was referred to the board of public works, which board recommended the franchise be offered for sale. The report was adopted by the council and the franchise was offered for sale, and notice thereof was given as required by the statute. The notice given was very full and circumstantial, but its contents are immaterial to the views we take of the case.

Bids were received by the council on February 10, 1902. Appellant bid $25,000; W. S. Hook, who, it is alleged, was president of the Los Angeles Traction Company, bid $37,500; E. A. Davis, one of the appellees, bid $139,000, and E. Murray bid $415,000. There were no other bids.

Section 5 of the act of 1901 provides that at the time of opening of the bids any responsible firm or corporation present

or represented may bid for the franchise or privilege a sum not less than ten per cent above the highest sealed bid therefor, and said bid so made may be raised ten per cent by any responsible bidder present, and said franchise or privilege finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, who shall deposit with the "governing body," or such person as it shall direct, the amount bid within twenty-four hours thereafter. In case of failure to do so "then the said franchise or privilege shall be granted *to the next highest bidder* therefor."

No person raising the bid of E. Murray, in accordance with section five, his bid was accepted, and it was ordered that said franchise be struck off and sold to said Murray, and the city treasurer was ordered and directed to receive the money therefor. It was further ordered that the period of twenty-four hours within which he was allowed to pay for the franchise should expire at 3.15 P. M. on February 11, 1902.

The bids of Hook, Davis and Murray were all made on behalf of the Los Angeles Traction Company and for its benefit, and with the fraudulent intent of preventing competition and further bidding when the bids should be open, well knowing that the franchise was not worth the sum of $415,000, and that no advance on the same was to be made. And it is alleged that Murray has no financial standing, never intended to pay his bid, and did not pay the same or offer to pay the same within the time allowed, and never appeared again before the council.

On February 11 the traction company and Davis and Hook appeared before the council, and in pursuance of their fraudulent scheme claimed that the council had no authority or power to do any other thing than to accept the bid of Davis for $139,000, and demanded that the said franchise be awarded to him. Such proceedings were had that the council declared the bid of Murray to be fraudulent and void, and the matter of the sale of the franchise was again taken up. Appellant thereupon bid the sum of $152,000, and presented

with its bid a certificate of deposit on one of the banks in the city, drawn in the name of the city for said sum. Bids over and above said bid were called for by the council, but none was received, and the franchise was ordered to be sold and struck off to appellant. The treasurer was also directed to receive the purchase money, which was paid by appellant in United States gold coin, and it was accepted by the treasurer and the council. Appellant executed a bond in the sum of $25,000 as required by the statute, and the franchise was thereupon struck off, sold and granted to appellant. Subsequently the council passed an ordinance granting the said franchise to appellant, and presented the same to the mayor of the city, who returned the same to the council without his signature or approval, and with his objections to the same. On February 21 the question came up before the council for the passage of the ordinance, notwithstanding the veto of the mayor. The ordinance was not passed, but the council passed a resolution pretending and purporting to order any and all bids to be rejected, and ordered the treasurer of the city to refund to appellant the money paid and the clerk to return the bond executed and filed by appellant—all of which was done by the council under the pretense that the approval of the mayor to the ordinance passed, as above stated, was necessary to give it validity or to make effectual the grant made by the city of the franchise to appellant.

It is alleged that the council of the city, under the statute of the State, had no discretion as to the bid of appellant, but were, on the contrary, by the operation of said statute, ordered to strike off, sell and grant the franchise to appellant and no ordinance was necessary to perfect the grant, and the mayor was not authorized to perform any function in, about or concerning said franchise, and his veto was wholly unfounded; and the title of the appellant became fully vested under the statute, and there was no power in the mayor or the council, or in both, to in any manner affect the rights which had accrued to appellant by virtue of its franchise.

That appellant had become vested with the title to the franchise, and the orders and resolution of the council, pretending to reconsider the order granting the franchise as above stated and readvertising the application, were made without any authority, and were intended to deprive appellant of its said property without due process of law, in violation of the provision of the Constitution of the United States prohibiting any State from depriving any person of life, liberty or property without due process of law.

That under the statute, notice of sale and order granting the franchise appellant was required to commence work for the construction of the road within four months from February 11, 1902, and complete the same within three years from that date. That appellant was and is desirous of commencing such construction, but on February 26, 1902, the council passed an order instructing the mayor, the street superintendent and the chief of police to stop and prevent any attempt appellant might make to construct said road upon any of the streets with all the force at their command, and said officers, acting under such instructions, will undertake by violence to prevent appellant from constructing said road or exercising any rights under its franchise, or for any enjoyment of its property so acquired unless prevented by the court (Circuit Court).

That if the city should sell said franchise, rights and privileges again it will aid the purchaser, with the police force of the city, to take possession of the city property, rights and franchises, and construct a road over and along said route, and to oust and exclude appellant therefrom, and appellant will be compelled to resort to a multiplicity of suits to protect and defend its rights, privileges and franchise purchased by it, and its right to exercise and enjoy the same, and appellant will suffer great and irreparable damage, which cannot be compensated in money.

The relief prayed is that appellant be declared the owner in fee simple of the rights and franchise described; that the orders

of the council, reconsidering the order selling and granting the same, and all of the proceedings of the council subsequent thereto, be rescinded and vacated, and the appellees be restrained from preventing appellant from constructing the road and exercising the rights, privileges and franchise granted.

The city of Los Angeles and the appellees composing its council demurred to the bill. The other appellees also demurred, and the grounds of demurrer, were among others, that the court had no jurisdiction of the subject matter of the suit and the bill was without equity. The Circuit Court overruled the demurrers on the first ground and sustained them on the second. 118 Fed. Rep. 746.

Mr. J. S. Chapman, with whom *Messrs. Hunsaker & Britt*, *Messrs. Works & Lee* and *Messrs. Dunn & Crutcher* were on the brief, for appellant.

Mr. W. B. Mathews, with whom *Mr. Jonathan R. Scott* was on the brief, for appellees.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court.

1. The jurisdictional question first demands consideration. It will be observed that rights under the Fourteenth Amendment of the Constitution of the United States were explicitly asserted. Besides, the Circuit Court treated the bill also as presenting for consideration rights under the contract clause of the Constitution and entertained jurisdiction of the case on the authority of *Riverside &c. Ry.* v. *Riverside*, 118 Fed. Rep. 736.

In *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, the railroad company occupied certain streets of the city of Indianapolis under ordinances of the city. Subsequently the city, in pursuance of an act of the General Assembly of the State, gave the City Railway permission to lay its track on some of the same streets which were occupied by the railroad company. The latter brought suit in the Circuit Court of the

United States for the District of Indiana against the railway company, to enjoin it from availing itself of the privilege attempted to be granted. The court granted the relief prayed for and the case was brought here directly. A question of the jurisdiction of the Circuit Court was raised, and replying to it we said: "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." And it was further observed whether the contract was or was not impaired could not be passed upon "on the motion to dismiss so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one." This view was repeated in *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28.

In those cases the question of jurisdiction was presented on motion to dismiss. In the case at bar it is presented by demurrer, but, however presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out, *City Railway Co.* v. *Citizens' R'd Co., supra*, nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient—a substantial controversy must be presented. This requirement is satisfied in the case at bar. The Circuit Court, therefore, had jurisdiction, and the case was properly brought here from that court, since it involves the construction and application of the Constitution of the United States.

2. The claim of appellant is that the order of the city council of February 11, 1902, granting the franchise to it, appellant, constituted a contract, the obligation of which the subsequent orders of the council impaired, and, further, deprived appellant of its property without due process of law. The question upon which the claim depends is, in our view, a simple one. We need not quote the provision of the statute applicable to the contentions of the appellees, that the notice

given of the sale of the franchise was insufficient, nor need we discuss that contention or the contention that the approval of the mayor of the city under the charter of the city and the constitution of the State was necessary to a grant of franchises. We will assume the contentions are untenable, and we will also assume that all the steps preliminary to the bidding were rightfully taken and that the order of the council striking off and selling to appellant the franchise was sufficient to vest title in appellant if its bid was properly and legally accepted under section 5 of the act of 1891. This narrows the question in the case to the construction of that section.

The notice of an application for a franchise is required to state that sealed bids will be received for the franchise "up to a certain hour and day named therein," (sec. 3,) and also to state that the franchise "will be granted to the person, firm or corporation who shall make the highest cash bid therefor;" and any bid may be raised not less than ten per cent "above the highest sealed bid," and the franchise finally struck off, sold and granted to the "highest bidder." (Sec. 5.) Section 5 also provides that the "successful bidder shall deposit with said governing body, or such person as it may direct, the full amount of his or its bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the *next highest* bidder therefor." We italicize the pivotal words. To what do they refer? To bids already made as contended by appellees or to a bid or bids to be made as contended by appellant? More obviously the former. They express the relation between bids in existence—those already made and pending before the council in pursuance of its notice. It is only in comparison with the *next* highest of those that the words have signification.

But this construction, it is said, permits the fraud which the bill alleges was practiced upon the city council. We cannot say the argument is without force, but that fraud might be attempted may have been considered and weighed by the legislature. It may have been thought that in any plan of

competition which could be devised there would be danger of illegal combinations, and that the safeguard against them must be the vigilance of the municipal officers, and, may be, that of competing interests. But be this as it may, the defects of the statute cannot control its plain letter. Obviously to give them such effect would be to amend the statute, not to interpret it. And we think section 5 is plain, and was intended to express as an alternative of a bid not fulfilled the acceptance of one already made, not one to be made. We are fortified in this view by section 7 of the act. That section provides that the grantee of the franchise shall file a bond to fulfill the terms and conditions of such franchise, and also provides that if such bond be not filed "the award of such franchise shall be set aside and the same may be granted to the next lowest bidder, or again offered for sale," in the discretion of the governing body. In other words, when there is to be further competition it is explicitly provided for.

It follows that appellant's bid was not the next highest to that of Murray and the order of the council selling and granting appellant the franchise was void, and the decree of the Circuit Court dismissing the bill is

Affirmed.

SLATER *v.* MEXICAN NATIONAL RAILROAD COMPANY.

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

No. 162. Argued February 29, 1904.—Decided April 11, 1904.

A common law action cannot be maintained in a Circuit Court of the United States against a foreign railroad corporation for the wrongful killing in a foreign country of one upon whom the plaintiffs were dependent where the right of recovery given by the foreign country is so dissimilar to that given by the law of the State in which the action is brought as to be incapable of enforcement in such State.

Damages in the nature of alimony and pensions during necessity or until marriage given by the Mexican law to the wife and children of one wrongfully killed in Mexico by a railroad company cannot be commuted into a lump sum by a jury in a common law action brought in a Circuit Court of the United States.

Where foreign statutes are the basis of a claim for damages in an action in the Circuit Court of the United States parol evidence of a properly qualified expert is admissible as to the construction of such statutes upon any matter open to reasonable doubt, notwithstanding certified copies of such statutes and agreed translations thereof are already in evidence.

THE facts are stated in the opinion of the court.

Mr. C. A. Keller, Mr. Mason Williams and *Mr. E. Atlee* for petitioners submitted:

Under the laws of Mexico, a clearly defined right of action exists for damages arising from injuries resulting in the death of a person, against the person whose negligence was the proximate cause of such injuries, there being no contributory negligence on the part of the person injured; such action lies in favor of the surviving wife and minor children of herself and her husband, whose death so resulted. Arts. 72, 97, Constitution of Mexico; Arts. 4, 5, 6, 11, 26, 301, 304–331, inc., 363–366 inc.; Penal Code of Mexico, Arts. 9, 20, 21, 205–225, 1095; Federal Civil Code of Mexico; Art. I, Act of Congress (Mexico), December 15, 1881; Arts. 52, 53, 99, 184, 208 of the Mexican Regulations for construction, maintenance and operation of railroads; Arts. 205–225 of ch. IV, Bk. 1, Title V, of the Civil Code as to alimony; ch. II of Book III, Title 1, of Civil Procedure, as to temporary alimony; Arts. 1373–1377 inc.

The civil action for damages for injuries resulting in death, under the laws of Mexico, is a personal action, transitory in its nature; and the right created by those laws not being contrary to the public policy of the State of Texas, nor calculated to injure the State of Texas, or the United States, or their citizens, the same may be enforced at law in the Federal courts within the State of Texas, and in this suit, where, by personal process and an appearance, the wrongdoer has been subjected to the jurisdiction of the court, the citizenship of the parties

is diverse. The defendant corporation appeared and filed its pleas. *Dennick* v. *Railway Co.*, 103 U. S. 11; *Railway Company* v. *Cox*, 145 U. S. 593; *Railway Company* v. *Babcock*, 154 U. S. 190; *Huntington* v. *Attrill*, 146 U. S. 670; *Stewart* v. *B. & O. Ry. Co.*, 168 U. S. 445; *B. & O. Ry. Co.* v. *Joy*, 173 U. S. 226; *Evey* v. *Mexican Central Ry. Co.*, 81 Fed. Rep. 294; *Mexican Central Ry. Co.* v. *Marshall*, 91 Fed. Rep. 933; Story on Conflict of Laws, § 625, note *a*; Cooley on Torts (as to damages recoverable), 262, 270 *et seq.*; Texas Revised Statutes, tit. 57, Arts. 3017–3027; *Railway Co.* v. *Haist*, 72 S. W. Rep. (Ark.) 893, and cases cited.

Damages for injuries resulting in death, the payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term; but, the support of which the wife and children have been deprived may be considered with other facts in determining the amount of the damages occasioned, and payment of such damages may be enforced in the courts of law of this country without reference to the procedure under the code of Mexico to enforce the payment of alimony.

Mr. LeRoy G. Denman, with whom *Mr. Thomas W. Dodd* was on the brief, for respondent:

The main question, or rather controlling question presented by the record is, can the Circuit Courts of the United States consistently with their own forms of procedure and law of trials, take jurisdiction of, and administer the laws of Mexico in the class of cases to which this case belongs, and do substantial justice between the parties plaintiffs and defendant, giving to the plaintiffs the rights secured by the laws of Mexico, and at the same time secure to defendant its rights under that law?

If that cannot be done, then it follows, according to all the adjudicated cases, that the Circuit Courts should decline jurisdiction, or rather refuse to assume the power and responsibility of undertaking to administer such laws. *Huntington* v. *At-*

trill, 146 U. S. 657, 689; *Higgins* v. *Central New England R. Co.*, 155 Massachusetts, 180.

The question is one for the determination of the sovereign appealed to, to enforce such foreign law. The fact that one sovereign power may refuse to assume such responsibility, can only be invoked before another sovereign because of the soundness of the reasons given for such refusal. One sovereign may decline such jurisdiction or responsibility for reasons another sovereign might deem not well taken.

As to the enforcement of foreign laws by the different States of the United States, which has generally arisen out of resorts to the courts of one of the States to enforce the laws of a sister State of our union of States, in every instance, each State as a sovereign has, for itself, according to its own discretion of a sound public policy, decided whether it would take jurisdiction or decline to do so. In some instances in the history of our Federal Judicature, these courts have refused to follow the rule established by the decisions of the state courts in which they hold sessions, in the class of cases to which this belongs. In Texas the courts hold that they will decline to take jurisdiction, and assume the responsibility of undertaking to administer the laws of Mexico in ordinary personal injury suits. *Mexican National R. R. Co.* v. *Jackson*, 89 Texas, 107. The United States Circuit Court of Appeals for the Fifth Circuit have refused to follow the decisions of the Supreme Court of Texas in that class of cases. *Evey* v. *Mexican Central Ry. Co.*, 81 Fed. Rep. 294; *Mexican Central Ry. Co.* v. *Marshall*, 91 Fed. Rep. 933.

It is also a well established rule of decision of the Supreme Court of Texas, to decline to take jurisdiction of claims for personal injuries resulting in death, even where the injuries occur in any of our domestic States or Territories, basing such refusal upon the fact that the statutes of the States wherein the injuries happened, upon the rights secured, were materially different from the laws of Texas in relation to same subject. *Railway Co.* v. *McCormick*, 73 Texas, 660; *Railway Co.* v. *Richards*, 68 Texas, 375.

The extensive border between this country and Mexico, coupled with the graphic description of the physical and business conditions existing along its border between the two republics, makes the question of the proper adjudication of this case one of gravity and importance, and of international concern.

It is now the accepted doctrine of this court that the laws of the country where a cause of action originates will govern in all matters touching the merits and rights secured. It is elementary, and so held by this court from its organization, that the Circuit Court cannot, in the trial of an action at law, exercise the power of a court of equity, and that in all cases or causes of action in said courts, the right will not be adjudicated and relief granted, when to do so, the power of a chancellor as contradistinguished from a law court must be exercised.

It often rests in the sound jurisdiction of the court whether or not to take jurisdiction where the cause of action arose outside of the jurisdiction and the parties are foreigners. *Gardner* v. *Thomas*, 14 Johns. 134; *Mex. Nat. Ry.* v. *Jackson*, 89 Texas, 107; Story, Conflict of Law, 38, and cases *supra*.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought in the United States Circuit Court for the Northern District of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico. The plaintiffs are the widow and children of William H. Slater, who was employed by the defendant as a switchman on its road and was killed through the defendant's negligence while coupling two freight cars at Nuevo Laredo, in Mexico. This action is to recover damages for the death. The laws of Mexico were set forth in the plaintiffs' petition, and the defendant demurred on the ground that the cause of action given by the Mexican laws was not transitory, for reasons sufficiently stated. The demurrer was over-

ruled, and the defendant excepted. A similar objection was taken also by plea setting forth additional sections of the Mexican statutes. A demurrer to this plea was sustained, subject to exception. The same point was raised again at the trial by a request to direct a verdict for the defendant. The judge who tried the case instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum, apportioned to the several plaintiffs. The judge and jury in this regard acted as prescribed by the Texas Rev. Stat. Art. 3027. The case then was taken to the Circuit Court of Appeals, where the judgment was reversed and the action ordered to be dismissed. 115 Fed. Rep. 593; 53 C. C. A. 239.

There is no need to encumber the reports with all the statutes in the record. The main reliance of the plaintiffs is upon the following agreed translation from the Penal Code, Book 2, "Civil Liability in Criminal Matters." "Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence." Coupled with these are articles making railroad companies answerable for the negligence of their servants within the scope of the servants' employment. Penal Code, Bk. 2, Arts. 330, 331; Regulations for the Construction, Maintenance and Operation of Railroads, Art. 184. We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of Article 11 of the

Penal Code, and, therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. (Ind.) 71; *Dennick* v. *Railroad Co.*, 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern Pacific R. R.* v. *Babcock*, 154 U. S. 190, 199, an action was brought in the District of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further *Pullman Palace Car Co.* v. *Lawrence*, 74 Mississippi, 782, 801, 802, *et seq.*; *Morris* v.

Chicago, Rock Island & Pacific Ry., 65 Iowa, 727, 731; *Mexican National Ry.* v. *Jackson*, 89 Texas, 107; *Bruce* v. *Cincinnati R. R.*, 83 Kentucky, 174, 181; *Holmes* v. *Barclay*, 4 La. Ann. 64; *Atwood* v. *Walker*, 179 Massachusetts, 514, 519; Minor, Conflict of Laws, 493, § 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this court, and our opinion is based upon the express adjudication of this court and as it seems to us upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws, the place of the death and the domicil of the parties have no bearing upon the case.

The application of these considerations now is to be shown. The general ground on which the plaintiffs bring their suit is, as we have stated, that there is a civil liability imposed on the railroad company arising from an act contrary to the penal law—a negligent crime, as it is called in the code. But the code contains specific provisions for the case of homicide. These necessarily override the merely general rule for torts which also are crimes. *Mutual Life Ins. Co. of New York* v. *Hill*, 193 U. S. 551. By Art. 311 the right is personal to the parties mentioned in Art. 318, and is no part of the estate of the deceased. The specific cause of action is the killing of the deceased. So far as appears, apart from that and the following articles, these plaintiffs would have no right of action for the cause alleged. For Art. 304 seems to presuppose a right in the family, not to create one, and we cannot assume a general right of the members of a family to sue for causing death. By Article 318 civil responsibility for a wrongful homicide includes, besides the expenses of medical attendance and burial and damages to the property of the deceased, the expenses "of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." Then, by Art.

319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration, but "the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." It is unnecessary to set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments and which is subject to modification from time to time as the circumstances change. See, also, Arts. 1376, 1377, of the Code of Procedure, and Penal Code, Bk. 2, Art. 363.

The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. But we are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce a liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by Art. 225, concerning alimony, the right

cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. *Mexican National Ry.* v. *Jackson*, 89 Texas, 107; *St. Louis, Iron Mountain & Southern Ry.* v. *McCormick*, 73 Texas, 660. The case is not one demanding extreme measures like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See *Mulhall* v. *Fallon*, 176 Massachusetts, 266.

So far as appears, the civil liability depends upon penal liability; no different suggestion has been made; and thus far we have taken it for granted that the defendant was within the penal law. The Circuit Court made the same assumption, although the question was one of fact, in case the jury should find the negligence relied upon to be proved. But whether or not a railroad company was subject to penalty for a homicide caused by the negligence of its servants did not appear. It has occurred to us, although no such argument was made, that it might be sought to sustain the liability on a different ground. The alleged cause of the accident was the different height of the draw-heads on two cars which the deceased attempted to couple as they came together. By Art. 52 of the Mexican Railroad Regulations it is required that "the cars which enter into the make up of a train shall have draw-heads of the same height." By Art. 208 of the same "all violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through

criminal acts and omissions committed by them." It might be argued that these sections, coupled with Articles 301 and 304 of the Penal Code, to which we referred in the beginning, were enough to create the liability without regard to the question of homicide. To this it might be enough to answer that it does not appear that a law imposing a fine to be assessed by the department of public works is a penal law within the meaning of the code—that, as we have said in a different connection, when the tort relied on is a homicide the specific provisions for homicide override merely general rules, and that the plaintiffs come here relying, as they have to rely, upon a statute which gives them a right of action independent of the deceased, and that the statute is made expressly and only for the case of homicide. Penal Code, Bk. 2, Art. 311.

But what we last have said brings into consideration another error of the Circuit Court which hitherto we have not mentioned. The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statute was the best evidence. So no doubt they were, so far as they went, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to reasonable doubt. Many doubts are left unresolved by the documents before us. The expert would have testified that where no criminal proceedings had been had, the right of the widow and children was dependent upon the court's finding that the killing was a crime as defined by the penal code, and that the right was in the nature of alimony or pension to be paid in installments for periods of time fixed by the court. Without stating his testimony more fully, we have said enough to show that it should have been received. Seemingly he understood that he was testifying in a case against a railroad, and if so he furnished further reasons for denying any liability except on the footing of homicide. In a case of homicide he excluded the argument that there was a right to a lump sum under Arts. 301, 304, distinct from the right of alimony,

and he confirmed the conclusion drawn from the language of the code as to what would be the nature of a Mexican decree in such a case. There may be other matters which would have to be considered before the verdict could be sustained, but what we have said seems to us sufficient to show that the judgment of the Circuit Court of Appeals should be affirmed.

Judgment affirmed.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM, dissenting.

Slater, the deceased, was a citizen of Texas, residing at Laredo in that State. The Mexican National Railroad Company was a corporation of Colorado, owning and operating a railroad from Laredo to the City of Mexico. Its superintendent resided in Laredo. Slater was fatally injured through the negligence of the company while working in its yard in New Laredo, just across the Rio Grande in Mexico, and died in Laredo from the injuries so inflicted. His wife and children, who resided in Laredo, brought this suit in the Circuit Court of the United States, diverse citizenship being the ground of jurisdiction, and no objection in that regard arises. Defendant did not "happen to be caught" in Laredo, but was domiciled there.

The laws of Texas provided that an action for damages on account of injuries causing death may be brought when the death is caused by the wrongful act, negligence, unskillfulness or default of another, and without regard to any criminal proceedings in relation to the homicide. The jury are to give such damages as they may think proportioned to the injury resulting from the death, to be divided among the persons entitled in such shares as found by the verdict. The jury pursued that course in this case under the instructions of the Circuit Court.

By the laws of Mexico, damages are recoverable for death by wrongful act, but they, it is said, are awarded as support by decree in the nature of alimony or pension.

As the two countries concur in holding that the act complained of is the subject of legal redress, the question is whether recovery in this cause must be defeated because the law of Mexico controls and cannot be enforced in Texas.

It seems to me that the method of arriving at and distributing the damages pertains to procedure or remedy, that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong, and I think the general rule that procedure and remedy are regulated by the law of the forum is applicable. 2 Rawle's Bouvier, 870; *Kring* v. *Missouri*, 107 U. S. 221; *Stewart* v. *Baltimore & Ohio Railroad Company*, 168 U. S. 445.

In *Northern Pacific Railroad Company* v. *Babcock*, 154 U. S. 190, 199, the company was not a corporation of Minnesota, and the ruling simply was that the right to recover was governed by the *lex loci*. The amount found was within the law of Minnesota as well as that of Montana.

The extent of damages does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. Finch, J., *Wooden* v. *Railroad Company*, 126 N. Y. 10.

In *Scott* v. *Lord Seymour*, 1 H. & C. 219, which was an action by one British subject against another for an assault committed in a foreign country, it was held unanimously by the Courts of Exchequer and of the Exchequer Chamber that the objection that by the foreign law compensation in damages could not be recovered until certain penal proceedings had been commenced and determined there, was an objection to procedure merely, and not a bar to the action in England. And many of the judges were of opinion that an action was maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful, in a broad sense, under the law of the foreign country where the act was done.

Mr. Justice Wightman, (Willes, J., in effect concurring,) specifically held that if an action would lie by the English law for a particular wrong, the English courts would give redress

for it, though it was committed in a country by the laws of which no redress would be granted, if the parties were both British subjects.

This case has never been overruled, and is cited as authority by Mr. Pollock in his work on Torts (6th ed.), p. 201.

At all events, the rule in England is well settled, as thus laid down in *Machado* v. *Fontes*, (1897) L. R. 2 Q. B. 231: "An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country." *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1, and *The M. Moxham*, (1876) 1 P. D. 107, were there cited and applied.

In *Phillips* v. *Eyre*, Willes, J., delivering the opinion of the Exchequer Chamber, said: "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

In *The Halley*, L. R. 2 P. C. 193, 203, Lord Justice Selwyn, speaking for the court, said: "It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances

attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordship's opinion, alike contrary to principle and to authority, to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

The rule in this court goes further, for "by our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought." *Huntington* v. *Attrill*, 146 U. S. 657, 670.

It is enough that the act complained of here was wrongful by both the law of Texas and the law of Mexico, and in such a case the action lies in Texas, except where the cause of action is not transitory, but is purely local such as trespass to land. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Railway Co.* v. *Cox*, 145 U. S. 593; *Ellenwood* v. *Marietta Chair Company*, 158 U. S. 105; *Mitchell* v. *Harmony*, 13 How. 115; *McKenna* v. *Fisk*, 1 How. 241.

It is suggested that the Texas courts have held that there can be no recovery in Texas because of the dissimilarity in the ascertainment of damages between the law of Texas and that of Mexico. And this seems to have been so ruled in *Mexican National Railway* v. *Jackson*, 89 Texas, 107, but the question is one of general law, and we are not bound by that ruling. Moreover, the railway company is stated in that case to have been "a Mexican corporation whose line of railway extended into Texas," whereas in this case the company is a corporation of Colorado, domiciled in Texas, and whose line of railway extends from Texas into Mexico. Again, after that decision was rendered, in *Mexican Central Railway Company* v. *Mitten*,

13 Tex. Civ. App. 653, the company being a Massachusetts corporation and Mitten a citizen of Texas, the Court of Civil Appeals for the Fourth District of Texas held to the contrary.

The court said: "If the construction placed upon the decision in the *Jackson* case be the true one, and some of its expressions would seem to justify the construction, it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, . . ." and: "We are not willing to subscribe to such doctrine and will not extend the scope of the decision referred to beyond the purview of the facts of that case."

The Supreme Court of Texas apparently accepted this view for it refused to grant a writ of error to review the judgment. 13 Tex. Civ. App. v. And see *Evey* v. *Mexican Central Railway Company*, 81 Fed. Rep. 294.

I entirely agree with the views expressed in *Scott* v. *Seymour*, to which I have referred. The legal relations of Slater with the United States and Texas were not destroyed by his crossing the Rio Grande to work in the railroad yard. This Colorado corporation was domiciled in Texas, as Slater was. The laws of Texas protected them alike. The injury was inflicted in Mexico and resulted fatally in Texas. The wrongful act was actionable in Texas and in Mexico.

The jurisdiction of the Circuit Court over person and subject matter was unquestionable, and I cannot accept the conclusion that the form in which the law of Mexico provides for reparation to its own citizens constitutes a bar to recovery in Texas in litigation between citizens of this country.

My brothers HARLAN and PECKHAM concur in this dissent.

SOUTHERN RAILWAY COMPANY *v.* CARSON.

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

No. 546. Submitted April 4, 1904.—Decided April 18, 1904.

In an action in which no application for removal to the Federal court was made at any time, *held* that if the right existed it furnished no defence to the action on the merits in the state court.

In instructing the jury that railroads are required to keep their appliances in good and suitable order, no right arising under the act of March 2, 1893, in respect of automatic couplers was denied nor was any such specially set up or claimed within § 709, Rev. Stat.

CARSON, a resident of Greenville County, South Carolina, brought this suit in the Court of Common Pleas of that county against the Southern Railway Company, a corporation chartered under the laws of the State of Virginia and engaged in running trains through several States as a common carrier, and J. C. Arwood and J. D. Miller, residents of Greenville County, to recover damages for personal injuries, which, he charged in his complaint, "were due to the joint and concurrent negligence, carelessness and fault of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit:"—setting forth the circumstances of his cause of action. Among other things, plaintiff alleged that he was a flagman in the employment of the Southern Railway Company, and on the day of the accident was ordered by Arwood, the conductor in charge of a certain freight train, on which Miller was engineer, to do the work of brakeman and to couple some of the cars in the train; that these cars were provided with automatic couplers, but one of them was not in proper condition, which rendered it necessary for plaintiff to go between the cars to effect the coupling; and that the acci-

dent thereupon happened by reason of defendants' "joint and concurrent carelessness, negligence, recklessness," etc., in particulars detailed.

Defendants severally demurred, the demurrers were overruled, and defendants excepted. Defendants then answered severally, in identical terms, denying all negligence on the part of defendants, and asserting "that the plaintiff's alleged injury was the result of his own negligence." Trial was had and the jury found for plaintiff against the railway company, judgment was entered, and the railway company appealed to the Supreme Court of the State. That court affirmed the judgment, 46 S. E. Rep. 525, and thereupon this writ of error was allowed.

Mr. W. A. Henderson and *Mr. T. P. Cothran* for plaintiff in error.

Mr. J. Altheus Johnson for defendant in error.

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

This case comes before us on motions to dismiss or affirm. There was certainly color for the motion to dismiss as we retain jurisdiction with hesitation, and we will dispose of the case on the motion to affirm.

By some of the many exceptions preserved on the trial and disposed of by the state Supreme Court, it was sought to raise Federal questions in respect of the acts of Congress (1) providing for the removal of cases from a state court to a court of the United States, and (2) providing that railroad companies engaged in interstate commerce shall equip their cars with automatic couplers.

1. The railway company did not at any time apply for the removal of the case to the Circuit Court. Plaintiff below and the company's two co-defendants were citizens of the same State, and the railway company did not make application to

remove before trial on the ground of separable controversy or want of good faith in the joinder. Nor did it make such application when plaintiff's evidence was in, nor on the whole evidence. There was no suggestion throughout the trial that the joinder was in itself improperly made, but the contention, as exhibited by the exceptions, was that a verdict could not be rendered against the company alone, because if it had been sued alone it would have had the right of removal. The trial court charged the jury that if the proof failed to show joint and concurrent negligence on the part of all the defendants, yet showed negligence on the part of one or more of them, resulting in injury to plaintiff, as the sole and proximate cause thereof, the jury might find a verdict against such defendant or defendants as the proof showed were guilty of such negligence; and to this instruction the railway company preserved an exception.

The railway company also excepted to the refusal of the court to give several instructions asked on its behalf to the effect that, as by the allegation of a joint and concurrent tort, the company had been deprived of the right to remove the cause, joint and concurrent tort must be made out against the company and at least one of the other defendants; that to allow plaintiff to recover without proof of joint and concurrent tort would deprive the company of the right of removal guaranteed by the Constitution and laws; and of its property without due process of law, in contravention of the Fourteenth Amendment, in that the company would be deprived of the right of reimbursement which would otherwise exist. But these are matters upon the merits, and recovery against one of several defendants does not depend on whether, if sued alone, that defendant might have removed the case. The right of removal depends on the act of Congress, and the company not only on the face of the pleadings did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray in *Powers* v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, "that an action of

tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defences from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

The view thus expressed was reiterated in *Chesapeake & Ohio Railway Company* v. *Dixon*, 179 U. S. 131, where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. *Schumpert* v. *Southern Railway Company*, 65 S. Car. 332. In that case it was held that under the state Code of Civil Procedure, in actions *ex delicto*, acts of negligence and willful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution, was without merit, as the rule was, as laid down by Mr. Cooley, (Torts, page 145,) that: "As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but

upon that of the servant himself." And see *Gardner* v. *Railway Company*, 65 S. Car. 341. In *Rucker* v. *Smoke*, 37 S. Car. 377, and *Skipper* v. *Clifton Man. Company*, 58 S. Car. 143, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the State deprived the company of its property by the rulings of the Supreme Court calls for no remark.

2. The act of March 2, 1893, 27 Stat. 531, c. 196, provided, in respect of common carriers engaged in interstate commerce, "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The trial court in one of its instructions set forth this provision, and told the jury that if they found the railway company was engaged, and these cars were being used, in interstate traffic, and that they were not equipped with the automatic couplers required, such failure was negligence; and it was further charged that railroads were required to keep their appliances in safe and suitable order. It is objected that the instructions assumed that if the automatic coupler was out of repair, the company failed to comply with the act of Congress, but we do not think so, and the Supreme Court of the State held that there was no error as Congress must have intended that the couplers should be kept in proper repair for use, and moreover, as such was the law of the State, even if the act of Congress had not specifically imposed this duty. By this ruling no right specifically set up or claimed under the act of Congress by defendant below was decided against. There was no pretense that the act of Congress provided that the automatic couplers need not be kept in order, and whether the cars in question were used in moving interstate traffic and whether the coupling appliances were defective or not, were facts left to the jury and determined by their verdict. The recovery

was not sought on the single ground of want of safe appliances. That was important in its connection with Carson's being ordered to go between the cars, and it was negligence while he was obeying that order, which was chiefly relied on. At all events, the company did not specifically set up or claim any right under the act of Congress or dependent on its construction which was denied by the state courts, and the question raised on these instructions and numerous others on various aspects of the case were not Federal questions, and need not be considered.

Judgment affirmed.

KIRBY *v.* AMERICAN SODA FOUNTAIN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 357. Submitted March 21, 1904.—Decided April 25, 1904.

The general rule is that when the jurisdiction of a Circuit Court of the United States has once attached it will not be ousted by subsequent change in the conditions.

A Circuit Court may proceed to judgment on a cross bill where defendant's pecuniary claim is less than $2,000, if the jurisdictional amount in dispute appears from bill, answer and cross bill which relate to the same transaction, notwithstanding the original bill has been voluntarily dismissed.

KIRBY filed his first original amended petition in the District Court of Dallas County, Texas, against the American Soda Fountain Company, averring that he was induced by false representations by defendant to agree to exchange his soda fountain apparatus for the soda fountain apparatus of defendant and pay defendant $2,025 in addition, and signed a memorandum in relation thereto, which, however, plaintiff alleged did not contain all the terms of the contract; that the exchange was made, but defendant's soda fountain apparatus, instead of being superior in value by $2,025, was, as matter of

fact, less by $2,500; and plaintiff prayed for the cancellation of the obligation to pay $2,025, for $2,500 damages, and for general relief. The original petition sought damages merely, and in the sum of $1,500.

On application of defendant the cause was removed to the Circuit Court of the United States for the Northern District of Texas.

The case was entered in that court May 12, 1902, and on that day defendant filed its answer, denying all charges of fraud, and setting up the written contract between plaintiff and itself, which it alleged contained all the terms of the agreement between them, whereby defendant agreed to manufacture and ship to plaintiff and plaintiff purchased of defendant a certain soda fountain machine at the price of $3,219; and defendant agreed to take plaintiff's machine in part payment at the sum of $1,194, leaving a balance of $2,025, which plaintiff agreed to pay, and which was secured by a mortgage lien on the property. That defendant manufactured and shipped the machine to plaintiff and set it up in his store, and fully complied with the contract, but plaintiff, after paying $325 on account of the $2,025, failed and refused to further comply with the contract or to pay anything more thereon.

Defendant said plaintiff ought to take nothing by his suit, and prayed judgment for the sum of $1,700 and for foreclosure of its mortgage lien. Together with its answer defendant filed its cross complaint, setting up the facts in detail and praying for judgment in the sum of $1,700, and interest, and for a decree establishing its mortgage lien on the property and for foreclosure and sale, and such further relief as equity might require.

Subpœna on the cross complaint was issued and served May 13, 1902.

June 20, 1902, plaintiff moved to transfer the cause to the law docket; and on that date the following order was entered of record: "Complainant coming and asking that the original bill of complaint be dismissed without prejudice, and it ap-

pearing to the court that said request should be granted. It is therefore ordered that the original bill of complaint herein be and the same is hereby dismissed without prejudice to the right of the plaintiff to proceed further on the cause of action set forth in said bill hereafter as he may be advised. It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant for which execution may issue."

July 24, 1902, plaintiff, as defendant in the cross complaint, filed his plea thereto, in which he averred that the original bill filed by him had been dismissed, and that the cross bill was not within the jurisdiction of the court because the amount sought to be recovered did not exceed two thousand dollars, exclusive of interest and costs. February 13, 1903, the plea to the jurisdiction of the court was argued and overruled, and plaintiff, defendant in the cross bill, was ordered to file an answer to said cross bill on or before the rule day of the court occurring in April, 1903. No further answer or plea to the cross bill having been interposed by the defendant therein, a decree *pro confesso* was rendered against him April 21.

On May 27, 1903, the court rendered a decree on the cross bill, which recited the various proceedings; found the allegations of the cross complaint and exhibits to be true; that Kirby was justly indebted to the American Soda Fountain Company in the sum of $1,700, with interest; and that a valid mortgage lien to secure that sum existed; and decreed payment of the amount within sixty days, and that, if not paid, the property should be sold and the proceeds applied, with judgment for deficiency, if any.

An appeal from this decree was prayed and allowed, and the question of jurisdiction was certified. The case came on in this court on motions to dismiss or affirm.

Mr. J. M. McCormick for appellant.

Mr. John J. Weed for appellee.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

This case was brought directly to this court on a certificate of jurisdiction under section five of the judiciary act of March 3, 1891, and might, therefore, have been advanced under Rule 32. The motions to dismiss or affirm may be treated as equivalent to submission under that rule, but as the motions were made, and the motion to dismiss was chiefly rested on the ground that the value of the matter in dispute was not sufficient to give this court jurisdiction, we think it proper to say that "the act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, from a District or Circuit Court of the United States." *The Paquete Habana*, 175 U. S. 677, 683.

On this appeal no question of error in matter of equity procedure in the retaining of the cross bill after the dismissal of the bill is open for consideration, but we do not intimate in the slightest degree that any error in that particular was committed. *Chicago, M. & St. P. Railway Company* v. *Third National Bank*, 134 U. S. 276; Daniell Ch. Pr. (5th ed.) 1553, note; Bates Eq. Proc. § 386.

The contention is that the Circuit Court had no jurisdiction as a court of the United States to proceed on the cross bill because of the lack of the prescribed jurisdictional amount. But we think the Circuit Court was right in rejecting this contention and in overruling the plea.

In the first place, the whole record being considered, the value of the matter in dispute might well have been held to exceed two thousand dollars, exclusive of interest and costs. *Stinson* v. *Dousman*, 20 How. 461, 466; *New England Mortgage Company* v. *Gay*, 145 U. S. 123, 131; *Shappirio* v. *Goldberg*, 192 U. S. 232; *Lovell* v. *Cragin*, 136 U. S. 130.

In *Stinson* v. *Dousman* the suit was brought to recover something less than five hundred dollars as rent of a parcel of land under a written contract for the purchase of the land

at eight thousand dollars, which provided that the covenantee should pay rent on failure to comply with sundry conditions prescribed, and defendant not only set up in his answer a defence to the claim for rent, but also sought a decree affirming the contract as outstanding. It was objected in this court that the matter in dispute was not of the value of one thousand dollars, and that therefore there was no jurisdiction. Mr. Justice Campbell said: "The objection might be well founded, if this was to be regarded merely as an action at common law. But the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at $8,000. We think this court has jurisdiction." The case is cited and considered in *New England Mortgage Company* v. *Gay* and in *Shappirio* v. *Goldberg*.

In *Lovell* v. *Cragin* it was held as correctly stated in the headnotes: "When the matter set up in a cross bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill."

In the present case the Circuit Court in its decree referred to the plaintiff's bill and the relief thereby sought, in connection with the cross bill, and, we think, was justified in doing this as the record had not passed from under its control, and it was apparent that the decree on the cross bill disposed of the contention of plaintiff in respect of the cancellation of the contract. Taking the bill, defendant's answer and the cross bill together, the jurisdictional amount was made out.

In the second place, it is the general rule that when the jurisdiction of a Circuit Court of the United States has once attached

it will not be ousted by subsequent change in the conditions. *Morgan* v. *Morgan*, 2 Wheat. 290; *Clarke* v. *Mathewson*, 12 Pet. 164; *Kanouse* v. *Martin*, 15 How. 198, 208; *Roberts* v. *Nelson*, 8 Blatchf. 74; *Cooke* v. *United States*, 2 Wall. 218.

In *Morgan* v. *Morgan* it was laid down by Chief Justice Marshall that the jurisdiction of the Circuit Court having once vested between citizens of different States, could not be divested by a change of domicil of one of the parties, and his removal into the same State as the adverse party *pendente lite*. This was so ruled in *Clarke* v. *Mathewson* and other cases there cited.

In *Kanouse* v. *Martin*, after petition to remove had been filed and bond tendered, the state court allowed the plaintiff to reduce the matter in dispute to less than the jurisdictional amount, and went on with the case. This was necessarily held to be erroneous, but the observations of Mr. Justice Curtis show that, in his opinion, the general rule to which we have referred also applied, and he cites *Morgan* v. *Morgan* and *Clarke* v. *Mathewson*.

In *Roberts* v. *Nelson* the amount claimed was reduced after the case had been removed, and Mr. Justice Blatchford, then District Judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it.

In *Cooke* v. *United States* Mr. Chief Justice Chase said that "jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy."

This action, when brought in the state court, was an action to recover $1,500 damages for deceit. Defendant demurred to and answered the original petition. Plaintiff subsequently filed his amended petition seeking to be relieved of the obligation to pay $2,025, and damages in the sum of $2,500. The matter in dispute having thus been made to exceed the sum or value of two thousand dollars, exclusive of interest and costs, defendant presented his petition and bond for removal, and the cause was thereupon removed. The jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action.

Decree affirmed.

JONES *v.* MONTAGUE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 189. Argued April 4, 5, 1904.—Decided April 25, 1904.

Where the case is one in prohibition, and it appears by conclusive evidence *aliunde* that since judgment by dismissal in the lower court the thing sought to be prohibited has been done and cannot be undone by any order of court, there is nothing remaining but a moot case and the writ of error will be dismissed. *Mills* v. *Green*, 159 U. S. 651.

On November 14, 1902, plaintiffs in error filed in the Circuit Court of the United States for the Eastern District of Virginia, in behalf of themselves and others similarly situated, their petition for a writ of prohibition. The petition set forth that the petitioners were citizens of the United States, citizens and residents of the State of Virginia, and of the third Congressional district of that State, and entitled to vote at the election held on November 4, 1902, for a member of the House of Representatives of the United States from that district; that they applied to the proper registration board for registration and were refused. It was further alleged that in 1901 a constitutional convention was assembled in Virginia; that it framed a new constitution; that it did not submit such constitution to the people for approval, but by a vote of forty-seven to thirty-eight ordained it as the organic law of the State. Attached to the petition were copies of the constitution, of a schedule making provisions for putting in force the new constitution without inconvenience, and of an ordinance providing for the registration of voters, all of which were adopted by the same convention. The petitioners also charge that the purpose of the party in power was the disfranchisement of the colored voters of the State, and specifically set forth how this disfranchisement was to be accomplished. They averred that at the election held on November 4, 1902, only the registration lists provided for by the ordinance were recognized; that abstracts

of the votes cast in the several cities and counties were certified to the Secretary of the Commonwealth, at Richmond, Virginia, and that the defendants, as the board of state canvassers, would assemble on the twenty-fourth of November, 1902, and would, unless prohibited, canvass the election returns, declare the result and give certificates to the parties found to be elected. The prayer of the petition was that a writ of prohibition issue to the defendants "prohibiting them, and each of them, from considering, canvassing, counting, determining upon, or certifying or otherwise acting upon, any returns or abstracts of returns in the office of the Secretary of the Commonwealth of Virginia, purporting to be returns of election held in the State of Virginia, Tuesday, November 4, 1902, for representatives in Congress from the State of Virginia, or in any wise dealing with or certifying the results of said returns as returns of a lawful election, held in Virginia on the date aforesaid. That by reason of the matters and things hereinabove set forth, said pretended election, and any and all precinct, county, district or state returns made thereunder, may be held to be null, void and of no effect, and the said board of state canvassers, and the members thereof, may be prohibited from in any wise proceeding to act upon the same as lawfully before them for their consideration. That pending the hearing, and until the final decision upon this petition for said writ of prohibition, an order may be granted by this honorable court suspending any and all proceedings, on the part of said board of state canvassers and the members thereof, upon any and all of the matters sought to be prohibited until the final decision of this cause. And for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual."

After answer by defendants the writ of prohibition was denied by the Circuit Court and the petition dismissed. The dismissal was based on a want of jurisdiction, whereupon the petitioners brought the case on error directly to this court. A motion has here been made to dismiss the writ of error on the

ground that everything sought to be prohibited has already been done, and that there is nothing upon which any order of the court can operate. In support of the motion an affidavit of the Secretary of the Commonwealth has been filed, to the effect that after the dismissal of the petition by the Circuit Court the board of canvassers convened at the office of the Secretary in accordance with the law of the State, and upon the returns then on file canvassed the votes, determined the parties found by such canvass to have been elected, and that a certificate to that effect had been prepared and transmitted to each of the persons declared to have been elected a representative in Congress from the State of Virginia.

Mr. John S. Wise for plaintiffs in error:

As to the motion to dismiss:

The motion is founded upon a misapprehension of the character of the relief sought in the two proceedings. The fact that the Board of State Canvassers, after the decisions, did a particular act, does not destroy either the substance of the petition or complaint, or the continuing character of the injury sought to be redressed. Both the bill and the petition sought relief from the continuing oppression of a conspiracy, to which the defendants were parties.

The effect of the operations of the conspiracy upon the plaintiffs and the class on behalf of which the petition and complaint were exhibited, was to disregard their lawful registration and right to vote, and the laws permitting them to do so; to have the false returns so made up, certified to this State Board of Canvassers, and to have these defendants, as participants in the conspiracy, recognize those false returns as lawful and compute results from them.

The substance of the injury complained of was not the single threatened act of counting the returns of that particular election, but the threatened recognition by the defendants, as the law of the State, of invalid acts, ordinances and schedules of a convention, for their guidance then and thereafter; under

which recognition the class complaining would then and thereafter be deprived of their voice in the political affairs of the State.

The law complained of was a continuing law; the injury complained of was a continuing injury; the test of the validity of the law, while it arose on an attempt to prevent that particular act, cannot be evaded, if the decision below was erroneous, by pleading that the particular act complained of has been accomplished before the error is reversed.

The appeal should not be dismissed, because, before it was made effectual, the first injury was accomplished to the complaints, and it is manifest that if it was an injury, it is only the first of a series of injuries to be inflicted upon them, unless the defendants are enjoined. The case is not at all like those in which a single act is the subject of injury. The defendants are a continuous body, with continuous duties of identically the same character as each function is performed, and those duties are dependent for their validity upon the validity of the law under which the returns are made to them. The rights of the parties complainant are continuous rights and rights of a recurring nature of which they are deprived at recurring intervals, so long as the defendants are allowed to invoke and act under a void law. If those laws are invalid, it would be impossible, upon the contention of the defendants, to test them, so long as the court below should continue to decide in defendants' favor; for each time a bill or petition was exhibited the writ would be denied, the act would be done and nothing would be left to bring up here, if the point of defendants be well taken.

Mr. William A. Anderson and *Mr. Frank W. Christian* for defendants in error:

As to motion to dismiss:

Everything sought to be prohibited in this proceeding has already been done, and nothing remains upon which any order of the court can operate.

After the lower court refused the prohibition prayed for in this case, the Board of State Canvassers of Virginia met and canvassed the returns for members of the House of Representatives, and the Secretary of the Commonwealth of Virginia issued writs of election to the members of the House of Representatives elected at such election. This court should take judicial notice of these facts.

The suggestion made by opposing counsel that the proceeding involves the validity or invalidity of the election held in November 4, 1902, and the Constitution and ordinance of registration of Virginia, and, therefore, the future rights of the complainants, is without force; for it is manifest that a decree adjudicating those questions would be merely upon abstract or moot questions; and it has been uniformly held that the court will not undertake to pass upon such questions. We, therefore, submit that this writ of error will be dismissed upon the ground above stated. See *Mills* v. *Green*, 159 U. S. 651, and cases cited; *United States* v. *Hoffman*, 4 Wall. 158.

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

Mills v. *Green*, 159 U. S. 651, is decisive, and compels a dismissal of the writ of error. That was a suit in equity, alleging the calling of a convention to revise the constitution of South Carolina and seeking to enjoin an alleged illegal, partial and void registration by which the plaintiff, and others like him, would be deprived of the right to vote for delegates to the convention. An injunction was granted by the Circuit Court, but was dissolved by the Circuit Court of Appeals and the suit dismissed. Thereupon the election was held, the convention met and entered upon the discharge of its duties. An appeal to this court from the order of dismissal made by the Circuit Court of Appeals was dismissed on the ground that the object of the suit could no longer be attained. Mr. Justice Gray, delivering the opinion, said (pp. 653, 657, 658):

"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. . . . In the case at bar the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing his bill, that date had passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 Stat. S. C. pp. 802, 803. The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. . . . It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted."

See also *Codlin* v. *Kohlhausen*, 181 U. S. 151; *Tennessee* v. *Condon*, 189 U. S. 64.

The case before us is one in prohibition. It is so declared by the petitioners in their petition, and the thing sought to be prohibited was a canvass of the votes cast at the election on November 4, 1902. The facts alleged in respect to the constitution, the purpose of the dominant party, the action of the convention, the refusal to submit the proposed constitution to the vote of the people, and the registration ordinance, were all stated for the purpose of showing that the election on November 4, 1902, was illegal, and that there ought to be no

canvass of the returns cast at that election. The prayer of the petitioners specifically is to retain such canvass. Even the general clause at the close of the prayer is "for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual." But—as shown by the affidavit, and as indeed we might perhaps take judicial notice by the presence in the House of Representatives of the individuals elected at that election from the various Congressional districts of Virginia—the thing sought to be prohibited has been done and cannot be undone by any order of court. The canvass has been made, certificates of election have been issued, the House of Representatives (which is the sole judge of the qualifications of its members) has admitted the parties holding the certificates to seats in that body, and any adjudication which this court might make would be only an ineffectual decision of the question whether or not these petitioners were wronged by what has been fully accomplished. Under those circumstances there is nothing but a moot case remaining, and the motion to dismiss must be sustained.

Dismissed without costs to either party.

SELDEN *v.* MONTAGUE.

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

No. 190. Argued April 4, 5, 1904.—Decided April 25, 1904.

Dismissed on authority of preceding case.

ARGUED simultaneously with and by the same counsel as *Jones* v. *Montague*, p. 147 *ante*.

MR. JUSTICE BREWER delivered the opinion of the court.

This is a suit in equity brought to obtain by injunction the same relief as was sought in the preceding case. The facts and conditions are substantially similar, and for the reasons there given the appeal will be dismissed without costs to either party.

DAMON *v.* HAWAII.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 207. Argued April 12, 1904.—Decided April 25, 1904.

A general law may grant titles as well as a special law.

The act of Hawaii of 1846, "of Public and Private Rights of Piscary," together with royal grants previously made, created and confirmed rights in favor of landlords in adjacent fishing grounds within the reef or one mile to seaward which were vested rights within the saving clause in the organic act of the Territory repealing all laws of the Republic of Hawaii conferring exclusive fishing rights.

A statement in a patent of an apuhuaa in Hawaii that "a fishing right is also attached to this land in the adjoining sea" and giving the boundaries thereof, passes the fishery right even if the *habendum* refers only to the above granted land.

THE facts are stated in the opinion of the court.

Mr. Francis M. Hatch, with whom *Mr. Reuben D. Silliman* was on the brief, for plaintiff in error:

The statutes of Hawaii from 1839 down on the subject of fisheries, have given property interests in the fisheries to the adjoining landowner. History and usage are to be looked at in considering these statutes. *Martin* v. *Waddell,* 16 Pet. 367. These acts are not to be construed as are conveyances between individuals. They are laws as well as grants. *Railway Co.* v.

Railway Co., 97 U. S. 491; *Railway Co.* v. *Davison*, 65 Michigan, 416; *Winona & R. Co.* v. *Barney*, 113 U. S. 618; *United States* v. *Railroad Co.*, 150 U. S. 1: *Barden* v. *Nor. Pac. R. R.*, 154 U. S. 288.

Fishing rights when legally acquired are rights of property, not mere privileges. *Boston* v. *Lecraw*, 17 How. 462; *Manchester* v. *Massachusetts*, 139 U. S. 259; *McCready* v. *Virginia*, 94 U. S. 391; *Commonwealth* v. *Alger*, 7 Cush. 53.

This is conclusively settled in Hawaii by *Haalelea* v. *Montgomery*, 2 Hawaii, 62.

The law as settled in Hawaii governs. *Tel. Co.* v. *Manning*, 186 U. S. 238; *Louisiana* v. *Pillsbury*, 105 U. S. 278; *Moody* v. *Railroad Co.*, 146 U. S. 162; *Railroad Co.* v. *Trust Co.*, 173 U. S. 99.

The "royal patent," under which plaintiff in error claims, is a muniment of title, under the great seal of a former government, and imports verity. All preliminary acts, involving the discretion of ministerial officers, are now beyond review. *United States* v. *Hanson*, 16 Pet. 199; *Knight* v. *U. S. Land Assn.*, 142 U. S. 183; *San Francisco* v. *Levy*, 138 U. S. 671.

The Joint Resolution of Congress of July 7, 1898, annexing Hawaii to the United States continued in force all municipal legislation of Hawaii, not inconsistent with the Constitution of the United States, until Congress should otherwise enact.

The fishery laws of Hawaii were among those continued in force.

Congress by the organic act for the government of Hawaii, repealed these fishing laws but saved vested rights. Rights, therefore, which were vested at the time of the transfer of sovereignty were protected by the act of Congress establishing a government for Hawaii. The court below was limited in its inquiry to a consideration if such rights existed in Hawaii prior to annexation. It erred in ignoring the saving clause of the organic act and in repudiating the old law in Hawaii on the subject.

Mr. Lorrin Andrews, Attorney General of the Territory of Hawaii, for defendant in error:

The royal patent under which the plaintiff in error claimed a grant did not contain words of conveyance sufficient to pass title to alleged fishing rights. The recital that a fishery in the sea is "attached" to the land does not grant the fishery. A deed to operate as an effectual conveyance should contain sufficient and proper words. 9 Am. & Eng. Ency. 138; 1 Devlin on Deeds, § 211; *McKinney* v. *Settles*, 13 Missouri, 541; *Hemmelman* v. *Mounts*, 87 Indiana, 178.

Government grants of lands, franchises and privileges are invariably construed in favor of the public and against the grantee. *Charles Bridge* v. *Warren Bridge*, 11 Pet. 539; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666; *Martin* v. *Waddell*, 16 Pet. 411; *Tucker* v. *Ferguson*, 22 Wall. 575; *Newton* v. *Commissioners*, 100 U. S. 561; *Shively* v. *Bowlby*, 152 U. S. 1; *Johnson* v. *Crowe*, 87 Pa. St. 184; *Commissioners* v. *Water Co.*, 104 Massachusetts, 449; *Water Co.* v. *Water Co.*, 80 Maine, 563.

The fisheries claimed in this suit did not pass to the plaintiff in error as an appurtenance to his land. *Haalelea* v. *Montgomery*, 2 Hawaii, 70. The right to fish in tide waters is a public right, which belongs to the State and to all the people, and not to private individuals. 13 Am. & Eng. Ency. 560; *Shively* v. *Bowlby*, 152 U. S. 1; *Smith* v. *Maryland*, 18 How. 71; *Proctor* v. *Wells*, 103 Massachusetts, 216; *Lansing* v. *Smith*, 4 Wend. 9; *Wooley* v. *Campbell*, 37 N. J. Law, 163; *State* v. *Roberts*, 59 N. H. 256; *Weston* v. *Sampson*, 8 Cush. 347; *Lincoln* v. *Davis*, 53 Michigan, 375.

The plaintiff in error was not entitled to any title in said fisheries through prescription or long continued use. 13 Am. & Eng. Ency. 581, note 3; *Fishing Co.* v. *Carter*, 61 Pa. St. 21. Prescription can only be based upon the supposition that a grant was originally made and has been lost or destroyed. Use or possession being permissive cannot result in the acquisition of title. 1 Am. & Eng. Ency. 794; *Kirk* v. *Smith*, 9 Wheat. 288.

In order to obtain a title in Hawaii a land commission award or a royal patent must have been obtained, and in no other way could it have been obtained. *Dowsett* v. *Maukeala*, 10 Hawaii, 169; *Thurston* v. *Bishop*, 7 Hawaii, 421; *Kenoa* v. *Meek*, 6 Hawaii, 67; *Kaai* v. *Mahuka*, 5 Hawaii, 356; *Kahoomana* v. *Minister*, 3 Hawaii, 639.

No fishing right could have been obtained by the plaintiff in error through custom.

No custom can transfer the title of public property to an individual, and the right to fish cannot be acquired by custom. 13 Am. & Eng. Ency. 583.

Plaintiff in error had no vested right in said fisheries within the meaning of the organic act of the Territory of Hawaii. His claims were based merely upon legislative enactments which were public laws, and all these laws were repealed by an act to provide a government for the Territory of Hawaii, passed by the United States Congress in 1900. A mere expectation based upon an anticipated continuance of general laws cannot be claimed to be a vested right. There can be no vested right under a public statute relating to a public subject, which does not amount to a grant or contract. *Newton* v. *Commissioners*, 100 U. S. 587; *Dobbins* v. *Bank*, 112 Illinois, 562; *Phipps* v. *State*, 85 Am. Dec. 654; *Pratt* v. *Brown*, 3 Wisconsin, 603; *Commissioners* v. *Water Power Co.*, 104 Massachussetts, 446; *Johnson* v. *Crowe*, 87 Pa. St. 189; *Lumber Co.* v. *Rust*, 168 U. S. 589.

Mr. Justice Holmes delivered the opinion of the court.

This is an action at law, somewhat like a bill to quiet title, to establish the plaintiff's right to a several fishery of a peculiar sort, between the coral reef and the ahupuaa of Moanalua on the main land of the Island of Oahu. The organic act of the Territory of Hawaii repealed all laws of the Republic of Hawaii which conferred exclusive fishing rights, subject, however, to vested rights, and it required actions to be started within

two years by those who claimed such rights. Act of April 30, 1900, c. 339, §§ 95, 96; 31 Stat. 141, 160. At the trial the presiding judge directed a verdict for the defendant. Exceptions were taken but were overruled by the Supreme Court of the Territory, and the case comes here by writ of error.

The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right. *Wedding* v. *Meyler*, 192 U. S. 573, 583.

The property formerly belonged to Kamehameha IV, from whom it passed to his brother Lot Kamehameha and from him by mesne conveyances to the plaintiff. The title of the latter to the ahupuaa is not disputed. He claims the fishery also under a series of statutes and a royal grant. The history is as follows: In 1839 Kamehameha III took the fishing grounds from Hawaii to Kauai and redistributed them—those named without the coral reef, and the ocean beyond, to the people—those "from the coral reef to the seabeach for the landlords and for the tenants of their several lands, but not for others." The landlord referred to seems to have been the konohiki or overlord of an ahupuaa or large tract like that owned by the plaintiff. It is not necessary to speculate as to what the effect of this act of the king would have been, standing alone, he then

having absolute power. It had at least the effect of inaugurating a system, *de facto*. But in 1846, the monarchy then being constitutional, an act was passed, article 5 of which was entitled "Of the Public and Private Rights of Piscary." By the first section of this article it was provided again that the same fishing grounds outside the reef should be free to the people, etc.; and then by the second it was enacted that the fishing grounds from the reefs to the beach, or, where there are no reefs, for one mile seaward, "shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries the said landholders shall not be molested except," etc.

By § 3 "the landholders shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions in this article imposed." Then follows a statement of the rights of the landlord as they have been summed up above and a provision that the landlords shall not have power to lay any tax or to impose any restrictions upon their tenants regarding the private fisheries other than those prescribed.

The Civil Code of 1859, § 387, repeated the enactment of § 2, that the fishing grounds within the reef or one mile seaward "shall, in law, be considered the private property of the konohiki," etc., in nearly the same words, and other sections codified the regulations just mentioned. There was a later repetition in the Penal Laws of 1897, § 1452, etc., and this was in force when the organic act of Congress was passed, repealing, as we have said, the laws conferring exclusive fishing rights, but preserving vested rights.

The foregoing laws not only use the words "private property," but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they

created only a revocable license, and if they imported a grant or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. The argument against their effect was not that in this case the ahupuaa did not belong to the fishery, within the words "landlords whose lands, by ancient regulation, belong to the same," (the land seems formerly to have been incident to the fishery,) but that citizens have no vested rights against the repeal of general laws. This is one of those general truths which become untrue by being inaccurately expressed. A general law may grant titles as well as a special law. It depends on the import and direction of the law. A strong example of the application of the rule intended by the argument is to be found in *Wisconsin & Michigan Railway* v. *Powers*, 191 U. S. 379, where a railroad company was held to have no vested right to exemptions proclaimed in a general tax act. The statute was construed not to import an offer, covenant or grant to railroads which might be built in reliance upon it. But if a general law does express such an offer, as it may, the grant is made. If the Hawaii statutes did not import a grant it is hard to see their meaning.

However, in this case it is not necessary to invoke the statutes further than to show that, by the law in force since 1846 at least, such rights as the plaintiff claims, and which, as is shown by the evidence, he and his predecessors in title have been exercising for forty years, have been recognized as private property. Such is the view of the leading case, decided in 1858 and acquiesced in, we believe, ever since. *Haalelea* v. *Montgomery*, 2 Hawaiian Rep. 62, 66. In the present instance the plaintiff claims under a royal patent, admitted to have been effective as to whatever, by its true construction, it purported to convey. This patent describes the ahupuaa by metes and bounds, and then the granting clause goes on: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows"—again giving boundaries, and continuing: "The islands of Mokumoa, Mokuonini and Mokuoco are a part of Moanalua, and are included in the above area."

The description of what is intended to be conveyed could not be plainer. But the habendum is "to have and to hold the above granted land," and it is said that as the fishery of an overlord or konohiki, unlike the rights of tenants, did not pass as an incident of land, but must be distinctly granted, the fishery was not included in the patent. *Haalelea* v. *Montgomery*, 2 Hawaiian Rep. 62, 71. Again, we must avoid being deceived by a form of words. We assume that a mere grant of the ahupuaa without mention of the fishery would not convey the fishery. But it does not follow that any particular words are necessary to convey it when the intent is clear. When the description of the land granted says that there is incident to it a definite right of fishery, it does not matter whether the statement is technically accurate or not; it is enough that the grant is its own dictionary and explains that it means by "land" in the habendum land and fishery as well. There is no possibility of mistaking the intent of the patent. It declares that intent plainly on its face. There is no technical rule which overrides the expressed intent, like that of the common law, which requires the mention of heirs in order to convey a fee. We are of opinion that the patent did what it was meant to do, and therefore that the plaintiff is entitled to prevail.

Judgment reversed.

UNITED STATES *v.* SING TUCK OR KING DO AND THIRTY-ONE OTHERS.

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

No. 591. Argued April 7, 1904.—Decided April 25, 1904.

It is one of the necessities of the administration of justice that all questions —even though fundamental—should be determined in an orderly way, and it is within the power of Congress to require one asserting the right to enter this country on the ground that he is a citizen, to establish his citizenship in some reasonable way.

A mere allegation of citizenship by a person of Chinese descent is not sufficient to oust the inspector of jurisdiction under the alien immigrant law and allow a resort to the courts without taking the appeal to the Secretary provided for in the act, and unless such appeal has been taken and decided a writ of *habeas corpus* will be denied.

THE facts, which involved the right to enter the United States, of certain persons of Chinese descent who claimed to be citizens of the United States, are stated in the opinion of the court.

Mr. Assistant Attorney General McReynolds for the United States:

The Circuit Court of Appeals did not have jurisdiction of the appeal. The appeal should have been direct to this court. *Am. Sug. Ref. Co.* v. *New Orleans*, 181 U. S. 277, 281; *Union Bank* v. *Memphis*, 189 U. S. 71.

The direct course of all the later decisions, both English and American, is to establish the rule that probable cause must first be shown to obtain the writ of *habeas corpus*, whether it be granted at common law or under the statute. Church on Habeas Corpus, § 92; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Milligan*, 4 Wall. 2, 110; *Ex parte Royall*, 117 U. S. 250; *Ex parte Terry*, 128 U. S. 301. At common law no evidence was necessary to support the return to the writ. It was deemed to import verity until impeached. Hurd on Hab. Corps. Bk. 2, c. 3, §§ 8, 10; Church on Hab. Corps. §§ 122, 160, 170. This rule is not changed by any statute of the United States. *Crowley* v. *Christensen*, 137 U. S. 86, 94; *Holden* v. *Minnesota*, 137 U. S. 483, 491.

The purpose of the Chinese exclusion acts and regulations adopted for making them effective is to *prevent* the landing of Chinese persons in the United States, unless it affirmatively appears that they are exempt from the general provisions because officials, teachers, students, merchants, travelers, or citizens of the United States. If officers should permit entry of any one of that race without demanding satisfactory proof of facts, they would grossly violate their duty. As to all

Chinese except such as claim birth in the United States, respondents do not deny this.

The return shows that of the 32 Chinamen examined, 27 made then no claim of birth in the United States and no show of right to enter therein. Five said they were born in the United States, but refused to give information to support such claim, and by their action made it incredible.

The original petition asserted citizenship upon information and belief. The return denied, upon information and belief, that respondents were citizens, and stated that they were alien Chinese laborers not entitled to entry. No denial was made of any facts set out in the return nor was application made to reply thereto in any way. Such facts must, therefore, be taken as true and the action of the court in dismissing the writ cannot be held to be error. The very ground upon which the petition was based was denied and there was nothing to put the denial in issue.

In any view of the facts brought by the return before the court it was the clear duty of the immigration officers to detain all of the respondents, and as it was their duty so to do, such detention could not be illegal. It follows, wholly irrespective of the question as to the finality of findings by immigration officers under the act of 1894, that the writ in the present case was properly dismissed, no illegal detention having been shown. *Ex parte Watkins*, 3 Pet. 201; *Wales* v. *Whitney*, 114 U. S. 571; *Ex parte Curtis*, 106 U. S. 375; *Ekiu* v. *United States*, 142 U. S. 651; *Carter* v. *McClaughry*, 183 U. S. 381.

Where the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority as to questions of fact is conclusive upon all others. See as to action of administrative officers in the Land Department, *Johnson* v. *Towsley*, 13 Wall. 83; *Smelting Company* v. *Kemp*, 104 U. S. 636. The courts have power to grant relief when the special tribunal acts contrary to law, or possibly where a manifest wrong has been done, and only in such cases.

Burfenning v. *Chicago, St. Paul &c. Railroad*, 163 U. S. 321, 323; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108.

If the mere unsupported statement of a Chinaman that he was born in the United States, entitles him to enter, the Exclusion Acts will prove farcical.

When Chinese persons present themselves for admission into the United States it is the duty of immigration officers to pass upon their claims. If citizenship is alleged, that, like other questions of fact, must be determined by such officers. Except, possibly, in extraordinary cases an adverse decision by the immigration officer is final, subject to an appeal to the Secretary of Commerce and Labor, and it cannot be reviewed upon writ of *habeas corpus*. *In re Moy Quong Shing*, 125 Fed. Rep. 641. *The Gee Fook Sing Case*, 49 Fed. Rep. 146, was decided without argument. And see *Lem Moon Sing* v. *United States*, 158 U. S. 547; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200; *Japanese Emigrant Case*, 189 U. S. 97.

Mr. Robert M. Moore, with whom *Mr. W. W. Cantwell* was on the brief, for respondents:

A person of Chinese descent born within the United States is a citizen thereof and the provisions of the Chinese Exclusion Act do not apply to such persons. *United States* v. *Wong Kim Ark*, 169 U. S. 653.

Citizenship is a right. Every person claiming it has the constitutional right to have it determined judicially in a constitutional court.

Congress cannot withdraw from judicial cognizance a matter which is the subject of a suit at common law or in equity. This right of citizenship is safe-guarded by the Constitution of the United States, which provides that "no person shall be deprived of life, liberty or property, without *due process of law*." See case reported in 94 Fed. Rep. 834; *Gee Fook Sing* v. *United States*, 49 Fed. Rep. 146.

Habeas corpus is the only, and is the proper, remedy. *Jew Wong Loy* v. *United States*, 91 Fed. Rep. 240; *In re Jung Ah*

Lung, 25 Fed. Rep. 141, affirmed 124 U. S. 621. The alien act does not apply to citizens.

The pretended trial and adjudication by the immigrant inspector in these cases was not due process of law. The rules prescribed by the Secretary of Labor and Commerce are arbitrary and unjust.

The legislature is not vested with the power to arbitrarily provide that any procedure it may choose to declare such shall be regarded as due process of law. *Colon* v. *List*, 153 N. Y. 188; *Burton* v. *Platter*, 10 U. S. App. 657.

Art. 14 of Amds. of Const. of U. S. is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will. *Meyers* v. *Shields*, 61 Fed. Rep. 713; *Holden* v. *Hardy*, 169 U. S. 366; *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Dorman* v. *State*, 34 Alabama, 216; *In re Ziebold*, 23 Fed. Rep. 791; Argument of Daniel Webster in *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

As applied to judicial proceedings the term "due process of law" means a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction; that the proceeding be regular and appropriate to the question involved; and that the trial be a fair one. *Rees* v. *Watertown*, 19 Wall. 107; *Carr* v. *Brown*, 38 Atl. Rep. 9; *Burton* v. *Platter*, 10 U. S. App. 657; *Davidson* v. *New Orleans*, 96 U. S. 97; *Dwight* v. *Williams*, 4 McLean, 581; *Parsons* v. *Russell*, 11 Michigan, 113; *Huber* v. *Riley*, 53 Pa. St. 112; *In re Ah Lee*, 5 Fed. Rep. 899; *Pennoyer* v. *Neff*, 95 U. S. 723; *Hennessey* v. *Volkening*, 30 Abb. N. Cas. 100; *Ziegler* v. *So. &c. Ala. R. Co.*, 58 Alabama, 594; *Brown* v. *Hummel*, 6 Pa. St. 86; *Jenson* v. *Union Pacific*, 6 Utah, 253.

There was no evidence before the inspector upon which he could base a judicial determination.

A Chinese inspector is in no sense a judicial officer and cannot be under the Constitution. See 32 Stat. c. 1021, § 23.

Section 1, Art. 3, Const. U. S. provides: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

Section 2 provides: "That judicial power shall extend to all cases, in law and equity."

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of *habeas corpus* against a Chinese Inspector and Inspector of Immigration. It appears from his return that the Chinese persons concerned came from China by way of Canada and were seeking admission into the United States. On examination by an inspector five gave their names, stated that they were born in the United States, (*United States* v. *Wong Kim Ark*, 169 U. S. 649,) and answered no further questions. The rest gave their names and then stood mute, not even alleging citizenship. The inspector decided against their right to enter the country and informed them of their right to appeal to the Secretary of Commerce and Labor. No appeal was taken, and while they were detained at a properly designated detention house for return to China a petition was filed by a lawyer purporting to act on their behalf, alleging that they all were citizens of the United States, and this writ was obtained. In the Circuit Court the detention was adjudged to be lawful, and the writ was dismissed without a trial on the merits. This decision was reversed by the Circuit Court of Appeals on the ground that the parties concerned were entitled to a judicial investigation of their status.

By the act of August 18, 1894, 28 Stat. 372, 390, "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless

reversed on appeal to the Secretary of the Treasury." The jurisdiction of the Treasury Department was transferred to the Department of Commerce and Labor by the act of February 14, 1903, 32 Stat. 825. It was held by the Circuit Court of Appeals that the act of 1894 should not be construed to submit the right of a native-born citizen of the United States to return hither to the final determination of executive officers, and the conclusion was assumed to follow that these cases should have been tried on their merits. Before us it was argued that by the construction of the statute the fact of citizenship went to the jurisdiction of the immigration officers, see *Gonzales* v. *Williams*, 192 U. S. 1, 7; *Miller* v. *Horton*, 152 Massachusetts, 540, 548; and therefore that the statute did not purport to apply to one who was a citizen in fact. We are of opinion however that the words quoted apply to a decision on the question of citizenship, and that, even if it be true that the statute could not make that decision final, the consequence drawn by the Circuit Court of Appeals does not follow and is not correct.

We shall not argue the meaning of the words of the act. That must be taken to be established. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 546, 547. As to whether or not the act could make the decision of an executive officer final upon the fact of citizenship we leave the question where we find it. The *Japanese Immigrant Case*, (*Yamataya* v. *Fisher*,) 189 U. S. 86, 97; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 304, 305. See *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200. Whatever may be the law on that point, the decisions just cited are enough to show that it is too late to contend that the act of 1894 is void as a whole. But if the act is valid, even if ineffectual on this single point, then it points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the

statute. The first mode of attacking his decision is by taking that appeal. It the appeal fails it then is time enough to consider whether upon a petition showing reasonable cause there ought to be a further trial upon *habeas corpus*.

We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet except under exceptional circumstances the courts of the United States do not interfere by *habeas corpus*. The prisoner must in the first place take his case to the highest court of the State to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. *Minnesota* v. *Brundage*, 180 U. S. 499; *Baker* v. *Grice*, 169 U. S. 284. In *Gonzales* v. *Williams*, 192 U. S. 1, there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts but merely a question of law. Here the issue, if there is one, is pure matter of fact, a claim of citizenship under circumstances and in a form naturally raising a suspicion of fraud.

Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at

least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. Now, when these Chinese, having that opportuntiy, saw fit to refuse it, we think an additional reason was given for not allowing a *habeas corpus* at that stage. The detention during the time necessary for investigation was not unlawful, even if all of these parties were citizens of the United States and were not attempting to upset the inspection machinery by a transparent device. *Wong Wing* v. *United States*, 163 U. S. 228, 235. They were offered a way to prove their alleged citizenship and to be set at large, which would be sufficient for most people who had a case and which would relieve the courts. If they saw fit to refuse that way, they properly were held down strictly to their technical rights.

But it is said that if, under any circumstances, the question of citizenship could be left to the final decision of an executive officer, the Chinese Regulations made under the statutes by the Department of Commerce and Labor are such that they do not allow a citizen due process of law, and the same argument is urged in favor of the right to decline to take any part in such proceedings from the outset. The rules objected to require the officer to prevent communication with the parties other than by officials under his control, and to have them examined promptly touching their right to admission. The examination is to be apart from the public, in the presence of the government officials and such witnesses only as the examining officer shall designate. This last is the provision especially stigmatized. It is said that the parties are allowed to produce only such witnesses as are designated by the officer. But that is a plain perversion of the meaning of the words. If the witnesses referred to are not merely witnesses to the examination, if they are witnesses in the cause, still the provision only excludes such witnesses at the discretion of the officer pending the examination of the party concerned—a natural precaution in this class

of cases, the reasonableness of which does not need to be explained. It is common in ordinary trials. No right is given to the officer to exercise any control or choice as to the witnesses to be heard, and no such choice was attempted in fact. On the contrary, the parties were told that if they could produce two witnesses who knew that they had the right to enter, their testimony would be taken and carefully considered, and various other attempts were made to induce the suggestion of any evidence or help to establish the parties' case, but they stood mute. The separate examination is another reasonable precaution, and it is required to take place promptly to avoid the hardship of a long detention. In case of appeal counsel are permitted to examine the evidence, Rule 7, and it is implied that new evidence, briefs, affidavits and statements may be submitted, all of which can be forwarded with the appeal. Rule 9. The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit.

We are of opinion that the attempt to disregard and override the provisions of the statutes and the rules of the department and to swamp the courts by a resort to them in the first instance must fail. We may add that, even if it is beyond the power of Congress to make the decision of the department final upon the question of citizenship, we agree with the Circuit Court of Appeals that a petition for *habeas corpus* ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a *prima facie* case. A mere allegation of citizenship is not enough. But, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide.

Judgment reversed.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE PECKHAM, dissenting.

I am unable to concur in either the foregoing opinion or

judgment. I have heretofore dissented in several cases involving the exclusion or expulsion of the Chinese, but, although my views on the questions are unchanged, I do not care to repeat anything then said. I pass rather to consider the present case and the declarations of the court. That is, as stated in the opinion, one of persons claiming to be citizens of the United States denied by an inspector of immigration—a mere ministerial officer—the right to enter the country, and who are now informed by this court that their application to the courts for the enforcement of that right must be denied. They are told that their only remedy is by appeal from one ministerial officer to another.

The decision is based upon the act of August 18, 1894, 28 Stat. 372, 390, which provides:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

But by its very terms that act applies only to an alien, and these parties assert that they are not aliens. If not aliens, certainly that act is inapplicable. So affirms Rule 2, prescribed by the Secretary of Commerce and Labor, concerning the immigration of Chinese persons, which reads: "If the Chinese person has been born in the United States, neither the immigration acts nor the Chinese exclusion acts prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States apply to such person." So this court has held at the present term. *Gonzales* v. *Williams*, 192 U. S. 1, decided January 4, 1904. In that case it appeared that Isabella Gonzales, an unmarried woman, coming from Porto Rico to New York, was prevented from landing and detained by the immigration commissioner as an alien immigrant. A writ of *habeas corpus* was issued on her behalf by the Circuit Court of the United States for the Southern District of

New York. Upon a hearing the writ was dismissed and she remanded to the custody of the commissioner. On appeal to this court that decision was reversed, and it was said in the opinion (p. 7):

"If she was not an alien immigrant within the intent and meaning of the act of Congress entitled 'An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor,' approved March 3, 1891, 26 Stat. 1084, c. 551, the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed."

There, as here, the applicant had not appealed from the decision of the immigration officer to the Secretary of the Treasury; that fact was pleaded in the return to the writ, and on the argument before us this act of August 18, 1894, was cited by the government and the argument made that the remedy was by appeal to the Secretary of the Treasury. I quote the language of the Solicitor General as reported (p. 4):

"The act of August 18, 1894, 28 Stat. 390, makes the decision of the appropriate immigration or customs officer, if adverse to the admission of an alien, final unless reversed on appeal to the Secretary of the Treasury. Even if appellant herein was ultimately entitled to a writ of *habeas corpus*, she was not in a position justly to obtain the writ until she had prosecuted an unavailing appeal to the Secretary of the Treasury, and thus pursued her remedy in the executive course to the uttermost."

That case did not hold that the applicant was a citizen of the United States, but only that—being a subject of Porto Rico, an island ceded to the United States, and, as adjudged by a bare majority of this court in conflicting opinions, not within the full scope of constitutional protection—she was not an alien immigrant. Here the petitioners claim that they are citizens by birth, and the decision is that nevertheless they cannot be heard in a court to prove the fact which they allege. There the petition disclosed both a question of law and one of fact, for not until the return to the writ was the question of fact

eliminated; here on the face of the petition only a question of fact is presented for the law applicable had been fully settled by the decision of this court in *United States* v. *Wong Kim Ark*, 169 U. S. 649.

But it is said that, inasmuch as Congress has provided for an appeal from the immigration officer to the Secretary of the Treasury, or rather, since the recent act transferring jurisdiction to the Department of Commerce and Labor, to the Secretary of the latter department, the orderly administration of affairs requires that the remedy by appeal to the Secretary should be followed. It was not so held in the *Gonzales* case, and I do not appreciate why it should be deemed necessary in the case of one claiming to be a citizen and not deemed necessary in respect to one who is merely not an alien immigrant. We have called American citizenship an "inestimable heritage," *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200, and I cannot understand why one who claims it should be denied the earliest possible hearing in the courts upon the truth of his claim.

Why should any one who claims the right of citizenship be denied prompt access to the courts? If it be an "inestimable heritage," can Congress deprive one of the right to a judicial determination of its existence, and ought the courts to unnecessarily avoid or postpone an inquiry thereof? If it be said that the conduct of these petitioners before the inspector was not such as to justify a belief in the probability of their claim of citizenship, it is sufficient answer that they assert the claim and ask a right to be heard. I never supposed that courts could deny a party a hearing on the ground that they did not believe it probable that he could establish the claim which he makes.

The postponement of the right to judicial inquiry until after the remedy by appeal to the Secretary has been exhausted is justified by analogy to the rule which restrains this court from interfering with the orderly administration of criminal law in the courts of a State until after a final determination by the

highest court of that State. But there is this essential difference: To the highest court of a State a writ of error runs from this court, and there is, therefore, propriety in waiting until the final decision of the courts of the States, the presumption being always that they will uphold the Constitution of the United States, and enforce any rights granted by it.

In *Ex parte Royall*, 117 U. S. 241, 251, 252, this court said:

"Does the statute imperatively require the Circuit Court, by writ of *habeas corpus*, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of opinion that while the Circuit Court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. . . . This court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it

will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

But here there is no appeal or writ of error from the decision of the Secretary to this or to any other court, and the remedy which must be pursued then as now is only that of *habeas corpus*. Indeed, in the opinion the court does not give to these petitioners encouragement to believe that there can be any judicial examination, even after the decision by the Secretary against their claim of American citizenship. If a judicial hearing at any time is not in terms denied, it is, at least, like a famous case of old, passed to "a convenient season." Meantime the American citizen must abide in the house of detention.

Further, there are special reasons why this prompt judicial inquiry by the writ of *habeas corpus* should be sustained. On July 27, 1903, the Secretary of Commerce and Labor, as authorized by statute, promulgated certain regulations concerning the admission of Chinese persons. Rule 4 named a dozen ports at which alone such persons should be permitted to enter, Malone, N. Y., where these petitioners are detained, being one of the number. Rules 6, 7, 8, 9, 21 and 22 are as follows:

"RULE 6. Immediately upon the arrival of Chinese persons at any port mentioned in Rule 4 it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law pro-

vided, touching their right to admission and to permit those proving such right to land.

"RULE 7. The examination prescribed in Rule 6 should be separate and apart from the public, in the presence of government officials and such witness or witnesses only as the examining officer shall designate, and, if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal, and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based.

"RULE 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

"RULE 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary; and within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge."

"RULE 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to, or residence within, the United States, to establish such right affirmatively and satisfactorily to the appropriate government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt

shall be given by administrative officers to the United States government.

"RULE 22. No authenticated copy of a judicial finding that a Chinese person was born in the United States shall be accepted as conclusive in favor of the person presenting it, unless he be completely identified as the person to whom such authenticated copy purports to relate."

By Rule 6 it is the duty of the inspector to prevent any communication between the immigrant and any person other than his own officials. In other words, no communication with counsel or with friends is permitted. By Rule 7 the examination is to be private, in the presence only of government officials and such witnesses as the examining officer shall designate. The most notorious outlaw in the land, when charged by the United States with crime, is, by constitutional enactment, (Art. 6, Amendments U. S. Constitution,) given compulsory process for obtaining witnesses in his favor and the assistance of counsel for his defence, but the Chinaman—although by birth a citizen of the United States—is thus denied counsel and the right of obtaining witnesses. After he has been adjudged inadmissible then, and then for the first time, is he permitted to have counsel and advised of his right of appeal, and such counsel, after filing notice of appeal, is permitted to examine but not make copies of the testimony upon which the excluding order is based. By Rule 8, if he desires to appeal, he must give written notice thereof within two days after the decision. By Rule 9, within three days after the filing of notice a complete record of the case is transmitted to the Commissioner General of Immigration, and on such appeal no evidence will be considered that has not been made the subject of investigation and report by the inspector. Can anything be more harsh and arbitrary? Coming into a port of the United States, as these petitioners did into the port of Malone, placed as they were in a house of detention, shut off from communication with friends and counsel, examined before an inspector with no one to advise or counsel, only such witnesses present as the in-

spector may designate, and upon an adverse decision compelled to give notice of appeal within two days, within three days the transcript forwarded to the Commissioner General, and nothing to be considered by him except the testimony obtained in this Star Chamber proceeding. This is called due process of law to protect the rights of an American citizen, and sufficient to prevent inquiry in the courts.

But is is said that the applicants did not prove before the immigration officer that they were citizens, that some simply alleged the fact, while others said nothing, that they were told that if they would give the names of two witnesses their testimony would be taken and considered. But what provision of law is there for compelling the attendance of witnesses before such immigration officer or for taking depositions, and of what avail would be an *ex parte* inquiry of such witnesses? Must an American citizen, seeking to return to this his native land, be compelled to bring with him two witnesses to prove the place of his birth or else be denied his right to return, and all opportunity of establishing his citizenship in the courts of his country? No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws and not of men, I do not think it should be enforced against American citizens of Chinese descent.

Again, by Rule 21, the burden of proof is cast upon the applicant, no other evidence is to be accepted except that which the law prescribes, and in every doubtful case the benefit of the doubt is to be given to the government. And by Rule 22 a judicial finding of citizenship is not to be accepted as conclusive unless the party presenting it is "completely identified." I showed in my dissenting opinion in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 740, that expulsion was punishment. That proposition was not denied by the majority of the court when applied to a citizen but only as applied to aliens (p. 709). If expulsion from the country is punishment for crime when applied to a citizen, can it be that the rule which requires the government to assume the burden of proof and which clothes

the accused with the presumption of innocence can be changed by casting upon the individual the burden of showing that he is one not liable to such punishment? Can it be that the benefit of a doubt which attaches to all other accused persons is taken away from one simply because he is a Chinaman? And can it be that when one produces a judicial finding of citizenship such finding can be brushed one side unless the identity of the individual in whose behalf the finding was made is established beyond doubt?

I cast no reflections upon the immigration officer in the present case. I am simply challenging a system and provisions which place within the arbitrary power of an individual the denial of the right of an American citizen to free entrance into this country, and put such denial outside the scope of judicial inquiry. It may be true that a ministerial officer, in a secret and private investigation, may strive to ascertain the truth and to do justice, but unless we blind our eyes to the history of the long struggle in the mother country to secure protection to the liberty of the citizen, we must realize that a public investigation before a judicial tribunal, with the assistance of counsel and the privilege of cross-examination, is the best, if not the only, way to secure that result.

In my judgment we are making a curious judicial history. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, decided in 1886, we said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *United States* v. *Wong Kim Ark*, 169 U. S. 649, decided in 1898, the petitioner, a Chinese person born in the United

States, returning from China, was refused permission to land, and was restrained of his liberty by the collector, the officer then charged with that duty. Without making any appeal from the decision of such local officer, although the law as to appeal to the Secretary was then the same as now, he sued out a writ of *habeas corpus* from the District Court of the United States, which court, after hearing, discharged him on the ground that he was born within the United States and therefore a citizen thereof. On appeal to this court that decision was affirmed. No one connected with the case doubted that the immigration and exclusion laws had no application to him if he were a citizen or questioned his right to appeal in the first instance to the courts for his discharge from the illegal restraint.

In *Chin Bak Kan* v. *United States, supra,* decided in 1902, it appeared that Chin Bak Kan was brought before a commissioner of the United States charged with wrongfully coming in and remaining within the United States. After a hearing he was adjudged guilty of the charge by the commissioner and ordered removed to China. An appeal was taken to the District Court of the United States but the appeal was dismissed, and thereupon the case was brought here. The jurisdiction of the commissioner was challenged, and in disposing of that the court said (p. 200):

"A United States commissioner is a *quasi* judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the District Court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute."

In the *Japanese Immigrant Case,* 189 U. S. 86, 100, decided in 1903, this court, while sustaining the action of the ministerial officers, said:

"But this court has never held, nor must we now be understood as holding, that administrative officers, when executing

the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

This was in the case of one confessedly an alien.

Now the courts hold that parties claiming to be citizens can have that claim determined adversely by a mere ministerial officer, and be denied the right of immediate appeal to the courts for a judicial inquiry and determination thereof. I cannot believe that the courts of this republic are so burdened with controversies about property that they cannot take time to determine the right of personal liberty by one claiming to be a citizen.

Further, even if it should be proved that these petitioners are not citizens of the United States but simply Chinese laborers seeking entrance into this country, it may not be amiss to note the significance of the act of April 29, 1902, 32 Stat. 176, reënacting and continuing the prior laws respecting the exclusion of the Chinese, "so far as the same are not inconsistent

with treaty obligations," taken in connection with this provision in article 4 of the treaty with China, proclaimed December 8, 1894, "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." I am not astonished at the report current in the papers that China has declined to continue this treaty for another term of ten years.

Finally, let me say that the time has been when many young men from China came to our educational institutions to pursue their studies, when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, "they have sown the wind, and they shall reap the whirlwind," and for cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation.

I am authorized to say that MR. JUSTICE PECKHAM concurs in this dissent.

GIBSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 195. Argued April 8, 1904.—Decided April 25, 1904.

Under § 1444, Rev. Stat., and § 11 of the Navy Personnel Act of March 3, 1899, a captain in the navy who is retired as a rear admiral receives three-fourths of the pay of rear admirals in the nine lower numbers of the eighteen rear admirals provided for by the act and not three-fourths of the pay of those in the nine higher numbers.

While repeals by implication are not favored where the same subject matter is covered by two acts which cannot be harmonized with a view to giving effect to the provisions of each, the latter act prevails, to the extent of the repugnancy between them when it is apparent that the latter act was intended as a substitute for the earlier one. *District of Columbia* v. *Hutton*, 143 U. S. 18.

Provisions as to allowances which are fixed for naval officers in the Navy Personnel Act of March 3, 1899, supersede the statutory provisions as to the same allowances in the earlier statutes.

THIS is an appeal from the Court of Claims. The claimant is a retired rear admiral. This action was prosecuted to recover the difference between three-fourths the pay of a brigadier general and that of a major general of the Army, accorded by statute to retired rear admirals. The Court of Claims dismissed the petition, holding the claimant entitled to three-fourths the pay of a brigadier general. Upon the hearing in that court the following facts were found:

"I. The claimant, William C. Gibson, was duly appointed a captain in the Navy, to rank from February 18, 1900. While serving in that grade, then being an officer of the Navy, with a creditable record, who served during the civil war, he was retired by the following order:

"'Navy Department.

"'WASHINGTON, June 30, 1900.

"'Sir: On July 23, 1900, you will regard yourself transferred to the retired list of officers of the U. S. Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear admiral, in accordance with the provisions of section 11 of the Naval Personnel Act, approved March 3, 1899.

"'Respectfully, JOHN D. LONG,

"'*Secretary*.

"'Captain William C. Gibson, U. S. Navy, commanding U. S. S. Texas.'

"II. Since his retirement he has received pay at the rate of

four thousand one hundred and twenty-five dollars ($4,125) a year, being three-fourths of five thousand five hundred dollars, ($5,500,) the pay fixed by section 1261 of the Revised Statutes of the United States as that of a brigadier general in the Army.

"If paid at the rate fixed by said section 1261 for a major general in the Army, he would receive pay at the rate of three-fourths of seven thousand five hundred dollars a year, being five thousand six hundred and twenty-five dollars ($5,625) a year, a difference of over and above what he has been receiving of one thousand five hundred dollars ($1,500) a year.

"III. From January 22, 1900, to July 3, 1900, inclusive, claimant was, by regular assignment, in command of the U. S. S. Texas, a seagoing vessel in commission. During that period he was, prior to the 18th of February, a commander in receipt of pay at the rate of four thousand dollars ($4,000) a year, and from and after that date a captain, receiving pay at the rate of four thousand five hundred dollars ($4,500) a year. He did not, while so attached to and in command of said vessel, receive any sea ration or commutation therefor, under Revised Statutes, sections 1578 and 1585.

"The commutation therefor at the rate of thirty cents per day would amount to forty-eight dollars and ninety cents ($48.90)."

Mr. George A. King and *Mr. William B. King* for appellant:

1. The word "grade" as used in section 11 has the same meaning as when used in section 7—that is, when a captain is retired under section 11, "the next higher grade" into which he goes is the "grade" of rear admiral as it is styled in section 7. "Three-fourths the sea pay of" that grade refers to the normal pay of the grade—that is, the pay of a major-general in the Army—not an exceptional rate of pay specifically attached to nine numbers in the grade of rear admiral, of which nine this claimant is not one. *United States* v. *Dickson*, 15 Pet. 141, 165; *Minis* v. *United States*, 15 Pet. 423, 445;

Ryan v. *Carter*, 93 U. S. 78, 83; Army Regulations (ed. of 1901), Art. III; *Schuetze* v. *United States*, 24 C. Cl. 299; 1 Opinions Attorneys General, 578, 582; 19 Opinions Attorneys General, 169.

2. The Personnel Act grants commissioned officers of the line of the Navy and of the medical and pay corps the same pay and allowances, except forage, as Army officers. Thereby they get the pay of Army officers in lieu of Navy pay; when traveling, Army mileage in lieu of Navy mileage; when ashore, Army allowances of quarters or commutation and fuel, which they had not before. These the law grants them in express terms; by necessary implication their Navy pay and Navy mileage for which there is an Army equivalent are taken away. The benefit to them in the way of allowances is entirely when on shore. There would be no inconsistency between the retention of the Navy sea ration and the grant of Army allowances for shore duty made by the act. *Hartford* v. *United States*, 8 Cranch, 109; *McCool* v. *Smith*, 1 Black, 470; *Ex parte Yeager*, 8 Wall. 105; *Distilled Spirits*, 11 Wall. 365; *Henderson's Tobacco*, 11 Wall. 657; *Red Rock* v. *Henry*, 106 U. S. 601; *Frost* v. *Wenie*, 157 U. S. 46, 58; Black on Interpretation of Laws, 116; Sedgwick (2d ed.), Pomeroy's Notes, p. 97; Potter's Dwarris, p. 273; *United States* v. *Greathouse*, 166 U. S. 501; *United States* v. *Healey*, 160 U. S. 136.

Mr. A. A. Hoehling, Jr., with whom *Mr. Charles L. Frailey* was on the brief, for appellant in No. 212, argued simultaneously with this case:

There is no language in the sections of the Navy "Personnel Act" applicable to this case which provides that officers of the Navy with the rank of captain, who retire with the rank and three-fourths sea pay of the next higher grade, are to be included among the nine lower numbers of the active list of the rear admirals, or that there is a pay grade formed by the nine lower numbers of rear admirals on the active list within which the retiring officers above mentioned are to be included.

Where the meaning of a statute is plain and there is no

ambiguity it is the duty of the courts to enforce it according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision. This principle of construction is applicable in this case. *Lake County* v. *Rollins*, 130 U. S. 662, 673; *United States* v. *Tyler*, 105 U. S. 244; *Thornley* v. *United States*, 113 U. S. 310; *United States* v. *Graham*, 119 U. S. 219; *United States* v. *Temple*, 105 U. S. 97; *Farnsworth* v. *Montana*, 129 U. S. 104; *Hamilton* v. *Rathbone*, 175 U. S. 414.

Mr. Assistant Attorney General Pradt, with whom *Mr. Special Attorney Thompson* was on the brief, for the United States, cited as to construction of the Navy Personnel Act, *Rodgers* v. *United States*, 36 C. Cl. 275; 185 U. S. 91, and opinion of Court of Claims in *Thomas* v. *United States*, 38 C. Cl. 113, and, as to the construction of the statute, *Dist. Columbia* v. *Hutton*, 143 U. S. 18, 26. A revision is meant to take the place of the law as previously formulated. *Batlett* v. *King*, cited in Sutherland on Statutory Construction, § 154; *King* v. *Cornell*, 106 U. S. 395.

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

The first question presented is whether a captain in the Navy retired as a rear admiral, under section 1444 of the Revised Statutes of the United States and section 11 of the Navy Personnel Act, shall receive three-fourths of the pay of the rear admirals in the nine higher numbers in the list of rear admirals or the like proportion of the pay of the nine lower numbers of the eighteen rear admirals.

Section 1444 of the Revised Statutes provides: "When any officer below the rank of vice admiral is sixty-two years old, he shall, except in the case provided in the next section, be retired by the President from active service."

Section 11 of the Navy Personnel Act reads: "That any officer of the Navy, with a creditable record, who served during

the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade." 30 Stat. 1004, 1007.

Section 13 provides: "That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

In the first proviso of section 7 of said act, provision having been made for eighteen rear admirals in the active list of the line of the Navy, it is enacted as follows: "*Provided*, That each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier general in the Army." 30 Stat. 1005.

The claimant at the time of his retirement was a captain in the United States Navy, who had served during the civil war, and was retired, by order of the Secretary of the Navy, pursuant to section 1444 of the Revised Statutes, with the rank and with three-quarters of the sea pay of the next higher grade, in accordance with section 11 of the Navy Personnel Act above quoted.

By section 1466 of the Revised Statutes of the United States it is provided:

"The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:

"The vice admiral shall rank with the lieutenant general.

"Rear admirals with major generals.

"Commodores with brigadier generals.

"Captains with colonels.

"Commanders with lieutenant colonels.

"Lieutenant commanders with majors.

"Lieutenants with captains.

"Masters with first lieutenants.

"Ensigns with second lieutenants."

Section 1261 fixes the pay of the officers of the Army:

"The officers of the Army shall be entitled to the pay herein stated after their respective designations:

"The general: thirteen thousand five hundred dollars a year.

"Lieutenant general: eleven thousand dollars a year.

"Major general: seven thousand five hundred dollars a year.

"Brigadier general: five thousand five hundred dollars a year.

"Colonel: three thousand five hundred dollars a year."

The claim of the appellant is, in substance, that the pay of the next higher grade above captain, the three-quarters of which the appellant is to receive, is the full pay of a rear admiral, that of a major general, and not what is claimed to be the exceptional pay for the nine lower numbers of that grade who are to receive the pay and allowance of a brigadier general.

It is admitted in the discussion, that the provision fixing the pay of the nine rear admirals to correspond with the pay of a brigadier general arose from the fact that the relative rank of officers of the Army and Navy had been so adjusted by statute as to rank commodores with brigadier generals, and the rank of commodore being dropped from the service, the pay of a brigadier general was given to the nine lower numbers of the rear admirals, who would otherwise have had the rank of commodores with the corresponding pay of brigadier generals.

The argument for the appellant insists that the language is plain and so explicit as to need no construction; but the fact that the rear admirals are divided into two classes for the purposes of pay, and the statute not specifically pointing out which class of pay shall be given those situated as the claimant is, leads us to consider the objects to be attained by the new law, the circumstances under which it was enacted, and to construe the language used in view of the purpose of Congress in enacting the statute.

There is no question that, had the claimant been promoted in the active service from captain to rear admiral, he would have passed into the lower grade of rear admirals, so far at least as his pay was concerned, and would have received, so

long as within that number, the pay of a brigadier general, notwithstanding that for all other purposes he was entitled to the rank and privileges of a rear admiral.

The appellant was promoted, and almost immediately retired; when thus retired, having served during the civil war, he was given the rank of the next higher grade and three-fourths of the sea pay of that grade. Congress had already created for the purposes of pay a division in the rank or grade of rear admiral, with higher pay for those of higher number and lower pay for others in the rank. It seems to us that it was the object of Congress, when retiring an officer under the circumstances stated, that he should receive the pay of the next higher rank, and, but for the division made in the pay of rear admirals, he would receive the three-quarters of the full pay of that rank, but taking one step upward for the purpose of pay he passes into and not over the next pay grade, which is that of the nine lower numbers.

In regular gradation in the active service, a rear admiral, for the purposes of pay, must first serve through the nine lower numbers of the grade. So with a retiring officer; it is the purpose to give him, as compensation in the regular order of promotion, the pay of the "next higher grade." This conclusion is in harmony with the decision of this court in *Rodgers* v. *United States*, 185 U. S. 83, 91, in which Mr. Justice Brewer, speaking for the court, said of this statute:

"The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who by length of service or by personal distinction had already earned the position, and provide that in, at least, the matter of pay there should be some recognition

of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the Army, should not by a mere change of statute be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear admirals into two classes—one composed substantially of former rear admirals, equal both in rank and pay with major generals in the Army, and the other of those who in the past were only commodores, to whom was given the rank of rear admirals but the pay of brigadier generals in the Army?"

We cannot believe that it was the intention of Congress that an officer upon retirement, and whose promotion shortly before his retirement was made for the purpose of giving him an increase of pay as well as rank, was intended to be given the higher grade of pay reserved for those of distinction or long service in the grade to which the retiring officer was promoted, leaving those in the active service who earned the right to promotion to receive the lower grade of pay. In short, we believe it was the intention of Congress to promote a retiring officer for the purposes of pay into the next grade above that in which he served before retirement. In this case such compensation was that provided for rear admirals of the lower grade. If this were not so, a retiring rear admiral would receive, under the circumstances now before us, more pay upon retirement than is given to the rear admirals in active service, in the lower pay grade. It is urged that the promotion and retirement of those who had rendered valuable service in the civil war was the object of Congress, which purpose is best subserved by construing the statute to give in case of such promotions the full rank and pay of the grade to which the officer is promoted. This reasoning may be adequate to furnish a motive for such legislation, but we can only give effect to purposes expressed or necessarily implied in the terms of the statute.

But, it is urged, that in sections 8 and 9 of the Navy Personnel Act, Congress, in providing for retirement of naval officers, has included the grade of commodores, and provides that captains within their terms shall be retired with three-fourths the pay of the next higher grade, "including the grade of commodore, which is retained on the retired list for this purpose," thus evincing the purpose of Congress to retain the rank and pay of commodores in express terms when such is the purpose. But this reservation is for officers retired under these sections who are not to rank above commodores, while officers who served in the civil war and are retired are to have the full rank of admirals with the pay of the lower grade of the rank.

We agree with the Comptroller of the Treasury and the Court of Claims in the construction to be given this statute. If the purpose of Congress has been mistaken the law can be corrected by a new enactment making clear the intention to give the more liberal treatment contended for by the appellant.

The question remains as to the right of this officer to receive commutation for the sea ration provided for by sections 1578 and 1585 of the Revised Statutes. These sections are:

"SEC. 1578. All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel.

"SEC. 1585. Thirty cents shall in all cases be deemed the commutation price of the navy ration."

The provision of section 13 of the Navy Personnel Act is:

Officers of the Navy "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." 30 Stat. 1007.

The claim upon this branch of the case is that sections 1578 and 1585 are not repealed in express terms by section 13 of the Navy Personnel Act, and, as repeals by implication are not favored, it is argued that, notwithstanding the later law, the allowance for sea rations still remains for naval officers. But

the later act distinctly provides that after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same compensation and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. This section was intended to cover and in exact terms provides for all pay and allowance for naval officers except forage. Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject matter of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for Army officers of corresponding rank. Had Congress intended that such allowances as theretofore given should be continued, or to reserve the right to commutation as to the sea ration, it would have been very easy to have inserted apt words which would have rendered effectual this purpose. But the terms of the law undertaking to revise former laws upon the subject make no such reservation as is contended for, and we think we are not at liberty to add to the statute by inserting it.

It is true that repeals by implication are not favored, but where the same subject matter is covered by two acts which cannot be harmonized with a view to giving effect to the provisions of each, to the extent of the repugnancy between them the latter act will prevail, particularly in cases where it is apparent that the later act was intended as a substitute for the earlier one. *District of Columbia* v. *Hutton*, 143 U. S. 18, 26.

It is admitted that a change in the compensation of naval officers was made by the enactment of the new law, and, while section 13 provided that such officers should not be reduced in pay, there is no provision retaining the allowances of the former act. Moreover, section 26 of the Navy Personnel Act provides that all acts and parts of acts, so far as they conflict with its provisions, shall be repealed. For the reasons stated we think the allowance of the previous statute cannot stand

consistently with the express provision upon the same subject of the later act.

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

Affirmed.

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

LOWE v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 212. Argued April 8, 1904.—Decided April 25, 1904.

Decided on authority of *Gibson* v. *United States*, *ante*, p. 182.

FOR counsel and abstracts of arguments, see p. 184, *ante*.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the same question, upon identical facts, as to the pay of a retired rear admiral, just disposed of in the case of *Gibson* v. *United States*, *ante*.

For the reasons therein stated, the judgment of the Court of Claims, dismissing the petition of the appellant, is

Affirmed.

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

THE UNITED STATES, PETITIONER.

No. 16. Original. Submitted April 18, 1904.—Decided May 2, 1904.

The words "court" and "judge" have frequently been used interchangeably in Federal statutes, and this court adheres to the construction it has heretofore recognized as correct, and which has been adopted generally in practice, and in Congressional legislation that the appeal from a United States Commissioner provided for in § 13 of the act of September 13, 1888, 25 Stat. 476, 479, is an appeal to the District Court, and should so be regarded.

The papers or proceedings below should be filed by the clerk of the District Court as an appeal pending in that court, and the final judgment should be accordingly recorded.

THE facts are stated in the opinion of the court.

Mr. Solicitor General Hoyt and *Mr. Assistant Attorney General McReynolds* for the United States.

No appearance or brief filed for respondents.

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

This is a petition for a writ of mandamus, commanding the judge of the District Court of the United States for the Northern District of Ohio to direct the entry on the records of that court of final judgment in the cases of *The United States* v. *Jock Coe, Bong Meng,* and *Woo Joe,* and that the clerk enter the same; and that the cases be treated as properly appealed from the United States commissioner before whom they had been heard in the first instance and as having been before the District Court for determination. The complaint against Coe was made before a United States commissioner for the Northern District of Ohio, charging that Coe, a Chinese person, was within the United States at Cleveland, Ohio, contrary to law, and a warrant was duly issued and executed, whereupon the commissioner found Coe guilty and ordered him to be deported.

Coe appealed "to the District Court of the United States in and for the Northern District of Ohio, and the judge of said court," and the commissioner transmitted a copy of the proceedings before him and the accompanying papers "into the District Court of the United States," as his certificate stated. The transcript was filed by the clerk of the District Court and was marked as filed among the papers pertaining to the case. Subsequently a hearing was had and section thirteen of the act of Congress of September 13, 1888, was held to be unconstitutional, and Coe was discharged, to which exception was taken. Motion for new trial was made and overruled, and a bill of exceptions was duly settled and signed by the District Judge. The United States applied to the clerk to file the bill of exceptions and various papers as part of the record of the District Court, and to prepare a certified transcript thereof; but the clerk declined to do this under instruction of the judge, and furthermore stated that so many of the papers as were marked filed "had been so marked by mistake." The United States thereupon requested the judge in writing to order the clerk to file in the District Court all the papers in the proceedings and to make the necessary entries in regard thereto, and to prepare a certified transcript thereof, in order that a complete record of the same might be preserved, to be used on an appeal taken to this court. The request was refused on the ground that the proceedings on appeal from the commissioner had been had before the judge as judge and not before the District Court.

Leave having been granted to file the petition and a rule having been entered thereon, return thereto has been duly made. The return of the judge states that in the proceedings against Coe, which were described in the bill of exceptions, a copy of which was attached to the petition for mandamus as an exhibit, he had denied as judge the order applied for, although he had allowed an appeal of the cause to the Supreme Court of the United States; that he had adopted this course because he was of opinion that section thirteen gave jurisdiction on appeal to respondent as judge, but did not give

jurisdiction to the District Court to hear such appeal; and that said appeal was heard by respondent as judge and not in the District Court; that the clerk should not be ordered to make the proceedings matter of record in the District Court because there was no provision of law requiring the clerk to record proceedings other than those occurring in the court.

It seems that the judge allowed a writ of error, but only to his action as judge, and even if it could be held to run to the District Court, it would be equally unavailing in the absence of final judgment in that court and of the filing of the bill of exceptions. As we understand this record, if the appeal from the commissioner under section 13 was an appeal to the District Court, then it follows that the commissioner's transcript and other papers pertaining to the case should be filed and the judgment be entered in that court, and an appeal will bring the cause before us. In other words, the District Court will not have lost jurisdiction because of the view taken by the District Judge, and the final order may be entered as the final judgment of the court.

Section 13 of the act of September 13, 1888, 25 Stat. 476, c. 1015, provides: "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

Many cases may be found in which the words "court" and "judge" were held to have been used interchangeably, and in

Foote v. *Silsby*, 1 Blatch. 542, Mr. Justice Nelson was of opinion that the Circuit Judge sitting at chambers was the Circuit Court in the usual and proper sense of the term and within the meaning of the seventeenth section of the Patent Act of July 4, 1836, 5 Stat. 117, c. 357.

In *Porter ads. United States*, 2 Paine, 313, Judge Betts said: "It is not an unusual use of language, in the statutes, to put the judge for the court, and to make provisions for him to execute which can only be executed in court." It was held that a statute authorizing a party "to prefer a bill of complaint to any District Judge of the United States," referred to the District Court and not to the judge as an individual.

The construction put upon section thirteen in practice has been quite general that the appeal to the District Judge is in effect an appeal to the District Court.

In 1892 the Circuit Court of Appeals for the Ninth Circuit so held, in *United States* v. *Gee Lee*, 50 Fed. Rep. 271, and that the Circuit Court of Appeals had jurisdiction over the judgment of the District Court under section six of the judiciary act of March 3, 1891. The Circuit Court of Appeals was of opinion that the words "the judge of the District Court for the district" could and should be held equivalent to the words "the District Court for the district," and that, while they were not, strictly speaking, convertible terms, they were so in a popular sense; "and it is safe to assume that Congress, in the use of the former phrase in this section, intended to give the party an appeal to the District Court of the District."

In *United States* v. *Pin Kwan*, 100 Fed. Rep. 609, decided February 28, 1900, the Circuit Court of Appeals for the Second Circuit sustained a writ of error to review the decision of the District Court, (94 Fed. Rep. 824,) in which an order of deportation by a United States commissioner had been reversed by the District Court. Of course the Circuit Court of Appeals took jurisdiction on the theory that the statute provided for appeals from the commissioner to the District Court. And see *United States* v. *Ham Toy*, 120 Fed. Rep. 1022.

A different view was expressed by the Circuit Court of the First Circuit in the case of *Chow Loy*, 110 Fed. Rep. 952, in September, 1901, a proceeding in *habeas corpus*, and in the same case on appeal in the succeeding November, 112 Fed. Rep. 354; and the original ruling was reiterated by the Circuit Court of Appeals for the Ninth Circuit in *Tsoi Yii* v. *United States*, April 4, 1904, not yet reported, in which the case of *Chow Loy* was considered.

In *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, decided February 26, 1900, this court entertained jurisdiction of several distinct appeals from the District Court for the District of Washington. In the case of *Mrs. Gue Lim* a warrant had been issued and her discharge ordered by the District Court, but in the other cases the proceedings were had before a United States commissioner, and from his judgment of deportation the cases had been taken to the District Court, which reversed his decision. The judgments of the District Court were affirmed by this court.

By the first section of the act of April 29, 1902, 32 Stat. 176, c. 641, section 13 of the act of 1888 was, together with some other sections, reënacted, and we think it not unreasonable to conclude that Congress accepted the view we had indicated, and by its action removed any doubt on the question.

Shortly after the approval of that act, in *Chin Bak Kan* v. *United States*, 186 U. S. 193, we took jurisdiction of an appeal from the judgment of the District Court for deportation on an appeal from the United States commissioner to the District Court of the United States for the Northern District of New York, and we observed: "Something is said in respect of want of jurisdiction in the commissioner because section six of the act of 1892 provides that Chinese laborers without certificates may be 'taken before a United States judge;' but we concur in the views of the Circuit Court of Appeals for the Ninth Circuit in *Fong Mey Yuk* v. *United States*, 113 Fed. Rep. 898, that the act is satisfied by proceeding before 'a justice, judge, or commissioner.' These are the words used in section twelve of the

act of 1882; section twelve of the act of 1884; section thirteen of the act of 1888; and section three of the act of 1892; while the first section of the act of March 3, 1901, explicitly authorizes the District Attorney to designate the commissioner before whom the Chinese person may be brought. The words 'United States judge,' 'judge' and 'court,' in section six, seem to us to refer to the tribunal authorized to deal with the subject, whether composed of a justice, a judge, or a commissioner. A United States commissioner is a *quasi*-judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the District Court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute." . . . "Section thirteen of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath, 'by any justice, judge, or commissioner of any United States court,' and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. 'But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district.' It seems to have been assumed, during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the District Court of the United States for the Northern District of New York, and, upon hearing, the District Court affirmed that judgment. From the judgment of the

District Court, this appeal was taken under section five of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question."

In the cases of *Ah How* v. *United States*, 193 U. S. 65, and *Tom Hong* v. *United States*, 193 U. S. 517, decided at this term, we disposed of sundry appeals from a District Court to which the cases had been brought on appeal from a United States commissioner. Our jurisdiction was directly challenged by the government and attention was called to the conflicting decisions of the Circuit Courts of Appeals for the Ninth Circuit in *United States* v. *Gee Lee*, and for the First Circuit in *Chow Loy* v. *United States*, on the question whether the appeal was to the District judge or to the District Court, but we maintained jurisdiction and affirmed the judgments of the District Court in some of the cases, and reversed the judgments and discharged the appellants in others. In these cases the District Court would not have had jurisdiction if the statute confined appeals from the commissioner to appeals to the judge individually.

While it must be admitted that the proper construction of section 13 is not free from difficulty, we are not willing to change the construction we have heretofore repeatedly recognized as correct, and which we think has been adopted by Congressional legislation. That construction enables uniformity in the administration of the laws on this important subject to be attained by securing uniformity in judicial decision, and operates as a safeguard against injustice.

We assume that the other two cases are in substance the same as that of Coe.

The result is that we hold that the relief sought should be granted, but as we do not doubt it will be accorded on the expression of our conclusion, the order will be

Petitioner entitled to mandamus as prayed.

CITY AND SUBURBAN RAILWAY *v.* SVEDBORG.

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

No. 214. Argued April 13, 1904.—Decided May 2, 1904.

Where there is evidence of a substantial character bearing upon the general issue, the question is for the jury even though the court may think there is a preponderance of evidence for the party moving for a direction.

Plaintiff is entitled to a verdict if the injury is caused by any of defendant's employés and it is not error for the court to insert "or other employés" in a requested instruction to the jury that they must find for defendant in absence of negligence on the part of the particular employés against whom the evidence was principally directed.

THE plaintiff in error is a corporation organized under acts of Congress and engaged in the business of carrying passengers for hire in street cars operated on public highways in the District of Columbia.

The defendant in error was received as a passenger on one of such cars, and, in alighting from the one in which she was riding, was thrown to the ground and seriously injured.

The present action was brought against the railway company to recover damages on account of such injuries, the theory of the plaintiff's case being that the car in which she was a passenger was stopped for her to alight from it, and while she was stepping off, it was suddenly and recklessly started, whereby, without negligence on her part, she was violently thrown to the ground.

The railway company pleaded not guilty as alleged, and the plaintiff joined issue on that plea.

The case was then tried before the court and a jury, the plaintiff introducing evidence tending to sustain her theory as to the cause of the injuries received by her, while the defendant introduced evidence tending to sustain its theory, which was that the plaintiff negligently attempted to alight from the car before it had actually stopped.

At the conclusion of the plaintiff's evidence the defendant asked the court to instruct the jury to find in its favor, upon the ground that the evidence was insufficient to justify a verdict for the plaintiff. That motion was denied, and the defendant excepted. The defendant then introduced evidence, at the close of which the motion to direct a verdict in its favor was renewed. The motion was also denied, and the defendant excepted.

It appears from the record that the court then granted two instructions at the request of the plaintiff and six instructions asked by the defendant. But none of the instructions so given, on either side, were embodied in the bill of exceptions. What they were this court has no means of knowing.

There was a verdict and judgment in favor of the plaintiff for $6,500, and that judgment was affirmed in the Court of Appeals for the District.

Mr. R. B. Behrend and *Mr. C. C. Cole* for plaintiff in error.

Mr. A. A. Lipscomb and *Mr. Philip Walker* for defendant in error.

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

The railway company assigns for error the refusal of the trial court to direct the jury to find a verdict in its favor. The refusal was proper; for there was evidence of a substantial character bearing upon the general issue as to the negligence of the defendant, and therefore the question was one peculiarly for the jury. Even if the court thought that the preponderance of evidence was for the defendant, it was not bound, simply for that reason, to have taken the case from the jury, whatever influence that fact might have in disposing of a motion for a new trial.

It is also assigned for error that the trial court refused to give the following instruction to the jury:

"In order to entitle the plaintiff to a verdict, the burden is upon her to prove by a preponderance of the evidence, to the satisfaction of the jury, that the car stopped for her to alight, and that while she was in the act of alighting the car, through the negligence of the motorman, started, and thereby threw her to the pavement and injured her, and unless, upon the whole evidence, the jury shall so find, the verdict should be for the defendant."

The court refused to grant that instruction without inserting after the word "motorman" the words "or conductor or both." These words having been inserted, the instruction was granted. The defendant excepted to the refusal of the court to give the instruction as asked.

It is contended that it was error prejudicial to the railway company to have added these words to the instruction asked, because by so doing the jury were, in effect, told that there was sufficient evidence upon which to base an inquiry whether the conductor was guilty of negligence; whereas, the company insists, there was not the silghtest proof showing negligence on the part of the conductor.

We need not review the evidence as to the conductor; for if, as the defendant insists, there was no evidence whatever showing negligence upon the part of the conductor, then the modification made by the court could not have so misled the jury as to prejudice the defence.

It is assigned for error that the trial court refused to grant the following instruction asked by the defendant: "The jury are instructed that under the evidence in this case they cannot find any negligence on the part of the conductor of the car, and unless they shall find from the evidence that the motorman was guilty of negligence which caused the accident to plaintiff, they should find for the defendant, and in considering that question they cannot infer the existence of any fact not shown to their satisfaction by the evidence."

Testing the action of the trial court alone by the evidence set out in the bill of exceptions, we cannot hold that the in-

struction in question was improperly denied; for that instruction took it for granted that there was not a scintilla of proof —none whatever—of negligence on the part of the conductor, and that the negligence, if there was any, was wholly or exclusively that of the motorman. The court below was not bound to submit the case to the jury in that way. It was not bound to make a particular part of the evidence the subject of a special instruction. Under the circumstances it properly submitted to the jury the whole case as to the alleged negligence of the company, leaving them to determine whether, under all the evidence, the injury was caused by the negligence of its employés or any of them. The plaintiff was entitled to a verdict if the injury was caused by the negligence of any employé. *Pomeroy* v. *Boston & Maine Railroad,* 172 Massachusetts, 92.

In the argument at the bar much was said by counsel as to the principles of law announced by the Court of Appeals, particularly in respect of the application of the maxim "*Res ipsa loquitur.*" Our attention has been called to many authorities upon that branch of the case. But we deem it unnecessary to extend this opinion by a review of those authorities; for, even if the Court of Appeals erred in its application of that maxim—and we express no opinion upon that point—the judgment should not be reversed, since, as we have seen, the record before us does not show that the trial court committed any error to the substantial prejudice of the defendant.

The judgment of the Court of Appeals affirming the judgment of the Supreme Court of the District must, therefore, be affirmed.

It is so ordered.

Mr. Justice White and Mr. Justice McKenna dissented.

PETTIT *v.* WALSHE.

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

No. 563. Argued April 6, 1904.—Decided May 2, 1904.

Where the petition for a writ of *habeas corpus*, and the warrant under which the accused is arrested both refer to a treaty and the determination of the court below depends at least in part on the meaning of certain provisions of that treaty, the construction of the treaty is drawn in question, and this court has jurisdiction of a direct appeal from the Circuit Court, even though it is also necessary to construe the acts of Congress passed to carry the treaty provisions into effect.

Where an extradition treaty provides that the surrender shall only be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed," one whose surrender is demanded from this Government and who is arrested in one of the States cannot be delivered up except upon such evidence of criminality as under the laws of that State would justify his apprehension and commitment for trial if the crime had there been committed.

A United States commissioner appointed to execute the extradition laws has no power to issue a warrant on a requisition made under existing treaties with Great Britain, under which a marshal of a district in another State can arrest the accused and deliver him in another State before the commissioner issuing the warrant, without a previous examination being had before some judge or magistrate authorized by the acts of Congress to act in extradition matters, and sitting in the State where he is found and arrested.

THE facts are stated in the opinion of the court.

Mr. Charles Fox for H. B. M., Consul General at New York, appellant:

Upon this appeal, from a decision upon the application for a writ of *habeas corpus*, this court has the power to review the decision below, upon the facts, as well as the law. *In re Neagle*, 135 U. S. 142; *Horner* v. *United States*, 143 U. S. 570. An order of a district or circuit court of the United States, upon an application for a writ of *habeas corpus*, can be reviewed only by an appeal, and not by a writ of error. *Rice* v. *Ames*, 180 U. S. 371; *Re Morrissey*, 137 U. S. 157, 158. The

appeal lies directly to this court, as the construction of a treaty is drawn in question. *Rice* v. *Ames*, *supra*.

The warrant of the Commissioner in New York could legally be executed in Indianapolis, by the marshal for that district, and the appellee brought by the marshal, before the Commissioner in New York for a hearing. Act of August 12, 1848, 9 Stat. 302; § 5270, Rev. Stat.; *Grin* v. *Shine*, 187 U. S. 194; *The British Prisoners*, 1 Wood. & M. 66; *In re Henrich*, 5 Blatch. 415; *Re Fergus*, 30 Fed. Rep. 607; *Ex parte Van Hoven*, 4 Dill. 415.

The state department, in issuing mandates, where required under treaties of extradition, does not issue them to a judge or commissioner, in any particular State or district, but directs them to any justice of the Supreme Court, circuit judge, district judge, etc., as contained in section 5270, Rev. Stat. See various forms, in Moore on Extradition, pp. 362, 364, 365, and § 304 as to warrants running throughout the United States. After the *Exposito* case in 1882 an effort was made to amend the act so that a person arrested as a fugitive could not be arrested in one State and brought to another for hearing but Congress did not amend the act in this respect although it did amend it in other respects. Sen. Rep. No. 82, 47th Cong. 2d Sess. Act of August 3, 1882, 22 Stat. 215.

The Federal law regulates proceedings for extradition, and state laws have no application thereto, except as necessary to define the crime, and determine whether the evidence introduced in support of extradition would be sufficient to justify his commitment for trial, if the offense had been committed within the State in which he is found. *Rice* v. *Ames*, 180 U. S. 371; *Wright* v. *Henkel*, 190 U. S. 40.

In the case of a fugitive convict, such as the appellee, the state law has no application, other than to ascertain whether the crime of which the appellee has been convicted was a crime within the laws of Indiana, and this could be determined with equal protection to all rights of the appellee, as well in New York as in Indiana.

The appellee is not a fugitive who is simply charged with crime but one who has been convicted of the crime; the procedure therefore in this case is not regulated by Article X of the treaty of 1842, but by Article VII of the treaty of 1889, which, dealing specially with persons convicted of crimes, respectively named and specified in the said Article X, whose sentence therefor shall not have been executed, prescribes the evidence upon which a fugitive shall be surrendered.

Whatever might be said in support of the decision of the Circuit Court, in respect to a person who had not been convicted of crime, and who was entitled to a hearing, and to have the evidence of criminality determined by the law of the place where he was found, can have no force in the case of a fugitive convict, under the treaty; for the treaty of 1889 has, in respect to fugitive convicts, avoided the requirements of evidence of criminality contained in the treaty of 1842.

If there is any conflict or inconsistency between Article X of the treaty of 1842, and Article VII of the treaty of 1889, the latter will control; being, in effect, a later law, it supersedes the earlier treaty. *Head Money Cases*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; *Horner* v. *United States*, 143 U. S. 570; *Chinese Exclusion Cases*, 130 U. S. 581. Treaties for extradition are to be liberally construed, for the purpose of carrying their object into effect. *Grin* v. *Shine*, 187 U. S. 191; *Tucker* v. *Alexandroff*, 183 U. S. 424.

An alien convict has no right of asylum or habitation anywhere in the United States under our immigration laws, and can acquire no local residence. *Grin* v. *Shine*, *supra*.

That the question of the extradition of the appellee is no longer open, by reason of the decision of Commissioner Moores, is not supported by the authorities. *In re Kelly*, 26 Fed. Rep. 852.

If the Commissioner had held that the offense was non-political, then, if his decision is to be considered final, there could be no appeal to the Secretary of State on behalf of the fugitive. It is a general principle that the surrender of a

fugitive criminal is an act of government to be performed by the executive authority. Moore on Extradition, vol. 1, §§ 210, 359; *In re Kaine*, 3 Blatch. 8.

As under the extradition procedure of the United States, there is no opportunity for review where the fugitive is discharged, the only remedy a demanding government has, is to have the fugitive arrested on a new complaint. *Re Calder*, 6 Op. Att'y Gen'l, 91; *Re Muller*, 10 Op. Att'y Gen'l, 501; *S. C.*, 5 Phila. Rep. 289.

Mr. Ferdinand Winter, with whom *Mr. Addison C. Harris* was on the brief, for appellee:

On every writ of error and appeal the first and fundamental question is that of jurisdiction, and the court, of its own motion, will refuse to proceed where want of jurisdiction appears on the face of the record. *Continental National Bank* v. *Buford*, 191 U. S. 119.

The jurisdiction in this case depends upon whether the construction of a treaty is involved. Act, March 31, 1891, § 5; 1 U. S. Comp. Stats. 1901, ch. 8*a*; *Cross* v. *Burke*, 146 U. S. 82; *Ex parte Lennon*, 150 U. S. 393; *Craemer* v. *State*, 168 U. S. 124.

This case depends for its decision upon the construction of the statutes relating to fugitives from the justice of a foreign country, and regulating the appointment and defining the powers of United States commissioners. It does not involve the construction of any treaty. § 5270, 3 U. S. Comp. Stats., 1901; § 19, Act, May 28, 1896; § 621, 1 U. S. Comp. Stats. 1901; § 1014, 1 Comp. Stats. U. S. 1901; § 1, Act, August 18, 1894; 1 Comp. Stats. U. S. p. 717.

There was no exception to the ruling and judgment of the court below, but, on the contrary, the British government acquiesced in the judgment by procuring appellee to be again arrested and tried upon the same charge, before a commissioner for the District of Indiana, in accordance with the judgment of the court below in this case. This was a waiver of error in said judgment, and of the right to appeal therefrom. *Liebuch*

v. *Stahle*, 66 Iowa, 749; *Gordon* v. *Ellison*, 9 Iowa, 317; *Carr* v. *Casey*, 20 Illinois, 637; *Holland* v. *Commercial Bank*, 22 Nebraska, 585; *Wilson* v. *Roberts*, 38 Nebraska, 206; *Brooks* v. *Hunt*, 17 Johns. 484; *Ehrman* v. *Astoria*, 26 Oregon, 377; *McAfee* v. *Kirk*, 78 Georgia, 356.

Immediately upon the appellee being discharged from arrest under the warrant of the New York Commissioner Shields, the British government, upon whose complaint that warrant had been issued, procured the appellee to be rearrested upon the same charge, upon a warrant issued by a judge, and brought before a commissioner of the District of Indiana, pursuant to the command of the warrant, by whose judgment, still in full force, appellee was acquitted and discharged upon the merits, after a full hearing. This judgment, while in force, is final, and disposed of the subject matter. The court cannot afford any substantial relief in the present case, which presents simply a moot question. *Tennessee* v. *Condon*, 189 U. S. 70, 71; *Mills* v. *Green*, 159 U. S. 653; *California* v. *Railroad*, 149 U. S. 314; *Dakota* v. *Glidden*, 113 U. S. 225; *Dinsmore* v. *Express Co.*, 183 U. S. 120; *Codlin* v. *Kohlhausen*, 181 U. S. 151; *Kimball* v. *Kimball*, 174 U. S. 159; *New Orleans Flour Inspectors*, 160 U. S. 170; *Washington &c.* v. *Columbia*, 137 U. S. 62; *Little* v. *Bowers*, 134 U. S. 547; *San Mateo County* v. *Southern Pac. R. Co.*, 116 U. S. 138; *Coryell* v. *Holcombe*, 9 N. J. Eq. 650; *In re Treadwell*, 111 California, 189.

The hearing of an application for the extradition of a fugitive from the justice of a foreign government, arrested upon the warrant of a United States commissioner, must be had in the district in which the alleged fugitive is found and arrested. § 19, Act, May 28, 1896; § 1, Act, August 18, 1894, 28 Stat. 416; § 5270, Rev. Stat.; *Rice* v. *Ames*, 180 U. S. 374.

The defendant has a right to be examined as a witness in his own behalf, if he is a competent witness by the laws of the State in which he is found. *In re Farez*, 7 Blatch. 345; *S. C.*, Fed. Cas. No. 4645.

And to examine witnesses in his own behalf. *In re Kelley*,

25 Fed. Rep. 268. The competency of evidence is to be determined by the law of the State in which the hearing is had. *In re Charleston*, 34 Fed. Rep. 531.

If there were conflict between the treaty and the statutes, the latter, being later in enactment, would control. *Horner* v. *United States*, 143 U. S. 570; *Head Money Case*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; *Chinese Exclusion Case*, 130 U. S. 581.

In this case there is no conflict. The treaty itself has reference to and recognizes the territorial and governmental subdivisions of the United States.

The evidence of criminality must be such as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed. Under Art. X, Treaty of 1842, 8 Stat. 572, 576, if the acts alleged to have been committed are not criminal by the statutes of the United States, resort must be had to the laws of the State. *Wright* v. *Henkel*, 190 U. S. 40; § 1014, Comp. Stats. U. S. 1901; *In re Farez*, 7 Blatch. 345; *S. C.*, Fed. Cas. No. 4645.

The construction contended for by appellant involves the establishment of the power to arrest a presumably innocent man at his place of residence, and to remove him therefrom without any hearing as to the rightfulness of his arrest, to the most distant part of the country. He may be taken from New York to Alaska, or from Australia to London.

Mr. Justice Harlan delivered the opinion of the court.

This is a case of extradition. It presents the question whether a Commissioner specially appointed by a court of the United States under and in execution of statutes enacted to give effect to treaty stipulations for the apprehension and delivery of offenders, can issue a warrant for the arrest of an alleged criminal which may be executed by a marshal of the United States, within his District, in a State other than the one in which the Commissioner has his office. It also presents

the question whether a person, arrested under such a warrant, can be lawfully taken beyond the State, in which he was found, and delivered in another State before the officer who issued the warrant of arrest, without any preliminary examination in the former State as to the criminality of the charge against him.

By the tenth article of the treaty between the United States and Great Britain, concluded August 9, 1842, it was provided that upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, they shall "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other." But by the same article it was provided that "this shall only be done upon such evidence of criminality as, *according to the laws of the place where the fugitive or person so charged shall be found*, would justify his apprehension and commitment for trial, if the crime or offense had *there* been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive." 8 Stat. 572, 576.

A supplementary treaty between the same countries, concluded July 12, 1889, provided for the extradition for certain crimes not specified in the tenth article of the treaty of 1842,

and "punishable by the laws of both countries"; and, also, declared that the provisions of the above article "shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed. In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers." 26 Stat. 1508, 1510.

By an act of Congress, approved August 12, 1848, c. 167, and entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders," it is provided (§ 1): "That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the Government of the United States and any foreign government, it shall and may be lawful for any of the justices of the Supreme Court or judges of the several District Courts of the United States—and the judges of the several state courts, and the commissioners *authorized so to do* by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State,

that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made." "SEC. 6. . . . That it shall be lawful for the courts of the United States, or any of them, *to authorize any person or persons to act as a Commissioner or Commissioners*, under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever." 9 Stat. 302.

And by section 5270 of the Revised Statutes—omitting therefrom the proviso added thereto by the act of June 6, 1900, c. 793, 31 Stat. 656, which applies only to crimes committed in a foreign country or territory "occupied by or under the control of the United States"—it is provided: "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, *authorized so to do by any of the courts of the United States*, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the

proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." See also § 5273.

In the Sundry Civil Appropriation Act of August 18, 1894, will be found the following clause: "*Provided*, That it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof." 28 Stat. 372, 416.

Under these treaty and statutory provisions, complaint on oath was made before John A. Shields—a Commissioner appointed by the District Court of the United States for the Southern District of New York *to execute the above act of August* 12, 1848, *and the several acts amendatory thereof*—that one James Lynchehaun was convicted, in a court of Great Britain, of the crime of having feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby, feloniously and with malice aforethought, to kill and murder said McDonnell; that the accused was sentenced to be kept in penal servitude for his natural life; that in execution of such sentence he was committed to a convict prison in Queens County, Ireland, and escaped therefrom, and was at large; and that he was a fugitive from the justice of the Kingdom of Great Britain and Ireland, and within the territory of the United States. It is admitted that the present appellee is the person referred to in the warrant as James Lynchehaun.

Upon the complaint, Commissioner Shields, in his capacity as a Commissioner appointed by a court of the United States to execute the laws relating to the extradition of fugitives from the justice of foreign countries, issued on the sixth day of June, 1903, in the name of the President, a warrant addressed "to any marshal of the United States, to the deputies of any such marshal, or any or either of them," commanding that the accused be forthwith taken and brought before him, *at his office, in the city of New York*, in order that the evidence as to his criminality be heard and considered, and if deemed sufficient to sustain the charge, that the same might be certified, together with a copy of all the proceedings, to the Secretary of State, in order that a warrant might be issued for the surrender of the accused pursuant to the above treaty.

This warrant having been placed for execution in the hands of the appellant, as Marshal of the United States for the District of Indiana, he arrested the accused in that State. Thereupon the latter filed his application for a writ of *habeas corpus* in the Circuit Court of the United States for that District, alleging that his detention was in violation of the Constitution, treaties and laws of the United States. The writ was issued, and the Marshal justified his action under the warrant issued by Commissioner Shields. Referring to the warrant and averring its due service upon the accused, the Marshal's return stated that the warrant was "regular, legal, valid and sufficient in law in all respects to legally justify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, *and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York city;* that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the Southern District of New York, by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James

Lynchehaun; . . . and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant purposes, if not otherwise ordered by this honorable court, to obey, as United States marshal for the District of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do."

The accused excepted to the Marshal's return for insufficiency in law, and the case was heard upon that exception. The court held the return to be insufficient; and the Marshal having indicated his purpose not to amend it, the accused was discharged upon the ground that the Commissioner in New York was without power to issue a warrant under which the Marshal for the District of Indiana could legally arrest the accused and deliver him before the court of that Commissioner in New York without a previous examination, before some proper officer in the State where he was found. *In re Walshe*, 125 Fed. Rep. 572.

The appellee contends that this case only involves a construction of certain acts of Congress, and that, therefore, this court is without jurisdiction to review the judgment on direct appeal from the Circuit Court. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407. We do not concur in this view. The treaties of 1842 and 1889 are at the basis of this litigation, and no effective decision can be made of the controlling questions arising upon the appeal, without an examination of those treaties and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a Circuit Court to this court if the *construction* of a treaty is therein drawn in question. 26 Stat. 826, c. 517, § 5. The petition for the writ of *habeas corpus* and the warrant under which the accused was arrested both refer to the treaty of 1842, and the court below properly, we think, proceeded on the ground that the determination of the questions involved in the case depended in part, at least, on the meaning of certain provisions of that treaty. The construction of the treaties was none the less drawn in question because it became necessary

or appropriate for the court below also to construe the acts of Congress passed to carry their provisions into effect.

We now go to the merits of the case. It has been seen that the treaty of 1842 expressly provides, among other things, that a person charged with the crime of murder, committed within the jurisdiction of either country, and found within the territories of the other, shall be delivered up by the latter country; and that the provision shall apply in the case of one convicted of such a crime, but whose sentence has not been executed. But both countries stipulated in the treaty of 1842 that the alleged criminal shall be arrested and delivered up *only* upon such evidence of criminality as, according to the laws of the *place* where the fugitive person so charged *is found,* would justify his apprehension and commitment for trial, if the crime or offense had been there committed. As applied to the present case, that stipulation means that the accused, Walshe, could not be extradited under the treaties in question, except upon such evidence of criminality as, under the laws of the State of Indiana—the place in which he was found—would justify his apprehension and commitment for trial if the crime alleged had been there committed. The words in the tenth article of the treaty of 1842, "as according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed," and the words "punishable by the laws of both countries," in the treaty of 1889, standing alone, might be construed as referring to this country as a unit, as it exists under the Constitution of the United States. But as there are no common law crimes of the United States, and as the crime of murder, as such, is not known to the National Government, except in places over which it may exercise exclusive jurisdiction, the better construction of the treaty is, that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that State of the Union in which he is arrested.

It was substantially so held in *Wright* v. *Henkel*, 190 U. S. 40, 58, 61, which was a case of extradition under the same treaties as those here involved. In that case the alleged fugitive criminal from the justice of Great Britain was found in New York. The court said: "As the State of New York was the place where the accused was found and, in legal effect, the asylum to which he had fled, is the language of the treaty, 'made criminal by the laws of both countries,' to be interpreted as limiting its scope to acts of Congress and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson* v. *McMahon*, 127 U. S. 457." Again: "When by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress."

The above provision in the treaty of 1842 has not been modified or superseded by any of the acts passed by Congress to carry its provisions into effect. In our opinion, the evidence of the criminality of the charge must be heard and considered by some judge or magistrate, authorized by the acts of Congress to act in extradition matters, and sitting in the State where the accused was found and arrested. Under any other interpretation of the statute Commissioner Shields, proceeding

under the treaty, could by his warrant cause a person charged with one of the extraditable crimes and found in one of the Pacific States, to be brought before him at his office in the city of New York, in order that he might hear and consider the evidence of the criminality of the accused. But as such a harsh construction is not demanded by the words of the treaties or of the statutes, we shall not assume that any such result was contemplated by Congress. While the view just stated has some support in those parts of the act of 1848, and section 5270 of the Revised Statutes which provide for the accused being brought before the justice, judge or commissioner who issued the warrant of arrest, it is not consistent with the above proviso in the Sundry Civil Act of August 18, 1894, the language of which is broad enough to embrace the case of the arrest by a marshal, within the district for which he was appointed, of a person charged with an extraditable crime committed in the territories of Great Britain and found in this country. By that proviso it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest Circuit Court Commissioner or the nearest judicial officer, having jurisdiction for a hearing, commitment or taking bail for trial in cases of extradition. The commissioner or judicial officer here referred to is necessarily one acting as such within the State in which the accused was arrested and found. So that, assuming that it was competent for the Marshal for the District of Indiana to execute Commissioner Shields' warrant within his District, as we think it was, his duty was to take the accused before the nearest magistrate in that District, who was authorized by the treaties and by the above acts of Congress to hear and consider the evidence of criminality. If such magistrate found that the evidence sustained the charge, then, under section 5270 of the Revised Statutes, it would be his duty to issue his warrant for the commitment of the accused to the proper jail, there to remain until he was surrendered under the direction of the National Government, in accordance with the treaty. Instead of pursuing that course, the Marshal

arrested Walshe, and in his return to the writ of *habeas corpus* distinctly avowed his purpose, unless restrained by the court, to take the prisoner at once from the State in which he was found and deliver him in New York, before Commissioner Shields, without a hearing first had in the State of Indiana before some authorized officer or magistrate there sitting, as to the evidence of the criminality of the accused. The Circuit Court adjudged that the Marshal had no authority to hold the accused in custody for any such purpose; and, the Marshal declining to amend his return and not avowing his intention to take him before a judicial officer or magistrate in Indiana for purposes of hearing the evidence of criminality, the prisoner was properly discharged from the custody of that officer.

For the reasons above stated the judgment is

Affirmed.

CLIPPER MINING COMPANY *v.* ELI MINING AND LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 76. Argued November 13, 1903.—Decided May 2, 1904.

This court has no jurisdiction in an action at law to review the conclusions of the highest court of a State upon questions of fact.

The land department has the power to set aside a mining location and restore the ground to the public domain, but a mere rejection of an application for a patent does not have that effect. A second or amended application may be made and further testimony offered to show the applicant's right to a patent.

Although a placer location is not a location of lodes and veins beneath the surface, but simply a claim of a tract of ground for the sake of loose deposits upon or near the surface, and the patent to a placer claim does not convey the title to a known vein or lode within its area unless specifically applied and paid for, the patentee takes title to any lode or vein not known to exist at the time of the patent and subsequently discovered.

The owner of a valid mining location, whether lode or placer, has the right to the exclusive possession and enjoyment of all the surface included within the lines of the location.

One going upon a valid placer location to prospect for unknown lodes and veins against the will of the placer owner, is a trespasser and cannot

initiate a right maintainable in an action at law to the lode and vein claims within the placer limits which he may discover during such trespass.

The owner of a placer location may maintain an adverse action against an applicant for a patent of a lode claim, when the latter's application includes part of the placer grounds.

Quære, and not decided, what the powers of a court of equity may be as to conflicting placer and lode locations.

On December 12, 1877, A. D. Searl and seven associates made a location of placer mining ground near the new mining camp of Leadville. The claim embraced at that time 157.02 acres of land. The original locators shortly conveyed all their interest to Searl, who applied for a patent on July 5, 1878. The application was met at the land office with a multitude of adverse claims. Settlements were made with some of the contestants, and on November 10, 1882, an amended application for patent was filed, including only $101\frac{916}{1000}$ acres. This application was rejected by the Commissioner of the General Land Office on March 6, 1886, and his decision was affirmed by the Secretary of the Interior on November 13, 1890. On November 25, 1890, four lode claims, known as the Clipper, Castle, Congress and Capital, were located by parties other than the owners of the placer claim within the exterior boundaries of that claim. These four lode claims became by mesne conveyances the property of the Clipper Mining Company. It applied for a patent, and on November 23, 1893, the defendants in error, as the owners of the Searl placer location, filed an adverse claim and commenced this action in the District Court of Lake County, in support of that claim. Judgment was rendered in favor of the plaintiffs, which was affirmed by the Supreme Court of the State, 29 Colorado, 377, and thereafter this writ of error was sued out.

Mr. W. H. Bryant, with whom *Mr. C. S. Thomas* and *Mr. W. H. Lee* were on the brief, for plaintiff in error.

Mr. John A. Ewing and *Mr. Aldis B. Browne*, with whom *Mr. Charles Cavender* and *Mr. Alexander Britton* were on the brief, for defendants in error.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The location of the placer mining claim and both the original and amended applications for patent thereof were long prior to the locations of the lode claims, and the contention of the plaintiffs is, that they, by virtue of their location, became entitled to the exclusive possession of the surface ground; that the entry of the lode discoverers was tortious and could not create an adverse right, even though by means of their entry and explorations they discovered the lode claims. The defendant, on the other hand, contends that the original location of the placer claim was wrongful, for the reason that the ground included within it was not placer mining ground; that the intent of the locators was not placer mining but the acquisition of title to a large tract of ground contiguous to the new mining camp of Leadville, and likely to become a part of the townsite. In fact, it was thereafter included within the limits of the town, and on it streets and alleys have been laid out and many houses built and occupied by individuals claiming adversely to the placer location.

It is the settled rule that this court, in an action at law at least, has no jurisdiction to review the conclusions of the highest court of a State upon questions of fact. *River Bridge Co.* v. *Kansas Pac. Ry. Co.*, 92 U. S. 315; *Dower* v. *Richards*, 151 U. S. 658; *Israel* v. *Arthur*, 152 U. S. 355; *Noble* v. *Mitchell*, 164 U. S. 367; *Hedrick* v. *Atchison &c. Railroad*, 167 U. S. 673, 677; *Turner* v. *New York*, 168 U. S. 90, 95; *Egan* v. *Hart*, 165 U. S. 188. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the Supreme Court.

As against this, it is contended that the Land Department

held that the ground within the Searl location was not placer mining ground, nor subject to entry as a placer claim, that such holding by the department must be accepted as conclusive in the courts, and therefore that the tract should be adjudged public land and open to exploration for lode claims and to location by any discoverer of such claims. It is true that the Commissioner of the General Land Office, in rejecting the amended application for the placer patent, said that he was not satisfied that the land was placer ground or that the requisite expenditure had been made, and further that the locators had not acted in good faith, but were attempting to acquire title to the land on account of its value for townsite purposes and for the lodes supposed to be contained therein. This decision was affirmed by the Secretary of the Interior; but notwithstanding this expression of opinion by these officials, all that was done was to reject the application for a patent. As said thereafter by the Secretary of the Interior upon an application of the Clipper Mining Company for a patent for the lode claims here in dispute:

"The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." 22 L. D. 527.

So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the department as a valid location. Such also was the finding of the court, and being so there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant's right to one. Undoubtedly when the department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have.

The fact that many years have elapsed since the original location of the placer claim and that no patent has yet been issued therefor does not affect its validity, for it is a well-known fact, as stated by the Court of Appeals in *Cosmos Exploration Company* v. *Gray Eagle Oil Company*, 112 Fed. Rep. 4, 16, that "some of the richest mineral lands in the United States, which have been owned, occupied and developed by individuals and corporations for many years, have never been patented."

The views entertained by the Supreme Court of the law applicable to the facts of this case are disclosed by the following quotation from its opinion. After referring to one of its previous decisions, known as the *Mt. Rosa* case, it said:

"If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the *Mt. Rosa* case the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins and the entry for prospecting was a trespass, and no title could thereby be initiated. * * * * * * *

"Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court intended to rule that in no circumstances may one, before application for a patent of a placer claim, go upon the ground within its exterior boundaries for the purpose of locating a lode, it went too far; yet as general language in an opinion must be taken in connection with the facts of the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose of prospecting for, or locating, unknown

lodes or veins; and to uphold the judgment we must presume that the evidence before the trial court showed that the veins or lodes upon which the defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting."

The law under which these locations were all made is to be found in chap. 6 of Title 32, Rev. Stat. Section 2319 of that chapter reads:

"All valuable mineral deposits of lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

Section 2320 provides for the location of mining claims upon veins or lodes.

By section 2322 it is provided that—

"The locators of all mining locations . . . on any mineral vein, lode or ledge, situated on the public domain, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

And by section 2329:

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Section 2333 is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for

such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

It will be seen that section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mines and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk* v. *Meagher*, 104 U. S. 279, 283, it was said by Chief Justice Waite that "A mining claim perfected under the law is property in the highest sense of that term;" and in a later case, *Gwillim* v. *Donnellan*, 115 U. S. 45, 49, he adds:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location there is

another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second."

In *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655, the present Chief Justice declared that "where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator." Nor is this "exclusive right of possession and enjoyment" limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground, becomes subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite, just quoted, while there is "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States." There is no provision for, no suggestion of a prior termination thereof.

By section 2329, placer claims are subject to entry and patent "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims. If there were no other legislation in respect to placer claims the case before us would present little doubt, but following this are certain provisions, those having special bearing on the case before us being found in section 2333. Parties obtaining a patent for a lode claim must pay $5 an acre for the surface ground while for a placer claim the government only charges $2.50 an acre. By section 2333 it is provided that one who is in possession of a placer claim and also of a lode claim

included within the boundaries of the placer claim shall, on making application for a patent, disclose the fact of the lode claim within the boundaries of the placer, and upon the issue of the patent payment shall be made accordingly; that if the application for the placer claim does not include an application for a vein or lode claim known to exist within the boundaries of the placer it shall be construed as a conclusive declaration that the placer claimant has no right of possession of that vein or lode; and further, that where the existence of a vein or lode within the boundaries of a placer claim is not known the patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries.

A mineral lode or vein may have its apex within the area of a tract whose surface is valuable for placer mining, and this last section is the provision which Congress has made for such a case. That a lode or vein, descending as it often does to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits of surface area, naturally gives to the surface area a higher value in the one case than the other, and that Congress appreciated this difference is shown by the different prices charged for the surface under the two conditions. Often the existence of a lode or vein is not disclosed by the placer deposits. Hence ground may be known to be valuable and be located for placer mining, and yet no one be aware that underneath the surface there is a lode or vein of greater value. A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after a patent therefor has been issued. There being no necessary connection between the placer and the vein Congress by the section has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken

as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.

While by the statute the right of exclusive possession and enjoyment is given to a locator, whether his location be of a lode claim or a placer claim, yet the effect of a patent is different. The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location together with all veins, lodes and ledges which have their apexes therein, whereas the patent to the placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes and ledges within its area. It makes no difference whether a vein or lode within the boundaries of a lode claim is known or unknown, for the locator is entitled to the exclusive possession and enjoyment of all the veins and lodes and the patent confirms his title to them. But a patent of a placer claim will not convey the title to a known vein or lode within its area unless that vein or lode is specifically applied and paid for.

It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has a right to go upon the claim, and by sinking shafts or otherwise explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful, obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his workings. And if the surface is open to the entry of whoever

seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in section 2322. That section, from which we have just quoted, is the one which gives a locator the right to pursue a vein on its dip outside of the vertical side lines of his location. The sentence, which is a limitation on such right, reads: "And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It would seem strange that one owning a vein and having a right in pursuing it to enter beneath the surface of another's location should be expressly forbidden to enter upon that surface if at the same time one owning no vein and having no rights beneath the surface is at liberty to enter upon that surface and prospect for veins as yet undiscovered.

We agree with the Supreme Court of Colorado as to the law when it says that "one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it." Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work and certainly if he acquiesces in their action, he cannot after they have discovered a vein or lode assert right to it, for, generally, a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search.

The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. *Atherton* v. *Fowler*, 96 U. S. 513; *Trenouth* v. *San Francisco*, 100 U. S. 251; *Haws* v.

Victoria Copper Mining Company, 160 U. S. 303. See also *Cosmos Exploration Company* v. *Gray Eagle Company, supra*, in which the court said (p. 17):

"No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent or clandestine entry thereon. *Cowell* v. *Lammers*, (C. C.) 21 Fed. Rep. 200, 202; *Nevada Sierra Oil Co.* v. *Home Oil Co.*, (C. C.) 98 Fed. Rep. 674, 680; *Hosmer* v. *Wallace*, 97 U. S. 575, 579; *Trenouth* v. *San Francisco*, 100 U. S. 251; *Mower* v. *Fletcher*, 116 U. S. 380, 385, 386; *Haws* v. *Mining Company*, 160 U. S. 303, 317; *Nickals* v. *Winn*, 17 Nevada, 188, 193; *McBrown* v. *Morris*, 59 California, 64, 72; *Goodwin* v. *McCabe*, 75 California, 584, 588; *Rourke* v. *McNally*, 98 California, 291."

If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins and lodes. It will not do to say that the right thus claimed is only a right to something which belongs to the United States and which will never belong to the placer locator, unless specifically applied and paid for by him, and therefore that he has no cause of complaint; for if the claim of the lode locator be sustained it carries under sections 2320 and 2333 at least twenty-five feet of the surface on each side of the middle of the vein. Further, if there be no prospecting, no vein or lode discovered until after patent, then the title to all veins and lodes within the area of the placer passes to the placer patentee and any subsequent discovery would enure to his benefit.

Again, it is contended that the claims which the defendant sought to patent were lode claims; that the only title set up in the complaint in the adverse suit was a placer title, and that a placer claimant has no standing to maintain an adverse suit against lode applications. In support of this is cited 2 Lindley on Mines, section 721, in which the author says:

"Where an application for a patent to a lode within the

limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, under which claim he cannot lawfully assert a right to the lode, he has nothing upon which to base an adverse claim, unless the lode is entirely without the placer, and the controversy is confined to a conflicting surface, or the lode claimant seeks to acquire more surface than the law permits."

We do not think the author's language is to be taken as broadly as counsel contend. Under the statutes a lode claim carries with it the right to a certain number of acres, and where one is in peaceable possession of a valid placer claim, if a stranger forcibly enters upon that claim, discovers and locates a lode claim within its boundaries, and then applies for a patent, surely the placer claimant has a right to be heard in defence of his title to the ground of which he has been thus forcibly dispossessed. If the application for a patent of the lode claim is not adversed it will pass to patent, and it may well be doubted whether the placer claimant could, after the issue of a patent under such circumstances, maintain an equitable suit to have the patentee declared the holder of the legal title to the ground for his benefit. If the placer claimant can be thus deprived of his possession and title to a part of his ground he may be in like manner dispossessed of all by virtue of many forcible trespasses and lode discoveries.

The amount of land embraced in this placer location was about one hundred acres, while the land claimed under the several lode locations was a little over thirty-five acres. Can it be that the placer claimant had no right to be heard in court respecting the claim of the lode claimants to so large a portion of the placer ground?

We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment neces-

sarily gives to them the lodes in controversy. In 2 Lindley on Mines, sec. 765, the author thus states the law:

"Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or no the conditions of the law have been complied with in good faith."

In 4 L. D. 316, Mr. Justice Lamar, then Secretary of the Interior, said in respect to this question:

"Does the judgment of a court as to which of two litigants has the better title to a piece of land bind the Commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law? The usual result following a favorable judgment in a court under section 2326 of the Revised Statutes is, I doubt not, the issue of patent in due time, but in such case the final passing of title is not on the judgment of the court independent of that of the Commissioner, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.

"The judgment of the court is, in the language of the law, 'to determine the question of the right of possession.' It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established.

"The party thus placed in possession may 'file a certified copy of the judgment roll with the register and receiver.' But this is not all. He may file 'the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.' Why file this, or anything further, if the judgment roll settles all questions as to title and right to patent? Clearly, because the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of

patent. His judgment should therefore be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. *Branagan* v. *Dulaney*, 2 L. D. 744. The sufficiency of that proof is a matter for the determination of the Land Department."

This opinion was cited as an authority by this court in *Perego* v. *Dodge*, 163 U. S. 160, 168. See also *Aurora Lode* v. *Bulger Hill & Nugget Gulch Placer*, 23 L. D. 95, 103. The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

Finally, we observe that the existence of placer rights and lode rights within the same area seems to have been contemplated by Congress, and yet full provision for the harmonious enforcement of both rights is not to be found in the statutes. We do not wonder at the comment made by Lindley, (1 Lindley, 2d ed. sec. 167,) that "the townsite laws, as they now exist, consist simply of a chronological arrangement of past legislation, an aggregation of fragments, a sort of 'crazy quilt,' in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws." Many regulations of the Land Department and decisions of courts find their warrant in an effort to so adjust various statutory provisions as to carry out what was believed to be the intent of Congress and at the same time secure justice to miners and those engaged in exploring for mines. If we assume that Congress, recognizing the co-existence of lode and placer rights within the same area, meant that a lode or vein might be secured by a party other than the owner of the placer location within which it is discovered—providing his discovery was made without forcible trespass and dispossession—it may be

that a court of equity is competent to provide by its decree that the discoverer of the lode, within the placer limits, shall be secured in the temporary possession of so much of the ground as will enable him to successfully work his lode, protecting at the same time the rights of the placer locator. But such equitable adjustment of co-existing rights cannot be secured in a simple adverse action and it would be, therefore, beyond the limits of proper inquiry in this case to determine the rights which may exist, if in the end the placer location be sustained and a discovery of the lodes without forcible trespass and dispossession established.

But for the present, for the reasons above given, we think the judgment of the Supreme Court of Colorado was right, and it is

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE WHITE dissent.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA *v.* MONTANA MINING COMPANY, LIMITED.

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

No. 250. Submitted April 21, 1904.—Decided May 2, 1904.

The patent for a lode claim takes the sub-surface as well as the surface, and there is no other right to disturb the sub-surface than that given by § 2322, Rev. Stat., to the owner of a vein apexing without its surface but descending on its dip into the sub-surface to pursue and develop that vein.

THIS was a suit brought by the appellee (hereinafter called the Montana Company) against the appellants (hereinafter called the St. Louis Company) in the Circuit Court of the United States for the District of Montana, for an injunction restraining the further prosecution of a tunnel. The facts were

agreed upon, and are substantially that the Montana Company was the owner and in possession of the Nine Hour lode mining claim under a patent from the United States on a location made under the mining acts of 1872 and acts amendatory thereof; that the St. Louis Company was the owner of the St. Louis lode mining claim, holding the same under a similar title. In the St. Louis claim is a vein other than the discovery vein, having its apex within the surface limits of the St. Louis claim, but on its dip passing out of the side line of the St. Louis claim into the Nine Hour claim. The tunnel was two hundred and sixty feet underground, running from the St. Louis into the Nine Hour claim and for the purpose of reaching the vein on its descent through the latter. It was run horizontally through country rock, and between the east line of the St. Louis claim and the vein above referred to will not intersect any other vein or lode. The St. Louis Company did not propose to extend the tunnel beyond the point at which it would intersect the vein above referred to, and simply proposed to use this cross-cut tunnel in working and mining said vein. The Circuit Court, upon the facts agreed to, enjoined the further prosecution of the tunnel. That injunction was sustained by the Circuit Court of Appeals for the Ninth Circuit, 113 Fed. Rep. 900; 51 C. C. A. 530, from whose decision the St. Louis Company has brought the case to this court.

Mr. E. W. Toole and *Mr. Thomas C. Bach* for appellants.

Mr. W. E. Cullen for appellee.

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

The situation and the question can be easily presented to the mind by considering the significant lines as lines of a right-angled triangle; the vein descending on its dip being the hypothenuse, the tunnel the base line, and the boundary between the two claims the side line of the triangle. The St. Louis

Company, being the owner of the vein, may pursue and appropriate that vein on its course downward, although it extends outside the vertical side lines of its claim and beneath the surface of the Nine Hour lode claim. Such is the plain language of section 2322, Rev. Stat., which grants to locators "The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

In other words, it has a right to the hypothenuse of the triangle. May it also occupy and use the base line? Is it, in pursuing and appropriating this vein, confined to work in or upon the vein, or is it at liberty to enter upon and appropriate other portions of the Nine Hour ground in order that it may more conveniently reach and work the vein which it owns? Its contention is that the mining patent conveys title to only the surface of the ground and the veins which go with the claim, and that the balance of the underground territory is open to any one seeking to explore for mineral, or at least may be taken possession of by one other than the owner of the claim for the purpose of conveniently working a vein which belongs to him. The question may be stated in another form: Does the patent for a lode claim take the sub-surface as well as the surface, and is there any other right to disturb the sub-surface than that given to the owner of a vein apexing without its surface but descending on its dip into the sub-surface to pursue and develop that vein?

We are of opinion that the patent conveys the sub-surface as well as the surface, and that, so far as this case discloses, the only limitation on the exclusive title thus conveyed is the right given to pursue a vein which on its dip enters the sub-surface. By section 2319, Rev. Stat., "all valuable mineral deposits in

lands belonging to the United States" are "open to exploration and purchase, and the lands in which they are found to occupation and purchase." By section 2325 "a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person . . . having claimed and located a piece of land for such purposes . . . shall thereupon be entitled to a patent for the land." In a subsequent part of the same section it is provided that the applicant shall pay five dollars per acre. Appellants rely upon the clause heretofore quoted from section 2322 as a limitation upon the full extent of the grant indicated by these provisions. But this limitation operates only indirectly and by virtue of the grant to another locator to pursue a vein apexing within his surface boundaries on its dip downward through some side line into the ground embraced within the patent. It withdraws from the grant made by the patent only such veins as others own and have a right to pursue. As said by Lindley (1 Lindley on Mines, 2d ed. § 71):

"In other words, under the old law he located the lode. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex of the vein."

And in vol. 2 (sec. 780):

"*Prima facie*, such a patent confers the right to everything found within vertical planes drawn through the surface boundaries; but these boundaries may be invaded by an outsider lode locator holding the apex of a vein under a regular valid location, in the pursuit of his vein on its downward course underneath the patented surface."

See also *Calhoun Gold Mining Company* v. *Ajax Gold Mining Company*, 182 U. S. 499, 508. The decisions of the courts in the mining regions are referred to in the opinion of the Court of Appeals in this case, from which we quote:

"This view is in accord with the trend of all the decisions to

which our attention has been directed. In *Parrot Silver & Copper Co.* v. *Heinze*, 64 Pac. Rep. 326, the Supreme Court of Montana held, in substance, that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: 'Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common law grant.' Cf similar import is *State* v. *District Court*, (Mont.) 65 Pac Rep. 1020. In *Doe* v. *Waterloo Mining Co.*, 54 Fed. Rep. 935, Judge Ross said: 'Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law.' In *Consolidated Wyoming G. M. Co.* v. *Champion Min. Co.*, 63 Fed. Rep. 540, Judge Hawley said: 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim.' "

The judgment of the Court of Appeals is

Affirmed.

THE IROQUOIS.

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

No. 200. Submitted March 18, 1904.—Decided May 2, 1904.

While a master is not bound in every instance where a seaman is seriously injured to disregard every other consideration, and put into the nearest port where medical assistance can be obtained, his duty to do so is manifest, if the accident happens within a reasonable distance of such a port.

The duty of the master in each case depends upon its own circumstances, and although the case may not be free from doubt this court will apply its general rule both in equity and admiralty cases, not to reverse the concurring decisions of two subordinate courts upon questions of fact unless there be a clear preponderance of evidence against their conclusion.

THIS was a libel filed in the District Court for the Northern District of California by Matthew Bridges against the ship Iroquois, to recover damages for a failure of the master to provide suitable surgical treatment and care for the libellant, who had suffered injury by a fall from the main yard to the deck of the vessel.

The facts of the case were substantially as follows: The Iroquois left New York on December 27, 1899, bound for the port of San Francisco, with a full cargo of general merchandise. On February 23, 1900, while the vessel was rounding Cape Horn during heavy weather, and while libellant was aloft in the performance of his duty, he accidentally fell from the main yard to the deck of the vessel, thereby fracturing two ribs and his right leg in two places. The master, with the aid of the carpenter, set the leg in splints, kept the libellant in his berth, gave him such food and delicacies as the supplies of the ship permitted, and on March 30, after five weeks, removed the splints, and found the leg apparently in good condition. Before arriving at San Francisco, and early in April, he was able to leave his berth, go upon deck and walk about with the aid of

a crutch. But after arriving at that port on May 7, 1900, he was sent to the hospital, where it was found that, while his ribs had healed perfectly, the bones of his leg had not united, and he was subsequently, and in October, compelled to suffer amputation, and, of course, became a cripple for the remainder of his life. The master was charged with a breach of duty in failing to put into an intermediate port and procure the proper surgical attendance.

Upon this state of facts the District Court entered a decree in favor of the libellant for $3,000, 113 Fed. Rep. 964, which was subsequently affirmed by the Court of Appeals. 118 Fed. Rep. 1003.

Mr. Milton Andros for petitioners, cited *The Osceola*, 189 U. S. 150, 175; *The Scotland*, 42 Fed. Rep. 925; Art. XIX, Laws of Wisby; *Reed* v. *Canfield*, 1 Sum. 202; *The City of Alexandria*, 17 Fed. Rep. 395; *Peterson* v. *The Chandos*, 4 Fed. Rep. 645, distinguishing *Brown* v. *Overton*, 1 Sprague, 462; *Danvir* v. *Morse*, 139 Massachusetts, 323; *Olsen* v. *Whitney*, 47 C. C. A. 331.

Mr. A. H. Ricketts, *Mr. Walter G. Holmes* and *Mr. D. T. Sullivan* for respondent, cited *Brown* v. *Overton*, 1 Sprague, 462; *S. C.*, Fed. Cas. 2024; *Scarff* v. *Metcalf*, 107 N. Y. 211, 216; *Peterson* v. *The Chandos*, 4 Fed. Rep. 645; *Robertson* v. *Baldwin*, 165 U. S. 287; *Burgess* v. *Equitable Marine Ins. Co.*, 126 Massachusetts, 70, and cases cited on p. 80; *Perkins* v. *Augusta Ins. Co.*, 10 Gray, 312; *Tomlinson* v. *Hewitt*, 2 Sawyer, 278; *The Osceola*, 189 U. S. 158, 175; *The Troop*, 118 Fed. Rep. 769; *Danvir* v. *Morse*, 139 Massachusetts, 323.

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

The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime

nations. It appears in the earliest codes of Continental Europe and was expressly recognized by this court in the recent case of *The Osceola*, 189 U. S. 158. Upon large passenger steamers a physician or surgeon is always employed, whose duty it is to minister to the passengers and crew in cases of sickness or accident. Of course, this would be impracticable upon an ordinary freighting vessel, where the master is presumed to have some knowledge of the treatment of diseases, and in ordinary cases stands in the place of a physician or surgeon, *The Wensleydale*, 41 Fed. Rep. 602; but for the further protection of seamen, vessels of the class of the Iroquois are compelled by law to be provided with a chest of medicines and with such anti-scorbutics, clothing and slop-chests as the climate, particular trade and the length of the voyage may require. Compiled Stat. secs. 4569, 4572, 4573.

What is the measure of the master's obligation in cases where the seaman is severely injured while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own particular facts that the rule laid down in one may afford little or no aid in determining another, depending upon a different state of facts. The early cases of *Harden* v. *Gordon*, 2 Mason, 541, and *Reed* v. *Canfield*, 1 Sumner, 195, contain an exhaustive discussion of the general subject by Mr. Justice Story. But, as in both cases the disability occurred at or near a port, they are of no special value in this case.

We have carefully examined the cases of *Brown* v. *Overton*, 1 Sprague, 462; *Peterson* v. *The Chandos*, 4 Fed. Rep. 645; *The Scotland*, 42 Fed. Rep. 925; *Whitney* v. *Olsen*, 108 Fed. Rep. 292; *The Troop*, 118 Fed. Rep. 769, and *Danvir* v. *Morse*, 139 Massachusetts, 323, and are of opinion that none of them fits the exigencies of the present case. We cannot say that in every instance where a serious accident occurs the master is bound to disregard every other consideration and put into the nearest port, though if the accident happen within a reasonable distance of such port, his duty to do so would be manifest.

Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen.

To judge of the propriety of the master's conduct in a particular case we are bound so far as possible to put ourselves in his place, and inquire whether, in view of all the circumstances, he was bound to put into an intermediate port. The charge in the libel is that he should either have put back to Port Stanley in the East Falkland Islands, or deviated from his course and made the port of Valparaiso, "or any one of several other ports in the southern part of South America." The very indefiniteness of this charge shows that neither libellant nor counsel had in mind any particular port, and it was not until the testimony of a former officer of the Chilian navy was taken at San Francisco, that they were able to fix upon the port of San Carlos or the Evangelist Islands as proper places at which to make call. In view of this inability to select a proper port until the officer whose business it had been to cruise up and down the Chilian coast had informed them, it may certainly be contended

with great show of reason that the master was not bound to know of the existence of these ports, except as he was informed by the chart, or of the possibility of obtaining surgical treatment at them. While masters plying upon vessels between New York and Pacific ports would be presumed to know of such familiar harbors as those of Port Stanley and Valparaiso, it by no means follows that they are chargeable with knowledge of every port upon the southwest coast of South America, or of their surgical facilities. The accident occurred upon one of the loneliest and most tempestuous seas in the world. For over one thousand miles from Cape Horn to Valparaiso there seem to have been but one or two places at which it would be feasible to make a call. The evidence shows that the ship at the time was about 480 miles from Port Stanley, and with the winds then prevailing it would have been possible to reach that port in three or four days, but that to return to the place of the accident in view of the head winds might have taken as many weeks. During this time the owners of the ship would sustain a heavy loss in the wages and provisions of the crew, and the demurrage of the ship, and while the cargo is not shown to have been perishable, there would be a risk of the loss of a market by the consequent delay in reaching San Francisco. The master is not chargeable with fault in failing to put back to Port Stanley.

It was also suggested that the ship could have made the Evangelist Islands, at the western end of the Straits of Magellan, by sailing one or two days out of her course; but it was shown that the only building there was a light-house, from which a small steamer was accustomed to put out to passing vessels in case a signal for relief was hoisted, and that nothing could be done there, except possibly to place the seaman upon a steamer bound north to Valparaiso or east to Sandy Point, near the middle of the straits. The probability of obtaining aid by this course, and the certainty of the limb being injured by the delay, would have made it highly inadvisable to adopt it. As there is no harbor in the islands, the various transfers

from the ship to a boat and from the boat to shore, and the return to another ship in the rough water that might be expected at that point, would have been extremely dangerous to a person in libellant's crippled condition. The transfer of passengers from a ship to a boat, even in a moderate sea, is attended with considerable difficulty, and, to a person with a broken leg, with great danger, in view of the unequal rising and falling of a large ship and a small boat. Had the master adopted this course and injury had resulted to the libellant, he could hardly have escaped the imputation of negligence.

The libellant contended in his brief that, assuming that the master was not in fault for failing to stop at the Evangelist Islands, he should have put in at the port of San Carlos or Ancud, which lie near together, where it seems there is a good harbor, a city of 15,000 or 20,000 inhabitants, and ample surgical facilities. We are not impressed with the force of this argument. These are not harbors at which vessels from the Atlantic and Pacific ports are in the habit of stopping. While the master was apprized by his charts of their existence, it might well be that he was ignorant of the population and of the accommodations for disabled seamen. There was no American consul there, and quite possibly no one familiar with the English language. To convict the captain of negligence for not calling there it must be shown that he knew or should have known that the libellant could obtain proper treatment. In short, the suggestion of these ports appears to have been purely an afterthought, inspired by the testimony of the Chilian officer.

With respect to Valparaiso, the case is different. This port appears to be about 1,500 miles from the place of the accident, and, with favorable winds, could have been reached in 14 days. It is true that the direct course from Cape Horn to San Francisco passes Valparaiso at a distance of about 600 miles; but the testimony all shows that if the Iroquois had borne away and hugged the South American coast she might have put into

Valparaiso, left the libellant there, and resumed her course without more than five or six days' detention. Valparaiso is a large city, with ample hospital facilities, and with an American consul general resident there.

We have no criticism to make of the treatment of libellant immediately following the injury, except that we think he should have been taken into the cabin, where he could have been more comfortably provided for. His leg was put in splints as well as the master and carpenter knew how to do it; he was kept to his berth in the forecastle and was fed with such delicacies as the ship's supplies afforded. No fever set in, and when the splints were taken off, about five weeks after the accident, and after the vessel had passed Valparaiso, the leg was found to be in good condition, except for certain sores which had broken out upon it, caused by the long confinement in splints. It is true the libellant said the bones were not united, but he does not seem to have complained of this to the master; yet with a careful examination, such as the master was bound to make, we think he should have detected it. It may be, however, that the bones failed to unite by reason of the libellant being allowed to go upon deck and walk about on crutches. But however this may be, it was admitted that when the splints were taken off the vessel was about as near San Francisco as Valparaiso, and that nothing would have been gained by turning about at that time.

The real question in the case is: whether the master, knowing his ignorance of surgery, the serious nature of the libellant's injury, the poor accommodations for him in the forecastle, the liability of inflammation setting in, and of the bones not uniting, the fact that he was to be carried through the tropics, where to an invalid confined in the forecastle the heat would be almost intolerable, he should not, even at the sacrifice of a week, have put into Valparaiso and left the libellant there in charge of the American consul. Upon the other hand: libellant made no complaint of his treatment; did not ask to be taken into an intermediate port, and, so far as appears, the master

did not know that the wound was not healing properly. The fact that the ribs had already united probably induced him to believe that the leg had also healed, although a careful examination could not have failed to reveal the truth. We lay no stress upon the fact that the libellant did not ask to be taken into an intermediate port. He was a boy, largely ignorant of his rights and duties. The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not. If, on arriving at Valparaiso, the bones were found not to have knitted together, there was at least a chance of securing their union by proper treatment. If, upon the other hand, they had united there was a certainty of securing ultimate recovery by careful nursing, and by the use of facilities which the hospital undoubtedly would have, and which the ship undoubtedly had not. To put it in a light most favorable to the master, he speculated upon the chance that the union of the bones had taken place without seeking to inform himself of the fact. The courts below held that the master did not discharge, as he should have done, the claim of humanity which the serious nature of the injury and the helpless condition of the libellant imposed upon him.

Upon the whole, while the case is by no means free from doubt, we are not disposed to disturb the decree of the court below in holding it to have been the duty of the master to put into an intermediate port. We regard the case as peculiarly one for the application of the general rule so often announced by this court, both in equity and admiralty cases, that this court will not reverse the concurring decisions of two subordinate courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions. *The S. B. Wheeler*, 20 Wall. 385; *The Lady Pike*, 21 Wall. 1, 8; *The Richmond*, 103 U. S. 540; *Towson* v. *Moore*, 173 U. S. 17; *Smith* v. *Burnett*, 173 U. S. 430, 436.

As the decision of the District Court was unanimously af-

firmed by the Circuit Court of Appeals, we do not think there is any such preponderance of evidence as would justify us in disturbing their conclusions. The decree is therefore

Affirmed.

ELDER *v.* HORSESHOE MINING AND MILLING COMPANY.

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

No. 220. Submitted April 18, 1904.—Decided May 2, 1904.

A notice to a coöwner, to contribute his share of development work on a mining claim, when rightfully published under § 2324 is effective in cutting off the claims of all parties and the title is thus kept clear and free from uncertainty and doubt. Claims for more than one year may be grouped in one notice.

It is not necessary for the notice to delinquent coöwners required by § 2324, Rev. Stat., to specifically name the heirs of a deceased coöwner, but is sufficient if addressed to such coöwner, "his heirs, administrators and to whom it may concern," even though an administrator had not been appointed at the time.

A notice published every day except Sundays, commencing Monday, January 7, and ending Monday, April 1, held to have been published once a week for ninety days and to be sufficient under § 2324, Rev. Stat.

THE plaintiffs in error, being the administrator, together with the heirs at law of Rufus Wilsey, deceased, commenced this suit in the state court of South Dakota against the defendants, and upon the trial the complaint was dismissed upon the merits; that judgment was affirmed by the Supreme Court of the State, and the plaintiffs have brought the case here. The action was commenced to obtain a decree that defendants held in trust for the plaintiffs in error an undivided one-half interest in and to the land embraced in what is called in the complaint the Golden Sand lode mining claim, the plaintiffs asked for a decree that the defendants should convey to the plaintiff in

error, Elder, administrator, an undivided one-half interest therein, and for such other and further relief as might be just and equitable.

The answer contained a denial of the various allegations of the complaint and set up a defence of laches on the part of the plaintiffs in error in asserting their claim. The case went to trial before the court, and the following facts were found:

In January, 1878, Rufus Wilsey and Charles H. Havens located a mining claim near Bald Mountain, in the Whitewood mining district, Lawrence County, South Dakota, by discovering mineral-bearing rock in place, sinking a shaft, posting discovery notices and planting boundary stakes; and on May 13 of the same year they filed for record their location certificate, which was then recorded. On June 12, 1878, Wilsey died, and soon thereafter the plaintiffs, his heirs at law, were informed of his death. They knew that he had left property, and from a time shortly after his death corresponded with different attorneys and others residing in the Black Hills, trying to get something out of the estate, but, until the arrangement was made with the attorneys under which this action is brought, made no progress toward a settlement. From the time of the death of Wilsey, in 1878, up to December, 1893, the heirs of Wilsey did nothing toward contributing or offering to contribute toward paying for the annual labor made necessary by the Federal statute, Rev. Stat. sec. 2324; 2 Comp. Stat. p. 1426, in order to keep possession of the mine. On June 19, 1878, one Evans was appointed special administrator of the estate of Wilsey, and his letters were subsequently revoked, and one Stevens was appointed and filed his bond as administrator on August 13, 1881. Subsequently, on an allegation of the death of Stevens, some time in 1888, the present administrator was appointed on the twelfth of August, 1893.

In 1889, or soon thereafter, processes for the successful treatment of all mining ores, including such ore as was found in the ground in controversy, were introduced in Lawrence County, and as a consequence the value of the mining property

therein was materially enhanced, and this property became of much greater value in August, 1892, and December, 1893, than at any time since its location.

On December 5, 1893, the plaintiffs in error by their attorneys served on the defendant company an offer in writing to pay $700 for annual development and assessment work, and if that was not the correct amount of the expense for protecting their half interest in the Golden Sand lode, then they offered to pay the full amount due for the protection of the half interest of the plaintiffs in error, and they asked for a receipt, and demanded a deed for such half interest. The offer and the request were refused, and this action was begun on December 6, 1893.

From the time of the location of the mine up to 1888, inclusive, Havens, the coöwner with Wilsey, did at least one hundred dollars' worth of labor each year in order to hold the claim, and filed on January 2, 1889, an affidavit to that effect, including the time from 1880 to and including the year 1887, and another affidavit to the same effect for the year 1888. Under the statute he published a notice directed to "Rufus Wilsey, his heirs, administrators, and to all whom it may concern," informing them that he had expended $800 in labor upon the mine for the years ending December 31, 1880, 1881, 1882, 1883, 1884, 1885, 1886 and 1887, and stating that if within ninety days after this notice by publication they failed to contribute their proportion, $400, being $50 for each of said years, their interest in said claim would become the property of the subscriber under section 2324 of the Revised Statutes of the United States. Havens also published for the year 1888 a notice similar to the one already given in regard to the work done prior to that year. The two notices were published in the proper newspaper and were set out in full and published in each daily issue of the paper, (every day in the week except Sunday,) beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889, and no more. Havens also continued during the years 1889, 1890, 1891, and 1892, to do at least $100 worth of work in the mine for the purpose of holding the same. On

August 10, 1892, Havens made a deed of the whole lode and mining claim to one Thomas H. White, and on August 25, 1892, White caused to be filed for record an affidavit of Havens, which recited that he was one of the locators of the Golden Sand lode and that Wilsey, his coöwner, and whom he advertised out for not contributing his proportion of labor, had not paid his proportion nor any of the expenditures for holding the claim.

Questions were made as to the sufficiency of the notices and as to the regularity of the publication of the same under the above statute of the United States. The case was tried once before and resulted in a judgment for plaintiffs, which was reversed by the Supreme Court of the State, 9 S. Dak. 636, and upon the new trial the judgment was for the defendants. 15 S. Dak. 124.

Mr. Eben W. Martin and *Mr. Norman T. Mason* for plaintiffs in error:

The notice of forfeiture was not sufficiently addressed. If there is any doubt as to the interpretation of the forfeiture provision of § 2324, the statute should be construed strictly as against defendants because it is a statute of forfeiture. On this point see, *Hammer* v. *Garfield M. & M. Co.*, 130 U. S. 291; *Johnson* v. *Young*, 24 Pac. Rep. 173 (Col.); *Quigley* v. *Gillette*, 35 Pac. Rep. 1040 (Cal.); *Early* v. *Doe*, 16 How. 615, 618; *Ronkendorff's Case*, 4 Pet. 349; 16 Am. & Eng. Ency. Law, 817; *Farmers Bank* v. *Dearing*, 91 U. S. 35; *Marshall* v. *Vicksburg*, 15 Wall. 146; *Turner* v. *Sawyer*, 150 U. S. 578; *Brundy* v. *Mayfield*, 38 Pac. Rep. 1067 (Mont.).

The title having vested in the heirs, it could not be disturbed by a notice given to a dead man. *Billings* v. *Aspen Co.*, 51 Fed. Rep. 338.

The heirs and administrator should have been mentioned by name. Many services have been held insufficient on account of inaccuracy in names of parties. *Detroit* v. *Railroad Co.*, 51 Fed. Rep. 9; *Cotton* v. *Ruppert*, 60 Michigan, 318; *S. C.*, 27

N. W. Rep. 520; *Entreken* v. *Chambers*, 11 Kansas, 368; *Thompson* v. *McCorkle*, 34 N. E. Rep. 813 (Ind.); *Chamberlain* v. *Blogett*, 10 S. W. Rep. 44 (Mo.); *New Orleans* v. *St. Romes*, 28 La. Ann. 17; *Bleidorn* v. *Pilot Mt. Co.*, 15 S. W. Rep. 737 (Tenn.); *Troyer* v. *Wood*, 10 S. W. Rep. 43 (Mo.).

As to effect of notice and whether subsequent action was necessary to forfeit the coöwner's title, see *Brundy* v. *Mayfield*, 38 Pac. Rep. (Mont.) 1069.

The publication was not sufficient as to time. *Early* v. *Doe*, 16 How. 617; *Wilson* v. *Northwestern Mut. Ins. Co.*, 12 C. C. A. 505; *S. C.*, 65 Fed. Rep. 38; *Finlayson* v. *Peterson*, 67 N. W. Rep. 954 (N. Dak.); *Bacon* v. *Kennedy*, 56 Michigan, 329; 22 N. W. Rep. 824; *Pratt* v. *Tinkcom*, 21 Minnesota, 142, 146; *Boyd* v. *McFarlin*, 58 Georgia, 208; *Ogden* v. *Walker*, 59 Indiana, 460, 466; *Security Co.* v. *Arbuckle*, 24 N. E. Rep. 329 (Ind.); *Smith* v. *Rowles*, 85 Indiana, 265; *Market Nat. Bank* v. *Bank*, 89 N. Y. 398.

Mr. Chambers Kellar for defendants in error, cited as to sufficiency of notice, *Reilly* v. *Phillips*, 4 S. Dak. 604; *S. C.*, 57 N. W. Rep. 780, and distinguished cases on brief of plaintiffs in error; and cited as to sufficiency of publication: *Rokensdorff* v. *Taylor's Lessee*, 4 Pet. 349; *Nevada* v. *Yellow Jacket M. Co.*, 5 Nevada, 415; *Bachelor* v. *Bachelor*, 1 Massachusetts, 256; *Sheldon* v. *Wright*, 5 N. Y. 497; *Alcott* v. *Robinson*, 21 N. Y. 150; *De Peyster* v. *Michael*, 6 N. Y. 467; *Wood* v. *Moorehouse*, 45 N. Y. 368; *Chamberlain* v. *Dempsey*, 13 Abb. Pr. 421; *Steinze* v. *Bell*, 12 Abb. Pr. (N. S.) 171; *Wood* v. *Knapp*, 100 N. Y. 109; *Savings & Loan Society* v. *Thompson*, 32 California, 347; *Cox* v. *Lumber Co.*, 51 N. W. Rep. 1130; *Knowlton* v. *Knowlton*, 39 N. E. Rep. 595; *Madden* v. *Cooper*, 47 Illinois, 359; *Pierson* v. *Bradley*, 48 Illinois, 250; *Andrews* v. *People*, 84 Illinois, 28; *Garrett* v. *Mauss*, 20 Illinois, 549; *Raum* v. *Leech*, 54 N. W. Rep. 1058; *Johnson* v. *Hill*, 62 N. W. Rep. 930; *Wilson* v. *Scott*, 29 Ohio St. 636; *Martin* v. *Hawkins*, 35 S. W. Rep. 1104; *McDonald* v. *Cooper*, 32 Fed. Rep. 745.

MR. JUSTICE PECKHAM, after making the above statement of facts, delivered the opinion of the court.

The Federal questions which arise in this case are based upon the statute of the United States already referred to in the foregoing statement of facts, being section 2324 of the Revised Statutes, the material portion of which is set forth in the margin.[1]

The plaintiffs in error contend that the notices published by or in behalf of the defendants in error were not a compliance with the statute, because of the manner in which they were addressed. They also insist that, even assuming the sufficiency of the notices, they were not published in accordance with the

[1] Rev. Stat. sec. 2324; as amended 21 Stat. 61, c. 9, 2 Comp. Stat. p. 1426.

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, Anno Domini eighteen hundred and seventy-two.

requirements of the statute for a sufficient length of time, and that, therefore, the title of the plaintiffs in error was not divested. We are not impressed with the validity of either of the two objections.

As to the first. The notice was addressed as follows: "To Rufus Wilsey, his heirs, administrators, and to all whom it may concern." The objection made is that at the time when this notice was published, Rufus Wilsey was dead, and there was no administrator then existing and the names of the heirs were not given, and the notice, "to whom it may concern," was futile.

The statute, it will be observed, does not require that the published notice in regard to a deceased coöwner shall be directed to any one by name. Upon the failure of a coöwner to contribute his proportion of the expenditure required under the section, the cöowner who has performed the labor or made the improvements may, as provided for by the section, at the expiration of the year, give such delinquent coöwner personal notice in writing or notice by publication in the newspaper published nearest the claim, and if at the expiration of ninety days after such notice in writing, or by publication, the delinquent refuses to contribute his proportion or fails to do so, his interest in the claim thereby becomes the property of his coöwners who have made the required expenditures. We perceive no possible harm arising from the fact that the notice itself, containing all the facts necessary to be included therein, was addressed to "Rufus Wilsey, his heirs, administrators and to whom it may concern." The fact that Rufus Wilsey was dead was not material so far as to thereby render the notice to his heirs illegal or insufficient. It certainly did them no harm to include the name of Rufus Wilsey, and the notice was quite as likely to become known to them as if it had been addressed "to the heirs of Rufus Wilsey, deceased, his administrators, and to all whom it may concern." It is entirely unlike the publication of a summons for the purpose of commencing an action against a particular individual or individuals. There the identification must be complete and the person particularly de-

scribed and named, so that when the publication has been finished it can be known that the particular individual has been served with process by publication with the same effect as if it had been personally served on the same individual without publication. This statute provides a summary method for the purpose of insuring the proper contribution of coöwners among themselves in the working of the mine, and it provides a means by which a delinquent coöwner may be compelled to contribute his share under the penalty of losing his right and title in the property because of such failure. It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The act does not require it. If the notice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficient notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein by the payment of their share of the expenses of working the mine, or else to lose their right, title and interest therein. The coöwner who did the work might not know who the heirs were, and it might be impossible for him to learn their names or whereabouts, and the statute never contemplated that the man who did the work should be prevented from obtaining the benefit of the statute by his inability to learn who the heirs were and where they lived. A general address to the heirs of the person named and the proper publication of the notice, is sufficient. It did not become insufficient because in addition to being addressed to them it was also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them.

The Supreme Court of South Dakota has held in this case that at the time this notice was published the title to a one-half interest in this claim was in the heirs, subject to a possible lien of the administrator for administration purposes, and had been since the death of Wilsey. 9 S. Dak. 636, 642. The same court has held that an administrator has but a lien on real

estate for administrative purposes, and that the title vests in the heirs. (Cases cited in opinion of the state court.) The only debt, so far as the record shows, existing against the estate of Wilsey was one for $50, in favor of Stevens, who was appointed administrator in 1881, and died in 1888, and from then until 1893 there was no administrator, the present one being appointed evidently for the purpose of this suit. The actual title to the fee is in the government, but the interest of the miner may be conveyed and inherited. *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449. We are of opinion that the publication of the notice was sufficient, although there was no administrator at the time of publication. It is unnecessary under this statute to publish a notice to lienors. We agree with the Supreme Court of the State that the evident purpose and object of the law of 1872 (section 2324) were to encourage the exploration and development of the mineral lands of the United States and the sale of the same, and that all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under the statute it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt.

There was no irregularity in grouping in one notice claims for more than one year's expenditures. We can perceive no reason why a consolidation of the claims of several years should not be made and included in one and the same notice.

(2.) The objection to the sufficiency of the publication of the notice we regard as equally unfounded. The statute provides for a publication "for at least once a week for ninety days." The publication was in fact made every day, except Sunday, in the proper newspaper, beginning Monday, January 7, 1889,

and concluding Tuesday, April 2, 1889. And the statute provides that if, after the expiration of ninety days after such notice in writing or publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coöwners who have made the required expenditures. The publication, we think, was sufficient. The ninety day period begins with the first publication; in this case, Monday, January 7. The publication on that day was sufficient for the week then beginning. The publication on January 15 was sufficient for that week, and, as stated by the Supreme Court of South Dakota: "Each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7 to April 1, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1 until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6. Excluding the first day, ninety days ended on Sunday, April 7. On that day the required notice had continued during ninety days, and another publication on Monday, April 8, was wholly unnecessary."

We are satisfied that this construction is the correct one, and the publication was, therefore, made for a sufficient length of time to comply with the statute.

The judgment of the Supreme Court of South Dakota is

Affirmed.

WEST *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 230. Argued April 5, 1904.—Decided May 2, 1904.

The construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses in criminal trials is not a Federal question and this court is bound in such cases by the construction given thereto by the state court.

The Sixth Amendment does not apply to proceedings in a state court, nor is there any specific provision in the Federal Constitution requiring defendant to be confronted with the witnesses against him in a criminal trial in the state courts.

The reading in accordance with the law of the State on a criminal trial in a state court, of a deposition taken before the committing magistrate, in the presence of the accused, of a witness who had been cross-examined by the counsel for accused and who was permanently absent from the State, does not deprive the accused of his liberty without due process of law, and is not violative of any provision in the Federal Constitution or any of the Amendments thereto.

As to matters within its exclusive jurisdiction a State has the right to alter the common law at any time, although it had theretofore adopted it with certain limitations, and if through its courts it errs in deciding what the common law is, yet if no fundamental right is denied to an accused, and no specific provision of the constitution is violated, he is not denied due process of law within the meaning of the Federal Constitution.

THE plaintiffs in error were proceeded against by information and were convicted of larceny in the Criminal District Court of the Parish of Orleans, Louisiana, on April 4, 1902, and sentenced to three years' imprisonment, which conviction and sentence were thereafter affirmed by the Supreme Court of Louisiana. 109 Louisiana, 603. They have brought the case here by writ of error.

On the trial the district attorney offered to read the testimony of one Thebaud, after having proved that he was permanently absent from the State and was a non-resident thereof, and that his attendance could not be procured. It appeared that the plaintiffs in error had been arrested and charged with the crime for which they were then on trial, and had been brought before the judge of the City Criminal Court, sitting as

a committing magistrate, and upon the hearing before him, in the presence of the plaintiffs in error and their counsel, the witness Thebaud had been produced and examined orally, and cross-examined by the counsel for plaintiffs in error. The offer of the district attorney, after he had made this proof, to read the testimony thus taken upon the preliminary examination, was objected to by counsel for plaintiffs in error on various grounds, the material one now urged being that it was not shown that the witness whose deposition was proposed to be read was dead, insane or sick, nor that he was absent by the procurement of the plaintiffs in error or their counsel, and it was insisted that the reading of that testimony would be in violation of the act of 1805, being now section 976 of the Revised Statutes of Louisiana, and of article 9 of the bill of rights and constitution of that State, and also would violate the Sixth and Fourteenth Amendments of the Constitution of the United States.

The act of 1805 reads as follows:

"All crimes, offences and misdemeanors shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence and all other proceedings whatsoever in the prosecution of crimes, offences and misdemeanors, changing what ought to be changed, shall be according to the common law, unless otherwise provided." Acts, 1805, p. 440, sec. 33.

Article 9 of the constitution of 1898 of the State of Louisiana provides as follows:

"In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury: *Provided*, that cases in which the penalty is not necessarily imprisonment at hard labor or death shall be tried by the court without a jury, or by a jury less than twelve in number, as provided elsewhere in the constitution: *Provided further*, that all trials shall take place in the parish in which the offence was committed, unless the venue be changed. The accused in every instance shall

have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, to have compulsory process for obtaining witnesses in his favor."

The evidence contained in the deposition was material. The objections to the reading thereof were overruled, and the counsel for plaintiffs in error duly excepted. The deposition was then read in evidence.

Mr. Lionel Adams, with whom *Mr. Henry L. Lazarus* and *Mr. Richard B. Otero* were on the brief, for plaintiffs in error.

Submitted by *Mr. Walter Guion*, Attorney General of the State of Louisiana, *Mr. F. C. Zacharie* and *Mr. Chandler C. Luzenberg* for defendant in error.

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

The only question for this court to determine is whether the admission of the deposition of Thebaud as evidence upon the trial of this case deprived the plaintiffs in error of due process of law, and therefore was a violation of the Fourteenth Amendment upon the part of the State through its judicial department.

For many years the Supreme Court of Louisiana has held that upon such facts as were proved in this case it was proper to admit a deposition as evidence upon the trial of the accused; that in such circumstances he had been confronted with the witnesses within the meaning of the constitution and laws of the State. Many cases were cited by the Supreme Court in the opinion in this case as authority for the proposition it laid down, and, after having cited them, the court, in its opinion, continued:

"A reference to these various decisions will show that this court has repeatedly permitted the introduction in evidence of testimony of witnesses which had been taken down in writing on a preliminary examination, when the presence of the wit-

nesses themselves at the trial could not be obtained. In the case before us the witnesses whose written testimony was so received were permanently absent from the State, the accused were present at the examination and cross-examined the witnesses. The jurisprudence of the State on the subject fully warranted the action of the District Court in permitting the testimony to be introduced."

Counsel for the plaintiffs in error in their brief used in this court concede that the law of Louisiana, as stated in the above extract from the opinion of the court in this case, "is absolutely indisputable," but they nevertheless urge that the decisions are founded in error and are in violation of the constitution and mandatory statute, (Act of 1805; Rev. Stat. sec. 976, *supra*,) requiring that in the prosecution of crimes, among other things, the rules of evidence shall be in accordance with the English common law as it stood in 1805.

We are now asked to review the decisions of the state court as to what is the law of that State regarding this question of evidence, because as asserted the State has ever since 1805 made the common law, as it existed at that time, the rule as to evidence on criminal trials, and it is contended that the common law did not permit this evidence under circumstances existing in this case, and the state court in permitting the deposition to be read not only violated the state law, but the Fourteenth Amendment, by refusing to the plaintiffs in error due process of law.

Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State, under circumstances such as those existing herein. Among many of the cases to that effect see *Brown* v. *New Jersey*, 175 U. S. 172.

As to the Federal Constitution, it will be observed that there is no specific provision therein which makes it necessary in a

state court that the defendant should be confronted with the witnesses against him in criminal trials. The Sixth Amendment does not apply to proceedings in state courts. *Spies* v. *Illinois*, 123 U. S. 131; *Brown* v. *New Jersey*, 175 U. S. 172, 174; *Maxwell* v. *Dow*, 176 U. S. 581, 586. The only question, therefore, is, as we have stated, whether the reading of the deposition under the circumstances amounted to a violation by the State of the Fourteenth Amendment, by depriving the plaintiffs in error of their liberty without due process of law.

At common law, the right existed to read a deposition upon the trial of the defendant, if such deposition had been taken when the defendant was present and when the defendant's counsel had had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness was at the time of the trial dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant. This much is conceded by counsel for plaintiffs in error, but they deny that the common law extended the right to so read a deposition upon proof merely of non-residence, permanent absence and inability to procure the evidence of the witness upon the trial.

There is some contrariety among the authorities and text-writers whether under the common law a deposition is admissible in such case. Assuming, however, that the state court erroneously held what the common law was on the subject, we must, in order to reverse this judgment, go further, and hold that a trial thus conducted and a deposition thus admitted did not furnish due process of law to the accused; in other words, that the refusal to exclude this deposition (an error regarding the admissibility of evidence) took away from plaintiffs in error a right of such an important and fundamental character as to deprive them of their liberty without due process of law.

The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If, through its courts, it erred in deciding

what the common law was, yet, if no fundamental and absolutely all-important right were thereby denied to an accused, he still had due process of law and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal Constitution.

As was said in *Brown* v. *New Jersey, supra:*

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information."

The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Brown* v. *New Jersey, supra.*

Coming to a decision of the question before us, we are of opinion that no Federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party or to fundamentally impair those general rights which are secured to him by the Fourteenth Amendment. The accused has, as held by the state court in such case, been once confronted with the witness and has had opportunity to cross-examine him, and it seems reasonable that when the State cannot procure the attendance of the witness at the trial, and he is a non-resident

and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.

We say this with reference to the question whether the admission of the deposition fails to give the accused "due process of law," as provided for in the Fourteenth Amendment. As the Sixth Amendment does not apply to the state courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case.

We have held, *Hurtado* v. *California*, 110 U. S. 516, that the words "due process of law," in the Fourteenth Amendment, do not require an indictment by a grand jury in the prosecution by a State for murder. We have also held, *Maxwell* v. *Dow*, 176 U. S. 581, that the trial of a person in a state court, accused as a criminal, by a jury of only eight persons instead of twelve, and his subsequent conviction and imprisonment, did not deprive him of his liberty without due process of law. See also *Brown* v. *New Jersey*, *supra*, as to a struck jury. In these cases it was held that the several rights mentioned in them were not those fundamental ones which were protected by the Federal Constitution when presented for review under state prosecutions.

The cases contain a somewhat full statement upon the subject of what constitutes or fulfills the requirements of "due process of law," so far as it relates to questions of this nature, and it is only necessary for us at this time to refer to those cases, without renewing the discussion here. Within the principle there decided the plaintiffs in error were accorded due process of law.

It is true that the proceedings in the cases were under particular state statutes, while it is contended here that there are no state statutes authorizing the rule as laid down by the Supreme Court of Louisiana. But that court has held that the proceeding was justified, and the deposition admissible under the law of that State. Whether the decision of the state court is made

under the authority of a statute or on its own construction of what the law of the State is, cannot in such case as this be a material inquiry, because the sole question for this court is, whether the Federal Constitution has been violated by the decision of the state court. We think it has not.

The cases cited from this court are not in any degree inconsistent with the views herein expressed, while some rather tend to support them.

In *Reynolds* v. *United States*, 98 U. S. 145, which was a prosecution for bigamy in the Territory of Utah under section 5352, Revised Statutes of the United States, it was held that when there was some proof that an absent witness was kept away by procurement of the defendant the burden of proof was on him to show (having full opportunity therefor) that he was not instrumental in concealing or keeping the witness away. If the defendant failed, he was in no condition to assert his constitutional right to be confronted with the witness.

In *Mattox* v. *United States*, 156 U. S. 237, the indictment was for murder, and it was found in the United States District Court of Kansas. It was held that the testimony of a former witness of the government, once taken by a stenographer on a former trial, and fully examined and cross-examined, was admissible on a second trial on proof of the death of the witness.

In *Murray* v. *Louisiana*, 163 U. S. 101, the state court, on the trial of plaintiff in error for murder, permitted to be read the evidence of a witness taken in the presence of the accused at the preliminary hearing, read to and signed by the witness, the prosecuting officer alleging that the witness was beyond the jurisdiction of the court, and his attendance could not be procured. This court refused to decide as to the admissibility of the evidence, as the bill of exceptions did not show the substance of the evidence and that it was material.

In *Kirby* v. *United States*, 174 U. S. 47, which was the case of an indictment in the District Court of the United States for the Southern Division of the District of South Dakota, it was held that, admitting the judgment convicting the three persons of

stealing postage stamps under the circumstances stated in the case, under the provisions of the act of Congress of March 3, 1875, chap. 144, section 2, that such judgment "shall be conclusive evidence against said receiver, that the property of the United States therein described has been embezzled, stolen or purloined," was improper in that the provision of the statute violated the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused should be confronted with the witnesses against him, and the judgment was, therefore, reversed.

In *Motes* v. *United States*, 178 U. S. 458, which was an indictment under section 5508 of the Revised Statutes of the United States, it was held that the admission upon the trial of written statements made by one Taylor at the preliminary examination was in violation of the rights of the accused under the Sixth Amendment of the Constitution of the United States, declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. It was so held because, as the court found, the absence of the witness was manifestly due to the negligence of the officers of the government. The witness was a witness for the prosecution and had been once committed to jail without bail, and his absence was, therefore, not within any recognized exceptions to the general rule prescribed in the Constitution.

These are the cases to which our attention has been called, and it is manifest there is nothing in them opposed to our judgment in this case. They are all cases arising in the Federal courts, with one exception, *Murray* v. *Louisiana*, and in that case the question was left untouched. In the other cases they were subject to the provision of the Federal Constitution assuring the accused the right to be confronted with the witnesses against him. But in not one of those cases was it held that, under facts such as were proved in this case, there would have been a violation of the Constitution in admitting the deposition in evidence. All the cases admit some exceptions to the general rule. What those exceptions may be is a question

for the state courts, in prosecutions therein, under the rule as already stated. The exception alleged in this case has not been denied by this court heretofore.

We are unable to see that any applicable provision of the Federal Constitution has been violated by the judgment in this case, and it is, therefore,

Affirmed.

MR. JUSTICE HARLAN dissented.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* MAY.

ERROR TO THE COUNTY COURT OF BELL COUNTY, STATE OF TEXAS.

No. 185. Submitted March 17, 1904.—Decided May 2, 1904.

The law of Texas, chap. 117, of 1901, directed solely against railroad companies and imposing a penalty for permitting Johnson grass or Russian thistle to go to seed upon their right of way, is not shown so clearly to deny the companies equal protection of the laws as to be held contrary to the Fourteenth Amendment.

THE facts, which involved the constitutionality under the Fourteenth Amendment of chapter 117 of the Laws of Texas of 1901, imposing a penalty on railroad companies for permitting Johnson grass and Russian thistle to go to seed upon their rights of way, are stated in the opinion of the court.

Mr. James Hagerman, Mr. T. S. Miller and *Mr. J. M. Bryson,* for plaintiff in error:

The classifications of the act are arbitrary and violative of fundamental conceptions of due process of law and its equal

protection. *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368, 373; *Dent* v. *West Virginia*, 129 U. S. 114, 124; *Gulf, C. & Santa Fé* v. *Ellis*, 165 U. S. 150, 153, 165; *Atch. Top. & S. F.* v. *Matthews*, 174 U. S. 96, 104; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 111; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Fraser* v. *McConway*, 82 Fed. Rep. 257, 260; *State* v. *Waters-Pierce Oil Co.*, 67 S. W. Rep. (Tex.) 1057; *North Carolina* v. *Tenant*, 15 L. R. A. 423; *Luman* v. *Hitchins Bros. Co.*, 46 L. R. A. 393; *Ex parte Jentzsch*, 32 L. R. A. 664; *Wally's Heirs* v. *Kennedy*, 2 Yerg. 554; *Holden* v. *James*, 11 Massachusetts, 396; Cooley on Const. Law (7th ed.), 559.

There are no reasons which justify the classification of § 2 of the act. There is no connection between permitting Johnson grass or Russian thistle to mature on the right of way of a railroad company and operating cars and locomotives along the same in respect to the object to be accomplished, nor can the distribution be sustained upon any theory that incentives exist in one case to prevent the grass and thistles from maturing and none in the other. *Ft. W. & D. C. Ry. Co.* v. *Hogsett*, 67 Texas, 685, and cases cited on p. 688; *T. & P. Ry. Co.* v. *Ross*, 7 Tex. Civ. App. 653; *St. L. S. W. Ry. Co.* v. *Knight*, 41 S. W. Rep. 416.

Unless there is some reason for distinguishing a class from the public an act affecting such class only is open to the charge of being partial and discriminating. *Landon* v. *Steele*, 152 U. S. 135; *Atch. T. & S. F.* v. *Clark*, 58 Pac. Rep. 477; *Pasadena* v. *Simpson*, 91 California, 238; *S. C.*, 27 Pac. Rep. 604. Where statutes affecting a class have been upheld it is because of special reasons distinguishing the class. *Hart* v. *Railroad Co.*, 13 Metc. 99; *Missouri Pacific* v. *Mackey*, 127 U. S. 205, 210.

There was no appearance or brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a action to recover a penalty of twenty-five dollars,

brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, ch. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States.

It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow, is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch* v. *Maryland*, 4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way we feel unable to say that the law before us may not have been justified by local

conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Judgment affirmed.

Mr. Justice Brewer concurs in the judgment.

Mr. Justice Brown, dissenting.

I am unable to concur in the opinion of the court in this case. While fully conceding that the legislature is the only judge of the policy of a proposed discrimination, it is not the only judge of its legality. Doubtless great weight will be given to its judgment in that regard, and the legislation will not be held invalid, if it be founded upon a real distinction in principle between persons or corporations of the same class. Upon this principle spark arresters may be required upon locomotives when they are not required upon other smokestacks, because of their greater liability to communicate fires to adjoining property; so, although other proprietors are not bound to fence their lands, railway companies may be required to do so to prevent the straying of cattle upon their tracks. Upon the same principle gates and guards may be required at railway crossings when the same would be entirely unnecessary at the crossing of ordinary highways. Other discriminating regula-

tions made necessary by the peculiar business and danger incident to railway transportation may be readily imagined.

In this case, however, the railway is not pursued as such, but merely as the proprietor of certain land alongside its track, and no reason can be conjectured why an obnoxious form of weed, growing upon its land, should be more detrimental than the same weed growing upon adjoining lands. The railway is not made the sole object of the statutory prohibition by reason of the fact that it is a railway, and the discrimination against it seems to be purely arbitrary. The only distinction suggested in support of the ordinance is that the seed of Johnson grass may be dropped from the cars in such quantities as to cause special trouble; but there is not only no evidence of such fact, but is is highly improbable that the seed of a noxious grass of this kind would be carried upon the cars at all. It is also suggested that the self-interest of owners of farms to keep down pests of this kind might be relied upon to prevent their growth. But this tends merely to show that if the law were made general, it would be more readily obeyed by private land proprietors than by the railway. It may be that railways are less given to the observance of precautions required of them as neighborhood landowners than the proprietors of individual property, but that does not create a distinction in principle. It merely tends to show that if the law were made general the railway companies would be oftener prosecuted than other proprietors. If Johnson grass growing upon railway tracks be a nuisance, it is equally so when growing upon the other side of the line fence, and I think the law should be made general to avoid the charge of an arbitrary discrimination. If the land owned by every corporation were held to this liability, while the land of individuals were exempt, the discrimination would be more conspicuously unjust in its appearance, but scarcely more so in its reality.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA also dissented.

RAPHAEL *v.* TRASK.

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

No. 229. Argued April 18, 19, 1904.—Decided May 2, 1904.

Diverse citizenship does not exist, giving a Circuit Court of the United States jurisdiction of an action affecting the disposition of a fund held by a copartnership doing business in a State other than that of complainant, if any of the partners are citizens of complainant's State; nor can the jurisdiction of such an action be maintained, either for the purpose of enforcing additional security or to stay waste, as ancillary to a foreclosure suit pending in another Circuit Court of the United States, where there is no privity of contract or trust relations between complainant and defendants, and the record does not show that the defendant in the foreclosure suit could not respond to any judgment that might be recovered therein.

THIS suit was begun by filing a bill in the Circuit Court of the United States for the Southern District of New York, seeking an injunction restraining the defendants, Spencer Trask & Company, from selling certain shares of capital stock of the Rio Grande and Western Railway Company to the Denver and Rio Grande Railway Company, unless a sufficient sum of money was deposited to indemnify the complainant upon the demand hereinafter set forth.

It appears from the allegations of the bill that Nathaniel W. Raphael, since deceased, now represented by Martha Raphael as administratrix, on January 7, 1901, filed a bill in the United States Circuit Court for the District of Utah against the Wasatch and Jordan Valley Railroad Company and the Rio Grande and Western Railway Company and the Union Trust Company of New York, the object being to foreclose a mortgage given by the Wasatch and Jordan Valley Railroad Company, and to redeem from two independent mortgages certain branch railroads in the possession of and claimed to be owned by the Rio Grande and Western Railway Company.

While that suit was pending the present action was begun. The bill averred that the defendants, composing the firm of Spencer Trask & Company, had undertaken to obtain stock of the Rio Grande and Western Railway Company, and to sell the same to the representatives of the Denver and Rio Grande Railway Company, which company was proceeding to acquire the railroad of the Rio Grande and Western Railway Company by acquiring the common and preferred stock of that company.

It is averred that Spencer Trask & Company, while negotiating the sale of said stock, learning of the foreclosure proceedings commenced by Raphael in the Utah court, made the following public advertisement:

"Since the commencement of the negotiations one Raphael has instituted in the United States Circuit Court of Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

The bill further avers:

"That the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah, and that there is no agreement existing between complainant and the other holders of the outstanding bonds similar to complainant's bonds, and Spencer Trask & Company, by which the said proposed 'fund' shall be applied toward the satisfaction of complainant's bond and the other outstanding bonds."

There are further allegations that the complainant—

"Is informed and believes that if said consolidation as set forth in the scheme contemplated by the advertisements re-

ferred to, is allowed to be carried out, without some stipulation between your orator and the members of the said firm of Spencer Trask & Company, as to the custody of the said fund, proposed to be created as aforesaid, the rights of remote purchasers of the mortgage premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing into the suit, as defendants, such remote purchasers, as the Denver and Rio Grande Western Railway Company and their proposed successors."

The prayer for relief is:

"That a preliminary injunction be issued restraining the said members of the firm of Spencer Trask & Company from selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver and Rio Grande Western Railway Company as set forth in the said advertisements of Spencer Trask & Company, and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Company shall agree to turn over to some trust company in the city of New York, at and before the completing of said sale of said shares, a sum of money which may be determined by this court, out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own, upon the final hearing of complainant's suit in Utah."

The bill also refers to the affidavit of one of the defendants, George Foster Peabody, filed in the Utah suit. This affidavit is annexed to the bill of complaint, and is in part as follows:

"One stipulation of the agreement for the sale of common stock of the Rio Grande Western Railway Company made by my banking firm of Spencer Trask & Company is that my said firm shall guarantee the purchaser against any claim of the complainant in this suit. The statement in that respect contained in the circular letter of my firm to the holders of the

common stock of that company, of which one of such cuttings is a copy, is as follows:

" 'Since the commencement of the negotiation one Raphael has instituted in the United States Circuit Court for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guaranty be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust.'

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, but also by a special amount to be held in trust. I am advised by the counsel of the Western Company that such provisions is a fact against, and not in favor of, the complainant's motion, as it gives a greater assurance that, if the complainant's claim shall be established, it will be paid.

"The statement of the said Raphael in his affidavit, that the retention of a fund to indemnify my said firm for their proposed guaranty against complainant's claim, is an attempt on the part of the Western Company to hinder and delay the complainant, is unqualifiedly false. The Western Company is in no way a party to the agreement or provision for such indemnity or such guaranty. The Western Company, if the purchase of its common stock shall be completed, will be itself indemnified against any claim of complainant."

To the bill of complaint the defendant filed a plea to the jurisdiction of the court, appearing for that purpose and no other, setting forth that the plaintiff at the time of the commencement of the suit was, and continues to be, a citizen of the State of New Jersey; that two of the defendants, Charles J.

Peabody and Edwin M. Bulkley, were, at the time of the filing of the bill and the beginning of the suit, citizens of the State of New Jersey, and were not and had not been for over eight years either citizens or residents of the State of New York.

The cause being brought on for hearing upon the plea, the bill of complaint was dismissed for want of jurisdiction.

Subsequently an application was made for leave to amend the bill and file a supplementary bill, which application was denied.

Upon dismissing the bill, for want of jurisdiction, the trial court certified the question of jurisdiction and the cause came here by direct appeal.

Mr. Charles Locke Easton for appellant.

Mr. William Mason Smith and *Mr. Edward M. Shepard* for appellees.

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

The Circuit Court sustained the plea of the defendants upon two grounds: 1, that the suit could not be maintained for want of the required diversity of citizenship; and, 2, that it could not be maintained as an ancillary or dependent proceeding for want of proper averments to bring the case within that branch of equity jurisdiction.

As the offer to amend and file a supplemental bill was not entertained in the court below, and as the exercise of this discretion is not reviewable here, except in special cases, we are only concerned with the correctness of the conclusion of the Circuit Court in dismissing the original bill.

As the case was brought on for consideration on bill of complaint and plea, the allegations of the plea are taken as admitted as upon demurrer thereto. *Farley* v. *Kittson*, 120 U. S. 303, 314.

Looked at as an original bill, it is elementary that all the

parties on one side of the controversy must be of diverse citizenship to those on the other. It is argued that the relief is sought not against the firm or its members personally, but to restrain the disposition of the fund pending the controversy or to require it to be paid into the hands of a holder for the benefit of the complainant as his rights may be established, and as some of the defendants are residents of New York, the bill can be maintained.

But we cannot concede the soundness of this claim. The action is against the firm, and every member of the firm is interested in the result. The proceeding is against them jointly. As between the complainant and the members of the firm who are residents of the State of New York there is no separable controversy. The partners are jointly and equally interested in the fund alleged to be held and in the disposition of the suit commenced by the complainant. This proposition is so plain as to scarcely require the citation of authorities. In *Stone* v. *South Carolina*, 117 U. S. 430, the State of South Carolina commenced an action to recover certain money from partners. Stone, one of the partners, sought to remove the case on the ground that he was a citizen of the State of New York. The application was denied, and upon this subject Mr. Chief Justice Waite, speaking for the court, said:

"The cause of action is joint, and only one of the defendants petitions for removal. . . . Neither is there any separable controversy in the case, such as might, if the necessary citizenship existed, allow Stone alone to remove the suit without joining Corbin with him in the petition for removal. The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all."

We have no doubt that the case cannot be sustained as an original suit dependent upon diverse citizenship.

Can the bill be sustained as an ancillary or supplementary bill?

We had occasion to consider the nature of ancillary bills in

the late case of *Julian* v. *Central Trust Co.*, decided at this term, 193 U. S. 93, and we are unable to find any precedent in the reported cases or text books which will maintain this bill in that aspect. Ancillary bills are ordinarily maintained in the same court as the original bill is filed, with a view to protecting the rights adjudicated by the court in reference to the subject matter of the litigation, and in aid of the jurisdiction of the court, with a purpose of carrying out its decree and rendering effectual rights to be secured or already adjudicated. Story Eq. Pleading (8th ed.), §326 *et seq.; Root* v. *Woolworth*, 150 U. S. 401, 411; Bates Federal Equity Procedure, vol. 1, § 97.

In the present case, the original action was begun to foreclose a mortgage upon property in Utah. It had nothing to do with the sale of the stock by the stockholders represented by Spencer Trask & Company. The stockholders were not parties to the Utah bill, nor could any relief be had against them in that suit. The purpose of Spencer Trask & Company in calling upon the vendors of the stock to deposit a certain amount, while having reference to the suit begun in Utah, did not evidence any agreement upon their part to indemnify the complainant because of any obligation or desire to protect him, but was a matter between that firm and the stockholders for whom it was acting. The purpose was to protect the selling firm, because of its guaranty to the purchasers of the stock, in case of any diminution in the value of the property in the event that the complainant prevailed in the suit in the Utah court. There was no privity of contract or trust relation between the complainant and defendants to this suit.

It is true that the affidavit of George Foster Peabody, upon which much reliance is had, gives some support to the claim that the advertisement embodied an agreement for the indemnification of the complainant. At most this is but the construction that Mr. Peabody placed upon the advertisement, and could not enlarge the rights of the complainant nor in any way change the true nature of the proceeding. Nor does it appear that this fund, had the complainant stood in such rela-

tion of privity of contract that he could claim the benefit of it, was necessary to the protection of the complainant's right in the property held by the railroad company, against which he was proceeding in Utah. There is nothing to show that the railroad company, with the large surplus which it was alleged to have accumulated, could not have responded to any decree which the complainant might have recovered in the foreclosure suit.

Nor can the bill be maintained as one to stay waste. There is no estate of complainants in the hands of Spencer Trask & Company which is likely to be wasted pending the suit. As the complainant shows no legal or equitable right to the fund furnished by the stockholders, neither the method of its management nor its protection from diminution can concern him.

We are of opinion that the Circuit Court was right, and that the bill cannot be maintained either as an original or ancillary proceeding.

Judgment affirmed.

UNITED STATES *ex rel.* JOHN TURNER *v.* WILLIAMS.

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

No. 561. Argued April 6, 7, 1904.—Decided May 16, 1904.

Congress has power to exclude aliens from, and to prescribe the conditions on which they may enter, the United States; to establish regulations for deporting aliens who have illegally entered, and to commit the enforcements of such conditions and regulations to executive officers. Deporting, pursuant to law, an alien who has illegally entered the United States, does not deprive him of his liberty without due process of law.

The Alien Immigration Act of March, 1903, 32 Stat. 1213, does not violate the Federal Constitution, nor are its provisions as to the exclusion of aliens who are anarchists, unconstitutional.

A board of inquiry and the Secretary of Commerce and Labor having found that an alien immigrant was an anarchist within the meaning of the Alien

Immigration Act of March 3, 1903, and there being evidence on which to base this conclusion, his exclusion, or his deportation after having unlawfully entered the country, within the period prescribed pursuant to the provisions of the act, will not be reviewed on the facts.

JOHN TURNER filed in the United States Circuit Court for the Southern District of New York, October 26, 1903, a petition alleging—

"First. That on October 23 in the city of New York your relator was arrested by divers persons claiming to be acting by authority of the Government of the United States and was by said persons conveyed to the United States immigration station at Ellis Island in the harbor of New York, and is now there imprisoned by the Commissioner of Immigration of the port of New York.

"Second. Your relator is so imprisoned by virtue of a warrant sworn out by the Secretary of the Department of Commerce and Labor, which warrant charges your relator with being an anarchist and being unlawfully within the United States in violation of section 2 and section 20 of the immigration laws of the United States, as amended by act of March 3, 1903.

"Third. Upon information and belief that a special board of inquiry consisting of Charles Semsey, Captain Weldon, supervising inspector, and L. C. Stewart, all of whom are executive officers of the United States, has inquired into your relator's case and decided that your relator is an anarchist, and is in the United States in violation of law within the meaning of the act of March 3, 1903.

"Fourth. Your relator denies that he is an anarchist within the meaning of the immigration laws of the United States, and states to the court that about six years ago he took out his first papers of application for citizenship in this country, and that he has at no times been engaged as a propagandist of doctrines inciting to or advising violent overthrow of government, but for about six years last past he has been the paid organizer of the retail clerks of Great Britain and his business

in this country is solely to promote the interests of organized labor, and that he has at all times conducted himself as a peaceful and law abiding citizen.

"By reason of all of which facts your relator says that his imprisonment is illegal, in that he is being deprived of his liberty without due process of law and is being denied equal protection of the laws, contrary to the Constitution and laws of the United States."

And praying for a writ of *habeas corpus* to the Commissioner of Immigration of the port of New York, and also for a writ of certiorari to bring up the record of the Board of Inquiry which adjudged him to be an anarchist and in the United States in violation of the immigration laws. The commissioner made return under oath and also certified the record of the Board of Inquiry.

The return stated—

"That the above named John Turner is an alien, a subject of the Kingdom of Great Britain and Ireland; that said alien came to the United States from England on or about ten days prior to October 24, 1903, as deponent is informed and believes.

"Said John Turner was arrested in the city of New York on or about October 23, 1903, under a warrant issued by the Secretary of the Department of Commerce and Labor of the United States, and was taken to the Ellis Island immigration station, where he was examined by a board of a special inquiry, duly constituted according to law, upon his right to remain in this country, and that said alien was by said board found to be an alien anarchist, and was by unanimous decision of said board ordered to be deported to the country from whence he came as a person within the United States in violation of law. That on October 26, 1903, said alien appealed from the said decision of the board of special inquiry to the Secretary of Commerce and Labor, who dismissed the appeal and directed that said alien be deported to the country from whence he came upon the ground that said alien is an anar-

chist and a person who disbelieves in and who is opposed to all organized government and was found to be in the United States in violation of law.

"That annexed hereto is a copy of the above-mentioned warrant for the arrest and deportation of said John Turner, and copies of the minutes of said hearing before the board of special inquiry, and a copy of the order or decision of the Secretary of Commerce and Labor dismissing said appeal and again directing deportation. That said John Turner is now held in deponent's custody at the Ellis Island immigrant station pending deportation to the country from whence he came in accordance with the above-mentioned decision or order of the Secretary of Commerce and Labor."

The warrant issued by the Secretary was addressed to certain United States immigrant inspectors, and recited that from the proofs submitted the Secretary was satisfied that Turner, an alien anarchist, came into this country contrary to the prohibition of the act of Congress of March 3, 1903, and commanded them to take him into custody and return him to the country from whence he came at the expense of the United States. On appeal to the Secretary the record of proceedings before the board of inquiry was transmitted, and the Secretary held: "The evidence shows that the appellant declined to give exact information as to the manner in which he secured admission to this country, although he swears that he arrived here about ten days ago. He admits that he is an anarchist and an advocate of anarchistic principles, which brings him within the class defined by section 38 of the act approved March 3, 1903. In view of these facts, the appeal is dismissed and you are directed to deport the said John Turner in conformity with warrant now in your hands for execution."

The hearing before the Board of Inquiry was had October 24, 1903, and it appeared from the minutes thereof that Turner testified that he was an Englishman; that he had been in the United States ten days, and that he did not come through New York, but declined to either affirm or deny that he arrived

via Canada; that he would not undertake to deny that he had in the lecture delivered in New York, October 23, declared himself to be an anarchist, which, he said, was a statement that he would make; and that the testimony of the inspectors was about correct. That evidence gave extracts from the address referred to including these: "Just imagine what a universal tie-up would mean. What would it mean in New York city alone if this idea of soliditary were spread through the city? If no work was being done, if it were Sunday for a week or a fortnight, life in New York would be impossible, and the workers, gaining audacity, would refuse to recognize the authority of their employers and eventually take to themselves the handling of the industries. . . . All over Europe they are preparing for a general strike, which will spread over the entire industrial world. Everywhere the employers are organizing, and to me, at any rate, as an anarchist, as one who believes that the people should emancipate themselves, I look forward to this struggle as an opportunity for the workers to assert the power that is really theirs."

Certain papers were found on Turner, one of them being a list of his proposed series of lectures, (which, when the warrant was in execution, he rolled up and threw away,) the subjects including: "The legal murder of 1887," and "The essentials of anarchism;" notices of meetings, one of a mass-meeting November 9, at which "Speeches will be delivered by John Turner in English, John Most in German, and several other speakers. Don't miss this opportunity to hear the truth expressed about the great Chicago tragedy on the eleventh of November, 1887;" and another, stating: "It may be interesting to all that Turner has recently refused to accept a candidacy to Parliament because of his anarchistic principles."

A demurrer was interposed to the return, and, after argument, the Circuit Court dismissed the writ and remanded the petitioner. 126 Fed. Rep. 253. From this order an appeal was prayed and allowed to this court, and, having been docketed, petitioner was admitted to bail.

Sections 2 and 38 of the act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States," 32 Stat. 1213, c. 1012, are as follows:

"SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all governments or of all forms of law, or the assassination of public officials; prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution; those who have been, within one year from the date of the application for admission to the United States, deported as being under offers, solicitations, promises or agreements to perform labor or service of some kind therein; and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes; but this section shall not be held to prevent persons living in the United States from sending for a relative or friend who is not of the foregoing excluded classes: *Provided*, That nothing in this act shall exclude persons convicted of an offence purely political, not involving moral turpitude: *And provided further*, That skilled labor may be imported, if labor of like kind unemployed cannot be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons

belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

"SEC. 38. That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of the Treasury under such rules and regulations as he shall prescribe.

"That any person who knowingly aids or assists any such person to enter the United States or any Territory or place subject to the jurisdiction thereof, or who connives or conspires with any person or persons to allow, procure, or permit any such person to enter therein, except pursuant to such rules and regulations made by the Secretary of the Treasury, shall be fined not more than five thousand dollars, or imprisoned for not less than one nor more than five years, or both."

By the act of February 14, 1903, 32 Stat. 825, c. 552, "To establish the Department of Commerce and Labor," the jurisdiction, supervision and control possessed and exercised by the Department of the Treasury over the immigration of aliens into the United States were transferred to the Department of Commerce and Labor established by the act, to take effect and be in force the first day of July, 1903.

Mr. Clarence S. Darrow and *Mr. Edgar L. Masters* for appellants:

The arrest and deportation are null and void. The act of February 14, 1903, which created the Department of Commerce and Labor which invested the Secretary thereof with

control of the general immigration service, was repealed by the act of March 3, 1903, which invested the Secretary of the Treasury with the administration of the immigration service, and which repealed by express terms all acts or parts of acts inconsistent therewith.

Section 38 of this act, under which section the appellant was deported, is unconstitutional because in contravention of the First Amendment to the Constitution of the United States, which declares that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. The inhibition of the First Amendment goes to the very competency of Congress itself to pass any such law, independent of whether such law relates to a citizen or an alien. *Pollock* v. *F. L. & T. Co.*, 157 U. S. 427; *Downes* v. *Bidwell*, 182 U. S. 244.

Although the law in question discriminates against disbelief this is the same thing as abridging freedom of speech. Spencer's Principles of Ethics, vol. 2, 136; Mill's Essay on Liberty; Freund on Police Power, 475.

The act is unconstitutional and void because in contravention of § 1, Art. III, which declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

The law provides for the trial of an alien by a Board of Special Inquiry, secret and apart from the public; without indictment; without confrontation of witnesses; without the privilege to the accused of obtaining witnesses; without the right of counsel. It transfers to the Federal inspectors engaged in executing the orders of the executive department of the government, that judicial power which belongs only to the judiciary under the Constitution of the United States.

The framers of the Constitution designed that the departments of the government should not encroach one upon the other. Brice's American Commonwealth, vol. 1, 282; Ban-

croft's History of the Constitution, vol. 1, 327; Madison's Debates, pp. 64, 73, 160; The Federalist, No. 46. For the advantage of thus dividing the government, see Montesquieu's Spirit of Laws, book 2, sec. 6; Locke on Civil Government, p. 14.

The whole judicial power under the Constitution is vested in one Supreme Court and such inferior courts as Congress shall from time to time ordain and establish. *Kilbourn* v. *Thompson*, 103 U. S. 168; *Marbury* v. *Madison*, 1 Cranch, 173; *Martin* v. *Hunter's Lessee*, 1 Wheat. 330; Kent's Com. vol. 1, 301; *Anderson* v. *Hovey*, 124 U. S. 694; *Ex parte Milligan*, 4 Wall. 2.

As to the general principle of liberty and as to its breach by the process warranted by this law, see Kentucky Resolutions; The Philosophy of Law, Immanuel Kant; Spencer's Principles of Ethics, vol. 2, p. 92 (D. Appleton & Co.).

The appellant was deprived of his liberty without due process of law. *Ex parte Sing* (C. C.), 82 Fed. Rep. 22; *Wong Wing* v. *United States*, 163 U. S. 227; *Yick Wo* v. *Hopkins*, 118 U. S. 356; Kent's Com. vol. 1, 599; *Caldwell* v. *Texas*, 137 U. S. 691; *Callan* v. *Wilson*, 127 U. S. 540; Madison's Virginia Resolutions; Elliott's Debates, vol. 4, 555 *et seq.*

No power whatever is delegated by the Constitution to the general government over alien friends with reference to their admission into the United States, or otherwise; or over the beliefs of citizens, denizens, sojourners or aliens, or over the freedom of speech, or of the press. See Elliott's Debates, vol. 1, p. 322, *et seq.*

The decisions which validate the exclusion laws of the general government predicate their reasoning upon the commerce clause of the Constitution or upon the sovereign character of the general government. *Edye* v. *Robertson*, 112 U. S. 580; *Fong Yue Ting* v. *United States*, 146 U. S. 698.

These cases referred to *Gibbons* v. *Ogden*, 9 Wheat. 1, for the definition of commerce. It is contended that *Gibbons* v. *Ogden* is binding in so far only as it holds commerce to include

navigation; that the definition of commerce given in that decision is not binding law, except in so far as it holds commerce to include navigation. The rule of *stare decisis* only arises in respect of decisions directly upon the points at issue. *Cohens* v. *Virginia*, 6 Wheat. 398; *Carroll* v. *Carroll*, 16 How. 275; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 427.

The regulation of commerce does not include the regulation of beliefs or the regulation of immigration. And though Congress has power to regulate commerce with foreign nations it cannot do so to the extent of overriding inhibitions upon its power which go to its very competency to pass the law. And though Congress may regulate commerce with foreign nations it cannot in and by such regulation abridge the freedom of speech or of the press.

So far as the sovereign character of the government is concerned, sovereignty under our system devolved upon the States after the Revolution. *Chisholm* v. *Georgia*, 2 Dallas, 470; *Sturgis* v. *Crowninshield*, 4 Wheat. 193; *Dartmouth College* v. *Woodward*, 4 Wheat. 161; *Rhode Island* v. *Massachusetts*, 12 Peters, 720; *Martin* v. *Waddell*, 16 Peters, 410; *Martin* v. *Hunter's Lessee*, 1 Wheat. 325; *Fontain* v. *Ravenel*, 17 How. 369.

The government of the United States is a government of limited power, and has only such powers as have been conferred upon it. Complete sovereignty never was transferred to the general government. *Marbury* v. *Madison*, 1 Cranch, 176; *McCulloch* v. *Maryland*, 4 Wheat. 405; *Wyman* v. *Southard*, 10 Wheat. 43; *Gilman* v. *Philadelphia*, 70 U. S. 713; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 342; *Buffington* v. *Day*, 11 Wall. 113; *United States* v. *Cruickshank*, 92 U. S. 542; *United States* v. *Harris*, 106 U. S. 629; *Yick Wo* v. *Hopkins*, 118 U. S. 356; Story on the Constitution; *Robertson* v. *Baldwin*, 165 U. S. 296, dissent of Mr. Justice Harlan; Cooley's Constitutional Limitations; Tucker's Blackstone App. A.; *Bank* v. *Earle*, 13 Pet. 58; Elliot's Debates, vol. 2, 131; Stephens's Constitutional View of the War, vol. 1, pp. 40, 41, 487, 488, 489.

If aliens can be excluded from the territory of the United

States because of their beliefs and that under the commerce clause of the Constitution, then citizens of one State can be prevented, because of their beliefs, from passing from that State to any of the other States, under the commerce clause of the Constitution; because that clause empowers Congress to regulate commerce not only with foreign nations but among the several States.

Mr. Assistant Attorney General McReynolds for appellee.

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

This appeal was taken directly to this court on the ground that the case involved the construction or application of the Constitution of the United States, and that the constitutionality of a law of the United States was drawn in question; and although it may be, as argued by the Government, that the principles which must control our decision have been practically settled, we think, the whole record considered, that we are not constrained to dismiss the appeal for that reason.

It is contended that the act of March 3, 1903, is unconstitutional because in contravention of the First, Fifth and Sixth Articles of Amendment of the Constitution, and of section 1 of Article III of that instrument; and because no power "is delegated by the Constitution to the General Government over alien friends with reference to their admission into the United States or otherwise, or over the beliefs of citizens, denizens, sojourners or aliens, or over the freedom of speech or of the press."

Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive

officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application. *Chae Chan Ping* v. *United States*, 130 U. S. 581; *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Wong Wing* v. *United States*, 163 U. S. 228; *Fok Yung Yo* v. *United States*, 185 U. S. 296; *Japanese Immigrant Case*, 189 U. S. 86; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *United States* v. *Sing Tuck*, 194 U. S. 161.

In the case last cited the distinction on which *Gonzales* v. *Williams*, 192 U. S. 1, turned was pointed out. The question whether a citizen of Porto Rico, under the treaty of cession and the act of April 12, 1900, came within the immigration law of March 3, 1891, was purely a question of law, which being decided in the negative all questions of fact became immaterial.

In the present case alienage was conceded and was not in dispute, and it was the question of fact thereupon arising that was passed on by the Board, and by the Secretary on appeal.

Whether rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us is not open to constitutional objection. And while we held in *Wong Wing* v. *United States*, *supra*, a certain provision of an immigration law invalid on that ground, this act does not come within the ruling.

In that case Mr. Justice Shiras, speaking for the court, said: "We regard it as settled by our previous decisions that the

United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

"But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.''

Detention or temporary confinement as part of the means necessary to give effect to the exclusion or expulsion was held valid, but so much of the act of 1892 as provided for imprisonment at hard labor without a judicial trial was held to be unconstitutional. The cases of *Chae Chan Ping, Fong Yue Ting* and *Lem Moon Sing* were carefully considered and applied.

We do not feel called upon to reconsider these decisions, and they dispose of the specific contentions as to the application of the Fifth and Sixth Amendments, and section 1 of Article III, and the denial of the delegation to the General Government of

the power to enact this law. But it is said that the act violates the First Amendment, which prohibits the passage of any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

We are at a loss to understand in what way the act is obnoxious to this objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

Appellant's contention really comes to this, that the act is unconstitutional so far as it provides for the exclusion of an alien because he is an anarchist.

The argument seems to be that, conceding that Congress has the power to shut out any alien, the power nevertheless does not extend to some aliens, and that if the act includes all alien anarchists, it is unconstitutional, because some anarchists are merely political philosophers, whose teachings are beneficial rather than otherwise.

Counsel give these definitions from the Century Dictionary:

"ANARCHY. Absence or insufficiency of government; a state of society in which there is no capable supreme power, and in which the several functions of the state are performed badly or

not at all; social and political confusion. Specifically—2. A social theory which regards the union of order with the absence of all direct government of man by man as the political ideal; absolute individual liberty. 3. Confusion in general.

"ANARCHIST. 1. Properly, one who advocates anarchy or the absence of government as a political ideal; a believer in an anarchic theory of society; especially, an adherent of the social theory of Proudhon. (See Anarchy, 2.) 2. In popular use, one who seeks to overturn by violence all constituted forms and institutions of society and government, all law and order, and all rights of property, with no purpose of establishing any other system of order in the place of that destroyed; especially, such a person when actuated by mere lust of plunder. 3. Any person who promotes disorder or excites revolt against an established rule, law, or custom."

And Huxley is quoted as saying: "Anarchy, as a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crime, but denotes a state of society in which the rule of each individual by himself is the only government the legitimacy of which is recognized."

The language of the act is "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials." If this should be construed as defining the word "anarchists" by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. And we suppose counsel does not deny that this Government has the power to exclude an alien who believes in or advocates the overthrow of the Government or of all governments by force or the assassination of officials. To put that question is to answer it.

And if the judgment of the board and the Secretary was that Turner came within the act as thus construed, we can-

not hold as matter of law that there was no evidence on which that conclusion could be rested. Even if Turner, though he did not so state to the board, only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating, not simply for the benefit of workingmen, who are justly entitled to repel the charge of desiring the destruction of law and order, but "at any rate, as an anarchist," the universal strike to which he referred, and by discourses on what he called "The legal murder of 1887," *Spies* v. *People*, 122 Illinois, 1, and by addressing mass meetings on that subject in association with Most, *Reg.* v. *Most*, 7 Q. B. Div. 244; *People* v. *Most*, 171 N. Y. 423, we cannot say that the inference was unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end.

If the word "anarchists" should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, or as applicable to any alien who is opposed to all organized government.

We are not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not involve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human governments endure they cannot be denied the power of self-preservation, as that question is presented here.

Reference was made by counsel to the alien law of June 25, 1798, 1 Stat. 570, c. 58, but we do not think that the con-

troversy over that law (and the sedition law) and the opinions expressed at the time against its constitutionality have any bearing upon this case, which involves an act couched in entirely different terms and embracing an entirely different purpose. As Mr. Justice Field remarked in the *Chinese Exclusion Case*, 130 U. S. 581, 610: "The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability. It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States."

Order affirmed.

MR. JUSTICE BREWER, concurring.

In view of the range of discussion in the argument of this case at the bar I feel justified in adding a few words to what has been said by the Chief Justice.

First. I fully endorse and accentuate the conclusions of the court, as disclosed by the opinion, that, notwithstanding the legislation of Congress, the courts may and must, when properly called upon by petition in *habeas corpus*, examine and determine the right of any individual restrained of his personal liberty to be discharged from such restraint. I do not believe it within the power of Congress to give to ministerial officers a final adjudication of the right to liberty or to oust the courts from the duty of inquiry respecting both law and facts. "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Const. Art. 1, sec. 9, clause 2.

Second. While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the amendments to the Constitution, 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." The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them.

Third. No testimony was offered on the hearing before the Circuit Court other than that taken before the immigration board of inquiry, and none before such board save that preserved in its report. Hence the facts must be determined by that evidence. It is not an unreasonable deduction therefrom that petitioner is an anarchist in the commonly accepted sense of the term, one who urges and seeks the overthrow by force of all government. If that be not the fact, he should have introduced testimony to establish the contrary. It is unnecessary, therefore, to consider what rights he would have if he were only what is called by way of differentiation a philosophical anarchist, one who simply entertains and expresses the opinion that all government is a mistake, and that society would be better off without any.

HEWIT *v.* BERLIN MACHINE WORKS.

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

No. 228. Argued April 18, 1904.—Decided May 16, 1904.

A trustee in bankruptcy gets no better title than that which the bankrupt had and is not a subsequent purchaser, in good faith, within the meaning of § 112 of chapter 418, of the laws of 1897 of New York. And as the vendor's title under a conditional sale is good against the bankrupt it is good also against the trustee.

LOREN M. HEWIT, as trustee in bankruptcy of Clara E.

Kellogg, applied to the United States District Court for the Eastern District of New York for an order of sale of certain real estate, buildings and machinery. Notice to creditors was given, and thereafter the Berlin Machine Works, a corporation, filed its petition, praying, on grounds set forth, to be declared the owner of certain machines included in the property and be awarded possession thereof, and that they be exempted from sale, or that it be determined that the corporation is entitled to be first paid out of the proceeds of the sale of the machines and to share in dividends on any unpaid balance. The matter was heard before the referee, who held that the corporation had lost the legal title to the machines, and must come in as an unsecured creditor. The corporation petitioned the District Court for a review of the referee's decision, the referee made his certificate and return, and the matter was submitted to the court, which thereafter reversed the decision of the referee and adjudged that the Berlin Machine Works had a good and valid title to the machines, and that the same be delivered to it, or, in the event that they had been disposed of, that the trustee pay over to the Berlin Machine Works the sum of twelve hundred dollars, the value of the machines. 112 Fed. Rep. 52.

The trustee then filed a petition in the District Court making application for revision and review in matter of law, and appealed to the Circuit Court of Appeals for the Second Circuit from the judgment of the District Court, and the District Court ordered "that a superintendency and revision and review in matter of law and an appeal be and the same hereby is allowed in the above-entitled proceedings to the Circuit Court of Appeals, Second Circuit of the United States." The Circuit Court of Appeals affirmed the judgment of the District Court, 118 Fed. Rep 1017, and thereupon an appeal was allowed to this court.

Mr. Frank H. Robinson for appellant:

There is no such provision as § 70, *a*-5, of the act of 1898,

in either the act of 1841, or act of 1867. *Youkon Woolen Co.*, 96 Fed. Rep. 326; *In re Tatem, Mann & Co.*, 110 Fed. Rep. 519; *In re Booth*, 98 Fed. Rep. 975; *In re Garcewich*, 115 Fed. Rep. 87; *In re Frazier*, 117 Fed. Rep. 746. As to *N. Y. Economical Printing Co.*, 110 Fed. Rep. 514, see *Shoe Co.* v. *Seldner*, 10 Am. B. R. 470.

The policy of the Bankrupt Act is to clothe the trustee with title as against secret titles, liens and equities and compel everybody to comply with the state statutes or lose their title, lien or equity and to give the trustee the protection which a purchaser in good faith or a creditor enjoys, and to prevent an action being brought against the trustee for conversion years after he had sold the property and distributed the proceeds as an officer of this court.

The reservation of title was void as against the bankrupt, void as against her grantee and void as against the trustee in bankruptcy.

The withholding from the files the conditional sale or failure to otherwise comply with the statute was an actual fraud upon creditors. The purpose of the statute was to prevent conditional sales from remaining unpublished. *In re Garcewich*, 115 Fed. Rep. 87; *Frank* v. *Batten*, 49 Hun, 91; *Moyer* v. *McIntyre*, 43 Hun, 58.

Mr. Charles M. Harrington for appellee:

At common law a vendor of chattels may lawfully make it a condition of his sale that title to the property shall remain in him until the purchase price is fully paid, and under such a conditional sale, title will not pass to the vendee until the condition be fulfilled. 2 Kent, 12th ed. 498; Benjamin on Sales, § 320; *Ballard* v. *Burgett*, 40 N. Y. 314; *Cole* v. *Mann*, 62 N. Y. 1; *Boon* v. *Moss*, 70 N. Y. 465, 473; *Graves Elevator Co.* v. *Callanan*, 11 App. Div. 301; *Davison* v. *Davis*, 125 U. S. 90.

The common law in respect to conditional sales has been somewhat modified by statute in many of the States, without,

however, any uniformity of legislation on the subject. *Matter of Kinat*, 2 Nat. Bkcy. N. & R. 369, and *Youkon Woolen Co.*, 96 Fed. Rep. 326, distinguished, as involving different state statutes.

Statutes changing the common law must be strictly construed, and the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires. *Fitzgerald* v. *Quann*, 109 N. Y. 441.

The contract that title to the moulders ordered by and delivered to the bankrupt shall remain in the manufacturers until fully paid for, is valid.

It is only purchasers in good faith who can claim the benefit of the statute. *P. & T. S. Co.* v. *Schirmer*, 136 N. Y. 305.

The trustee in bankruptcy (the appellant here) is not a purchaser in good faith, and has no greater right to the machines in question than had the bankrupt. 2 Story's Eq. Jur. § 1228; *Winsor* v. *McClellan*, 2 Story, 630; *Greatman* v. *Savings Institution*, 95 U. S. 764; *Stewart* v. *Platt*, 101 U. S. 731; *Hanselt* v. *Harrison*, 105 U. S. 401, 406; *Chattanooga Nat. Bank* v. *Rome Iron Co.*, 102 Fed. Rep. 755; *Re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514.

The Bankrupt Act of 1898 does not confer on a trustee in bankruptcy any greater rights than the bankrupt possessed, in respect to property obtained by the bankrupt under a conditional bill of sale. *Casey* v. *Cavaroo*, 96 U. S. 467 (law of 1867); *Chattanooga Nat. Bank* v. *Rome Iron Co.*, 102 Fed. Rep. 755; *Re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514; *Re Bozeman*, 2 Am. B. R. 809; *Re Garcewich*, 8 Am. B. R. 149; *Re McCay*, 1 Am. B. R. 292; section 70 (*a*) Bankruptcy Law of 1898.

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

If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under sec-

tion 24*b* of the bankruptcy law, the case would have fallen within *Holden* v. *Stratton,* 191 U. S. 115, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those "controversies arising in bankruptcy proceedings" over which the Circuit Court of Appeals could, under section 24*a,* exercise appellate jurisdiction as in other cases. Section 25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, *Holden* v. *Stratton, supra,* while section 24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto. *Hutchinson* v. *Otis,* 190 U. S. 552; *Burleigh* v. *Foreman,* 125 Fed. Rep. 217.

The appeal to this court then followed under section 6 of the act of March 3, 1891.

This brings us to the consideration of the case on the merits. The material facts are these: October 10, 1900, Clara E. Kellogg contracted with the Berlin Machine Works for the purchase of two wood working machines at the price of $1,850, payment to be made within four months from date of shipment, and title to the property to remain in the machine company until fully paid for. The machines were shipped to Kellogg, October 29 and November 16, respectively, and were received by her, set up in her planing mill, and put in operation. October 29 and November 16 she signed and delivered to the machine company in payment for the machines two promissory notes for $925 each, payable in two and four months from their respective dates, to the order of the machine company, and each containing the following clause:

"Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid for." Kellogg, on her voluntary petition, was adjudicated a bankrupt, March 1, 1901, and a trustee was selected March 22, and thereafter duly qualified. The notes have not been paid and were mentioned in the schedules as secured claims, the security being the machines in question. It also appeared that January 21, 1901, Clara E. Kellogg, being insolvent, executed a conveyance of the planing mill to a corporation called the C. E. Kellogg Company, which being attacked as fraudulent, the property was voluntarily released to the trustee, all the capital stock of the company, the entire consideration of the alleged transfer, being surrendered to the company.

This sale was a conditional sale and the title did not pass to the vendee because the condition was not fulfilled, *Ballard* v. *Burgett*, 40 N. Y. 314; *Cole* v. *Mann*, 62 N. Y. 1, unless the statutes of New York otherwise provided. The applicable statute is section 112 of chapter 418 of the Laws of 1897, which reads as follows:

"Conditions and reservations in contracts for sale of goods and chattels: Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale containing such conditions and reservations, or a true copy thereof, be filed as directed in this article."

It is admitted that the machine company did not comply with the statute until after the appointment and qualification

of the trustee, but if the trustee was not a subsequent purchaser, pledgee or mortgagee in good faith, the omission to file the contract of sale was immaterial. *Prentiss Tool & Supply Company* v. *Schirmer,* 136 N. Y. 305.

Did the trustee occupy the position of a subsequent purchaser, pledgee or mortgagee in good faith? We dismiss the pretended conveyance by Kellogg to the Kellogg Company from discussion as the District Court did, as it was attacked as fraudulent and without consideration, and was voluntarily released to the trustee, who derived no title thereby, and had none other than by operation of law.

Section 70*a* of the bankruptcy law provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The District Court, Hazel, J., held that the reasonable construction of this provision was that the trustee was vested with the title which the bankrupt had to property situated as described, and not otherwise, and quoted from the opinion of the Circuit Court of Appeals for the Second Circuit in the case of *In re New York Economical Printing Company,* 110 Fed. Rep. 514, upholding that view, as follows: "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee." And the Circuit Court of Appeals, adhering to that decision,

held in this case that, inasmuch as by the New York statute a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the District Court was right, and affirmed the judgment. 118 Fed. Rep. 1017.

We concur in this view which is sustained by decisions under previous bankruptcy laws, *Winsor* v. *McLellan*, 2 Story, 492; *Donaldson* v. *Farwell*, 93 U. S. 631; *Yeatman* v. *Savings Institution*, 95 U. S. 764; and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors.

In our opinion, these machines were not, prior to the filing of the petition, property which, under the law of New York, might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of section 70*a*. See *Low* v. *Welch*, 139 Massachusetts, 33. The company's title was good as against the trustee, who could not claim as a subsequent purchaser in good faith.

Judgment affirmed.

HANKS DENTAL ASSOCIATION *v.* INTERNATIONAL TOOTH CROWN COMPANY.

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

No. 253. Argued April 26, 1904.—Decided May 16, 1904.

The act of March 9, 1892, 27 Stat. 7, in regard to taking testimony, does not repeal or modify § 861, Rev. Stat., or create any additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions, and is not supplementary to § 914, Rev. Stat.

A Circuit Court of the United States in the State of New York is not authorized to make an order for the examination of a party before trial before a master or commissioner appointed pursuant to §§ 870 *et seq.*, of the Code of Civil Procedure of New York.

THE certificate in this case is as follows:

"This cause comes here upon a writ of error for the review of the judgment of the Circuit Court for the Southern District of New York, entered upon the verdict of a jury in favor of the defendant in error, The International Tooth Crown Company, sustaining the validity of a patent and awarding damages for infringement. Upon examination of the record it appears that the sole evidence of infringement was found in the deposition of the president of the Hanks Dental Association, the plaintiff in error, taken pursuant to an order of the Circuit Court under section 870 *et seq.* of the Code of Civil Procedure of the State of New York, the defendant in error contending the examination of a party before trial, if permitted by the law of the State, is authorized by act of Congress of March 9, 1892. 27 Stat. L. page 7.

"The taking of the deposition was objected to at every stage and when offered in evidence at the trial it was again duly objected to and to its reception the plaintiff in error duly excepted.

"Whether this practice is warranted or not is the question upon which we desire the instructions of the Supreme Court.

"*Question Certified.*

"Upon the facts above set out the question of law concerning which the court desires the instruction of the Supreme Court is:

"Was the order of the Circuit Court directing the president of the Hanks Dental Association, the defendant in that court, to appear before a master or commissioner appointed pursuant to the provisions of section 870 *et seq.* of the Code of Civil Procedure of the State of New York valid and authorized under the act of March 9, 1892?"

Mr. Charles K. Offield and *Mr. Philip B. Adams*, with whom *Mr. Charles C. Linthicum* was on the brief, for plaintiff in error.

Submitted by *Mr. Walter D. Edmonds* for defendant in error.

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

Section 870 of the Code of Civil Procedure of New York provides that "the deposition of a party to an action pending in a court of record or of a person who expects to be a party to an action about to be brought . . . may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial as prescribed in this article." And succeeding sections set forth how such examinations may be ordered.

In *Ex parte Fisk*, 113 U. S. 713, decided at October term, 1884, it was held that this statute was in conflict with section 861 of the Revised Statutes of the United States, and not within any of the exceptions to the rule therein prescribed. The sections bearing on the subject were thus summarized by Mr. Justice Miller, who delivered the opinion of the court:

"'Sec. 861. The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.'

"'Sec. 863. The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court, by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or infirm.' The remainder of this section, and §§ 864 and 865, are directory as to the officer before whom the deposition may be taken, the notice to the opposite party, and the manner of taking, testifying and returning the deposition to the court.

"'SEC. 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States.'

"Section 867 authorizes the courts of the United States, in their discretion, and according to the practice in the state courts, to admit evidence so taken; and §§ 868, 869 and 870 prescribe the manner of taking such depositions, and of the use of the *subpœna duces tecum*, and how it may be obtained."

Mr. Justice Miller then continued: "No one can examine these provisions for procuring testimony to be used in the courts of the United States and have any reasonable doubt that, so far as they apply, they were intended to provide a system to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far-reaching, and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted."

And he further said: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and to subject him to all the skill of opposing counsel, to extract something which he may then use or not as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this."

Sections 721 and 914 were held inapplicable because the law of the State was inconsistent with the law of Congress. And see *Beardsley* v. *Littell*, 14 Blatchf. 102, Blatchford, J.; *United States* v. *Pings*, 4 Fed. Rep. 714, Choate, J.; *Fogg* v. *Fisk*, 19 Fed. Rep. 235, Wallace, J.; *Luxton* v. *North River Bridge Company*, 147 U. S. 337, 338.

In *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250, decided at October term, 1890, the question was whether a court of the United States could order a plaintiff, in an action for an injury to the person, to submit to a surgical examination in advance of the trial, and it was held that it could not.

Mr. Justice Gray, among other things, said: "Congress has enacted that 'the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided,' and has then made special provisions for taking depositions. Rev. Stat. §§ 861, 863 *et seq.* The only power of discovery or inspection, conferred by Congress, is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. Stat. § 724. And the provision of § 914, by which the practice, pleadings and forms and modes of proceeding in the courts of each State are to be followed in actions at law in the courts of the United States held within the same State neither restricts nor enlarges the power of these courts to order the examination of parties out of court."

Ex parte Fisk was quoted from and applied, and the opinion concluded: "The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The Circuit Court, to adopt the words of Mr. Justice Miller,

'has no power to subject a party to such an examination as this.' "

March 9, 1892, the following act was approved (27 Stat. 7): "Chap. 14. An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States. Be it enacted, etc., That in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held."

Mode usually means the manner in which a thing is done, and this act relates to the manner of taking "depositions and testimony," which the title treats as equivalent terms, and which may be so regarded so far as the question before us is concerned. But it is contended that the word "mode" as used in the act has a broader significance and embraces the production of evidence, thereby qualifying section 861, which prescribes the mode of proof.

We cannot concur in this view. The act is clear upon its face and does not call for construction, or, at all events, is susceptible of but one construction. It does not purport to repeal in any part, or to modify, section 861, or to create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions, and as it is applicable alone to the taking of depositions or testimony in writing, we cannot attribute to it any such effect, nor hold, this being so, that it is supplementary to section 914.

That section refers to "the practice, pleadings, and forms and modes of proceeding in civil causes," and Mr. Justice Blatchford, then District Judge, in *Beardsley* v. *Littell*, thought the expression "forms and modes of proceeding" did not necessarily include the subject of evidence. But be that as it may, we do not think the words "mode of taking" were used in this act with the intention of expanding the scope of

the section so as to cover the production of testimony through the examination of a party before trial.

In short, the courts of the United States are not given discretion to make depositions not authorized by Federal law, but, in respect of depositions thereby authorized to be taken, they may follow the Federal practice in the manner of taking, or that provided by the state law. *United States* v. *Fifty Boxes*, 92 Fed. Rep. 601.

In *National Cash Register Co.* v. *Leland*, 77 Fed. Rep. 242, it was ruled by the Circuit Court for the District of Massachusetts that the act of 1892 did not "enlarge the instances in which depositions may be taken or in which answers may be obtained upon interrogatories for use as proofs in the Federal courts;" and "was only intended to simplify the practice of taking depositions by providing that the mode of taking in instances authorized by the Federal laws might conform to the mode prescribed by the laws of the State in which Federal courts were held;" and this was approved by the Circuit Court of Appeals for the First Circuit. 94 Fed. Rep. 502. The conclusions announced by the Circuit Court of Appeals for the Fifth Circuit in *Texas & Pacific Railway Co.* v. *Wilder*, 92 Fed. Rep. 953, and by the Circuit Court for the District of Kansas in *Shellabarger* v. *Oliver*, 64 Fed. Rep. 306; for the District Court of Indiana in *Tabor* v. *Indianapolis Journal*, 66 Fed. Rep. 423; for the Western District of Missouri in *Seeley* v. *Kansas City Star*, 71 Fed. Rep. 554; for the Eastern District of Pennsylvania in *Despeaux* v. *Pennsylvania Railroad Company*, 81 Fed. Rep. 897; for the Eastern District of Missouri in *Zych* v. *American Car & Foundry Company*, 127 Fed. Rep. 723, are to the same effect. The decision of the Circuit Court in this case is to the contrary, 101 Fed. Rep. 306, and was concurred in by the Circuit Court for the Northern District of Washington in *Smith* v. *Northern Pacific Railway Company*, 110 Fed. Rep. 341.

In *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172, October term, 1899, the question of the power of

the Circuit Court for the District of New Jersey under a statute of New Jersey providing therefor, was under consideration, and the power sustained. The validity of the statute had been affirmed by the Supreme Court of New Jersey, and in the course of the opinion of this court it was said: "The validity of a statute of this nature has also been upheld in *Lyon* v. *Manhattan Railway Company*, 142 N. Y. 298, although the particular form of that statute would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence might not be enforced in courts of the United States sitting within the State of New York."

Section 873 of the New York Code of Procedure provided that "in every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination;" and in *Lyon* v. *Manhattan Railway Company*, the Court of Appeals held that the physical examination could only "be procured in the same way and as part of the examination of the party before trial;" that it could not be had apart from and independent of the examination before trial. The reference to the New York statute in *Camden & Suburban Railway Company* v. *Stetson*, so far as it goes, indicates the opinion of the court that the ruling in *Ex parte Fisk* remained unaffected by the act of March 9, 1892, in any substantial particular. We think that that ruling applies, and that the question must be answered in the negative.

So ordered.

PLYMOUTH CORDAGE COMPANY *v.* SMITH.

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

No. 565. Submitted April 5, 1904.—Decided May 16, 1904.

The Circuit Court of Appeals for the Eighth Circuit has jurisdiction to superintend and revise, in matter of law, proceedings of the District Courts of the Territory of Oklahoma in bankruptcy.

THIS was a petition to the Circuit Court of Appeals for the Eighth Circuit to superintend and revise in matter of law certain proceedings in bankruptcy had in the District Court of Kingfisher County, Oklahoma, on which a question or proposition of law arose concerning which that court desired the instruction of this court, and accordingly granted a certificate setting forth: (1) Section 24 *a*, *b*, of the bankruptcy law; (2) The order of this court of May 11, 1891, assigning the Territory of Oklahoma to the Eighth Judicial Circuit, pursuant to section 15 of the judiciary act of March 3, 1891; (3) The filing of the petition to superintend and revise in matter of law the proceedings of the District Court of Kingfisher County, Oklahoma, in the following particulars:

"(*a.*) On March 23, 1903, a petition was pending in said court to adjudge J. A. Smith an involuntary bankrupt. The District Court on that date permitted three creditors to withdraw from said petition.

"(*b.*) On April 6, 1903, the District Court of Kingfisher County, Oklahoma, sustained a motion to dismiss a petition in involuntary bankruptcy theretofore filed against J. A. Smith.

"(*c.*) On April 6, 1903, the District Court of Kingfisher County, Oklahoma, denied the prayer of certain creditors of J. A. Smith asking leave to join in the petition in involuntary bankruptcy against J. A. Smith.

"(*d.*) On April 14, 1903, the District Court of Kingfisher County, Oklahoma, refused to permit certain creditors of J. A. Smith to file a motion asking the court to set aside the order of April 6, 1903, dismissing the petition in involuntary bankruptcy against J. A. Smith."

(4) That petitioners prayed the court "to set aside each and all of the foregoing orders so entered by the District Court of Kingfisher County, Oklahoma."

And propounding the following question or proposition of law:

"Does the United States Circuit Court of Appeals for the Eighth Circuit have the jurisdiction to superintend and revise in matter of law the proceedings of the District Court of Kingfisher County, Oklahoma, in bankruptcy?"

Mr. E. C. Brandenburg and *Mr. Edwin A. Krauthoff* for appellant.

No brief filed for appellee.

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

By the bankruptcy law, the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories and the United States courts in the Indian Territory and the District of Alaska are made courts of bankruptcy.

By subdivision 3 of section 1 the words "appellate courts" are defined to "include the Circuit Courts of Appeals of the United States, the Supreme Courts of the Territories, and the Supreme Court of the United States."

"Appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," is vested by section 24*a* in the Supreme Court of the United States, the

Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories. And by section 24*b* it is provided that the several Circuit Courts of Appeals shall have jurisdiction in equity "to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

By section 25*a* appeals "as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories" from judgments adjudging or refusing to adjudge the defendant a bankrupt; granting or denying a discharge; and allowing or rejecting a claim of five hundred dollars or over.[1]

---

[1] SEC. 24. Jurisdiction of Appellate Courts. *a*. The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

b. The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

SEC. 25. Appeals and Writs of Error. *a*. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b. From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

The act clearly distinguishes between "controversies arising in bankruptcy proceedings" and "bankruptcy proceedings" proper, and between supervisory jurisdiction in a summary way in matter of law, and jurisdiction by appeal or writ of error. Appellate jurisdiction over controversies, as in other cases, is vested by section 24*a*, and over certain designated bankruptcy proceedings by section 25*a*, by appeal, as in equity cases, bringing up both law and fact.

The question before us arises on a petition to revise certain proceedings in a court of bankruptcy of the Territory of Oklahoma. That Territory by order of this court, as required by law, was assigned in 1891 to the Eighth Judicial Circuit, (139 U. S. 707,) and the courts of the Territory were thereby brought within the appellate jurisdiction of the Circuit Court of Appeals for that circuit.

By the judiciary act of March 3, 1891, that jurisdiction embraced the review of the judgments, orders and decrees of the Supreme Courts of the Territories in cases in which the judgments of the Circuit Courts of Appeals were made final by that act, but in other cases the jurisdiction remained in this court. *Shute* v. *Keyser*, 149 U. S. 649.

Then came the bankruptcy law making the District Courts of the Territories courts of bankruptcy, and providing that their proceedings as such might be revised by the Circuit

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c. Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Courts of Appeals within whose jurisdiction they happened to be.

We think the law should be taken as it is written, and perceive no adequate reason for concluding that the real intention of Congress is not expressed in the language used. Congress may well have believed it wisest that the Circuit Courts of Appeals should deal in this summary way with questions of law arising in the progress of bankruptcy proceedings in the territorial courts, although jurisdiction by appeal or writ of error, and by appeal, as provided, was vested in the Supreme Courts of the Territories.

The Circuit Court of Appeals for the Fifth Circuit has announced the same conclusion, *In re Seebold*, 105 Fed. Rep. 910, 914, as has the Supreme Court of Oklahoma, *Ex parte Stumpff*, 9 Oklahoma, 639. A different view appears to have been entertained by the Circuit Court of Appeals for the Eighth Circuit in *In re Blair*, 106 Fed. Rep. 662, though apparently the case did not necessarily require the precise question to be passed on.

Question answered in the affirmative.

J. RIBAS Y HIJO *v.* UNITED STATES.

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

No. 151. Submitted April 28, 1904.—Decided May 16, 1904.

Under § 35 of the act of April 12, 1900, this court can review on writ of error a final judgment of the District Court of the United States for Porto Rico, where the amount in dispute exceeds $5,000, and a final judgment in a like case in the Supreme Court of one of the Territories of the United States could be reviewed by this court.

An action which could be brought under the Tucker Act against the United States in either a District or a Circuit Court of the United States is within the cognizance of the District Court of the United States of Porto Rico.

Quære, and not decided, whether a foreign corporation can maintain any

action under the Tucker Act in any court in view of the provisions of the act that the petition must be filed in the District where the plaintiff resides.

The seizure and detention by the military and naval forces of the United States during the war with Spain, of a vessel owned by Spanish subjects, was a seizure of enemy's property and an act of war within the limits of military operations, although the owners were not directly connected with military operations, and a claim for damages for such seizure and detention is not founded on the Constitution of the United States, or on any act of Congress, or regulation of an Executive Department, or on any contract express or implied, and an action based thereon is not sanctioned by the Tucker Act and cannot be maintained thereunder.

The fact that the vessel was retained pending negotiations for a treaty of peace and during a cessation of hostilities does not connect the original seizure with an implied contract to compensate the owners for the detention of the vessel.

If the owners had any claim against the United States it was relinquished by the stipulation in the treaty of peace relinquishing claims, such stipulation covering all claims arising prior to the exchange of ratifications of the treaty.

In case of a conflict between a statute and treaty the one last in date prevails.

THIS action was brought against the United States by J. Ribas y Hijo, a Spanish corporation, to recover the sum of ten thousand dollars as the value of the use of a certain merchant vessel taken by the United States in the Port of Ponce, Porto Rico, when that city was captured by the United States Army and Navy on July 28, 1898.

The vessel was kept and used by the Quartermaster's Department of the Army until some time in April, 1899, when the War Department ordered its return to the owner, if all claim for use or damage for detention should be waived. Such conditional return was refused by the captain who claimed to be a part owner and with his crew he left the vessel.

Subsequently the consignees of the vessel were notified that it was at their disposal; that the Government was about to discharge those having it in care; and they were requested to put some one in control of it. This they declined to do, and the vessel was abandoned and in August, 1899, was wrecked in a hurricane.

The vessel was never in naval custody nor condemned as

prize. When seized it was a Spanish vessel, carried the Spanish flag, and its owner, captain and crew were all Spanish subjects. It did not come within any of the declared exemptions from seizure set forth in the Proclamation of the President of April 26, 1898. 30 Stat. 1770. A claim filed in the War Department in February, 1900, for its use was rejected.

Such being the facts found, the court below, upon final hearing, dismissed the action upon the general ground that the vessel was properly seized as enemy's property, and its use was by the war power for war purposes.

A rehearing was asked and was denied, the court saying: "A rehearing is asked upon the ground that the court has found as a matter of fact that the use continued until in April, 1899, and, as the protocol, followed by the President's proclamation, was dated August 12, 1898, the complainants should recover on a *quantum meruit* the value of the use of the vessel between those dates. This was a seizure in time of war, and not in time of peace. It was, as has been said, a special case arising from the necessary operation of war, and the war power of the Government concluded it was necessary to take and use the property. Even conceding that the seizure did not terminate all right of the Spanish owner in the property, or to any use of it, yet the protocol and proclamation did not end the war. The protocol worked a mere truce. The President had not the power to terminate the war by treaty without the advice or consent of the Senate of the United States. If a treaty be silent as to when it is to become effective, the weight of authority is that it does not become so until ratified, and this was not done until in April, 1899, and the war did not end by treaty until then, and all the use made by the Government of the vessel was justified by the rules of law and international law without compensation."

Mr. Charles M. Boerman for appellant:

It is an undisputed rule of modern international law, European and American alike, that the private property

of the citizens of an invaded territory of the enemy cannot be taken without compensation. Halleck's Int. Law, vol. II, ch. XXI, § 12; Bluntschli's Codified Int. Law, introduction, and § 655; Theo. D. Woolsey's Introduction to Int. Law, § 130; Freeman Snow, Int. Law, § 51; *Mrs. Alexander's Cotton*, 2 Wall. 404; General Order, No. 100, § 38; Lawrence's Int. Law, § 66; Dana's Wheaton, § 16; Glenn's Int. Law, appendix; General Order, 101, July 13, 1898.

In view of definite instructions to the United States armies not to seize private property without compensation there can be no doubt that in the seizure and use of appellant's vessel there was implied a contract in fact that the United States would pay a just compensation for the use of the vessel. See also Lawrence's Wheaton, Part 4, ch. II, § 7; Taylor's Int. Law, §§ 536, 538; Fiore, Public Int. Law, § 1506 (Italian); Frederic II, Oeuvres, vol. 28, p. 91; Bluntschli, Moderne Kriege (German), §§ 152, 157.

The only exception to the foregoing rule is that an army during a war may take or destroy property of private citizens in case of immediate necessity for or on the field of battle, encampment or marches or for battle or siege.

A protocol containing the preliminaries of peace and a stipulation of cessation of hostilities puts an end to the right of confiscation even for so-called necessities of war. Bluntschli, § 705; Woolsey, § 150.

Mr. Assistant Attorney General McReynolds for the United States:

The trial court had no jurisdiction.

The plaintiff did not reside in the District of Porto Rico. Such residence was necessary under section 5 of the Tucker Act to give the trial court jurisdiction.

Plaintiff's claim is not such as would entitle it to redress in a court of law, equity or admiralty.

There was no contract, either express or implied, between the United States and the plaintiff. Any possible action would sound in tort. *Gorch* v. *United States*, 15 C. Cl. 281, 287.

The vessel was rightly treated as property of a subject of the enemy upon the high seas and the seizure was justifiable. It was taken for government use. Section 4624, Rev. Stat., and arts. 46–50, Am. Naval Code, render action by a prize court in such cases unnecessary, nor is such adjudication to vest title in the captors required by international law, and the return of the vessel before condemnation ought not to be complained of. If the vessel had been destroyed its owner certainly could not have recovered its value. *The Manila Prize Cases*, 188 U. S. 254; *United States* v. *Ross*, 1 Gall. 624; Hall's Int. Law, §§ 143, 148, 150; Halleck, Int. Law, p. 758, § 13; Dana's Wheaton, § 388, note; Wharton, Int. L. Dig. § 328; *Jecker* v. *Montgomery*, 18 How. 110, 123; *The Siren*, 13 Wall. 389, 394.

If the seizure was upon land, it was justifiable upon the ground of military necessity.

The general rule is that private property on land may be taken when it is directly useful for military purposes. It should not be seized for the mere sake of gain or to increase the wealth of the country. *Mrs. Alexander's Cotton*, 2 Wall. 404, 419; *Taylor* v. *Nashville &c. R. R. Co.*, 6 Coldw. (Tenn.) 646; *S. C.*, 98 Am. Dec. 474; *Oakes* v. *United States*, 174 U. S. 778, 786; *Cook* v. *Howard*, 13 Johns. (N. Y.) 275, 282.

Gen. Orders, No. 101, quoted by counsel for appellant, has no application to the present case. It was made for the government of the military authorities in Cuba. Rept. of War Dept., 1898, vol. 1, pt. 1, p. 125.

The military authorities in Porto Rico were acting under General Orders, No. 100. See § 37.

Any possible claim was relinquished by Art. VII of the Treaty of Peace.

The first part of this section fairly states the rule of international law which would control had no such express stipulation been made. Halleck's Int. Law, p. 851; Baker's Int. Law, p. 113; *Ware* v. *Hylton*, 3 Dall. 189, 229; *Gray, Admr.*, v.

United States, 21 C. Cl. 340, 392; *United States* v. *Mining Co.*, 29 C. Cl. 432, 512.

By the protocol there was a mere suspension of hostilities (Art. VI). It was only a step in the effort to arrive at an agreement for peace. In effect, it was a truce. The object being temporary, everything in the end should be in the same position as at the beginning. The meaning of every such compact is that all things should remain as they were at the moment of its consummation. 1 Kent's Comm. 159, 161; Vattel, b. 3, ch. 16, §§ 233–238; Taylor's Int. Law, § 513.

This vessel was taken before the truce was declared. Its retention during the existence of the truce was entirely proper. The Government by thus retaining it incurred no new obligation, and as no liability existed prior thereto plaintiff's claim is without merit.

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

1. By the 35th section of the act of Congress of April 12, 1900, c. 191, temporarily providing revenues and civil government for Porto Rico, it was declared that "writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeals shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; . . ." As the value of the matter here in dispute exceeds the sum of five thousand dollars, and as the final judgment, in a like case in the Supreme Court of one of the Territories of the United States, could be reëxamined here, we have jurisdiction of the present appeal from the Dis-

trict Court of the United States for Porto Rico. 23 Stat. 443, c. 355; 31 Stat. 85, c. 191, §§ 34, 35; *Royal Insurance Co.* v. *Martin*, 192 U. S. 149.

2. This action, we have seen, was brought to recover the value of the use of a vessel belonging to Spanish subjects and taken by our Army and Navy during the war with Spain, and used by the Quartermaster's Department of the Army.

By the above act of April 12, 1900, the court below was given, "in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed in the same manner as a Circuit Court." 31 Stat. 85, c. 191, § 34. If, therefore, this action could have been brought in a Circuit Court of the United States, it was within the cognizance of the court below. We must, then, look to the act of March 3, 1887, commonly known as the Tucker Act, and which provides for the bringing of suits against the Government of the United States. 24 Stat. 505, c. 359.

By the first section of that act it is provided that the Court of Claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable. . . ." The second section provides that "the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars." The fifth

section is in these words: "That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

The Government insists that the requirement in that act, that the petition shall be filed "in the district where the plaintiff resides," precludes a suit against the United States by any person, natural or corporate, residing out of the country. We express no opinion upon that question, as there are other grounds upon which we may satisfactorily rest our decision.

The present suit finds no sanction in the above act even if the plaintiff were not a foreign corporation. Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an Executive Department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain. The case does not come within the principle announced in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, where this court said that "the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of claimant for public use, are under an obligation, imposed

by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property, to which the Government asserts no title, is taken pursuant to an act of Congress as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'" The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. "A truce or suspension of armies," says Kent, "does not terminate the war, but it is one of the *commercia belli* which suspends its operations. . . . At the expiration of the truce, hostilities may recommence without any fresh declaration of war." 1 Kent, 159, 161. If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. Besides, the treaty of peace between the two countries provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United

States will adjudicate and settle the claims of its citizens against Spain relinquished in this article." This stipulation clearly embraces the claim of the plaintiff—its claim against the United States for indemnity having arisen prior to the exchange of ratifications of the treaty of peace with Spain.

We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail; for, it is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts. *The Cherokee Tobacco*, 11 Wall. 616, 621; *Whitney* v. *Robertson*, 124 U. S. 190, 194; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221.

It results that the judgment below dismissing the action must be affirmed.

It is so ordered.

BESSETTE *v.* W. B. CONKEY COMPANY.

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

No. 142. Argued April 7, 8, 1904.—Decided May 16, 1904.

A contempt proceeding is *sui generis*, in its nature criminal, yet may be resorted to in civil as well as criminal actions and also independently of any action. The purpose of contempt proceedings is to uphold the power of the court, and also to secure suitors therein the rights by it awarded. The power to punish for contempt is inherent in all courts.

Under § 6 of the Court of Appeals Act of 1891, a Circuit Court of Appeals has jurisdiction to review a judgment of the District or Circuit Court finding a person guilty of contempt for violation of its order and imposing a fine for the contempt.

If the person adjudged in contempt and fined therefor is not a party to the suit in which the order is made he can bring the matter to the Circuit Court of Appeals by writ of error but not by appeal.

THIS case is before us on questions certified by the Circuit Court of Appeals for the Seventh Circuit. The facts as stated are that on August 24, 1901, the W. B Conkey Company filed

its bill of complaint in the Circuit Court of the United States for the District of Indiana against several parties, praying an injunction, provisional and perpetual, restraining the defendants, their confederates, agents and servants, from interfering with the operation of its printing and publishing house. A temporary restraining order was issued, and on December 3, 1901, a perpetual injunction was ordered against all the defendants appearing or served with process. On September 13, 1901, the complainant filed its verified petition, informing the court that various persons, among them Edward E. Bessette, (who was not named as a party defendant in the bill,) with knowledge of the restraining order, had violated it, describing fully the manner of the violation. Upon the filing of that petition Bessette was ordered to appear before the court and show cause why he should not be punished for contempt in violating the restraining order. He appeared and filed his answer to the charges, and upon a hearing the court found him guilty of contempt and imposed a fine of $250. From this order or judgment Bessette prayed an appeal to the Circuit Court of Appeals, which was allowed, and the record filed in that court. Upon these facts the Circuit Court of Appeals certified the following questions:

"First. Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of the Circuit Court of the United States, finding a person guilty of contempt for violation of an order of that court and imposing a fine for the contempt.

"Second. Whether the 'act to establish Circuit Courts of Appeals and to define and regulate in certain cases jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, (26 Stat. 826,) authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that court made in such suit, and imposing a fine for such contempt.

"Third. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

"Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error."

Mr. William Velpeau Rooker for appellant.

Mr. Jacob Newman, Mr. Salmon O. Levinson and *Mr. Benjamin T. Becker* for appellee.

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

The primary question is whether the Circuit Court of Appeals can review an order of a District or Circuit Court in contempt proceedings. A secondary question is, how, if there be a right of review, can it be exercised?

A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.

The power to punish for contempt is inherent in all courts. It is true Congress, by statute, (1 Stat. 83,) declared that the courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." And this general power was limited by the act of March 2, 1831, 4 Stat. 487; Rev. Stat. sec. 725, the limitation being—

"That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the

administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

But in respect to this it was held in *Ex parte Robinson*, 19 Wall. 505, 510:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. As said in *In re Chiles*, 22 Wall. 157, 168:

"The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform."

In *In re Nevitt*, 54 C. C. A. 622, 632; 117 Fed. Rep. 448, 458, Judge Sanborn, of the Court of Appeals for the Eighth Circuit,

considered the nature of contempt proceedings at some length. We quote the following from his opinion:

"Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson* v. *Railroad Co.*, 48 N. J. Eq. 105, 108; 21 Atl. Rep. 182; *Hendryx* v. *Fitzpatrick*, [C. C.] 19 Fed. Rep. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex* v. *Edwards*, 9 Barn. & C. 652; *People* v. *Court of Oyer and Terminer*, 101 N. Y. 245, 247; 4 N. E. Rep. 259; 54 Am. Rep. 691; *Phillips* v. *Welch*, 11 Nevada, 187, 190; *State* v. *Knight*, 3 S. Dak. 509, 513; 54 N. W. Rep. 412; 44 Am. St. Rep. 809; *People* v. *McKane*, 78 Hun, 154, 160; 28 N. Y. Supp. 981; 4 Bl. Comm. 285; 7 Am. & Eng. Ency. Law, 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings." See also Rapalje on Contempts, sec. 21.

Doubtless the distinction referred to in this quotation is the

cause of the difference in the rulings of various state courts as to the right of review. Manifestly if one inside of a court room disturbs the order of proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court, yet it is not misconduct in which any individual suitor is specially interested. It is more like an ordinary crime which affects the public at large, and the criminal nature of the act is the dominant feature. On the other hand, if in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested, and if it should turn out on appeal from the final decree in the case that the original order was erroneous, there would in most cases be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled.

It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party.

In the case at bar the controversy between the parties to the suit was settled by final decree and from that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet being no party to the suit he was found guilty of an act in resistance of the order

of the court. His case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpœna, as among those acts primarily directed against the power of the court, and in that view of the case we pass to a consideration of the questions presented.

In *In re Debs*, 158 U. S. 564, a case of *habeas corpus* brought to review an order of the Circuit Court imprisoning for contempt, we said (p. 596):

"In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

And again, in summing up our conclusions (p. 599):

"That the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation."

At common law it was undoubted that no court reviewed the proceedings of another court in contempt matters. In *Crosby's Case*, 3 Wils. 188, Mr. Justice Blackstone said:

"The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court."

In the case of *Ex parte Yates*, 4 Johns. 318, 369, Chief Justice Kent, after reviewing the English cases and referring to the case of *The Earl of Shaftsbury*, 1 Mod. 144, concluded as follows:

"The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind, in which great confidence is placed, must be the sole judge, in the last resort, of contempts arising therein, is more explicitly defined and more

emphatically enforced in the two subsequent cases of the *Queen* v. *Paty and others*, and of the *King* v. *Crosby*."

Without stopping to notice the decisions of the courts of the several States, whose decisions are more or less influenced by the statutes of those States, we turn to an examination of the rulings of this court in respect to the finality of contempt proceedings.

In *Ex parte Kearney*, 7 Wheat. 38, a writ of *habeas corpus* was issued by this court in behalf of a party committed to jail by the Circuit Court of the District of Columbia for contempt in refusing to answer a question put to him on a trial. The application for a discharge was refused. The reasons therefor are disclosed by the following quotations from the opinion delivered by Mr. Justice Story (p. 42):

"It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the Circuit Court, in any case where a party has been convicted of a public offence. . . . If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly? . . . If this were an application for a *habeas corpus*, after judgment on an indictment for an offence within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled, upon full deliberation, in the case of *Brass Crosby, Lord Mayor of London*, 3 Wilson, 188."

New Orleans v. *Steamship Company*, 20 Wall. 387, was a suit by the company in the Circuit Court of the United States for an injunction restraining the city from interfering with its

possession of certain premises. Pending this suit the mayor of the city applied to a state court for an injunction restraining the company from rebuilding an inclosure of the premises which the city had destroyed, and the injunction was granted. At this time the city was the only party defendant in the Circuit Court, although service upon it had been made by delivering process to the mayor. Subsequently the mayor was made a party defendant by a supplemental bill. A final decree was entered against the defendants, and, as a part thereof, was an order adjudging the mayor guilty of contempt in suing out the injunction in the state court and imposing a fine therefor. Thereupon the case was brought to this court, and among other things the validity of the punishment for contempt was challenged, in respect to which we said (p. 392):

"The fine of three hundred dollars imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offence. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

Hayes v. *Fischer*, 102 U. S. 121, was a suit in equity to restrain the use of a patented device. An interlocutory injunction was granted. The defendant was fined for contempt in violating this injunction, and the entire amount of the fine ordered to be paid over to the plaintiff in reimbursement. To reverse this order defendant sued out a writ of error. A motion to dismiss was sustained, Mr. Chief Justice Waite saying for the court (p. 122):

"If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be reëxamined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, (7 Wheat. 38,) and the rule then established was followed as late as *New Orleans* v. *Steamship Company*, 20 Wall. 387. It follows that we have no jurisdiction."

In *Ex parte Fisk*, a case of *habeas corpus*, 113 U. S. 713, 718, Mr. Justice Miller, speaking for the court, declared:

"There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this court. Nor is there, in the system of Federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

In *Worden* v. *Searls*, 121 U. S. 14, a final decree was entered in a suit for infringement of a patent, in favor of the plaintiff, and from that decree the defendants appealed. A preliminary injunction had been granted, and prior to the final decree the defendants were adjudged guilty of a contempt in violating it, and ordered to pay to the complainant the sum of $250 as a fine therefor, together with the costs of the contempt proceedings. This court was of opinion that the decree in favor of the plaintiff was erroneous, and reversed it; and in addition to directing a dismissal of the bill, set aside the order imposing the fines in the contempt proceedings, saying in respect thereto (p. 25):

"We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were

directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent."

But, while setting aside the orders imposing the fines, it was "without prejudice to the power and right of the Circuit Court to punish the contempt referred to in those orders by a proper proceeding."

Again, in *In re Chetwood*, an application for prohibition, 165 U. S. 443, 462, is this ruling:

"Judgments in proceedings in contempt are not reviewable here on appeal or error, *Hayes* v. *Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573; 159 U. S. 251; but they may be reached by certiorari in the absence of any other adequate remedy. The writ of certiorari will be allowed to bring up the record, so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank, and to dismiss the other, may be revised and annulled."

In *O'Neal* v. *United States*, 190 U. S. 36, in which an order of the District Court punishing for contempt was brought here on writ of error, we said (p. 38):

"While proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. Sec. 5, act of March 3, 1891, 26 Stat. 826, c. 517, as amended by the act of January 20, 1897, 29 Stat. 492, c. 68; *Chetwood's Case*, 165 U. S. 443, 462; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Cary Manufacturing Company* v. *Acme Flexible Clasp Company*, 187 U. S. 427, 428."

In *In re Watts and Sachs*, 190 U. S. 1, the petitioners having been found guilty of a contempt of court by the District Court

of Indiana, applied for a writ of *habeas corpus*. We issued with that writ a certiorari and brought the entire record to this court, and upon the evidence discharged the petitioners.

From these decisions it is apparent that the uniform ruling of this court has been against the right to review the decisions of the lower court in contempt proceedings by writ of error, or by appeal, except in cases of purely remedial and interlocutory orders. Yet we have issued certioraries in aid of *habeas corpus* proceedings and applications for prohibition by which the facts in the contempt case have been brought before us, and then we have passed upon the merits of the decision in the lower court.

The thought underlying the denial by this court of the right of review by writ of error or appeal has not been that there was something in contempt proceedings which rendered them not properly open to review, but that they were of a criminal nature and no provision had been made for a review of criminal cases. This was true in England as here. In that country, as is well known, there was no review of criminal cases by appeal or writ of error. Neither was there in our Federal system prior to the act of February 6, 1889, 25 Stat. 656, which provided for a writ of error from this court in capital cases. While the act creating the Court of Appeals, March 3, 1891, 26 Stat. 826, authorized a review of criminal cases, yet it limited the jurisdiction of this court to cases of a conviction for a capital or otherwise infamous crime—since limited to capital cases—(29 Stat. 492,) and gave the right of review of all other criminal cases to the Circuit Courts of Appeal, and, of course, a proceeding in contempt cannot be considered as an infamous crime. *Habeas corpus* is not treated as a writ of error, and while it may be issued by one court to inquire into the action of a court of coördinate jurisdiction, yet the inquiry is only whether the action of the court in imposing punishment was within its jurisdiction. Even in an appellate court the writ of *habeas corpus* is not of itself the equivalent of a writ of error, although when supplemented by certiorari, as

shown in the case of *In re Watts and Sachs, supra,* it may bring the whole case before the appellate court for review.

The act of March 3, 1891, establishing Circuit Courts of Appeals must now be more fully considered. While its primary purpose was the relief of this court by the creation of new appellate courts and the distribution between those courts and this of the entire appellate jurisdiction of the United States, *The Paquette Habana,* 175 U. S. 677, 681, and cases cited, yet it also enlarged the area of appellate jurisdiction. As originally passed it gave to this court jurisdiction over cases of infamous crimes in addition to that which it theretofore had in capital cases. By section 6 it gave to the Circuit Courts of Appeals appellate jurisdiction to review by appeal or writ of error final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section. That this was intended to include criminal cases is evident from a subsequent clause, which makes the decision of the Courts of Appeals final "in all cases arising . . . under the criminal laws." See *United States* v. *Rider,* 163 U. S. 132, 138, in which, referring to sections 5 and 6, we said:

"Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the Circuit Courts of Appeals."

As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves cease to have controlling authority, and whether the Circuit Courts of Appeals have authority to review proceedings in contempt in the District and Circuit Courts depends upon the question whether such proceedings are criminal cases. That they are criminal in their nature has been constantly affirmed.

The orders imposing punishment are final. Why, then, should they not be reviewed as final decisions in other criminal cases? It is true they are peculiar in some respects, rightfully styled *sui generis.* They are triable only by the court against

whose authority the contempts are charged. No jury passes upon the facts; no other court inquires into the charge. *Ex parte Tillinghast*, 4 Pet. 108. As said by Mr. Justice Miller, speaking for the court, in *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36:

"If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

See also *In re Debs*, *supra*, in which we said (p. 594):

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to his orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

But the mode of trial does not change the nature of the proceeding or take away the finality of the decision. So when, by section 6 of the Courts of Appeals act, the Circuit Courts of Appeals are given jurisdiction to review the "final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can

it be held that the final decisions in contempt cases in the Circuit or District Courts are not subject to review by the Circuit Courts of Appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the Circuit Court of Appeals. Such review must, according to the settled law of this court, be by writ of error. *Walker* v. *Dreville*, 12 Wall. 440; *Deland* v. *Platte County*, 155 U. S. 221; *Bucklin* v. *United States*, 159 U. S. 680. On such a writ only matters of law are considered. The decision of the trial tribunal, court or jury, deciding the facts, is conclusive as to them.

We, therefore, answer the questions in this way: The second and fourth in the affirmative, the third in the negative. It is unnecessary to answer the first.

NORTHERN PACIFIC RAILWAY COMPANY *v.* DIXON.

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

No. 211. Argued April 13, 1904.—Decided May 16, 1904.

A local telegraph operator called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, acts in the matter of giving such information as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher that was induced by false information given by the local operator.

Negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company without any fault or negligence of the train dis-

patcher, is not the negligence of a vice principal for which the railway company is liable in damages to the fireman or his personal representatives, but is the negligence of a fellow servant of the fireman the risk of which the latter assumes.

THIS case is before us on questions certified by the Circuit Court of Appeals for the Eighth Circuit. The facts as stated are that Chauncey A. Dixon was employed on December 25, 1899, by the Northern Pacific Railway Company as a fireman in operating extra freight train No. 162, and while so engaged was killed by means of a head-end collision of that train with extra freight train No. 159. The company had made and promulgated time tables for its regular trains and had adopted reasonable rules for the operation of all its trains. The time tables did not and could not provide for the running of extra trains. The company had in its employ a train dispatcher at Missoula, Montana, who had general power and sole authority to make and promulgate orders for the running on the division of the road on which this collision occurred of those trains which were not governed by the time tables. A large proportion of its freight trains on this division were run as extra trains and the times of their arrival and departure were not shown on the regular time tables, but their movements were made upon telegraphic orders issued by the train dispatcher upon information furnished by telegraph to him by the station agents and operators along the line of the road. All these facts were known to Dixon. One of the rules of the company was: "Operators will promptly record in a book to be kept for the purpose and report to the superintendent the time of arrival and departure of all trains and the direction in which extra trains are moving." The reports mentioned in this rule were made to the train dispatcher and he was vested with the authority of the superintendent to issue orders for the movement of trains.

These two freight trains were running in opposite directions, train No. 162 going east. It arrived at Bonita at 12:35 A. M. and left there at 12:50 A. M. The local operator and station

agent at that place was asleep and did not know of or report its arrival and passage to the dispatcher. None of the crew of that train were aware of the fact that train No. 159 was coming west. The railroad had but one track. At 1:05 A. M. No. 159 reached Garrison, about 48 miles east of Bonita, and that was reported to the train dispatcher. Thereupon he asked the operator at Bonita, by telegraph, whether No. 162 had arrived there, and the operator promptly answered that it had not. This question was repeated, and the operator asked if he was sure that No. 162 had not passed Bonita, and he replied that he was sure that it had not. Thereupon the train dispatcher issued orders for the movement of these two trains, which were sufficient to guard against collision if the information received had been correct, but as it was not correct, the movement of the trains resulted in a collision and the death of Dixon, to recover damages for which this action was brought. Upon these facts the Circuit Court of Appeals certified the following questions:

"First. When a local telegraph operator is called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher that was induced by false information given by the local operator?

"Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company, without any fault or negligence of the train dispatcher, the negligence of a vice principal for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman the risk of which the latter assumes?"

Mr. C. W. Bunn, Mr. Emerson Hadley and *Mr. James B. Kerr* for plaintiff in error, submitted:

The question turns on the character of the act rather than on the relation of the employés to each other. *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 385; *Nor. Pac. R. R.* v. *Petersen*, 162 U. S. 346, 353.

In *New England Railroad Co.* v. *Conroy*, 175 U. S. 323, the court reviewing all its prior decisions overruled *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Ross*, 112 U. S. 377. *Farwell* v. *B. & W. R. R. Co.*, 4 Met. 49; *Quebec S. S. Co.* v. *Merchant*, 133 U. S. 375; *Oakes* v. *Mase*, 165 U. S. 363; *Nor. Pac. R. R. Co.* v. *Poirier*, 167 U. S. 48; *Nor. Pac. R. R. Co.* v. *Charless*, 162 U. S. 359; *B. & O. R. R. Co.* v. *Camp*, 31 U. S. App. 213, 236; *C., N. O. &c. R. R. Co.* v. *Clark*, 16 U. S. App. 17; *Randall* v. *B. & O. R. R.*, 109 U. S. 478.

The precise negligence of the operator was his failure to observe and report to the dispatcher the passage of a train by his station, which resulted in the dispatcher giving orders for another train to move in the opposite direction. The operator was as much a fellow servant of the fireman in the performance of the duty of observing the passage of trains by his station and reporting to the dispatcher, as in communicating orders of the dispatcher to trainmen. Indeed in communication of orders an operator seems more nearly a vice principal than in this case, 31 U. S. App. 240. Trainmen know that in the ordinary course of business the dispatcher in directing the movement of trains must necessarily rely upon the observation and report of station operators, and they know that if an operator is negligent and fails to observe and report correctly the natural and probable result is wrong orders and a collision. In entering the employment they therefore assume this risk.

See *Illinois Central Railroad Company* v. *Bentz*, 40 C. C. A. 56, where a failure of the telegraph operator to keep the train dispatcher advised as to the whereabouts of a train was, as in this case, the cause of wrong orders resulting in a collision.

See also *Railroad Company* v. *Frost*, 44 U. S. App. 606; *Reiser* v. *Pennsylvania Co.*, 152 Pa. St. 38; *Sutherland* v. *Troy & Boston Railroad Co.*, 125 N. Y. 737.

Mr. A. M. Antrobus for defendant in error, cited as to obligation to provide orders and schedules of trains: *B. & O. R. R. Co.* v. *Andrews*, 1 C. C. A. 639; *Nor. Pac. R. R. Co.* v. *Poirier*, 15 C. C. A. 52; *Lewis* v. *Seifert*, 11 Atl. Rep. 514; *Railroad Co.* v. *Camp*, 13 C. C. A. 233; *Oregon Short Line* v. *Frost*, 21 C. C. A. 186; *Danigan* v. *Railroad Co.*, 56 Connecticut, 285; *Hough* v. *Railroad Co.*, 100 U. S. 213, 226; *Nor. Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642, 660.

Local operators and the train operators are not fellow servants. *Bentz* v. *Railroad Co.*, 99 Fed. Rep. 657; 40 C. C. A. 56, distinguished, and see cases cited in that opinion; *Dana* v. *Railroad Co.*, 92 N. Y. 639; *Shehan* v. *Railroad Co.*, 91 N. Y. 332; *Flike* v. *Railroad Co.*, 53 N. Y. 549; *Booth* v. *Railroad Co.*, 91 N. Y. 38; *Ell* v. *Nor. Pac. Ry. Co.*, 12 L. R. A. 97; *Nor. Pac. Ry. Co.* v. *Mix*, 121 Fed. Rep. 476.

The local operator is a vice principal. *M. K. & T. Ry. Co.* v. *Elliott*, 42 C. C. A. 188; *Lewis* v. *Seifert*, 116 Pa. St. 627; *B. & O. R. R. Co.* v. *Camp*, 13 C. C. A. 233; *Hankins* v. *Railroad Co.*, 142 N. Y. 416; *Harrison* v. *Railroad Co.*, 79 Michigan, 407; *Hall* v. *Galveston &c. R. R. Co.*, 39 Fed. Rep. 18; *Price* v. *Railroad Co.*, 145 U. S. 651.

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

A servant is entitled to recover damages for injuries suffered through the personal fault or misconduct of his employer, but when the employer has been personally free from blame and the injury results from the fault or misconduct of a fellow servant it would seem reasonable that the wrongdoer should be alone responsible, and that one who is innocent should not be called upon to pay damages. And such is the

general rule. But where the employer is a railroad or other corporation having a large number of employés, sometimes engaged in different departments of service, certain limitations or qualifications of this general rule have been prescribed. Perhaps no question has been more frequently considered by the courts than that of fellow servant, and none attended with more varied suggestions and attempted qualifications. It has been discussed so often that any extended discussion in the present case is unnecessary, and it is sufficient to state the principal suggestions and consider their applicability to the case at bar.

In a recent case in this court, *New England Railroad Company* v. *Conroy*, 175 U. S. 323, it was said (p. 328):

"We have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end."

Tested by this, it is obvious that the local operator was a fellow servant with the fireman. They were "engaged in the same general undertaking," the movement of trains. They were called upon "to perform duties tending to accomplish the same general purposes," and "the services of each in his particular sphere or department were directed to the accomplishment of the same general end." The fireman who shovels coal into the fire-box of the engine is not doing precisely the same work as the engineer, neither is the conductor who signals to the engineer to start or to stop, nor the operator who delivers from the telegraph office at the station to the

engineer orders to move, and who reports the coming and the going of trains, and yet they are all working each in his particular sphere towards the accomplishment of this one result, the movement of trains.

Another qualification suggested is where the one guilty of the negligence has such general control and occupies such relation to the work that he in effect takes the place of the employer—becomes a vice principal, or *alter ego*, as he is sometimes called. If an employer, whether an individual or a corporation, giving no personal attention to the work, places it in the entire control of another, such person may be not improperly regarded as the principal and his negligence that of the principal. That thought has in some cases been carried further, and when it appeared that the work in which the employer was engaged was divided into separate and distinct departments, the one in charge of each of those departments has been regarded as also a vice principal. In *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 383, we said:

"It is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employés under them, vice principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the *Ross* case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct."

So also in *Northern Pacific Railroad* v. *Peterson*, 162 U. S. 346, it was held that the foreman of a gang of laborers em-

ployed in putting in ties and keeping in repair a part of the road, although he had the power to hire or discharge any laborer and exclusive control and management in all matters connected with their work, was a fellow servant with the men in the gang, and on page 355 the rule was thus stated:

"The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

Obviously there is nothing in this qualification which has application here. The negligent person was a local operator and station agent, and in no reasonable sense of the term a vice principal or in charge of any department.

Another suggestion is, that the doctrine of fellow servant does not apply where the servant injured and the servant guilty of the negligence are engaged in separate departments of service. In *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349, a common laborer was employed under the direction of a section boss in building a culvert on the line of defendant's railroad, and while so employed was struck and injured by a moving passenger train, the injury resulting solely through the misconduct and negligence of the conductor and engineer of the train. It was held that they were fellow servants, and in respect to this suggestion it was said (p. 357):

"As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possi-

bility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply."

Applying this to the case before us, manifestly the work of the fireman and the operator brought the parties closely together in the matter of the movement of the trains. Dixon knew that any negligence on the part of the operator might result in injury to him, and must have contemplated such possibility when he entered the service of the company.

It is urged that "it is as much the duty of the company to give correct orders for the running of its trains so they would not collide as it was to see that their servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work," and hence, that one who is employed in securing the correct orders for the movement of trains is doing the personal work of the employer, and not to be regarded as a fellow servant of those engaged in operating and running the trains. But the master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a want of competency in either the train dispatcher or the telegraph operator. So far as appears, they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times, and in the nature of things cannot guard against

every temporary act of negligence by one of his employés. As said in *Whittaker* v. *Bent*, 167 Massachusetts, 588, 589, by Mr. Justice Holmes, then a member of the Supreme Court of Massachusetts:

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes. *McCann* v. *Kennedy*, *ante*, p. 23. See also *Johnson* v. *Boston Towboat Co.*, 135 Massachusetts, 209; *Moynihan* v. *Hills Co.*, 146 Massachusetts, 586, 592, 593; *Bjbjian* v. *Woonsocket Rubber Co.*, 164 Massachusetts, 214, 219."

Without discussing more at length the various forms and phases of the question of fellow servants, or the many suggestions which have been made to qualify or limit the general doctrine, we answer the questions presented as follows:

First. The telegraph operator was, under the circumstances described, a fellow servant of the fireman.

Second. The negligence of the telegraph operator was the negligence of a fellow servant of the fireman, the risk of which the latter assumed.

MR. JUSTICE WHITE, with whom concurred the CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, dissenting.

As it is given to me to understand the ruling now made, it reverses many previous decisions of this court and introduces into the doctrine of fellow servant, as hitherto applied in those decisions, a contradiction which will render it impossible in the future to test the application of the rule of fellow servant by any consistent principle.

It is undoubtedly true that in many decisions of state courts of last resort the rigor of the rule of fellow servant has been assuaged by an extension of two conceptions, the one designated as "the department theory," and the other as the "doctrine of vice principal." By the application made of the

first of these in the decisions referred to the relation of fellow servant would not exist in any case where the servants were working in separate departments, even although engaged in a single enterprise or common employment. By the second, where even a limited authority was possessed by a particular employé, such authority would cause him not to be a fellow servant with those over whom the authority was exercised.

But the decisions of this court, whilst not rejecting absolutely either the department, or the vice principal, theory, have with practical uniformity refused to adopt the broad import given to those theories as above stated. Accordingly it has been consistently held that the fact of separate departments did not destroy the relation of fellow servant unless the departments were substantially so distinct as to cause them to be independent one of the other to such an extent that the persons engaged in one or the other were not really employed in the same business. And so also as to the doctrine of vice principal, it has been uniformly held that it did not apply to every limited exercise of authority but was only applicable in cases where the person charged to be a vice principal possessed such general authority and supervision over the business as to cause him in effect to stand in the relation of master to those employed under him. But whilst thus declining to fritter away the rule of fellow servant by a latitudinarian application of the department and vice principal theories, such theories have always been applied by the decisions of this court wherever a given case was embraced in the doctrine as expounded in the rulings of this court above referred to. Besides, it has been declared by an unbroken line of authority in this court that, wherever there rests upon the master a positive duty which the law has imposed upon him towards his servants, liability of the master or a failure to perform such positive legal duty could not be escaped by a resort to the principle of fellow servant because, in an action for damage occasioned by the neglect of the master to perform such positive duties, the doctrine of fellow servant had no applica-

tion. I content myself with referring to some of the leading and more recent cases of this court establishing all the propositions which I have previously stated. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S. 349; *Central Railroad Co.* v. *Keegan*, 160 U. S. 259; *Northern Pacific Railroad Co.* v. *Peterson*, 162 U. S. 346; *New England R. R. Co.* v. *Conroy*, 175 U. S. 323.

The inapplicability of the doctrine of fellow servant to a violation by the master of a positive duty resting on him, often stated in previous decisions, was reiterated in *Baltimore & Ohio Railroad Company* v. *Baugh*, *supra*, 387, and was fully restated in *Central Railroad Co.* v. *Keegan*, *supra*, where it was said (p. 263):

"We held in *Baltimore & Ohio Railroad Company* v. *Baugh*, 149 U. S. 368, that an engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, were fellow servants of the railroad company; hence that the fireman was precluded from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer. In that case it was declared that: '*Prima facie*, all who enter the employment of a single master are engaged in a common service and are fellow servants. . . . All enter in the service of the same master to further his interests in the one enterprise.' And whilst we in that case recognized that the heads of separate and distinct departments of a diversified business may, under certain circumstances, be considered, with respect to employés under them, vice principals or representatives of the master as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent, we declined to affirm that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master. It was further declared that 'the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those

who are simply coworkers with him in it; each is equally with the other an ordinary risk of the employment,' which the employé assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employés with fit and careful coworkers, and the furnishing to such employés of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employé turn rather on the character of the alleged negligent act than on the relations of the employés to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor."

And the *Keegan* case was cited approvingly in *Northern Pacific Railroad Co.* v. *Peterson, supra,* and *Railroad Co.* v. *Conroy, supra.*

With the rules thus conclusively determined by the prior decisions of this court, let me come to consider the questions certified in the light of the facts stated in the certificate. Now, it is undoubted from those facts that the accident was caused by an erroneous order issued by the train dispatcher in charge of the movement of all the trains, and it is equally undoubted that the fatal error committed by the train dispatcher was caused by the neglect of an operator on the line of the railroad with whom the train dispatcher communicated before he gave the erroneous order. To determine whether the doctrine of fellow servant applies to such a case it must be ascertained first, whether the train dispatcher was a fellow servant with those operating the train; and, second, if he was not, can the

corporation avoid liability because the error of the train dispatcher was occasioned by the wrong of an operator?

First. Whether it be considered in the light of the doctrine of vice principal as applied in the decisions of this court, or from the point of view of the positive duties of the master, it seems to me that the train dispatcher was not the fellow servant of the men running the trains. The dispatcher was a vice principal in the narrowest significance of that term. He represented the master as to the operation and movement of trains over the road. He formulated and transmitted the orders by which all were to be governed. The duty to obey his orders rested on those in charge of every train, and upon complying with this duty of obedience on their part their safety, as well as the safety of persons employed on or moved by every train, depended. As the duties of the train dispatcher were of the character just stated, it must besides follow, in any view, it seems to me, that in performing them he was discharging a positive duty imposed by law upon the master. For it cannot, in reason, I submit, be questioned that the law placed a positive duty on the master to furnish a safe place to work and to give such orders as would save those who obeyed them from loss of life or limb. The opinions of this court in the cases already referred to leave no room for question on this latter proposition, and there are other decisions not previously referred to which treat it as elementary. *Hough* v. *Railroad Co.*, 100 U. S. 213; *Union Pacific Railway Co.* v. *Daniels*, 152 U. S. 684; *Northern Pacific Ry. Co.* v. *Hambly*, 154 U. S. 349; *Northern Pacific R. R. Co.* v. *Peterson*, 162 U. S. 346, 353.

The doctrine of positive duty was applied to the determination of whether a train dispatcher was a vice principal and performed the master's duty, by the Court of Appeals of the State of New York, in *Hankins* v. *New York, Lake Erie & Western R. R. Co.*, 142 N. Y. 416, and was also applied to the case of a train dispatcher by the Supreme Court of Pennsylvania in *Lewis* v. *Seifert*, 116 Pa. St. 628. Indeed, elabora-

tion to show that a train dispatcher is either a vice principal or one who in the discharge of his functions performs a positive duty of the master, is unnecessary, since the opinion of the court in this case proceeds upon the assumption that such is the case, and rests its conclusion upon the theory that the rule of fellow servant applies because the error of the train dispatcher was caused by the fault of the operator. This then is the real issue.

Second. It being then established that the train dispatcher was either a vice principal or performing the positive duty of the master, does the fact that his wrongful order for the movement of the train was occasioned by the neglect of the operator with whom he communicated give rise to the application of the rule of fellow servant? I fail to perceive how it can, if the principles which the previous decisions of this court have upheld are to be adhered to. Those principles are these: That where the act is one done in the discharge of a positive duty of the master, negligence in the performance of the act, however occasioned, is the act of the master, and not the act of a fellow servant. To say to the contrary, it seems to me, is to cause the decisions of this court to reduce themselves to two contradictory propositions; first, that a servant when injured by the act of another person cannot be allowed to recover, by applying the broad construction given by many of the state courts to the vice principal and department theories, because the correct rule is the one which narrows those theories, and because, besides, the truer test by which to ascertain the existence of the relation of fellow servant is to determine whether the act done was one concerning a positive duty of the master; and, second, when a case is presented where the act complained of has been done by a vice principal, under the view adopted by this court of that theory, or involves a positive duty of the master, there may be no recovery because of the application of the doctrine of fellow servant to the case. The result being that recovery cannot be had in any event.

The decisions of this court leave no doubt as to the true rule

on the subject. In *Northern Pacific Railroad Co.* v. *Herbert*, 116 U. S. 642, speaking of the positive duty of the master, the court, through Mr. Justice Field, said (p. 647):

"This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

In *Northern Pacific Railway Company* v. *Hambly*, 154 U. S. 349, the court, speaking through Mr. Justice Brown, thus approvingly referred to the *Herbert* case (p. 357):

"The case of *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company, who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority, both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow servants. See also *Hough* v. *Railway Co.*, 100 U. S. 213; *Union Pacific Railway* v. *Daniels*, 152 U. S. 684."

In *Union Pacific Ry. Co.* v. *Daniels*, 152 U. S. 684, an action for injury occasioned by the breaking of a defective car wheel, the existence of which defect had not been discovered owing to insufficient inspection, liability was sought to be escaped upon the plea that a sufficient number of competent inspectors had been employed. But, declaring the liability of the railroad company, the court said (p. 689):

"There can be no doubt that under the circumstances of the case at bar the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition, and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty or through its negligent performance."

Again, in *Northern Pacific R. R. Co.* v. *Peterson*, 162 U. S. 346, speaking through Mr. Justice Peckham, of the positive duties of the master, the court said (p. 353):

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many States that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employés, and if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

And these principles have been applied by the Court of Appeals of the State of New York to a case like the one at bar. *Dana* v. *Railroad Co.*, 92 N. Y. 639. In that case, in communicating verbally to a conductor an order received from

the train dispatcher, an error was committed by one Keifer, a telegraph operator, and a collision between trains resulted. In the course of the opinion, reversing the judgment which had been entered in favor of the railroad company, the court said (p. 642):

"For Keifer's act, in this respect, the defendant is clearly liable. The act he was required to do, and did perform, was one for which the master was responsible as a duty pertaining to itself, and as to it Keifer occupied the place of master. (*Flike* v. *Boston & Albany R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545.)"

Nor do I perceive the pertinency, as applied to the facts in the case at bar, of the extract made from the opinion of the Supreme Judicial Court of Massachusetts in the case of *Whittaker* v. *Bent*, 167 Massachusetts, 588, 589. The doctrine of transitory risk as expounded in the case referred to and in previous cases in Massachusetts which that case followed really amounts only to this, that where the work is of such a character that dangers which cannot be foreseen or guarded against by the master, may in the nature of things suddenly and unexpectedly arise, there is no neglect of a positive duty owing by the master in failing by himself or the agencies he employs to anticipate and protect against that which the utmost care on his part could not have prevented. But this doctrine can have no application to a case like the one in hand, where the damage was occasioned by an act of obvious neglect in the performance of a positive duty.

That the doctrine of transitory risk applied in the Massachusetts cases relied upon has no application here, it seems to me is made clear by the fact that it is stated in the certificate that the trains in question were extra trains, obliged by the rules of the company to run on no preordained schedule, and solely under the command of the dispatcher, and that, to quote the certificate, "a large proportion of its freight trains on this division were run as extra trains, and the times of their arrivals and departures were not shown on the regular time tables, but

their movements were made upon telegraphic orders issued by the train dispatcher upon information furnished by telegraph to the train dispatcher by its station agents and operators along the line of the railroad." To apply the transitory risk theory to this condition of affairs it seems to me is to say that the method permanently adopted by the company for running the class of trains in question is to be governed, not by that fact, but by the fictitious assumption that the trains were temporarily operated by wire alone. The consequence of the application of the doctrine of transitory risk to the condition of affairs shown in the certificate is, as I understand it, but to say that a railroad which chooses to operate its trains solely through orders of the train dispatcher is a licensed wrongdoer as respects its employés, since thereby it is exempt from those rules of positive duty which the law would otherwise impose. The result is, besides, to decide that if a railroad adopts a regular schedule the law casts a positive duty on it as regards its employés, but that it may escape all such duty on the theory of transitory risk, if only the road elects to adopt no schedule and to operate its trains solely by telegraph.

For the foregoing reasons I dissent.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA concur in this dissent.

FILHIOL *v.* TORNEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 252. Submitted April 25, 1904.—Decided May 16, 1904.

Where, in an ejectment action, the plaintiffs' statement of their right to the possession of the land discloses no case within the jurisdiction of the Circuit Court of the United States, that jurisdiction cannot be established by allegations as to the defence which the defendant may make or the circumstances under which he took possession.

THIS was an action of ejectment commenced in the Circuit Court of the United States for the Eastern District of Arkansas, based upon the same title which was presented in *Muse* v. *Arlington Hotel Company*, 168 U. S. 430, and *Filhiol* v. *Maurice*, 185 U. S. 108. A demurrer to the complaint was sustained on the ground of want of jurisdiction and a judgment entered for the defendant, and thereupon the case was brought directly to this court on writ of error.

Mr. Branch K. Miller, *Mr. William F. Vilas*, *Mr. James K. Jones* and *Mr. J. H. McGowan* for plaintiffs in error.

Mr. Solicitor General Hoyt and *Mr. Marsden C. Burch* and *Mr. Robert A. Howard*, Special Assistants to the Attorney General, for defendants in error.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The only question decided by the Circuit Court was one of jurisdiction, but the record contains no certificate of that question nor anything which can be considered an equivalent thereto. The demurrer filed by the defendant stated three grounds therefor: First, a want of jurisdiction over the present defendant; second, a like want of jurisdiction over the subject matter of the action; and, third, that the complaint did not state facts sufficient to constitute a cause of action. The judgment was that the "demurrer to the jurisdiction . . . be sustained" and the complaint dismissed. In the opinion of the court only the question of jurisdiction over the subject matter was discussed. The assignment of errors contains nine specifications, some going to the matter of jurisdiction; others, such as the fifth, eighth and ninth, running to the merits, the ninth being general and in this language: "The court erred in divers other matters manifest upon the face of the record of said action." The petition for a writ of error alleged that the plaintiffs, "being aggrieved by the judgment made and en-

tered in the above entitled cause on the 12th day of January, 1903, and the several rulings of the court herein, file herewith their assignment of errors in said cause and pray a writ of error to the end that the rulings and judgment of said court in said cause may be reversed by the Supreme Court of the United States." This petition was allowed generally and without any limitation or specification. The necessity of a certificate was affirmed in *Maynard* v. *Hecht*, 151 U. S. 324, and what may be considered a sufficient certificate or taken as equivalent thereto considered in *In re Lehigh Mining & Manufacturing Campany*, 156 U. S. 322; *Shields* v. *Coleman*, 157 U. S. 168; *The Bayonne*, 159 U. S. 687; *Interior Construction Company* v. *Gibney*, 160 U. S. 217; *Van Wagenen* v. *Sewall*, 160 U. S. 369; *Chappell* v. *United States*, 160 U. S. 499; *Smith* v. *McKay*, 161 U. S. 355. The case of *Chappell* v. *United States*, *supra*, is closely in point. In that case Mr. Justice Gray, speaking for the court, after referring to tests laid down in prior cases, observed (p. 508):

"The record in the present case falls far short of satisfying any such test. The defendant, among many other defences, and in various forms, objected to the jurisdiction of the District Court, because the act of Congress under which the proceedings were instituted was unconstitutional, because the proceedings were not according to the laws of the United States, and because they should have been had in a court of the State of Maryland; and the court, overruling or disregarding all the objections, whether to its jurisdiction over the case, or to the merits or the form of the proceedings, entered final judgment for the petitioners. There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the 'rulings, judgments and orders' of the court 'upon the question of jurisdiction raised in said exceptions, pleas and demurrers, and the other papers on file in this cause,' without defining or indicating any

specific question of jurisdiction. Here, certainly, is no such clear, full and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute."

There being no sufficient certificate of jurisdiction, counsel for plaintiffs in error rely upon the proposition that there is involved in the case the application of the Constitution of the United States, and also the meaning and force of the treaty of October 21, 1803, between the United States and the Republic of France, and that, therefore, the case was rightfully brought directly to this court.

"But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question." *Chappell* v. *United States, supra,* 509. See also *Giles* v. *Harris,* 189 U. S. 475, 486.

The title upon which the plaintiffs rest was a grant made on February 22, 1788, by the governor general, in the name of the King of Spain, then the sovereign of the territory, and, as contended, protected by the treaty of 1803, which provided that the inhabitants of the province ceded should, among other things, "be maintained and protected in the free enjoyment of their . . . property." It was alleged that such provision, by a just construction of the treaty, extended to the property of the original grantee and descended from him to his heirs, but that the United States, denying that plaintiffs were entitled to be maintained and protected in the enjoyment of their said property by any construction of the treaty, asserted title to the land, expelled the plaintiffs from possession and delivered it over to the defendant in this action, and that said defendant is in possession by direction of the United States, in pursuance of the unlawful and unjust possession so given him, and without any other right or claim of right than as an officer of the United States. Plaintiffs also

averred that they were lawfully possessed of the land by inheritance from their ancestor, and that the United States, without process of law and without legal right so to do, took the same for public use without any compensation, and established defendant in possession thereof wrongfully and unjustly. By virtue of these allegations they contend that there is involved in this case the construction of a treaty, as well as the application of the Constitution of the United States, which forbids the taking of private property for public use without just compensation.

But it is well settled that in ejectment the plaintiffs must rest on their own title. If that title fails it is immaterial what wrong the defendant may have committed. There is nothing in the statutes of Arkansas which changes this rule. The averments of an infraction by the United States of its obligations under the treaty or an unlawful act in taking possession without compensation in defiance of the Constitution do not add to the plaintiffs' title. So far as the cause of action is concerned these averments are superfluous. Any action by the government is matter of defence and may never be presented by the defendant. He has a right to go to trial on the sufficiency of the title presented by the plaintiffs, and need neither plead nor prove the rightfulness of his possession by whomsoever it may have been given to him until they have shown that they have a title to the premises.

"The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought." *Osborn* v. *Bank*, 9 Wheat. 738, 824.

"By the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." *Tennessee* v. *Union & Planters' Bank et al.*, 152 U. S. 454, 464.

See also *Chappel* v. *Waterworth*, 155 U. S. 102; *Walker* v. *Collins*, 167 U. S. 57; *Sawyer* v. *Kochersperger*, 170 U. S. 303, in which this court said:

"The case was removed into the Circuit Court of the United States, but improvidently, as it falls within the rule laid down in *Tennessee* v. *Banks*, 152 U. S. 454, notwithstanding the petition stated that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States." *Florida Central &c. Railroad* v. *Bell*, 176 U. S. 321, 329; *Arkansas* v. *Kansas & Texas Coal Company*, 183 U. S. 185.

We have not considered whether the averments distinctively made of the plaintiffs' title were sufficient to vest jurisdiction in the Circuit Court, for that question was settled against the plaintiffs by the decision in *Filhiol* v. *Maurice*, *supra*.

As the plaintiffs' statement of their right to the possession of this land disclosed no case within the jurisdiction of the Circuit Court, that jurisdiction was not established by allegations as to the defence which the defendant might make or the circumstances under which he took possession.

The judgment of the Circuit Court is

Affirmed.

FISCHER *v.* ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 204. Argued April 12, 1904.—Decided May 16, 1904.

It is within the power of a municipality when authorized by the law of the State, to make a general police regulation subject to exceptions, and to delegate the discretion of granting the exceptions to a municipal board or officer and the fact that some may be favored and some not, does not, if the ordinance is otherwise constitutional, deny those who are not favored the equal protection of the law.

The ordinance of the city of St. Louis, prohibiting the erection of any dairy or cow stable within the city limits without permission from the municipal assembly and providing for permission to be given by such assembly, is

a police regulation, and is not unconstitutional as depriving one violating the ordinance of his property without due process of law, or denying him the equal protection of the laws.

Whether such an ordinance is violated is not a Federal question, and this court is bound by the decision of the state court in that respect.

THIS proceeding was originally instituted by a criminal complaint filed by the city of St. Louis against Fischer in the Police Court for a violation of an ordinance of the city in erecting, building and establishing on certain premises occupied by Fischer, at Nos. 7208 and 7210 North Broadway, a dairy and cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance, and for maintaining such dairy and cow stable without permission of such assembly.

Motion was made to quash the complaint upon the ground, amongst others, that section 5 of the ordinance under which the conviction was held was in violation of the Fourteenth Amendment of the Constitution of the United States.

The case was submitted to the court upon the following agreed statement of the facts:

"The plaintiff, the City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable, which had been erected and built prior to the occupancy of said premises by defendant.

"At the time of the approval of ordinance No. 18,407, of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Some time in the month of March, 1898, the said premises at Nos. 7208 and

7210 North Broadway *were abandoned* as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for *residence purposes only*, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to premises Nos. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said sixteenth day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance, as provided by section 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896," a copy of which section is given in the margin.[1]

Upon this state of facts defendant was convicted and fined. An appeal was granted to the St. Louis Court of Criminal Correction, which affirmed the judgment. An appeal was then taken to the Supreme Court of the State, where the judgment was again affirmed. 167 Missouri, 654.

Mr. Louis A. Steber, with whom *Mr. J. E. McKeighan* was on the brief, for plaintiff in error in No. 204; *Mr. G. N. Fickeissen*, with whom *Mr. J. D. Johnson* was on the brief, for plaintiff in error in No. 62, which involved the same ordinance, and was argued simultaneously with this case:

In a suit brought to this court from a state court, which involves the constitutionality of ordinances made by a munic-

[1] SEC. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred nor more than five hundred dollars.

ipal corporation, this court will, when necessary, put its own independent construction upon the ordinances. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366; *Minnesota* v. *Barber*, 136 U. S. 313; *State* v. *Sponagle*, 45 W. Va. 415.

An ordinance which denies to a person the right to engage in a lawful business or occupation followed and engaged in by others, deprives such person of his property and liberty without due process of law, abridges his privileges and denies him the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment, and is void. *In re Hong Wah*, 82 Fed. Rep. 623; *In re Tie Lay*, 26 Fed. Rep. 611, 615; *Barthet* v. *New Orleans*, 24 Fed. Rep. 563, 566; *In re Quong Woo*, 13 Fed. Rep. 229; *City of Newton* v. *Belger*, 143 Massachusetts, 598; *Tugman* v. *Chicago*, 78 Illinois, 405; *Mayor* v. *Thorne*, 7 Paige, 261; *St. Louis* v. *Dorr*, 145 Missouri, 466; *St. Louis* v. *Hill*, 116 Minnesota, 466, 485, 501.

An ordinance which treats a lawful business and occupation, irrespective of location or the manner in which it is carried on, as a nuisance and tends to suppress such business, denies to the person or persons carrying on such business the equal protection of the law and tends to create a monopoly, and is void as conflicting with the Fourteenth Amendment. *The Stockton Laundry Case*, 26 Fed. Rep. 611, 614; *State* v. *Mahner*, 43 La. Ann. 496; *Yates* v. *Milwaukee*, 10 Wall. 497.

Under the decision of the Supreme Court of the State of Missouri the scope, purpose and effect of this ordinance is to compel the dairymen of St. Louis to move their business outside the limits of the city whenever by circumstances they are compelled to leave the premises upon which their dairies and cow stables were in operation at the time the ordinance went into effect. Such an ordinance tends to destroy a lawful occupation and business and conflicts with the Fourteenth Amendment. Cases cited *supra*.

The police power of the State extends only to the regulation of the pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise

destructive or injurious to the common interests of the community. *In re Jacobs*, 96 N. Y. 98; *Barthet* v. *New Orleans*, 24 Fed. Rep. 563; *In re Andrew Frazee*, 63 Michigan, 396; *Mayor* v. *Radecke*, 49 Maryland, 217; *State* v. *Tenant*, 110 N. Car. 609; *City* v. *Dudley*, 129 Indiana, 112; *Anderson* v. *City*, 40 Kansas, 173.

If § 5 of the ordinance is under the charter power to "prohibit" it must apply to all persons alike and without discrimination. The same rule applies to the power to "regulate." You cannot by special ordinance "prohibit" "B" and at the same time "regulate" "A." *Tugman* v. *Chicago*, 78 Illinois, 405, 409; *Hibbard* v. *Chicago*, 173 Illinois, 91, 98; *St. Louis* v. *Russell*, 116 Missouri, 248, 257, 258; *State* v. *Walsh*, 136 Missouri, 400, 406; *Shreveport* v. *Robinson*, 51 La. Ann. 1314; *Town of Crowley* v. *West*, 52 La. Ann. 526, 534; Cooley Const. Lim., 6th ed. p. 137, note 1, and p. 481.

There is a substantial difference between "prohibition" and "regulation." *Chillicothe* v. *Brown*, 38 Mo. App. 617; *State* v. *Burgdoerfer*, 107 Missouri, 1, 24–26; *State* v. *Mott*, 61 Maryland, 297, 308–309; *Merced County* v. *Fleming*, 111 California, 46, 50; *Los Angeles* v. *Hollywood Cemetery Assn.*, 124 California, 344, 349.

Whatever charter power be relied upon, whether it be to "prohibit" or to "regulate," it must be by general laws, or ordinances, applying to all alike, of the same class. The exercise of the power, in any given particular or individual case, cannot be delegated to any individual, officer, board, committee, or even to the municipal legislative body itself. Cases *supra; Newton* v. *Belger*, 143 Massachusetts, 598; *Richmond* v. *Dudley*, 129 Indiana, 112; *State* v. *Dubarry*, 44 La. Ann. 1117; *State* v. *Tenant*, 110 N. Car. 609.

Section 5 of the ordinance does not condemn all dairies or cow stables, but only such as are "erected" without the permission of the municipal assembly. This body possesses only the delegated powers. The legislature, which is the representative of, what might be termed, the sovereign power,

cannot, constitutionally, declare a given use of a particular property as harmful or as a nuisance. This would be exercising a judicial function. *Quintini* v. *Bay St. Louis*, 64 Mississippi, 483; Tiedeman on Police Powers, sec. 122*a*, p. 426; Wood on Nuis. 3d ed. sec. 744, p. 976; *Mayor* v. *Thorne*, 7 Paige (N. Y.), 261; *Hutton* v. *Camden*, 39 N. J. L. 122, 130; *New Orleans* v. *Blineau*, 3 La. Ann. 689; *State* v. *Mott*, 61 Maryland, 297, 308; *Evansville* v. *Miller*, 146 Indiana, 613, 620; *Eden* v. *The People*, 161 Illinois, 296, 308.

The judicial powers cannot be delegated as attempted in § 5 of the ordinance. Cooley Const. Lim. 6th ed. pp. 137, 504.

The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, legislative and the judicial branches of these governments are all of limited and defined power. *Curry* v. *District of Columbia*, 14 App. D. C. 423, 439; *Loan Association* v. *Topeka*, 20 Wall. 622; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Railroad Co.* v. *Chicago*, 166 U. S. 226, 237; *State* v. *Loomis*, 115 Missouri, 307, 313; *Railroad Co.* v. *State*, 47 Nebraska, 549, 573.

The personal liberty of the citizen and his right of property cannot thus be invaded under the guise of a police regulation. *Ex parte Sing Lee*, 96 California, 354, 358; Dill. Munic. Corp. 4th ed. § 374, p. 447; *River Rendering Co.* v. *Behr*, 77 Missouri, 91, 98, 99; *State* v. *Julow*, 129 Missouri, 163, 177; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *United States* v. *Sweeney*, 95 Fed. Rep. 434, 450, and cases *supra*.

Section 5 being highly penal in its nature and consequences must be subject to strict construction. This is the rule in Missouri. *St. Louis* v. *Dorr*, 136 Missouri, 370, 375; *St. Louis* v. *Robinson*, 135 Missouri, 460, 470. Its provisions cannot be carried beyond its express terms. *Pacific* v. *Seifert*, 79 Missouri, 210, 215; *State* v. *Schuchmann*, 133 Missouri, 111, 117.

When doubts arise concerning their interpretation, such doubts are to weigh only in favor of the accused. *Canton* v.

Dawson, 71 Mo. App. 235, 239; *State* v. *Bryant*, 90 Missouri, 534, 537, 538; *Westport* v. *Mastin*, 62 Mo. App. 658.

Mr. William F. Woerner, with whom *Mr. Charles W. Bates* and *Mr. C. R. Skinker* were on the brief, for defendant in error:

The only question is whether the ordinance in question violates the Fourteenth Amendment. On all other points the plaintiff in error is concluded by the ruling of the state Supreme Court. *Barbier* v. *Connolly*, 113 U. S. 27; *Wilson* v. *Eureka*, 173 U. S. 32; *Crowley* v. *Christensen*, 137 U. S. 86; *Gundling* v. *Chicago*, 177 U. S. 183.

That permission of the municipal assembly must be obtained before establishing or maintaining a dairy within the city limits, does not operate as a violation of the Fourteenth Amendment. Cases *supra*, and *Davis* v. *Massachusetts*, 167 U. S. 43, 48; *St. Louis* v. *Galt*, 77 S. W. Rep. (Mo.) 876; *Ex parte Fiske*, 72 California, 124, 126; *Slaughter House Cases*, 16 Wall. 36, 80.

The charter provisions confer on the city express power to prohibit altogether the erection or maintenance of cow stables and dairies as well as to remove and regulate the same. Under these provisions it is competent to impose, instead of absolute prohibition, the lesser restriction, upon all persons desiring to erect or maintain a dairy, of first obtaining permission so to do from the municipal assembly and mayor by ordinance. The maintenance of dairies and cow stables within the city limits is not an absolute right, but a privilege, and whether under the individual circumstances of each case the operation of a dairy in the particular locality may be advantageous or injurious to the public is a question the determination of which is properly left to the discretion of the municipal assembly, and the ordinance is not for that reason void as conferring an arbitrary and unregulated power. Cases *supra*, and *Commonwealth* v. *Parks*, 155 Massachusetts, 531; *Quincy* v. *Kennard*, 151 Massachusetts, 563; *In re Flaherty*, 105 California, 558, 562; *Ex parte Fiske*, 72 California, 124; *Easton* v. *Covey*,

74 Maryland, 262; *Love* v. *Judge*, 128 Michigan, 545; *St. Louis* v. *Howard*, 119 Missouri, 47; *St. Louis* v. *Weber*, 44 Missouri, 547; *State ex rel.* v. *Holt*, 39 Missouri, 521; *Perry* v. *Salt Lake*, 7 Utah, 143; *Hine* v. *New Haven*, 40 Connecticut, 478; *Commonwealth* v. *Davis*, 162 Massachusetts, 510; *State ex rel.* v. *Schweickardt*, 109 Missouri, 496, 514.

Where the determination of the question whether the pursuit of a certain occupation, which may or may not be a nuisance according to conditions and circumstances, is left to the discretion of the municipal assembly, the presumption is indulged by the courts that such body will make the proper investigation and act impartially, not that it will favor one and discriminate against another, or exercise its powers for purposes of profit or oppression. Cases *supra*, and *Soon Hing* v. *Crowley*, 113 U. S. 703, 710.

The possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. *Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Williams* v. *Mississippi*, 170 U. S. 213, 225; *Verdin* v. *St. Louis*, 131 Missouri, 26, 130.

As it does not appear upon the face of the ordinance, or from any facts in evidence or of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, or that there is any unjust discrimination, the legislative determination of the questions of public policy requiring its enactment is conclusive upon this court and forms no subject for Federal interference. *Powell* v. *Pennsylvania*, 127 U. S. 678; *Gundling* v. *Chicago*, 177 U. S. 183, 187; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246; *State* v. *Layton*, 160 Missouri, 474, 498.

The ordinance is a valid exercise of the police power expressly delegated by the State to the city. The Fourteenth Amendment was not designed to interfere with the exercise of the police power by the States, and nothing in that amendment has shorn the States of their police power to prohibit or regulate trades and occupations which are or may be un-

wholesome, nor of regulating the use of property so as to guard against a use which is injurious to the community. Cases *supra,* and *Holden* v. *Hardy,* 169 U. S. 366, 392; *State* v. *Broadbelt,* 89 Maryland, 565; *Ferrenbach* v. *Turner,* 86 Missouri, 416; *In re Linehan,* 72 California, 114; *Lawton* v. *Steele,* 152 U. S. 133; 2 Tiedeman on State and Fed. Control, 730, § 145; Parker & Worthington on Public Health, § 254, p. 291; *St. Louis* v. *Galt, supra; Ex parte Cheney,* 90 California, 617; *Westport* v. *Mulholland,* 159 Missouri, 86, 94.

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

The authority of the city of St. Louis to adopt the ordinance in question is found in the Revised Statutes of the State, (1899, pp. 2486 and 2488,) which declares: "The mayor and assembly shall have power, within the city, by ordinance not inconsistent with the Constitution, or any law of this State, or of this charter, . . . to . . . prohibit the erection of . . . cow stables and dairies . . . within prescribed limits, and to remove and regulate the same."

"Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or of the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars."

The authority of the municipality of St. Louis, under this charter, to adopt the ordinance in question was settled by the decision of the Supreme Court, and is not open to attack here.

Considerable stress is laid upon the fact that at the time the ordinance was adopted, (April 6, 1896,) the dairy and cow stable had already been erected and at that time was occupied and in use for that purpose, though such use was subsequently abandoned and the premises used as a private residence for a

short time, when defendant moved his cattle there and established anew the dairy and cow stable which had theretofore been used. The Supreme Court, however, found that defendant was guilty of maintaining a dairy and cow stable within the meaning of the ordinance without permission of the municipal assembly, and as this construction of the ordinance involves no Federal question, we are relieved from the necessity of considering it.

Defendant's objection to the ordinance, that it is made to apply to the whole city when authority was only given by the charter to prohibit the erection of cow stables and dairies "within prescribed limits," is equally without foundation. If it were possible to prescribe limits for the operation of the ordinance it was held by the Supreme Court to be equally possible to declare that those limits should be coincident with the limits of the city. This is also a non-Federal question.

Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons, a discrimination is thus declared in favor of such persons and against all other persons, and the equal protection of the laws denied to all the disfavored class. The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, etc. *In re Linehan*, 72 California, 114; *Quincy* v. *Kennard*, 151 Massachusetts, 563; *Love* v. *Judge*, 128 Michigan, 545.

We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city and another in the suburbs; or, where one was known to keep his stable in a filthy condition and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who for reasons totally disconnected with the merits of the case are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. *Crowley* v. *Christensen*, 137 U. S. 86; *Davis* v. *Massachusetts*, 167 U. S. 43; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710.

The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desire to establish dairies and cow stables in the outskirts of the city, as well as inconvenience to the inhabitants, who to

that extent would be limited in their supply of milk. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, *Chicago* v. *Trotter*, 136 Illinois, 430; *Matter of Frazee*, 63 Michigan, 396; *State* v. *Fiske*, 9 R. I. 94; *Baltimore* v. *Radecke*, 49 Maryland, 217; *Sioux Falls* v. *Kirby*, 6 S. Dak. 62, and in others that such authority cannot be delegated to the adjoining lot owners. *St. Louis* v. *Russell*, 116 Missouri, 248; *Ex parte Sing Lee*, 96 California, 354. But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, *Quincy* v. *Kennard*, 151 Massachusetts, 563; *Commonwealth* v. *Davis*, 162 Massachusetts, 510, and by this court the delegation of such power, even to a single individual, was sustained in *Wilson* v. *Eureka City*, 173 U. S. 32, and *Gundling* v. *Chicago*, 177 U. S. 183.

Whether the defendant be in a position to avail himself of the alleged invalidity of the ordinance without averring that he applied for and had been refused a permit to establish the dairy and cow stable in question, as was intimated in the latter case, is not necessary to a decision here, and we express no opinion upon the point.

It is sufficient for us to hold, as we do, that the ordinance in question does not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

The judgment of the Supreme Court of Missouri is, therefore,

Affirmed.

SCHEFE *v.* ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 62. Argued April 12, 1904.—Decided May 16, 1904.

Decided on authority of *Fischer* v. *St. Louis*, *ante*, p. 361.

Mr. G. N. Fickeissen, with whom *Mr. J. D. Johnson* was on the brief, for plaintiff in error.

Mr. William F. Woerner, with whom *Mr. Charles W. Bates* and *Mr. C. R. Skinker* were on the brief, for defendant in error.[1]

This case is similar to *Fischer* v. *St. Louis*, *ante*, p. 361, in every material particular, and, for the reasons stated in that case, is also

Affirmed.

UNITED STATES *ex rel.* HOLZENDORF *v.* HAY.

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

No. 210. Argued April 12, 13, 1904.—Decided May 16, 1904.

The "matter in dispute," as respects a money demand, as employed in the statutes regulating appeals from the courts of the District of Columbia, has relation to justiciable demands and must be money or some right, the value of which can be ascertained in money, and which appears by the record to be of the requisite pecuniary value.

Where the averments in a petition that a mandamus be issued directing the Secretary of State to assert for the petitioner a claim against a foreign government do not state a cause of action under the principles of law of false imprisonment in this country, and do not show that the alleged wrong was actionable in such foreign country, the right to have the claim asserted is purely conjectural, and not susceptible of pecuniary estimate, and cannot be said to have the value necessary to give this court jurisdiction, and the writ must be dismissed.

THE relator, plaintiff in error, filed his petition in the Su-

[1] For abstract of arguments, see *ante*, p. 363.

preme Court of the District of Columbia, praying a writ of mandamus directed to the then and present Secretary of State of the United States. In substance it was averred that Holzendorf, prior to and since May, 1898, had been a naturalized citizen of the United States, and while on a visit to Germany, his native country, he was wrongfully imprisoned in an asylum for the insane at Dalldorf, near Berlin, from May 11, 1898, to July 8, 1899, when he was released by the judgment of a German court, as being "perfectly sound in mind and body." The grievance complained of was alleged to have been the act of the German Empire, and it was averred that said grievance "was manifestly in contempt of his rights as a citizen of the United States," which "oppressively deprived him of liberty, reputation and time, greatly to his cost, loss, damage and injury." Alleging a refusal by the defendant in mandamus "to proceed, on the part of the United States, to seek to obtain redress of grievance in behalf of your petitioner," it was prayed that a writ of mandamus issue, "addressed to said defendant, John Hay, the Secretary aforesaid, commanding and requiring him forthwith to institute vigorous and proper proceedings against the Empire of Germany, or Kingdom of Prussia, or both, that is to say, against the Emperor, for the recovery of five hundred thousand dollars damages, in behalf of your petitioner."

The matter was heard and an order was entered dismissing the petition. An appeal was allowed, and the Court of Appeals of the District affirmed the judgment. 20 App. D. C. 576. By writ of error the cause was then brought to this court.

Mr. R. S. Tharin for plaintiff in error.

Mr. Assistant Attorney General McReynolds for defendant in error.

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

The relief demanded was denied by the court below sub-

stantially upon the ground that no legal duty rested upon the defendant to do the act the performance of which it was the purpose of the proceeding to coerce, because such act concerned the political department of the government, involving solely the exercise of official discretion, which was not subject to judicial control. Without intimating in the slightest degree that the dismissal was not justified upon the ground referred to, we are compelled to dispose of the case upon the objection made to the want of jurisdiction in this court to entertain the writ of error.

It is provided in the Code of the District of Columbia, 31 Stat. c. 854, p. 1227, as follows:

"SEC. 233. Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It is clear, therefore, unless the case is one in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, we have no power to review the final judgment of the Court of Appeals in this case.

The meaning of the term "matter in dispute," as employed in prior and analogous statutes regulating appeals from the courts of the District of Columbia, has been considered in previous decisions of this court, to one only of which we shall specially refer.

In *South Carolina* v. *Seymour*, 153 U. S. 353, the court had

under consideration section 8 of the act of 1893, referred to in section 233 of the District Code, *supra*. Particularly discussing the preliminary provision conferring jurisdiction upon this court where "the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars," the court said (p. 357):

"In order to bring a case within the first alternative, the matter in dispute, according to the settled construction, must be money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value."

Now, assuming that the term "matter in dispute" may embrace a right to have a claim against a foreign government presented through the political department of the United States, and that the value of such a right may be gauged by the possible pecuniary injury which may be sustained if no such action is taken, it is yet evident that the claim under consideration is one having merely a conjectural value. The "matter in dispute," as respects a money demand, has relation to justiciable demands. Now, the averments in the petition for mandamus in this case do not, under the principles of the law of false imprisonment prevailing in this country, state a cause of action even against individuals, much less against a sovereignty; nor is it shown that the alleged wrong was actionable under the laws of Germany. So far as appears, the right to assert the demand in question upon the German Empire is merely a right to appeal to the grace of that country. The value of such a right is manifestly purely conjectural and not susceptible of a pecuniary estimate. It certainly cannot be said to have the value declared by the statute to be essential to our power to entertain a writ of error. The writ of error must therefore be

Dismissed.

MR. JUSTICE BREWER and MR. JUSTICE BROWN think the judgment should be affirmed.

SUN PRINTING AND PUBLISHING ASSOCIATION *v.* EDWARDS.

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

No. 239. Argued April 20, 1904.—Decided May 16, 1904.

An allegation in the complaint, which is admitted by the answer that defendant is a domestic corporation duly organized and existing under the laws of a designated State and having its principal office therein is a sufficient averment as to defendant's citizenship.

In determining, on certified question of jurisdiction from the Circuit Court of Appeals, whether diverse citizenship exists, the whole record may be looked to for the purpose of curing a defective averment, and if the requisite citizenship is anywhere averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient.

Where the court is satisfied, in the light of all the testimony, that an averment of residence in a designated *State* was intended to mean, and, reasonably construed must be interpreted as averring, that plaintiff was a *citizen* of that State, it is sufficient.

THE facts, which involved the sufficiency of averments and proof of diverse citizenship to maintain the jurisdiction of the United States Circuit Court, are stated in the opinion of the court.

Mr. Franklin Bartlett for plaintiff in error:

The complaint is defective. Citizenship and residence are not synonymous terms, *Parker* v. *Overman*, 18 How. 141; *Robertson* v. *Cease*, 97 U. S. 648; *Abercrombie* v. *Dupuis*, 1 Cr. 343; *Bingham* v. *Cabot*, 3 Dall. 382; *Wood* v. *Wagnon*, 2 Cr. 9; *Capron* v. *Van Noorden*, 2 Cr. 126; *Brown* v. *Keene*, 8 Pet. 112; *Hornthal* v. *Collector*, 9 Wall. 560; *Grace* v. *Am. Cent. Ins. Co.*, 109 U. S. 283; *Bors* v. *Preston*, 111 U. S. 255; *Everhart* v. *College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253; *Denny* v. *Pironi*, 141 U. S. 123.

The record fails to disclose diverse citizenship. *Ex parte Smith*, 94 U. S. 455; *Gibson* v. *Bruce*, 108 U. S. 561; *Enshei-*

mer v. *New Orleans*, 186 U. S. 44; *Continental Ins Co.* v. *Rhoads*, 119 U. S. 237; *Peper* v. *Fordyce*, 119 U. S. 471; *Thayer* v. *Life Association*, 112 U. S. 717.

It is error for the Circuit Court to proceed unless its jurisdiction be shown. *Railway Co.* v. *Swan*, 111 U. S. 379; *Horne* v. *Geo. H. Hammond Co.*, 155 U. S. 393; *Construction Co.* v. *Gibney*, 160 U. S. 219, 239.

A party cannot by proceedings in the Circuit Court waive a question of jurisdiction in that court so as to prevent its being raised and passed on in the Supreme Court of the United States. *Railway Co.* v. *Swan*, *supra*; *Metcalf* v. *Watertown*, 128 U. S. 589; *Parker* v. *Ormsby*, 141 U. S. 81, 83.

An argumentative inference is not permitted. *Bernards Township* v. *Stebbins*, 109 U. S. 353; *Shreveport* v. *Cole*, 129 U. S. 44. There is no evidence that defendant in error lived in Delaware. *Stevens* v. *Nichols*, 130 U. S. 231; *Jackson* v. *Allen*, 132 U. S. 34.

Brown v. *Keene*, 8 Peters, 112, is fatal to argument of defendant in error; a permanent domicil is not equivalent to citizenship. *United States* v. *Wong Kim Ark*, 169 U. S. 649. The place of business of a corporation is not a test of residence. *Guinn* v. *Iowa Central R. Co.*, 14 Fed. Rep. 323; *N. Y. &c. R. R. Co.* v. *Hyde*, 56 Fed. Rep. 188.

Mr. Thomas F. Bayard for defendant in error:

If the diversity of citizenship affirmatively appears upon the record, the jurisdiction of the Circuit Court must be affirmed. *Robertson* v. *Cease*, 97 U. S. 646; *Grace* v. *American &c. Ins. Co.*, 109 U. S. 278; *Peper* v. *Fordyce*, 119 U. S. 469; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237.

It affirmatively appears upon the record that the plaintiff in error is a citizen of the State of New York in the Southern District of New York.

An affirmative averment that one of the parties is a corporation, duly organized and existing under the laws of a certain State, is a sufficient allegation to establish the citizen-

ship of the party in that State. *Louisville R. R. Co.* v. *Letson*, 2 Howard, 497, 558; *Marshall* v. *B. & O. R. R.*, 16 Howard, 314, 329; *Express Co.* v. *Kountze*, 8 Wallace, 342, 351; *Muller* v. *Dows*, 94 U. S. 444, 445; Black's Dillon on Removal of Causes, sec. 178; Foster's Federal Practice, sec. 19, p. 67, 3d ed.

It affirmatively appears upon the record that defendant in error is a citizen of the State of Delaware. *Poppenhauser* v. *Rubber Co.*, 14 Fed. Rep. 707; Carter on Jurisdiction of Federal Courts, 18, 19; Story on Conflict of Laws, sec. 44; Wharton on Conflict of Laws, sec. 21, 2d ed.; *Mitchell* v. *United States*, 21 Wall. 350; *Anderson* v. *Watt*, 138 U. S. 694, 706; *Rucker* v. *Bolles*, 80 Fed. Rep. 504, 508; *Marks* v. *Marks*, 75 Fed. Rep. 321; *Butler* v. *Farnsworth*, 4 Wash. C. C. 101; *Morris* v. *Gilmer*, 129 U. S. 315.

Defendant in error was not a citizen of New York where plaintiff in error resided. *Cooper* v. *Galbraith*, 3 Wash. C. C. 546, 553; *Dickerman* v. *Trust Co.*, 176 U. S. 181; Jacobs on Domicile, sec. 134; *Winn* v. *Gilmer*, 27 Fed. Rep. 817; Story's Conflict of Laws, secs. 47, 48; Wharton's Conflict of Laws, sec. 58; Dicey's Conflict of Law, ch. II, rule 2; *Guier* v. *O'Daniel*, 1 Binney (Pa.), 350; Bluntschli, National Law Codified, sec. 394.

Mr. Justice White delivered the opinion of the court.

The certificate of the United States Circuit Court of Appeals for the Second Circuit is as follows:

"This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. Upon examination of the record it appears that, in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the Circuit Court is in issue. Under sections 5 and 6 of the act of March 3, 1891, writs of error in such cases are to be taken direct to the

Supreme Court, and the grant of appellate jurisdiction to the Circuit Courts of Appeal does not include such cases.

"In accordance therefore, with the practice indicated in *Cincinnati, Hamilton & D. Co.* v. *Thiebaud*, 177 U. S. 615, and *Am. Sugar Co.* v. *New Orleans*, 181 U. S. 277, and followed by this court in *United States* v. *Lee Yen Tai*, 113 Fed. Rep. 465, this court elects to reserve judgment upon the other questions and to certify the question of jurisdiction to the Supreme Court.

"*Statement of Facts.*

"The facts out of which the question of jurisdiction arises are as follows:

"The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York. The complaint further avers and the answer admits that 'plaintiff is a resident of the State of Delaware.' Upon the trial the plaintiff testified: 'I started in the printing business about thirty years ago. . . . I have been on the New York Tribune, on the World, the Philadelphia Record and the American Press Association . . . I had charge of the Morning News, Wilmington, Delaware. . . . In this city [New York] I worked on the New York Tribune, on the Sun, on the World, and in the American Press Association . . . Just prior to my going to work upon the New York Sun [under the contract in suit] I was the publisher and business manager of the Evening Journal of Wilmington, Delaware, and president of the company. . . . [After my discharge from the employ of the Sun] I finally secured a place with the New Haven Palladium, and I was there a while. . . . One of the reasons I left the New Haven Palladium was that it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware.'

"There was no other testimony in any way bearing upon the plaintiff's residence or citizenship.

"The jurisdiction of the Circuit Court was not questioned by the defendant in the court below, and the assignments of error do not present any such question.

"*Question Certified.*

"Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court is:

"'Had the Circuit Court jurisdiction of the controversy between plaintiff and defendant?'

"In accordance with the provisions of section 6 of the act of March 3, 1891, establishing Courts of Appeal, etc., the foregoing question of law is by the Circuit Court of Appeals for the Second Circuit hereby certified to the Supreme Court."

In the argument at bar on behalf of the Sun Printing and Publishing Association, the plaintiff in error in the Circuit Court of Appeals, the jurisdiction of the Circuit Court over the controversy was denied, not only upon the hypothesis that Edwards, the plaintiff, was not alleged or shown to have been a citizen of Delaware, but also upon the assumption that the Sun Association was not averred to have been a citizen of New York. The latter contention may be at once dismissed from view, because the allegation of the complaint, admitted by the answer, "that defendant is a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York," clearly imported that the corporation was originally created by the State of New York. The presumption necessarily followed that the corporation was composed of citizens of that State, and consequently the corporation was entitled to sue or be sued in the courts of the United States as a citizen of New York. *Southern Ry. Co.* v. *Allison*, 190 U. S. 326.

We come to the contention that the citizenship of Edwards

was not averred in the complaint or shown by the record, and hence jurisdiction did not appear.

In answering the question, whether the Circuit Court had jurisdiction of the controversy, we must put ourselves in the place of the Circuit Court of Appeals, and decide the question with reference to the transcript of record in that court.

Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a "resident of the State of Delaware," as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, a negative answer would have been impelled by prior decisions. *Mexican Central Ry. Co.* v. *Duthie*, 189 U. S. 76; *Horne* v. *George H. Hammond Co.*, 155 U. S. 393; *Denny* v. *Pironi*, 141 U. S. 121; *Robertson* v. *Cease*, 97 U. S. 646. The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship, is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient. *Horne* v. *George H. Hammond Co.*, *supra*, and cases cited.

As this is an action at law, we are bound to assume that the testimony of the plaintiff contained in the certificate of the Circuit Court of Appeals, and recited to have been given on the trial, was preserved in a bill of exceptions, which formed part of the transcript of record filed in the Circuit Court of Appeals. Being a part of the record, and proper to be resorted to in settling a question of the character of that now under consideration, *Robertson* v. *Cease*, 97 U. S. 646, 648, we come to ascertain what is established by the uncontradicted evidence referred to.

In the first place, it shows that Edwards, prior to his employment on the New York Sun and the New Haven Palladium, was legally domiciled in the State of Delaware. Next, it demonstrates that he had no intention to abandon such domicil, for he testified under oath as follows: "One of the reasons I

left the New Haven Palladium was, it was too far away from home. I lived in Delaware, and I had to go back and forth. My family are over in Delaware." Now, it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell* v. *United States*, 21 Wall. 350.

As Delaware must, then, be held to have been the legal domicil of Edwards at the time he commenced this action, had it appeared that he was a citizen of the United States, it would have resulted, by operation of the Fourteenth Amendment, that Edwards was also a citizen of the State of Delaware. *Anderson* v. *Watt*, 138 U. S. 694. Be this as it may, however, Delaware being the legal domicil of Edwards, it was impossible for him to have been a citizen of another State, District or Territory; and he must then have been either a citizen of Delaware or a citizen or subject of a foreign State. In either of these contingencies, the Circuit Court would have had jurisdiction over the controversy. But, in the light of the testimony, we are satisfied that the averment in the complaint, that Edwards was a resident "of" the *State* of Delaware, was intended to mean, and, reasonably construed, must be interpreted as averring, that the plaintiff was a *citizen* of the State of Delaware. *Jones* v. *Andrews*, 10 Wall. 327, 331; *Express Company* v. *Kountze*, 8 Wall. 342.

The question is answered in the affirmative, and it will be so certified.

MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM dissented.

MORRIS *v.* HITCHCOCK.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 272. Submitted April 29, 1904.—Decided May 16, 1904.

The constitutionality of the Curtis Act, 30 Stat. 495, for the protection of the Indian Territory has been settled by this court and is not now open to question. *Stephens* v. *Cherokee Nation*, **174 U. S. 445**; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294.

The act of the Chickasaw Nation, approved by the Governor May 5, 1902, and by the President of the United States May 15, 1902, prescribing privilege or permit taxes, and the regulations of the Secretary of the Interior of June 3, 1902, governing the introduction by non-citizens of live stock in the Chickasaw Nation are valid, and not an exercise of arbitrary power, and they do not in any respect violate the Constitution of the United States.

THIS is an equity suit begun in the Supreme Court of the District of Columbia by Edwin T. Morris and nine other persons, all averred to be citizens of the United States and not Indians, against Ethan A. Hitchcock, as Secretary of the Department of the Interior, William A. Jones, as Commissioner of Indian Affairs, J. George Wright, as Indian inspector, and J. Blair Shoenfelt, as United States Indian agent, resident at the city of Muscogee, in the Indian Territory. Certain of the complainants were averred to be residents either of the State of Texas or of the State of Missouri, and others were averred to be residents of the Indian Territory.

It was alleged that each complainant was the owner in his own right of not less than five hundred head of cattle and horses, of the value of not less than fifteen dollars per head, which were grazing upon land in the Chickasaw Nation, Indian Territory, under contracts with individual members of said tribe, holding such lands as their approximate shares

upon allotments to be made. The purpose of the suit was to obtain a decree perpetually enjoining said defendants from seizing, molesting or removing the cattle and horses of plaintiffs from the Indian Territory, as it was averred they threatened to do under the pretended authority of an act of the legislature of the Cherokee Nation and regulations promulgated by the Secretary of the Interior, which were averred to be repugnant to the Fourth and Fifth Amendments to the Constitution of the United States. The statute and regulations referred to are copied in the margin.[1]

---

[1] *Regulations* (*June* 3, 1902,) *Governing the Introduction by Non-citizens of Live Stock in the Chickasaw Nation, Indian Territory.*

Section 29 of the act of Congress, approved June 28, 1898, 30 Stat. 495, ratifying the agreement with the Choctaw and Chickasaw Nations, Indian Territory, provides in part as follows:

"It is further agreed that no act, ordinance or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes,) or the rights of any persons to employ any kind of labor; or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances or resolutions, passed by the councils of either of said tribes, shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same—said acts, ordinances or resolutions, when so approved, shall be published in at least two newspapers having a *bona fide* circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

"It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for a period of eight years from the fourth day of March, eighteen hundred and ninety-eight."

Under these provisions, the following act of the Chickasaw national council, approved by the governor on May 3, 1902, was approved by the President of the United States on May 15, 1902, and entitled:

The bill of complaint was demurred to upon the grounds following: (*a*) Want of jurisdiction in equity because of ade-

---

An act to prescribe privilege or permit taxes and defining the manner of their collection.

Be it enacted by the legislature of the Chickasaw Nation:

SEC. 1. That there shall be paid upon live stock owned or held by non-citizens within the limits of the Chickasaw Nation, an annual privilege or permit tax as follows: On cattle, horses and mules, twenty-five cents per head; and on sheep and goats, five cents per head: *Provided*, That there shall be exempted from the provisions of this act, when owned and used by the head of a family, two cows and calves, and one team, consisting of two horses or two mules, or one horse and one mule; and the provisions of this act shall also apply to all live stock introduced into the Chickasaw Nation since January 1, 1902, upon which the tribal taxes imposed by the laws of the Chickasaw Nation have not been paid, with like force and effect as if such cattle had been owned and held within the limits of Chickasaw Nation for one year prior to the passage and approval of this act.

SEC. 2. That such privilege or permit taxes shall hereafter be payable to such person or persons and collected under such rules and regulations as may be prescribed by the Secretary of the Interior.

SEC. 3. That the expenses of collecting such privilege or permit taxes shall be deducted from the gross collections, and the balance paid quarterly into the treasury of the Chickasaw Nation.

SEC. 4. That such privilege or permit taxes shall be due and payable annually, upon demand, and if such taxes are not paid when demanded, the live stock upon which such taxes are due shall be held to be in the Chickasaw Nation without its consent, and unlawfully upon the lands of the Chickasaws, and the presence of such live stock, and owners or holders thereof, within the limits of said nation, shall be deemed detrimental to the peace and welfare of the Chickasaw Indians.

SEC. 5. That all acts or parts of acts in conflict herewith, be and the same are, hereby repealed; and this act shall take effect from and after its approval by the President of the United States.

In pursuance of the above and foregoing the following regulations are promulgated:

Regulations Prescribed by the Secretary of the Interior Governing the Introduction or Holding of Live Stock in the Chickasaw Nation by Non-citizens.

SEC. 1. Any person, other than a recognized citizen of the Choctaw or Chickasaw Nations, desiring to introduce or hold stock of any description within the limits of the Chickasaw Nation, Indian Territory, shall first make application to the United States Indian inspector for the Indian Territory, Muscogee, Indian Territory, and shall pay to the United States Indian agent, Union agency, an annual tax of twenty-five (25) cents per head on all cattle, horses and mules, and on all sheep and goats five (5) cents per

quate right to relief at law; (*b*) Defect of necessary parties in that neither the Chickasaw Nation or tribe, or any mem-

---

head, provided that there shall be exempted from the provisions of these regulations, when owned and used by the head of a family, two cows and calves, and one team of horses, or two mules, or one horse and one mule.

SEC. 2. Such tax shall be paid January 1st of each year, or prior to the time of the introduction of such stock, and accompanying such remittance there shall be furnished, under oath, a full description of such stock, including the number and brands, together with any other desired information.

SEC. 3. Such taxes shall apply to all stock introduced within the limits of the Chickasaw Nation since January 1, 1902, upon which taxes have not already been paid to the Chickasaw Nation and for which the owners or holders cannot produce receipts.

SEC. 4. The tax prescribed shall be paid annually in advance, whether such stock is held the entire succeeding twelve months or for a portion of such time.

SEC. 5. Where cattle are held by a citizen and mortgaged to a non-citizen, not in good faith but for the purpose of evading the payment of taxes, said cattle shall be considered as owned or held by such non-citizen, and subject to these regulations and taxes.

SEC. 6. Parties who now hold stock within the limits of the Chickasaw Nation should remit the taxes prescribed promptly to the U. S. Indian agent at Muscogee, Indian Territory, and such payments must be made within ten (10) days from the date of receiving notice of these regulations. If such taxes are not paid within this time remittances made thereafter will not be accepted, but such stock and any other stock found within the limits of the Chickasaw Nation after July 1, 1902, upon which taxes have not been paid, will be considered as being within the limits of the Chickasaw Nation unlawfully, and measures will be adopted looking to the removal by the United States Indian agent of such stock, together with the owners of holders thereof, without further notice.

SEC. 7. Authorized agents of the Interior Department will make necessary investigations and reports and see that proper remittances are forwarded, acting under the direction of the United States Indian inspector for Indian Territory, but will not be authorized to receive or collect any taxes whatsoever, as all payments must be made direct to the United States Indian agent, who will furnish receipts for all payments made.

SEC. 8. These regulations and taxes will apply to all stock as indicated, held within the limits of the Chickasaw Nation by other than recognized citizens of the Choctaw or Chickasaw Nations, whether held upon the public domain or upon lands leased from individual Indians.

THOS. RYAN, *Acting Secretary.*

Department of the Interior, Washington, D. C.
Approved June 3, 1902.

ber or representative thereof, was joined as a defendant; and (*c*) Want of equity.

After argument, the court overruled the first and second grounds of demurrer, and sustained the third ground. The complainants elected to stand upon their bill of complaint and a decree was consequently entered dismissing the bill. On appeal, the decree was affirmed by the Court of Appeals of the District of Columbia. 21 App. D. C. 565. The cause was then brought to this court.

Mr. Jackson H. Ralston, Mr. Frederick L. Siddons and *Messrs. Davis & Garnett* for appellants.

Mr. Assistant Attorney General Campbell and *Mr. Assistant Attorney A. C. Campbell* for appellees.

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

We think the court below was right in holding that the first and second grounds of demurrer were not well taken, but do not think it necessary to review the subject, as the opinion which we have reached on the merits of the case will dispose of the entire controversy.

The act of Congress approved June 28, 1898, commonly known as the Curtis Act, 30 Stat. 495, c. 517, under which the act of the Chickasaw Nation and regulations of the Secretary of the Interior which are assailed were adopted, is entitled "An act for the protection of the people of the Indian Territory, and for other purposes." The question of the validity and construction of that act was under consideration in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, and *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, and in view of the rulings in those cases the constitutionality of the statute is not now open to question.

While it is unquestioned that by the Constitution of the United States Congress is vested with paramount power to

regulate commerce with the Indian tribes, yet it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, and the duty of the United States to protect the Indians "from aggression by other Indians and white persons, not subject to their jurisdiction and laws," has also been recognized. Arts. 7 and 14, Treaty June 22, 1855, 11 Stat. 611; Art. 8, Treaty April 28, 1866, 14 Stat. 769. And it is not disputed that under the authority of these treaties the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory.

Legislation of the same general character as that embodied in the act of the legislature of the Chickasaw Nation here assailed as invalid had been enacted by the Chickasaw Nation before the passage of the Curtis Act. The essential provisions of one such law, passed on October 17, 1876, were recited in a report made to the Senate by the Committee on the Judiciary, on February 3, 1879, from which we copy the following:

"The law in question seems to have a twofold object—to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue. By its terms no citizen of any State or Territory of the United States can either rent land or procure employment in the Chickasaw country without entering into a contract with a Chickasaw, which contract the latter is to report to the clerk of the county where he resides, and a permit must be obtained for a time not longer than twelve months, for which the citizen is to pay the sum of $25.

"Every licensed merchant, trader, and every physician, not a Chickasaw, is required to obtain a permit, for which the sum of $25 is exacted."

Declaring in substance that under the existing treaties with the tribe, the Chickasaws were not prohibited from excluding

from the territory of the nation the persons affected by the act, the committee expressed the opinion that the act which was the subject of the report was not invalid.

Again, on December 14, 1898, the legislature of the Chickasaw Nation passed an act, which in section 2, with some exemptions mentioned in a proviso, imposed the following permit taxes:

"SEC. 2. That any non-citizen who owns horses, jacks, jennets, mules, or other cattle, and who holds them upon the public domain or within the Chickasaw Nation, shall be required to pay an annual permit tax of twenty-five cents per head for each horse, jack or jennet, mule, or bovine, and five cents per head for each sheep and goat so held within this nation."

By the ninth section of the same act it was provided as follows:

"SEC. 9. That any non-citizen, subject to a permit tax under the provisions of section one of this act, and who shall refuse to pay his permit tax, after due notice for thirty days, shall be deemed an intruder by virtue of the intercourse law of the United States of America and subject to removal; and such intruder shall be reported to the United States Indian agent (or inspector) to the Five Civilized Tribes, and shall forthwith be removed from the Chickasaw Nation, under the direction of the said United States Indian agent or inspector."

The agreement made by the commission to the Five Civilized Tribes with the commissions representing the Choctaw and Chickasaw tribes of Indians on April 23, 1897, as amended by the Curtis Act, was in section 29 of that act ratified and confirmed and made operative on December 1, 1898.

By that agreement certain modifications, not material to be stated, were made in the legislative authority and judicial jurisdiction of the tribal governments, and, so modified, the tribal governments were continued in force, and are to so continue until March 4, 1906. One of the clauses of the agreement reads as follows:

"It is further agreed that no act, ordinance or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof, (except appropriations for the regular and necessary expenses of the government of the respective tribes,) or the right of any persons to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a *bona fide* circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same."

On September 17, 1900, and September 21, 1901, the proper construction of the Curtis Act was considered, at the request of the Secretary of the Interior, in opinions of Attorney General Griggs and Attorney General Knox respectively. In the first of those opinions it was in substance held as follows:

"Under the treaties with the Five Civilized Tribes of Indians no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted.

"The provisions of the act of June 28, 1898, 30 Stat. 495, for the organization of cities and towns in said Indian country and the extinguishment of Indian title therein have not yet been consummated, and it is still Indian country. This

act does not deprive these Indians of the power to enact laws with regard to licenses or taxes, nor exempt purchasers of town or city lots from the operation of such legislation.

"Purchasers of lots do so with notice of existing Indian treaties and with full knowledge that they can only occupy them by permission from the Indians. Such lands are sold under the assumption that the purchasers will comply with the local laws.

"Sections 2147 to 2150, inclusive, of the Revised Statutes, expressly confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands, and the grant of this power carries with it the duty of its exercise.

"It is the duty of the Department of the Interior to remove all classes forbidden by treaty or law who are within the domain of the Five Civilized Tribes without Indian permission; to close all businesses which require permit or license and are being conducted without the same; and to remove all cattle which are being pastured on said land without Indian permit or license."

And in the last-mentioned opinion it was in substance declared that, under section 16 of the Curtis Act, the Secretary of the Interior had authority to collect a tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation, and that the tax was just as applicable to hay raised upon lands occupied by individual members of the nation as their share of the public domain, pending allotments, as in any other case, and would be so even if the shipper was the absolute owner of the land on which the hay was raised.

Since the rendition of these opinions of the legal advisers of the Government, Congress has created an express exception in favor of owners of town lots, prohibiting their being proceeded against as intruders, but has not legislated against the enforcement of the legislation now under review, which was then operative. Thus, on May 27, 1902, in the Indian Appropriation Act, 32 Stat. 259, c. 858, it was provided "That it shall

be hereafter unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a townsite under existing laws and treaties, and no part of this appropriation shall be used for the deportation or removal of any such person from Indian Territory."

Viewing the Curtis Act in the light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of opinion that one of the objects occasioning the adoption of that act by Congress, having in view the peace and welfare of the Chickasaws, was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventive of arbitrary and injudicious action.

The refusal to pay the permit tax in question caused the cattle and horses of the complainants to be wrongfully within the Territory, and we cannot decline to recognize such fact because of the hardships which it is alleged must arise if the act and regulations are enforced. Being of opinion that the regulations of the Secretary of the Interior are valid, and that the act of the legislature of the Chickasaw Nation approved by the governor on May 5, 1902, and sanctioned by the President of the United States on May 15, 1902, was not the exercise of arbitrary power as claimed, and that neither the act nor the regulations in any respect violate the Constitution of the United States, it follows that the judgment below is correct, and it must, therefore, be

Affirmed.

UNITED STATES *v.* ANDERSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 560. Submitted March 21, 1904.—Decided May 16, 1904.

By the fiction of relation, where the interest of justice demands it, the legal title may be held to relate back to the initiatory step for the acquisition of the land.

Where the selection of indemnity lands is made in accordance with the statute and the selection rejected, and action on the appeal is delayed, but the appeal is finally decided in favor of the selections, the case is one peculiarly within the principle of relation, as the approval of the selection manifestly imports that at the time of the selection the land was rightfully claimed by the applicant.

The successor in interest to the applicant who would have been entitled to recover against trespassers for materials removed from the land after the application and before the patent issued, may, under the doctrine of relation, be regarded as the owner from the date of the application, and is entitled to receive from the United States the amount collected by it from trespassers who removed materials from the land after such date, the United States having had notice of the claim prior to such collection.

THE United States appeals from a judgment condemning it to pay fifteen thousand dollars. The essential facts stated in the findings are as follows:

In 1856 Congress granted to the State of Alabama public lands to aid in the construction of various railroads referred to in the first and sixth sections of the act. Among these was the Northeast and Southwestern Railroad, "from near Gadsden to some point on the Alabama and Mississippi state line, in the direction to the Mobile and Ohio Railroad, and with a view to connect with said Mobile and Ohio Railroad." The grant of land in place was six odd-numbered sections per mile and lying within six sections in width on each side of the railroad. The act in section 1 also contained a provision for indemnity lands, as follows:

"But in case it shall appear that the United States have,

when the lines or routes of said roads are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of preëmption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of preëmption have attached as aforesaid, which lands (thus selected in lieu of those sold and to which preëmption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers, as aforesaid, and appropriated as aforesaid) shall be held by the State of Alabama, for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads."

The act, in section 6, moreover contained this proviso:

"That the lands hereby granted to said State for the purpose of constructing a railroad from the northeast to the southwestern portion of said State, lying northwest of Elyton, shall be assigned to such road as may be designated by the legislature of said State."

It was further in substance provided, in section 4, that if any of the authorized roads were not completed within ten years, all right of the State in and to the lands granted should cease, and they should revert to the United States. 11 Stat. c. 41, pp. 17, 18.

By joint resolution of the legislature of the State of Alabama, approved January 30, 1858, the grant made by the act aforesaid was accepted, and land was granted by the State to the Northeast and Southwestern Alabama Railroad, a body corporate, existing under the laws of Alabama, to be used and applied by said company "upon the terms and conditions in said act of Congress contained." Laws of Alabama, 1857 to

1858, p. 430. In June, 1856, an order of withdrawal was made by the Land Department of all the lands which were thought to be embraced within both the place and indemnity limits, which withdrawal included the land to which this controversy relates. This order was modified a few days thereafter so as to allow settlements to be made on the lands prior to the time of the definite location of the road. Such definite location was made and accepted by the Commissioner of the General Land Office with the approval of the Secretary of the Interior, in December, 1858.

The Northeast and Southwestern Railroad was reincorporated by the State of Alabama in October, 1868, under the name of the Alabama and Chattanooga Railroad Company. Acts of Alabama, 1868, pp. 207, 345. In April, 1869, the time for the completion of the road was extended by act of Congress for a period of three years from that date. 16 Stat. 45. The road was completed within the extended time, in conformity with the law of Alabama and in compliance with the act of Congress.

In December, 1887, an agent, duly appointed by the Governor of Alabama for that purpose, selected certain lands in the indemnity limits in lieu of lands within the place limits, which had been lost to the grantee by sale or preëmption. At the time of making the selections there were tendered to the proper land officers all legal fees and charges. The selections were rejected by the local officers and an appeal was taken to the Commissioner of the General Land Office. This appeal, however, was not acted upon for a considerable period of time; but finally in April, 1896, the appeal was decided in favor of the selections, which were approved, and the title consequently passed from the United States to the State of Alabama in trust for its grantees under the act of Congress. At the time of the definite location of the road there was a deficiency in the place limits of 519,000 acres, and the whole amount of the vacant or odd-numbered sections within the indemnity limits, both approved and unapproved, available

to meet this deficiency, was less than 238,000 acres, leaving, therefore, on the face of the land office records, at the time of the definite location of the road, a deficiency of more than 281,000 acres. By various acts of the legislature of the State of Alabama and conveyances which are recited in the findings, and which it is not necessary to reproduce, the plaintiffs below became the owners of the land patented by the United States, within the indemnity limits, as above stated. During the period, however, which intervened between the selections of land made by the agent of the State of Alabama and the approval of the selections by the Secretary of the Interior, certain persons went upon the lands selected and removed therefrom valuable iron ore and lime rock. After the approval of the selections the United States brought a suit to recover from the persons who had thus trespassed upon the lands the value of the product by them removed. The owners of the land, in pursuance of the selections, asserted a claim to the benefit of the recovery which might be made, but assented to a compromise made by the United States with the trespassers by which fifteen thousand dollars was paid to the United States as the value of the material taken from the land. The owners of the land at the time of the compromise protested that they alone were entitled to receive the sum paid to the United States and reserved their right to recover the same from the United States.

It is stated in the findings that a road known as the South and North Alabama Railroad, declared to be one of the roads enumerated in the sixth section of the act of Congress making the grant to the State of Alabama, was definitely located opposite the land in controversy on May 30, 1866, nearly eight years after the definite location of the Northeast and Southwestern Railroad, and was constructed within the time required by law. There is no finding, however, that a grant was ever made to the South and North Alabama Railroad by the State of Alabama, or that that road preferred any claim to the land in question.

Mr. Assistant Attorney General Pradt for appellant.

Mr. M. D. Brainerd and *Mr. J. A. W. Smith* for appellees.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

As there is no finding which tends even to establish any right at any time to the land in question in favor of the South and North Alabama Railroad, all consideration of that subject may be put out of view. Moreover, the existence of any supposed right in favor of that company is conclusively disposed of on this record by the finding as to the prior selection by the State of Alabama under the grant in aid of the Northeast and Southwestern Railroad and the approval of such selection by the Secretary of the Interior.

The Government makes no contention that if the title of the plaintiffs was of such a character as to entitle them generally to recover against the trespassers that the cause of action against the United States for the money collected by it from the trespassers is not one which is judicially cognizable. The sole contention of the Government is that the plaintiffs, after application for selections and before approval of the selections, had no such title to the land as would have justified a recovery from the trespassers, and, *a fortiori*, therefore had no such title as would warrant their recovering from the United States the sum of money which it collected from the trespassers for the elements removed from the land during the period between the date of the application for selections and the approval of the same by the Secretary of the Interior. This contention is based upon the proposition that, whilst under the act in question the grant of land within the place limits may have been one *in præsenti*, the right to the indemnity lands did not vest in the grantee until approval of the selections by the proper officers of the Government; and hence the legal title was in the United States as to such lands pending action on the applica-

tion for selections, and therefore at the time of the trespass the United States was alone authorized to recover for the depredations committed. Unquestionably the general doctrine is that where approval by the officers of the Government of selections of indemnity land has been made a condition precedent to the right to take such lands, the legal title remains in the United States until divested by the approval of the selections. *Oregon & California Ry. Co.* v. *United States, No. 1,* 189 U. S. 103. In consonance with this doctrine it has also been decided that, until approval of selections within the indemnity limits, land embraced in applications for selections remains the property of the United States to such an extent that it cannot be taxed as the property of the applicants. *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496.

But even though it be conceded, *arguendo,* that the doctrine in question would allow rights to be acquired by third parties to the injury of the applicant after the making of the selections and pending approval thereof by the Government, it does not follow that it controls the controversy here presented. This results because on this record the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain as against its grantees the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land and pending action thereon by the proper officers of the Government. Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land. Many cases illustrating the doctrine in various aspects have been determined in this court.[1]

Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly

[1] *Gibson* v. *Chouteau,* 13 Wall. 92, 100; *Ross* v. *Barland,* 1 Pet. 655; *Landes* v. *Brant,* 10 How. 348; *Lessee of French* v. *Spencer,* 21 How. 228, 240; *Beard* v. *Federy,* 3 Wall. 478; *Grisar* v. *McDowell,* 6 Wall. 363; *Stark* v. *Starrs,* 6 Wall. 402; *Lynch* v. *Bernal,* 9 Wall. 315; *Shepley* v. *Cowan,* 91 U. S. 330.

imported that at the time of the application for selections the land in question was rightfully claimed by the applicant. And cogently does this become the case when it is considered that the findings establish that at the time the application for selection was made, on the face of the records of the land office, there was an enormous deficiency both in the place and indemnity lands. *Shepley* v. *Cowan*, 91 U. S. 330, 337.

Nor is the assertion well founded that this case is not a proper one for the application of the doctrine of relation because coming within the rule announced in *United States* v. *Loughrey*, 172 U. S. 206. At the time of the trespass complained of in that case the United States had taken no step to assert its reversionary rights in and to the land trespassed upon, the legal title to which was in the State of Michigan at the time the trespass was committed. Here as we have seen the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything therefore which the grantee was required by law to do to obtain the legal title had been performed. These facts bring this case within the principle decided in *Heath* v. *Ross*, 12 Johns. 140, and *Musser* v. *McRae*, 44 Minnesota, 343, referred to in the opinion of the court in the *Loughrey* case, (p. 218,) as not being inconsistent with the principle there applied. *Heath* v. *Ross* was an action of trover for timber cut between the application for and date of a patent from the State, and its ensealing and delivery by the Secretary of State. The title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer, for the value of the timber cut and carried away in the meantime. *Musser* v. *McRae* was an action brought to recover the value of timber cut by trespassers from indemnity lands selected by the agent of certain railroad companies, intermediate the application for selection and the patenting of the lands. To permit a recovery, it was held that the title evidenced by the patent related back at least to the date of the application for

selection. It was declared that the doctrine of relation was properly applied to the case, "for the advancement of justice, and to give the full effect to the grant it was intended to have." Among other cases relied upon by the Minnesota court as sustaining the application made of the doctrine was the decision of this court in *Landes* v. *Brant*, 10 How. 348.

Concluding, as we do, that the money in question belongs to the appellee as the successor in interest of the party for whose benefit the application for selections was made, it results that the judgment of the Court of Claims must be

Affirmed.

HY-YU-TSE-MIL-KIN *v.* SMITH.

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

No. 209. Submitted April 12, 1904.—Decided May 16, 1904.

An Indian woman, head of a family of the Walla Walla tribe, having asked under the act of March 3, 1885, 23 Stat. 340, for an allotment of land on which she resided and had made improvements, was refused on the ground that she was not on the reservation at the time of the passage of the act. She was directed to remove from the land which was allotted to another Indian who knew of her claims and improvements and who did not pay for her improvements or make any himself. Subsequently she was notified to make a selection but was not allowed to select the land formerly occupied but was told by the land officer that her selection of other lands would not prejudice her claim thereto. No patent was issued to her for the lands so selected. In an action brought by her against the allottee in possession of the lands originally selected by her,

Held, that it was not necessary under the act of March 3, 1885, that the individual members of the tribes mentioned in the act should be actually residing on the reservation at the time of the passage of the act, and that as her selection was prior to that of anyone else, she was entitled to the allotment originally selected and that her right thereto had not been lost by the selection of other lands.

Held, that in a contest between two Indians, each claiming the same land, the United States having no interest in the result is not a necessary party.

THIS is a suit in equity brought by the appellee, complainant below, in the Circuit Court of the United States, District of Oregon, against the appellant, to obtain the cancellation of an allotment of land made by the officers of the government to the appellant, on the Umatilla Indian reservation in Oregon in 1891, and to have the land allotted to her (the appellee). Issue being joined in the case, it was referred to a special examiner to ascertain and report the facts, and upon his report the Circuit Court gave judgment in favor of appellee, 110 Fed. Rep. 60, which was affirmed by the Circuit Court of Appeals, 119 Fed. Rep. 114, and the appellant thereupon appealed here.

The action was brought pursuant to the authority of an act of Congress (before amendment) passed in 1894, chapter 290. 28 Stat. 286, 305; amended, 31 Stat. 760. The right to the allotment claimed by the appellee is based on the act of March 3, 1885, chapter 319, 23 Stat. 340, and grows out of the treaty of June 9, 1855, between the United States and the Walla Walla and other Indian tribes, which treaty was ratified by the Senate, March 8, 1859, and proclaimed by the President, April 11, 1859. 12 Stat. 945.

A demurrer to the bill was filed by the defendant on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant then answered denying many of the material allegations in the bill.

Witnesses were examined before the special examiner and he made a report and findings of facts, which findings were subsequently adopted by the Circuit Court and by the Circuit Court of Appeals. Among others the following facts were found: The appellee, Philomme Smith, is a full-blooded Indian woman, and at all times mentioned in the complaint was and is now a member of the Walla Walla band or tribe of Indians, and resides upon the Umatilla Indian reservation in the State of Oregon. The defendant (appellant) is also a full-blooded Indian residing upon the reservation. Pursuant to the authority granted by the above-mentioned act of March 3, 1885,

the President appointed commissioners for the allotment of lands on the Umatilla reservation, and the commissioners carried out the duty devolved upon them by the President under that act and completed the allotments on or about April 1, 1891, but refused at that time to make any allotment to the appellee, because of her absence (although but temporary) when the commissioners made a census of the Indians entitled to allotment. At the time the other allotments were made the appellee was the wife of W. A. Smith, a white man, and she was also the real head of the family, which consisted of the husband, his wife and their eight children. The parties were married January 16, 1861, and the appellee has been recognized by the Interior Department as the head of the family in the sense mentioned in the act of Congress of 1885.

At the time the allotments were made to the other Indians by the commissioners, as above mentioned, appellee was located and actually residing with her family upon the reservation upon a large tract of land, some five hundred and sixty acres, including the land in controversy herein, and she and her family at that time were living in a house about twenty steps from the boundary line of this particular 160 acres. The land (including the 160 acres) was enclosed in one body by having a furrow plowed around the same, marking it off from the other adjacent land. The appellee had selected the land in 1888, and with her family was then in possession thereof, and retained such possession until the fall of 1896, with the consent of Homily, chief of the Walla Walla Indians, and Show-a-way, chief of the Cayuse Indians, and also with the consent of ——— Coffee, who was at that time acting as Indian agent upon that Indian reservation.

Since 1888 and prior to the time when the allotment to defendant was made the appellee made valuable improvements upon and around the land in question, by building upon it a small cabin and a barn and making other improvements, and by putting a wire fence around the whole tract, the whole cost amounting to between $700 and $775, and from April, 1888,

until the fall of 1896, long after the allotments were made by the commissioners, the appellee and her family had possession of the land in question with the improvements thereon, and she and her family continued to live during that time in the house, about twenty steps from the boundary line of this land. When the appellee left the land in the fall of 1896 she left it because she was ordered to do so by the then Indian agent, pursuant to a determination by the Interior Department, made in 1893, that she was not entitled to any allotment under the act of 1885.

Before the land was allotted to the defendant and while the allotting commissioners were engaged in allotting lands in 1891, as above stated, the appellee asked to be allotted the particular 160 acres in controversy in this case by the commissioners, but they declined to do so because her name was not upon their allotting list. The defendant obtained possession of the 160 acres in October, 1896, and the land was allotted to him at that time, when appellee was ordered off the same by the Indian agent, and the defendant has never paid the appellee any money or in any manner reimbursed her for the improvements which she had made upon the lands in controversy, and the defendant had made no improvements thereon, and was aware of all that had been done by appellee when he made the selection of this land and when it was allotted to him. There is neither allegation nor proof that appellant has since made any improvements on the land.

In April, 1897, the Department of the Interior reconsidered its former decision, and held that appellee was entitled to an allotment of land upon the reservation, and it directed one G. W. Harper, the then Indian agent of that Indian reservation, to make an allotment to her, and, pursuant to that direction, Harper called upon her to make a selection of lands for her allotment, and she thereupon selected certain lands, which were not the lands in question, the land selected amounting to 146.2 acres in all, and she was recognized by the department as the head of a family entitled to make selection and

have an allotment. A part of this land she has since leased to a tenant and has accepted rental from the tenant, the lease covering only 70 acres.

The land selected by the appellee after she had been forced to relinquish the possession of the 160 acres was not as valuable as the land from which she was ordered, and at the time the selection of this other land was made by her she and her husband came to the office of the Indian agent and asked him if it would affect her rights in the land in question for her to select land as directed by the Indian commissioner. She was told by the agent that he thought it would not; that she was under orders from an officer, and not under her own free will, when she left the land, and it was taken possession of by the defendant, and with that understanding the appellee made the selection of the other and less valuable land.

The particular relief asked by the appellee in her bill was a decree declaring her "to be the allottee upon the said tract of land, and that the allotment thereof to the defendant be cancelled and annulled, and that the defendant, his servants and all persons holding under him, as tenants, lessees or otherwise, be forever enjoined from interfering with your orator's possession thereof, and that she may have judgment against the defendant for damages," etc.

Mr. Samuel Herrick and *Mr. John C. Gittings* for appellant:

The act of August 15, 1894, 28 Stat. 305, upon which complainant bases her right to bring suit, is not applicable to cases of this kind, where the decision of the Secretary of the Interior denying her allotment was made before the passage of such act. Such act is prospective in character, and confers a special jurisdiction where none existed before, and must be strictly construed, and fixed rights cannot be disturbed by it, nor prior decision of officers exercising proper powers be set aside. It relates to the future, and is not retrospective in effect. Endlich on Interpretation of Statutes, § 209, p. 392; 6 Am. & Eng. Ency. of Law, 939, 2d ed.; *Farrington* v. *Tennessee*, 95 U. S.

379; *Cheu Heong* v. *United States*, 112 U. S. 536; *Smith* v. *Lyon*, 44 Connecticut, 175; *Dyer* v. *Belfast*, 80 Missouri, 140; *Dash* v. *Van Kleeck*, 7 Johns. 477; *Vanderpool* v. *Railway Co.*, 44 Wisconsin, 663; Act of August 15, 1894, 28 Stat. 305.

The act of March 3, 1885, applies only to the Indians residing upon the Umatilla reservation at the time of its passage, and then members of the confederated tribes thereon, and not to persons who came there afterward seeking allotments, who had never resided there. Treaty of June 9, 1855, 12 Stat. 945; Act of March 3, 1885, 23 Stat. 340; *Sloan* v. *United States*, 95 Fed. Rep. 197; *Sloan* v. *United States*, 118 Fed. Rep. 287, 291, 292.

The United States is a necessary and indispensable party defendant herein, being the original source of title, the holder of the legal title, a trustee under a special statutory trust, and the allotting power, with the active duty of protecting the possession of the allottee. Act of March 3, 1885, 23 Stat. 340, § 1; Act of August 15, 1894, 28 Stat. 305; Rev. Stat. § 2119; *United States* v. *Flournoy Cattle Co.*, 69 Fed. Rep. 886; *United States* v. *Mullan*, 71 Fed. Rep. 682; 22 Ency. Pl. & Pr. 161, and cases there cited.

Mr. R. J. Slater and *Mr. T. J. Hinkle* for appellee:

As to who are Indians the courts follow the decisions of the Department. *United States* v. *Holladay*, 3 Wall. 419; *In re Kansas Indians*, 5 Wall. 737; *United States* v. *Boyd*, 68 Fed. Rep. 560; *United States* v. *Higgins*, 103 Fed. Rep. 348; *Farrell* v. *United States*, 110 Fed. Rep. 942.

Whether appellee was a Umatilla Indian in blood or not is immaterial so long as she was an Indian woman in whole or in part born within the United States and was recognized by them as one of their number. *Sloan* v. *United States*, 95 Fed. Rep. 193; *United States* v. *Higgins*, 103 Fed. Rep. 348.

When one person is in the actual and peaceable possession of government land no other can obtain a superior right thereto. See *Atherton* v. *Fowler*, 96 U. S. 513, which has been cited and

approved in many different kinds of cases. *Hosmer* v. *Wallace*, 97 U. S. 575; *Quimby* v. *Coulen*, 124 U. S. 423; *DelMonte* v. *Last Chance*, 171 U. S. 32; *Tustin* v. *Adams*, 87 Fed. Rep. 360; *United States* v. *LaChappelle*, 81 Fed. Rep. 152.

As between two claimants of public lands of any kind or nature, it has long been an established rule of law that the first in time is the first in right. *Shepley* v. *Cowen*, 91 U. S. 330; *Worth* v. *Branson*, 98 U. S. 118; *McCreery* v. *Haskell*, 119 U. S. 327.

The act of March 3, 1885, gives the appellee superior equities because it was evidently the intention of Congress to put the Indians in a position whereby they might protect their possessions, their homes and their families. The heads of families were authorized and empowered to make their selections, and the law in its scope and effect is very like the homestead law, and the allottees are to be regarded very much as homesteaders. *State* v. *Norris*, 55 N. W. Rep. 1086, 1089.

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

The first objection made by counsel for the appellant is that the act of Congress of August 15, 1894, 28 Stat. 286, 305, under which the complainant instituted this suit, is not applicable to this case, and, therefore, the court has no jurisdiction of the subject matter. The objection made by the appellant is, that to make the act applicable to the appellee would be to give it a retrospective effect, while its purpose is plainly prospective. The objection is untenable.

The appellee claims that under the act of 1885 she was entitled to an allotment of land in the Umatilla reservation, and that it was improperly refused her. The act provides (p. 305): "That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by

Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States."

That this act embraces the case of a person situated, as was the appellee at the commencement of this suit, seems to us so plain as to require no further argument. It is not in any way a retrospective operation which is thus given to the act, except as it applies, by its language, to any one who was then (at the time of the passage of the act of 1894) entitled to an allotment. She claims that she was so entitled to an allotment of the land in question, and that it had been improperly allotted to defendant (appellant), and that the act permits her to assert her claim in the Circuit Court, as against the appellant, and to have it adjudged between them. We have no doubt she has that right.

The next objection is that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege the residence of the complainant (appellee) on the reservation at the time of the passage of the allotment act (1885), and shows upon its face that her claim for this allotment was decided against her by the Secretary of the Interior in 1891, long prior to the passage of the act of 1894, under which she is now suing, and when the sole authority for settling disputes concerning allotments resided with the Secretary of the Interior.

We are of opinion that it was not necessary to allege or prove the residence of the appellee on the reservation at the time of the passage of the act of 1885, called the "Allotment Act." That act had reference, as its preamble states, to the "Confederated bands of Cayuse, Walla Walla and Umatilla Indians, residing upon the Umatilla reservation, in the State of Oregon."

It related to the residence of the bands as bands and not as individual Indians, many of whom were residing off the par-

ticular reservation and yet within the country theretofore ceded to the United States by the treaty of 1855. Under the act mentioned a commission was appointed by the President, the members of which were to go upon the reservation and ascertain as near as might be the number of Indians who would remain on that reservation and who should be entitled to take lands in severalty thereon, and the amount of land required to make the allotment, and the commission was then to determine and set apart so much of their reservation as should be necessary to supply agricultural lands for allotments in severalty. The commission was to report to the Secretary of the Interior the number and classes of persons entitled to allotment as near as they might be able to do so, and if the report were approved by the Secretary of the Interior the tracts selected should thereafter constitute the reservations for those Indians, and within which the allotments provided for in the act should be made.

Under this act a report had been made to the Secretary of the Interior by the commission some time after the conclusion of their labors in the Indian countries in 1891, and an opinion was asked by the Department of the Interior from the Assistant Attorney General regarding the rights of the appellee, among others, to an allotment under that act which had been refused by the commission. An opinion was delivered on July 1, 1893, by one of the Assistant Attorneys General, in which he held that the appellee was not entitled to an allotment, but upon reviewing that opinion, on June 28, 1895, he held that she was entitled thereto. In his latter opinion he thought that while it was agreed in the treaty of 1855, already mentioned in the statement of facts, that the Indians should remove within one year to the permanent reservation (which in this case was the Umatilla reservation), yet there was no penalty affixed to its violation, and the failure of the Indians to so remove and reside would not work a forfeiture of their tribal rights, and that while the appellee was not residing upon this reservation at the time that the act of 1885 became operative, she was,

so far as that fact was concerned, in the same position as a majority of the Indians belonging to the confederated tribes mentioned in the act; that the record showed that when the agents of the Government went on this reservation they found but few Indians actually residing there, and it was only after weeks of sending out runners and using all the means at their disposal that the commissioners succeeded in securing the attendance of a majority of the male adults of these tribes. The Assistant Attorney General gave the opinion that that was itself a recognition by the department that residence upon the reservation was not essential to tribal recognition.

It is plain that the agreement in the treaty of 1855, by which the tribes and bands agreed to remove to and settle upon the reservation within one year after the ratification of this treaty, had not been lived up to so far as actual residence upon the reservation of individual Indians was concerned. Thirty years after that time, when the act of 1885 was passed, it is seen that a majority of the Indians were not even then actually residing, in the strict sense of the term, upon this reservation. There existed under the treaty an exclusive right among the Indians of taking fish from the streams running through and bordering upon the reservation, and at all other usual and accustomed stations, in common with the citizens of the United States, and the privilege of erecting suitable buildings for curing such fish, and also the right of pasturing their stock on unclaimed lands in common with the citizens of the United States was secured to them. The right to roam over so much of the territory as was ceded by them to the Government as they had been accustomed to do and such as were not settled upon or claimed for individual use by citizens of the United States seems to have been recognized, or to have been expected by the Government, although the residence of the tribe or band as such was to be within the reservation mentioned in the treaty. It was also said in the opinion regarding the facts in this case:

"The trouble with these claimants seems to have arisen out

of their failure to be upon the reservation when the census roll of the tribe was made up. They arrived at said reservation in reply to the communication sent to them by one of the Indians the day after the census takers had left the reservation, to wit, on the 7th day of June, 1887, or rather Mrs. Morisette arrived upon that day and Mrs. Smith shortly afterwards. They were recognized by Homily, chief of the Walla Wallas, and various other head men and members of the confederated tribes, and the Indian agent then in charge assigned each one of them to a parcel of land, after selection, and they have made valuable improvements on and have continued to reside thereon, as far as this record shows, ever since, the value of their improvements amounting to a considerable sum. They began residence upon the land about the middle of June, and their reasons for not having arrived sooner being that they lived some two hundred miles away and were without money to make the trip."

Pursuant to this opinion of the Assistant Attorney General, the Department of the Interior reconsidered its former decision, and held that the appellee was entitled to an allotment under the act of 1885. We concur with the latter opinion of the Assistant Attorney General, and hold that it was not necessary that the individual Indian of the tribes mentioned in the act of 1885 should be actually residing on the reservation at the time of the passage of that act. If the individual were a member of the tribe or band, recognized as such by his chiefs, it was not necessary that such person should be an actual resident of the reservation when the act was passed. The fact found is that the appellee herein is a full-blooded Indian woman, and was at all the times mentioned a member of the Walla Walla band or tribe of Indians, and at the time of the original allotment resided upon the reservation in the State of Oregon. When such a large percentage of allottees upon this reservation resided as did the appellee, elsewhere than actually upon the reservation at the date of the passage of the act of 1885, it cannot be that the act passed was intended

to limit the right to an allotment to those actually residing on the reservation to the exclusion of a majority of the members of the different bands or tribes. The fact of such non-residence is presumed to have been known by Congress, and the act should be construed with reference to that knowledge.

The purpose of the treaty and of the act evidently was to induce the Indians and encourage them so far as possible to break up the tribal relations and adopt the habits of an agricultural people, and it would seem that those persons who were Indians and members of one or the other bands or tribes of Indians mentioned in the treaty and in the act and recognized by the chief of the tribe, should have the right to an allotment, especially if recognized by the Land Department as entitled thereto.

The purpose of the act would fall very far short of accomplishment were the allotments confined exclusively to those actually residing within the limits of the reservation, while those who were absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled to the allotments under the act, simply because of residence outside of the described limits of the reservation.

The appellant further contends that the weight of the evidence shows the appellee is not a member of the Walla Walla tribe of Indians. We are not disposed to review that question of fact, which has been determined by the special examiner and adopted by the Circuit Court and the Circuit Court of Appeals. There is evidence upon which the fact as found may be based, and it is not so plainly erroneous as to call upon this court to vary from its usual rule not to review the unanimous finding upon questions of fact of two courts, unless such finding is plainly erroneous. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Baker* v. *Cummings*, 169 U. S. 189, 198; *The Carib Prince*, 170 U. S. 655; *Towson* v. *Moore*, 173 U. S. 17; *Smith* v. *Burnett*, 173 U. S. 430, 436; *Brainard* v. *Buck*, 184 U. S. 99.

Another objection is made that the United States is a nec-

essary party defendant, and, not being before the court, no binding decree can be entered herein.

The contest here is between two Indians, each claiming the same land under an allotment which was made last to the appellant herein. The United States has no interest in the result. Both parties are Indians claiming under the act of 1885.

In our opinion the claim that the United States must be made a party is without foundation. Under the act of 1894 (*supra*) the Circuit Courts are given jurisdiction to try and determine any action of this nature, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, "and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. . . . *Provided*, That the right of appeal shall be allowed to either party as in other cases." The case at bar was commenced prior to the amendment of the statute of 1894 by the act of February 6, 1901, 31 Stat. 760, wherein it is provided that the United States shall be a party defendant, and the case must be decided without regard to the amendment.

Under this statute there is no provision rendering it necessary, in a private litigation between two claimants for an allotment, to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary. This provision assumes that an action may be maintained without the Government being made a party, and provides for the filing of a certificate of the judgment and its effect, and the Government thereby in substance and effect consents to be bound by the judgment and to issue a patent in accordance therewith. The first section of the act of 1885 (*supra*) provides that an allotment made by

or under the direction of the Secretary of the Interior entitles the allottee to a patent for the land allotted to him. And the filing of the certificate of the judgment decreeing an allotment is to have the same effect with the Secretary as if the allotment had been made by him. This is sufficient.

Upon the facts herein found we are also of opinion that the appellee selected the lands in controversy within the meaning of the statute long prior to the selection made by the appellant, and that she is not concluded by the selection she afterwards made of another tract of land. The act of 1885 provided that the selection of land for allotment should be made by heads of families. The appellee was such and was so recognized by the Land Department. By section 6 of the act the Secretary of the Interior had power to determine all disputes between Indians respecting the allotments. If more than one person claimed the same land, it is, as we think clear, that the dispute should be decided and the allotment made in favor of the one whose priority of selection and residence and whose improvements on the land equitably entitled such person to the land. The Government has proceeded upon such principle heretofore, *Shepley* v. *Cowan*, 91 U. S. 330, and it is a right and eminently just principle. The defendant knew of the prior possession of the appellee, at the time he made his selection, and knew of her improvements upon the land, for they were open and visible, while he had made none, and had obtained possession by direction of the Land Office, only because of the mistake in law which denied the right of allotment to appellee on account of her absence when the census was taken. Defendant with all this knowledge selected the land and never offered to pay a dollar for the improvements and never has paid anything therefor, nor does he allege in his answer, and there is no proof that he has since made any improvements on the land or expended anything thereon. When the Land Department corrected its mistake of law the appellee had the right to insist upon her original selection. Her selection of other land, after the department had reconsidered her case,

does not prevent her from claiming this land from defendant. She selected the other land only after advising with the Indian officer and upon his statement that it would not affect her claim for the land she had previously selected and from which she had been ordered by the officers of the Government. She has never received any patent from the Government for this other land, and nothing further need be done by her in order to authorize the Government to cancel the allotment for this other land at the time when patent issues for the original selection.

We find no error in the judgment, and it is

Affirmed.

HOOKER *v.* BURR.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 263. Submitted April 26, 1904.—Decided May 16, 1904.

A party insisting upon the invalidity of a statute as violating any constitutional provision must show that he may be injured by the unconstitutional law before the courts will listen to his complaint.

An independent purchaser at a foreclosure sale, who has no other connection with the mortgage, cannot question the validity of legislation existing at the time of his purchase on the ground that it impaired a contract, even though the law complained of was passed after the execution of the mortgage which was foreclosed. *Insurance Co.* v. *Cushman*, 108 U. S. 51, followed, and *Barnitz* v. *Beverly*, 163 U. S. 118, distinguished.

Whether the requirements of a statute affecting foreclosure sales and redemption, and which does not conflict with the Federal Constitution have been complied with, is not a Federal question.

THE plaintiff in error commenced this action in the proper state court to procure a decree cancelling a deed of the premises mentioned in the complaint, executed by the defendant Hammel to the defendant Rhodes, and also directing that a deed should be executed to the plaintiff by defendant Hammel

or Burr, or both, conveying the same property to the plaintiff, which had been purchased by him under the sale in foreclosure hereinafter mentioned. Defendant Burr was sheriff at the time of that sale, and conducted the same and executed the certificate of sale June 13, 1898. His term of office expired in January, 1899, and defendant Hammel became his successor, and as such executed the deed to defendant Rhodes, which plaintiff in error asks to have set aside. The two defendants, Burr and Hammel, were made parties herein because it was not certain which one of them should be decreed to execute the deed to plaintiff which he asks for in this suit.

The defendants by their answer denied many of the material allegations of the complaint, and the case went to trial before the court, and a judgment having been entered dismissing the complaint on the merits, an appeal was taken to the Supreme Court of California, which affirmed the judgment, 137 California, 663, and the plaintiff has brought the case here. The material facts are as follows:

On October 16, 1893, Anna P. and Ambrose H. Spencer, then being the owners of the property, mortgaged the same to one Jacob Swiggart, to secure the payment of a promissory note of the same date for $5,000. This note and mortgage were subsequently assigned by Swiggart to Charles H. Bishop, who afterwards commenced a suit upon the note and mortgage to recover the amount due on the former and to foreclose the mortgage. On May 14, 1898, a judgment was entered in the case, whereby it was adjudged that there was due to the plaintiff upon the note the sum of $6,782.49, and that the same was a lien upon the mortgaged premises, and there was also a judgment for the sale of the premises to obtain payment of the sum found due on the note. On May 16, 1898, an execution upon the judgment was issued to the sheriff, (Burr,) and on June 13, 1898, he sold to the plaintiff in error, Hooker, the mortgaged premises for the sum of $9,500, who thereupon paid the amount of his bid to Burr, and Burr then gave a certificate of sale to the plaintiff as the purchaser. Plaintiff alleges that he was

entitled to a deed from the sheriff of date December 13, 1898, that being six months after his purchase at the foreclosure sale. On December 12, 1898, Rhodes, one of the defendants, (who was a judgment creditor of Spencer, the mortgagor,) issued an execution on his judgment and assumed to redeem the land from the foreclosure sale by the payment of $10,070 to the sheriff, to be paid to the purchaser, the plaintiff in error, being the amount of the purchase price paid by the latter at the foreclosure sale, together with interest thereon at the rate of one per cent per month. The sum was received by the sheriff as the full amount due to the plaintiff in error on his bid, with interest. The plaintiff in error declined to accept the money, and now contends that the amount delivered to the sheriff for the redemption was not enough, and he also makes the claim that there was never any legal payment to the sheriff, even of the sum mentioned. The sheriff, after receiving the redemption money, executed a deed to the judgment creditor, Rhodes, and it is this deed which plaintiff seeks to have set aside.

At the time when the above mentioned mortgage was executed, on October 16, 1893, the law in California provided that a judgment debtor or redemptioner might redeem the property from the purchaser at the foreclosure sale, at any time within six months after the sale, on paying the purchaser the amount of his purchase money with interest at two per cent a month thereon in addition up to the time of redemption. On March 27, 1895, the legislature altered this statute, which was section 702 of the Code of Civil Procedure, by providing that redemption might be made upon the payment of the amount of the purchase money with *one* per cent a month as interest thereon, and on February 26, 1897, the same section was again amended by the legislature by extending the time for redemption to twelve instead of six months, while keeping the rate of interest at one per cent per month on the amount of the purchase price paid at the sale.

It will be noticed that both these amendments had been

enacted and existed as the law in regard to redemptions at the time when the sale was made on June 13, 1898, upon the foreclosure of the mortgage.

Mr. J. S. Chapman for plaintiff in error.

Mr. W. H. Anderson and *Mr. E. C. Bower* for defendant in error.

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

The plaintiff in error contends that the several alterations of the law as it existed at the time when this mortgage was executed, regarding the time of redemption and the amount of interest payable to the purchaser at the foreclosure sale in order to redeem the land sold, impair the obligation of a contract as to all mortgages in existence before the alterations were made.

The first inquiry is, Whose contract was impaired by the alteration of the law? It is seen that the amount due on the mortgage in question at the time of the sale upon foreclosure was $6,782.49, and that the property sold for $9,500. That amount was paid by the purchaser to the sheriff and it resulted in the payment of the mortgage debt, principal and interest, and the release of the land from the lien of the mortgage. Subsequently to that payment the mortgagee had no interest in further proceedings. Neither the mortgagee nor his assignee was the purchaser at the sale, and neither was in any manner injured by the alterations of the law in the respects mentioned. If, therefore, there was by this legislation an impairment of the obligation of a contract between the mortgagor and the mortgagee, which the latter could have taken advantage of if injured thereby, it is perfectly clear that he is not in the least injured when, by the sale under his mortgage, he realizes the full amount of his debt, principal, interest and costs. What

can he complain of under such circumstances, even conceding an abstract impairment of the obligation of his contract? Having realized and been paid in full the entire amount of money called for by his mortgage, he surely cannot be heard to complain that nevertheless the obligation of his contract was impaired. If not injured to the extent of a penny thereby, his abstract rights are unimportant.

We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. *Tyler* v. *Judges &c.*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 U. S. 51, 60. If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot of course ask the interference of the court. Therefore, if the mortgagee, or his assignee, were himself the plaintiff, and complaining that the obligation of his contract had been impaired by subsequent legislation, it is plain his complaint would be dismissed when it appeared that, notwithstanding the alleged subsequent illegal legislation, he suffered no injury, because he had proceeded with the foreclosure of his mortgage and had been paid the full amount of his contract debt, interest and costs. Under such circumstances the question becomes a moot one, and courts do not sit to decide that character of question. *American Book Company* v. *Kansas*, 193 U. S. 49; *Jones* v. *Montague*, *ante*, p. 147, decided April 25, 1904.

The question of the impairment of the mortgage contract, therefore, is not before us, as between mortgagor and mortgagee.

We are of opinion that, as to the plaintiff in error, an independent purchaser at the foreclosure sale, having no connection whatever with the original contract between the mortgagor and mortgagee, his rights are to be determined by the law as it existed at the time he became a purchaser, unless upon action taken by the mortgagee the property had been sold

under a decree providing that it should be sold without regard to the subsequent legislation which impaired his contract. The purchaser bought at the time when the law as altered was in operation, and, so far as he was concerned, it was a valid law; his contract was made under that law, and it is no business of his whether the original contract between the mortgagor and mortgagee was impaired or not by the subsequent legislation. He cannot be heard to contend that the original law applies to him, because a subsequent statute might be void as to some one else. The some one else might waive its illegality or consent to its enforcement, or the question might have no importance, because the property sold for enough to pay the debt, even though there was an abstract impairment of the obligation of his contract.

The purchaser must found his rights upon the law as it existed when he purchased. An alteration after he had purchased, to his prejudice, would be a different thing. Cooley on Const. Limitations (4th ed.), 356. We agree that the law existing when a mortgage is made enters into and becomes a part of the contract, but that contract has nothing to do, so far as this question is concerned, with the contract of a purchaser at a foreclosure sale having no other connection with the mortgage than that of a purchaser at such sale. His rights regarding matters of redemption are to be determined as we have stated.

It has been so decided in the case of *Connecticut Mutual Life Insurance Co.* v. *Cushman,* 108 U. S. 51. There the property was sold at foreclosure sale for enough to pay the mortgage debt (page 56), and the reduction of the rate of interest which was payable to the purchaser at the foreclosure sale, upon a redemption, (which reduction was made by the legislature prior to the sale, although subsequently to the mortgage,) was held valid. The company, as purchaser at the foreclosure sale, bid enough to pay the principal and interest of its debt, and after the purchase it contended that the attempted redemption was insufficient because the interest upon the amount it

had bid upon the sale had been computed at eight per cent, the rate of interest allowed by law at the time of the sale, instead of ten per cent, the rate existing at the time of the execution of the mortgage. It was held that as to the purchaser the rate existing at the time of the sale was the legal rate and the redemption at that rate was valid. The principle of that case decides the one at bar.

It is asserted, however, on the part of the plaintiff in error that *Barnitz* v. *Beverly*, 163 U. S. 118, has in effect overruled the former case, and that upon the principle decided in the *Barnitz* case the plaintiff in error herein is entitled to a reversal of the judgment. We are not of that opinion.

In the first place, it was distinctly stated in *Barnitz* v. *Beverly* that it was not inconsistent with and did not overrule the former case, and its facts show a clear distinction between the two cases. The sum bid at the foreclosure sale did not pay the amount due on the mortgage, and the whole case shows that, although the mortgagee became purchaser, the debt of the mortgagor was not thereby paid, and it was the mortgagee's rights under her contract, as contained in the mortgage, and not her rights as a purchaser at the foreclosure sale, that were in controversy.

In the *Cushman* case, on the contrary, the amount bid at the foreclosure sale paid the mortgage debt, and the subsequent position of the mortgagee was as a purchaser only. The *Barnitz* case was decided distinctly upon the ground that, by the subsequent legislation, there was an impairment of the obligation of the contract between the mortgagor and the mortgagee, and it was her rights as mortgagee that were passed upon and recognized by the court. This is plain from a perusal of the opinion, especially at pages 130 and 131.

Attention is also called by plaintiff in error to a portion of the opinion in which it is stated that, "Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which

extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." And it is asserted that such a case is now before the court.

These remarks must be interpreted in the light of the facts of that case and must be limited in their application to the parties to the mortgage contract whose rights are impaired by subsequent legislation. If the mortgage had been foreclosed and the mortgagee had thereby realized his debt, principal and interest in full, upon the sale, there can be no doubt that he would not have been heard to assert the invalidity of the subsequent legislation, nor would an independent purchaser at the sale have been heard to make the same complaint. Of course, this does not include the case of a mortgagee who purchases at the foreclosure sale and bids a price sufficient to pay his mortgage debt in full with interest, and an action thereafter commenced against him to set aside the sale because it was made in violation of legislation subsequent to the mortgage. In such case we suppose there can be no doubt of the right of the mortgagee to assert, as a defence to the action, the unconstitutionality of the subsequent legislation as an impairment of his contract contained in the mortgage. But it may be said that where the legal or equitable rights of a party are not in any way touched and he is in no way injured, he cannot be heard to complain of the impairment of the obligation of his contract, as a mere abstract proposition.

Many of the earlier cases declare the invalidity of subsequent laws in regard to redemption of land sold under execution, which altered the law existing when a mortgage was made, and some of them, it would seem, have declared the laws unconstitutional, even at the suit of a purchaser at the sale. The leading case on the subject of redemption decides nothing as to the rights of a purchaser. It is that of *Bronson* v. *Kinzie*, 1 How. 311. In that case the subsequent legislation, which was held to be invalid, gave twelve months after sale in which to redeem, and provided that the property should not be sold

under the foreclosure decree unless two-thirds of the amount which had previously been established by appraisers as the value of the property should be bid at the sale. The case came before the court upon a division of opinion. Bronson, the mortgagee, filed his bill to foreclose the mortgage, and asked for a decree that the mortgaged premises should be sold to the highest bidder without being subject to the rule established by the subsequent legislation. The motion was resisted on the part of defendants, who moved that the decree should direct the sale according to the subsequent legislation, and the judges were opposed in opinion as to the sale of the premises without regard to the subsequent law. This court held that the subsequent law was plainly one which impaired the obligation of the contract between the mortgagor and the mortgagee, and at the request of the mortgagee and to prevent the impairment of the obligation of his contract the court decreed that the sale should be made without reference to the law passed subsequently to the time of the execution of the mortgage contract.

McCracken v. *Hayward*, 2 How. 608, arose in the same way and was decided substantially upon the authority of the last case. The mortgagee made the same request, that the marshal should sell the property without regard to the statute of Illinois passed subsequently to the execution of the mortgage, and it was held that his motion should be granted, because the subsequent legislation impaired his contract as mortgagee with the mortgagor.

In *Gantley* v. *Ewing*, 3 How. 707, after the mortgage had been executed, the legislature passed an act which required on sales upon execution issued upon a judgment, that the property should first be appraised and should not thereafter be sold on execution for a sum less than one-half the appraised value. The mortgagee foreclosed the mortgage, and upon the sale the premises were sold to the defendants for $76, not a tenth part of the mortgage debt. The property had not been valued prior to the sale, as required by the statute. An act

had, however, been passed prior to the execution of the mortgage requiring the sheriff on such sales to first offer the rents and profits of the real estate for a term of seven years, and if the same did not bring enough to satisfy the execution, then the fee simple was to be offered for sale and sold. This offer to sell the rents and profits was not in fact made. There were two questions upon which the judges were opposed, the one as to the effect of the failure to make the offer to sell the rents and profits, and the other regarding the effect of the failure to make the appraisal. A certificate of division of opinion was sent to this court. The action was, as stated in the opinion, one of ejectment, the defendants setting up and claiming under the sheriff's deed, and the plaintiff, the mortgagee, asking the court to instruct the jury that the deed was void because the rents and profits had not been offered for sale before the fee simple was sold, and also because the land had not been valued as required by the statute before the sale was made. The mortgagee was thus the party claiming that the sale under his own foreclosure was void because of the failure to comply with the subsequent legislation of Indiana, while the defendants who bid at the sale and became the purchasers of the land insisted that the act (existing when they purchased) was unconstitutional, because it altered the law as it existed when the mortgage was made, and required that the land should not be sold until it had been appraised, and then only after at least one-half of the value so appraised had been bid. This court held that the offer to sell the rents and profits for seven years, as provided for by the statute existing prior to the execution of the mortgage, should have been made, and that the sale, such offer not having been made, was void, but it held that the condition provided for in the later statute of not selling unless the appraisal had taken place, and more than one-half such appraised value had thereafter been bid, was void as an impairment of the obligation of the contract between the mortgagor and the mortgagee, and the deed of the sheriff could not, so far as that ground was concerned, be avoided,

although no valuation of the property was made before the sale. The case was decided, as the opinion shows, entirely upon the authority of *Bronson* v. *Kinzie, supra,* which, as we have seen, was not a case of a purchaser and was decided upon the prayer of the mortgagee, who contended that his contract contained in his mortgage would be impaired by the subsequent law if the court should permit it to be enforced.

The question again arose in *Howard* v. *Bugbee,* 24 How. 461, and that case was also decided upon the authority of *Bronson* v. *Kinzie, supra.* In the statement of facts, by Mr. Justice Nelson, it appears that the mortgage by Parsons to Tait was executed in 1836, and in a subsequent year (1842) the law regarding redemption was altered, and a right was given to a judgment creditor to redeem for two years after a sale under a mortgage. The mortgage was foreclosed in 1848, and Howard, the appellant, became the purchaser of the premises at the sale under the decree of foreclosure, and obtained a deed of the same duly executed by the proper officer. Bugbee, the appellee, the plaintiff in the court below, recovered judgment against the estate of the mortgagor in 1843, and thereafter, pursuant to the altered law, tendered the purchase money, interest and charges to Howard, the purchaser, and asked for a deed of the land, which was refused. A bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale and execute a deed. The defence was that the mortgage from Parsons, under which the defendant derived title as purchaser at the foreclosure sale, having been executed before the passage of the act providing for the redemption, the act, as respects this debt, was inoperative and void as impairing the obligation of a contract. Now here was a case where the purchase was made at the foreclosure sale six years after the law had been enacted providing for redemption, and the question was raised, not by the mortgagor or the mortgagee, but by the purchaser at the sale. The Alabama court of chancery held that complainant was not entitled to the relief asked, and dismissed the bill, but

the Supreme Court of that State upon appeal reversed the decree of the court of chancery and entered a decree for the complainant. Upon writ of error from this court it was here decided that the act of the legislature was invalid as an impairment of the mortgage contract, upon the authority of *Bronson* v. *Kinzie, supra,* which had never decided the particular question.

Upon principle, we cannot see how an independent purchaser, having no connection whatever with the mortgage, excepting as he becomes such purchaser at the foreclosure sale, can raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase, and this question, we think, has been clearly determined against the purchaser in the case of *Insurance Company* v. *Cushman, supra.*

We have no disposition to revise the decision in that case, which, we think, was correct and stands upon a firm foundation. The later case of *Barnitz* v. *Beverly, supra,* when the facts therein are regarded, does not militate against the soundness of the views expressed in the *Cushman* case, and in addition to that it was distinctly so stated in the opinion of the court. If a sale be made under a decree directing that it be without regard to the subsequent legislation, as in *Bronson* v. *Kinzie, supra,* then the purchaser, buying under the decree with those specific directions, takes his rights thereunder. But in that case the decree is obtained in the interest and at the request of the mortgagee, and to save the impairment of his contract.

In our view this independent purchaser must, under the facts herein, abide by the law as it stood at the time of his purchase.

A further question is made by plaintiff in error, that there was no proper tender made.

Holding the views we do in regard to the main question, it follows that the amount of the bid made by the purchaser carried interest at the rate of one per cent per month only. If that amount at that rate of interest was tendered the sheriff,

it was sufficient. The state court has found that such amount was paid to the sheriff by a check which was subsequently paid. Whether the defendant Rhodes fully complied with the requirements of the state statute in order to make a complete tender, is not a Federal question.

The judgment of the Supreme Court of California is

Affirmed.

CAU *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 57. Argued April 8, 1904.—Decided May 16, 1904.

While primarily the responsibility of a common carrier is that expressed by the common law and the shipper may insist upon such responsibility, he may consent to a limitation of it, and so long as there is no stipulation for an exemption which is not just and reasonable in the eye of the law the responsibility may be modified by contract. It is not necessary that an alternative contract be presented to the shipper for his choice. A bill of lading is a contract and knowledge of its contents by the shipper will be presumed and a provision therein against liability for damages by fire is not unjust or unreasonable. It is not necessary that there be an independent consideration apart from that expressed in the bill of lading to support a reasonable stipulation of exemption from liability.

While the burden may be on the carrier to show that the damage resulted from the excepted cause, after that has been shown the burden is on the plaintiff to show that it occurred by the carrier's own negligence from which it could not be exempted.

THIS is an action to recover the value of cotton delivered by plaintiff to defendant, to be transported over its railroad from Texarkana, Texas, to New Orleans. The cotton was destroyed by fire while in the custody of defendant.

The action was originally brought in the Civil District Court of the Parish of Orleans and removed on the petition of defendant to the Circuit Court of the United States for the Eastern District of Louisiana. The case was tried to a jury,

which, under the instructions of the court, rendered a verdict for defendant, upon which judgment was entered dismissing the suit with costs. 113 Fed. Rep. 91.

The main question presented by the record is the effect of a provision in the bills of lading delivered by defendant to plaintiff, exempting it from liability for damages caused by fire. Incidentally a question arises as to the burden of proof. At the time of the delivery of the cotton there were four bills of lading issued by defendant—three exactly alike and the fourth substantially like the other three in all that is material to this case. They all contain the following provision: "That neither the Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire. . . ."

For the purpose of showing the delivery of the cotton to the defendant the plaintiff introduced in evidence the bills of lading, but without prejudice to his claim that the provision quoted was not binding in the absence of a consideration therefor. The court admitted the bills of lading, with that limitation.

The other evidence in the case was that the bills of lading in blank were obtained from the defendant's agent by plaintiff's agent, and three of them made out by the latter at his office. The record leaves doubtful whether the other bill of lading was prepared by him or by the agent of defendant. The former, however, testified that he did not know the fire clause was in the bills of lading, and further testified as follows:

"A. When I applied to the agent of the Texas and Pacific railroad for a rate to New Orleans on the cotton I was going to ship he told me I could get but one rate, 60 cents per 100 pounds; that that was the rate of the other roads. And I gave them the cotton because it was the most direct line to New Orleans. I simply went there to get the rate, and I simply gave them the cotton at that rate which they gave me, 60 cents per 100 pounds."

He also testified that he did not want to know the lowest

rate; that he asked for the correct rate, he knew there was but one rate, all of the roads having the same, and that it was against the law to give other rates.

The following was the testimony as to the fire clause:

"Q. What I mean to say is this: Did you tell the agent of whom you asked for the rate that you did not want any fire clause in any bill of lading which he might issue to you? A. No, sir.

"Q. Did you tell him that you wanted to ship your cotton without any fire clause in the bill of lading? A. No, sir; because I did not know it was in the bill of lading.

"Q. Therefore you made no application to him then for a rate based on a bill of lading not containing the fire clause? A. I made no application that way; I made no inquiries; I just asked for the rate.

* * * * * * * *

"Q. Allowing that his reply to you was only one rate, was anything said by him as to the different kinds of contracts you could get? A. No, sir; he never said anything to me at all.

"Q. Were you or not informed that you could get a contract under which the company would be liable as insurer, practically, and another kind of contract, under which they would not be liable for loss in case of fire? A. No, sir.

"Q. Did you have any information, or did you know that if you wanted to make a choice between these two that you could do it? A. No, sir."

The cotton was in the possession of the Union Compress Company when destroyed to which company it had been delivered by defendant to be compressed, and that company had obtained insurance on it for the defendant, it being the custom of that company to effect insurance for the benefit and in the name of each particular railroad compressing cotton at their press. The testimony of the destruction of the cotton is that the Union Compress Company's building and platforms in Texarkana, Texas, were destroyed by fire Sepember 19, 1900, in which the cotton was destroyed with other cotton.

Plaintiff requested instructions of the court which embodied the following propositions:

1. A carrier cannot limit his common law liability without consent of the shipper for consideration given.

2. The mere contract of shipment is not such a consideration.

3. The condition usually, though not necessarily, is a reduced rate, but in such case both rates must be offered shipper and be reasonable, and the shipper given a genuine freedom of choice in making his selection, and if the evidence satisfied the jury, "there was no fair alternative or choice offered to plaintiff by defendant as between two rates, under one of which defendant would be liable for the loss of said cotton by fire, and under the other of which he would not be so liable," the fire clause was not binding upon plaintiff, and the jury might "deal with such bill of lading as though it did not contain such clause or stipulation."

4. The burden of proving the reasonableness of the fire clause, and that plaintiff had a fair opportunity to refuse or accept it, rested upon the defendant.

Mr. W. S. Parkerson, with whom *Mr. Branch K. Miller* was on the brief, for plaintiff in error.[1]

Mr. Charles P. Cocke, with whom *Mr. William Wirt Howe*, *Mr. John F. Dillon* and *Mr. Walter B. Spencer* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court.

It is well settled that the carrier may limit his common law liability. *York Co.* v. *Central Railroad*, 3 Wall. 107. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option

[1] For abstract of argument, which was substantially the same as in *Charnock* v. *Texas & Pacific Railway Co.*, see *post*, 433.

and opportunity must be given to the shipper to select under which, the common law or limited liability, he will ship his goods."

If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174.

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

(2) It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Co.* v. *Central Railroad, supra.* In response it was said: "The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one

rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads.

(3) The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the burden of proof is upon the defendant to show that the fire was not caused by its negligence or that of its servants. The contention is answered by *Clark* v. *Barnwell*, 12 How. 272. In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accidents of the seas and navigation excepted. It was held that after the damage to the goods had been established the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that even if the damage so occurred, yet if it might have been avoided by skill and diligence at the time the carrier was liable. "But," it was observed, "in this stage and posture of the case the burden is upon the plaintiff to establish the negligence as the burden is upon him." The doctrine was affirmed in *Transportation Co.* v. *Downer*, 11 Wall. 129. See also section 218, 2 Greenleaf on Evidence.

Judgment affirmed.

CHARNOCK *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 194. Argued April 8, 1904.—Decided May 16, 1904.

Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances.

The failure to keep a watchman and fire apparatus at a switch track planta-

tion station, maintained for ten years for the convenience of shippers, who thereby were saved the expense of sending their cotton two and a half miles to a regular station and who never demanded the additional protection, no accident or fire occurring during such period, is not negligence on the part of the carrier and in the absence of any evidence whatever as to the origin of the fire, justifies the direction of a verdict for defendant.

Cau v. *Texas & Pacific Railway Co., ante*, p. 427, followed as to conditions under which a common carrier may limit its liability against damages to goods by fire.

THE facts are stated in the opinion of the court.

Mr. William S. Parkerson, with whom *Mr. Branch K. Miller* was on the brief, for plaintiff in error:

In order to be binding upon the shipper a contract limiting the common law liability of a carrier must be upheld by a valid consideration. Hutchinson on Carriers, § 278; *Wehman* v. *Minneapolis &c. Co.*, 61 Am. & Eng. R. Cases, 273.

In Louisiana, where the consideration is denied, and the evidence leaves its existence or reality in doubt, the burden is on the carrier to prove the consideration. *Mossop* v. *His Creditors*, 41 La. Ann. 297.

The validity or effect of the exemption is determined by the law of Louisiana. *Liverpool &c. Co.* v. *Phœnix &c. Co.*, 129 U. S. 397, 453.

Where proof of one of the facts in issue is peculiarly within the knowledge of one of the parties, the burden of proof is shifted to the party who has special knowledge as to the controverted fact, and he must establish it by evidence. *King* v. *Adkins*, 33 La. Ann. 1057, 1065; *School Board* v. *Trimble*, 33 La. Ann. 1073, 1079.

Where a bill of lading, or contract, limiting the liability of the carrier, contains no statement of the rate paid, the whole limitation is void. *Kellerman* v. *Kan. City &c. R. R. Co.*, 68 Mo. App. 255, 275.

Contracts limiting the common law liability of carriers are not favored by the law, and they are not binding on the

shipper unless fairly made and freely entered into by him. *Adams Express Co.* v. *Nock*, 2 Duval (Ky.), 562, 565; *Hance* v. *Wabash &c. R. Co.*, 56 Mo. App. 476, 482.

In order to be valid, such contract must be the choice of the shipper, and not of the carrier; the shipper must be allowed an option or opportunity to select under which, the common law or limited liability, he will ship his goods; if such free choice or option is not allowed him, the contract is not reasonable, and therefore is void; both rates, that for transportation under the common law liability and that under the limited liability, must be free to the shipper in order that he may have real liberty of choice in making the selection between the two; otherwise, the contract limiting the liability is not fair or reasonable, and therefore is void. *Atchison &c. Co.* v. *Dill*, 56 Am. & Eng. R. Cases, 376; *Dovignac* v. *Mo. Pac. Ry. Co.*, 57 Mo. App. 550; *Lewis* v. *Great Western R. Co.*, 3 Q. B. Div. 195; 47 L. J. Q. B. Div. 131; *Car* v. *Lancashire &c. Co.*, 21 L. J. Exch. 261; 7 Exch. 707; *L. & N. R. Co.* v. *Gilbert*, 42 Am. & Eng. R. Cases, 372.

A carrier is not permitted to so limit its liability as to exempt it from the consequences of its own negligence. *N. Y. Central R. Co.* v. *Lockwood*, 17 Wall. 357; *The Tanbark*, Fed. Cas. No. 13,742.

Where there is a clause limiting the liability of a carrier it bears the burden of proof to show not only that the cause of the loss was within the exemption, but also that it was not due to its negligence or that of its servants. *South &c. Co.* v. *Henlin*, 56 Alabama, 606; *Inman* v. *South Carolina R. Co.*, 129 U. S. 128; *Dillard* v. *L. & N. R. Co.*, 2 Lea (Tenn.), 288; *Steele* v. *Townsend*, 37 Alabama, 247; *Adams Exp. Co.* v. *Stetaners*, 68 Illinois, 184; *Texas &c. Co.* v. *Richmond*, 94 Texas, 571.

In Louisiana, where the contract exempts the carrier from any loss by fire, he carries the burden of proving not only the exemption, but also that the loss was not due to the carrier's negligence, or omission of duty, in any manner causing or

contributing thereto. *Maxwell & Putnam* v. *So. Pac. R. Co.*, 48 La. Ann. 397; *Roberts* v. *Riley*, 15 La. Ann. 103.

This rule has been affirmed by decisions of Federal courts. *New Jersey &c. Co.* v. *Merchants' Bank*, 6 How. 383; *Seiller* v. *Pac. Co.*, Fed. Cas. No. 12,644; *Ormsby* v. *Union Pac. Co.*, 4 Fed. Rep. 706.

The exemption from loss or damage by fire is not effective unless the fire be the proximate cause of the loss or damage. *Condict* v. *Grand Trunk R. Co.*, 54 N. Y. 500.

Proximate cause of the loss here was not the fire, but defendant's negligence, which preceded it and without which the fire would not have occurred.

The delivery of goods for shipment at a place where the carrier has consented to receive them for transportation is a complete delivery to the carrier, and when this is done its liability for the goods is that of a common carrier. *St. Louis &c. Co.* v. *Murphy*, 60 Arkansas, 337; *Dixon* v. *Georgia, &c. Co.*, 110 Georgia, 173; *I. C. R. Co.* v. *Smiser*, 38 Illinois, 354; *Greenwood* v. *Cooper*, 10 La. Ann. 796; *Barret* v. *Salter*, 10 Rob. (La.) 424; *Fitchburg &c. Co.* v. *Hanna*, 6 Gray (Mass.), 539.

A special contract exempting the carrier from liability in specified instances is not to be used by it against any claim of liability as to which it was designed to furnish protection. *So. Pac. R. Co.* v. *Arnette*, 111 Fed. Rep. 849.

Where goods are delivered for shipment at a place designated by the carrier, and before being ladened, and when in such place, they are stolen or destroyed, the carrier is guilty of negligence, if it makes no provisions against such theft or destruction, and is liable to the shipper for the value of the goods. Hutchinson on Carriers, § 89; *Fisher* v. *Brig Norvall*, 8 N. S. (Martin's La. Rep.) 120; *Roth* v. *Harkson*, 18 La. Ann. 705.

If the carrier negligently leaves goods in a place of danger, he cannot by stipulation exempt himself from liability for loss by fire. *McFadden* v. *Railway Co.*, 92 Missouri, 343.

Mr. Charles P. Cocke, with whom *Mr. William Wirt Howe, Mr. W. B. Spencer* and *Mr. John F. Dillon* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

The case was removed from the Civil District Court in and for the Parish of Orleans to the United States Circuit Court for the Eastern District of Louisiana by defendant, on the ground that it was a corporation organized by an act of Congress of the United States.

The petition alleges that plaintiff delivered to defendant, at a point on the line of its railway called Meekers' Switch, to be transported to New Orleans, fifty-two bales of cotton at a rate of freight then and there agreed upon and a bill of lading issued to plaintiff. The cotton was loaded upon the cars of defendant, and while waiting transportation was destroyed by fire.

The petition charges negligence on the part of defendant in that it failed to take measures of precaution for the safety and protection of the cotton, but left it in the cars on a side track, "in an open country, unguarded and unwatched." The bill of lading contained a provision exempting defendant from liability for damage to or destruction of the cotton by fire, but the petition alleges that the provision was null and void, as far as plaintiff is concerned, for the following reasons, among others: He received no consideration therefor; the rate which he agreed to pay was the only rate defendant would give or was offered; on account of the negligence of the defendant.

The value of the cotton was $2,440.32.

The evidence in the case is that Meekers was a mere switch track running to the Meekers plantation. No agent was maintained at the station. Shippers wanting cars applied for them at the next station. The practice was for shippers to load the cars furnished and gets bills of lading from the agent who furnished the cars. The next train passing after the cars were

loaded took them; that no guard or watchman was placed over freight was well known.

The loading of the cotton in the present case was completed at 2 P. M. The bill of lading was obtained at 5 P. M. The fire was discovered at 10 P. M. The train which was to take the cars was not due until 9 A. M. next morning. There was no evidence of the cause of the fire.

Defendant moved the court to instruct the jury to return a verdict for it. Plaintiff requested the court to submit to the jury the question whether or not the destruction of the cotton was due to or caused by the negligence of the defendant. The request was denied, and the motion of the defendant was granted, and a verdict was returned for defendant. From the judgment entered on the verdict error was prosecuted to the Circuit Court of Appeals for the Fifth Circuit and the judgment was affirmed. 113 Fed. Rep. 91.

This case was argued and submitted with *Cau* v. *Texas & Pacific Railway Co.*, and all of its questions are ruled by that case except one, and that is the effect of leaving the cotton unguarded on the responsibility of the defendant.

In answering the question two elements are to be considered —the negligence of the defendant and its connection with the destruction of the cotton. If the evidence established neither, the Circuit Court rightfully directed a verdict for defendant.

Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. Applying that test in the case at bar, we do not think negligence on the part of defendant was established.

Meekers was not a regular station; indeed was not a station at all but a mere switch track. The defendant was not obliged to receive freight there. It was, as said by the Court of Appeals, "a country or plantation switch," established and maintained for the accommodation of the planters of the neighborhood. There was no agent or employé maintained there for the purpose of receiving or guarding freight, nor was there fire

apparatus kept. Cars were only sent there when ordered, loaded by the shipper, and taken by the first passing freight train to the point of destination. This was the practice for years, and there is not a word of testimony that it was not adequate to the protection of the planters as it was to their accommodation, or that it was in their judgment not a complete fulfillment of the duty of defendant. No circumstance is shown which demanded a change in the practice. There was no demand made by the plaintiff for a change. Whatever risk there was seems to have been accepted as a consideration for the convenience afforded. It is easy to understand that if watchmen had been demanded of the defendant, it would have insisted upon the delivery of freight at its regular station at Le Compte, two and one-half miles distant. But the risk seems not to have been great. No loss from any cause is shown to have occurred during the existence of the practice —nothing shown from which danger could be apprehended. One of the plaintiff's witnesses testified that tramps passed up and down the road daily, but what can be inferred from that? It is inappreciable. Was danger to be apprehended from their carelessness or malice? During the ten or eleven years of the existence of the station not an instance of either is shown.

It is, however, urged that a place of delivery other than a regular station can be agreed on or established by custom or practice, and at the instant of delivery the full responsibility of a carrier attaches. To bring the case at bar within those principles *Fischer* v. *Norvall* 8 N. S. (10 Martin) 120; *Barret* v. *Salter,* 10 Rob. Rep. (La.) 434, and *Roth* v. *Harkson,* 18 La. Ann. 705, are cited. The principles may be assented to; the cases cited are distinguishable from that at bar.

In *Fischer* v. *Brig Norvall* thirty-five bales of cotton were sent to be shipped on the brig Norvall, and were received by the captain. The cotton was left upon the levee unguarded, and during the night following delivery it was destroyed by fire. The origin of the fire was not shown, but it was shown

that it was not customary in the city (New Orleans) to put a guard over cotton so placed. The code of the State made carriers liable for loss or damage to property entrusted to their care, unless they proved that such loss or damage had been occasioned by accidental and uncontrollable events. The defendants in the case were adjudged liable. The Supreme Court held, approving the decision of the trial court, "there was negligence in the defendants permitting the cotton to be exposed all night on the levee, to theft, fire and other accidents, without some person to take care of it." It was not the care, the court further observed, that a prudent person would take of his own property, and the custom proved was not a good excuse. The facts in that case are markedly different from those in the pending case. Cotton exposed upon the levees of New Orleans is in a different situation from cotton enclosed in locked box cars on a side track in the solitude of the country, and demands a different degree of care.

In *Barret* v. *Salter* forty hogsheads of tobacco were delivered for shipment on the ship Huron. It was receipted for by the mate. After it was received a heavy rain came, which lasted about two hours, to which it was suffered to remain exposed. It was testified that the captain was told that if the tobacco should be put on board without being opened and trimmed it would be found damaged on its arrival at destination. It was so found. The defendants were held liable.

In *Roth* v. *Harkson* the question was whether cotton put in a place designated by a mate of a ship and covered by a tarpaulin by the direction of the officers of the ship was delivered to the ship, notwithstanding the officers afterwards refused to receipt for it on the ground of the lateness of the hour. It was held to be a delivery.

The question in the case at bar, however, is, not whether there was delivery to defendant nor when its responsibility attached, but assuming delivery at Meekers and that defendant's responsibility attached at the time the bills of lading were issued, was defendant guilty of negligence? That ques-

tion we have answered in the negative, nor could the answer be otherwise, even if it be conceded, as contended by plaintiff, that under the law of Louisiana the burden of proof was upon the defendant to show the absence of negligence. The allegation of the petition was: "That the fire, by which the destruction of said cotton was caused, was due to the negligence of the said company itself, and of its agents, employés and servants; that the said cotton was by it left in two cars of the said company, standing upon its track, in the open country, unguarded and unwatched by the said company, in any particular whatsoever; that it was the duty of the said company to take some measures of precaution to protect said cars, and the cotton contained therein, from depredation, loss or injury, by third persons, wrongdoers or those bent upon mischief; that it totally failed and neglected to take any measures of precaution, for the safety and protection of the said cotton, but left it in said cars, said track, unguarded and unwatched in the night time during which it was destroyed by fire; that petitioner believes that the said cotton was set on fire by some malicious person; that petitioner has no actual knowledge as to the origin or cause of said fire." The evidence we have commented on, and, we may only add, it established all that was charged as negligence, and there was nothing for the defendant to explain. The defendant could, as it did, submit the question of its liability upon the evidence adduced.

Judgment affirmed.

SWARTS *v.* HAMMER.

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

No. 238. Argued April 20, 1904.—Decided May 16, 1904.

Where Congress has the power to exempt property from taxation the intention must be clearly expressed.

There is nothing in the Bankruptcy Act of 1898 which exempts property in the hands of a trustee in bankruptcy from the State and municipal taxes to which similar property in the same locality is subject.

THE facts are stated in the opinion of the court.

Mr. Lee Sale, with whom *Mr. Solomon L. Swarts* and *Messrs. Woef & Cohen* were on the brief, for appellant:

Art. I, § 8, of the Constitution gives Congress power to establish uniform laws on bankruptcy. No other sovereignty —state or foreign—can exercise any control over the bankrupt's property. The power granted is a sovereign power, *McCulloch* v. *Maryland*, 4 Wheat. 316; it admits of only one system. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492. If the trustee were subject to state taxation the distribution would not be uniform, he might be required to pay to different States, where bankrupt resides and where property is situated. *Bank* v. *Moyses*, 186 U. S. 181, distinguished. As to non-interference of State by taxation with matters under Federal control, see Cooley on Taxation, 2d ed. ch. 3, p. 83; *Leloup* v. *Mobile*, 127 U. S. 640; *Kelley* v. *Rhoads*, 188 U. S. 1; *Phila. & Read. R. R.* v. *Pennsylvania*, 15 U. S. 232; *Railroad Co.* v. *Penniston*, 18 Wall. 5; *Re Bank*, 12 Blatch. 189.

Mr. Herbert R Marlatt, with whom *Mr. George S. Johnson*, *Mr. Charles A. Houts* and *Mr. Harry B. Hawes* were on the brief, for appellee:

Under the laws of Missouri, property in the hands of a trustee in bankruptcy is taxable.

Under § 9118, Rev. Stat. Mo. 1899, all property in the State, real and personal, is made taxable except that which is specifically exempt.

Section 6, Art. X, Const. of Missouri, §§ 9119, 9120, Rev. Stat. Mo. 1899, enumerate all classes of exempt property. Section 7, Art. X, provides that all other exemptions are void. Property in the hands of a trustee in bankruptcy is not exempted.

It is not necessary, in order to make property taxable, that it should be specifically mentioned as being taxable. Taxation is the rule; exemption therefrom the exception. *Adelphia Lodge* v. *Crawford*, 157 Missouri, 356, 359; *Fitterer* v. *Crawford*, 157 Missouri, 51, 59; *St. Louis* v. *Wenneker*, 145 Missouri, 230, 239; Judson on Missouri Taxation, p. 88.

By § 9186, Rev. Stat. Mo. 1899, provision is made for assessing every person "owning or holding property on the first day of June." By § 9144 each person is required to make a correct statement of all taxable property "owned by him or under his care, charge or management." This includes property in charge of a trustee in bankruptcy.

Under the Missouri laws, trustees and executors are taxable with property in their charge. *State ex rel.* v. *Burr*, 143 Missouri, 209, 215; *St. Louis* v. *Wenneker*, 145 Missouri, 230; § 9151, Rev. Stat. Mo. 1899.

Conceding the restrictions arising from the Federal supremacy, the exemption of the instrumentalities of the Federal government from state taxation is a very limited exemption, —a limitation growing out of necessity and applicable only where the tax would "interfere with or impair the operation of Federal agencies." *Nat. Bank* v. *Commonwealth*, 9 Wall. 353, 362; Desty on Taxation, p. 77; Cooley on Taxation, p. 85; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Thompson* v. *Pacific R. R.*, 9 Wall. 579; *Railroad Co.* v. *Penniston*, 18 Wall. 5; *Railroad Co.* v. *California*, 162 U. S. 91; *W. U. Tel. Co.* v. *Gottlieb*, 190 U. S. 425; *Prevost* v. *Grenoux*, 19 How. 1.

The bankruptcy law contains no express exemption of the

assets of bankrupt estates from state taxation during administration. Legislative intent to exempt property from taxation must be clearly and explicitly expressed. Exemption from taxation is never presumed. Cooley on Taxation, 3d ed. p. 356; *United States* v. *Herron*, 87 U. S. 251; *In re Sims*, 118 Fed. Rep. 356. Unless the sovereign is explicitly mentioned, there is no bar against that sovereign's claims. *In re Moore*, 111 Fed. Rep. 145; *In re Baker*, 96 Fed. Rep. 954; *Johnson* v. *Auditor*, 78 Kentucky, 282; *Commonwealth* v. *Hutchinson*, 10 Pennsylvania, 466. The bankruptcy law itself recognizes impliedly the State's right to impose taxes. *State ex rel. Tittmann*, 103 Missouri, 553; § 64*b* of the act.

All of the cases in which the question here involved has been raised have upheld the tax, except one. *In re Mitchell*, 16 Nat. Bank. Rep. 535; Fed. Cas. No. 9658; *In re Conhaim*, 100 Fed. Rep. 268; 4 Am. Bank. Rep. 58; *In re Keller*, 109 Fed. Rep. 131; 6 Am. Bank. Rep. 351; *In re Sims*, 118 Fed. Rep. 356. See also Brandenburger on Bankruptcy (3d ed), par. 1015. In only one case, *In re Booth*, Fed. Cas. No. 1645, decided under law of 1867 by a referee in bankruptcy, has the right of the State to tax been questioned.

Mr. Justice McKenna delivered the opinion of the court.

The case involves the validity of taxes imposed upon property in the hands of a trustee in bankruptcy.

The appellant was duly elected and qualified as trustee of the estate of Siegel-Hillman Dry Goods Company, which had been adjudged a bankrupt. The appellant as such trustee had in his hands and on deposit in the designated depository the sum of $68,320, belonging to the estate. The appellee, as collector of the revenue of the city of St. Louis, Missouri, filed before the referee a petition alleging state, school and city taxes for the year 1901 had been regularly assessed against said sum on the first of June, 1900, and that a bill for said taxes, properly certified, had been delivered to him for collection, and

prayed for an order directing the taxes to be paid. The trustee filed an answer denying the liability of the property to the taxes. After hearing, the referee made an order directing the appellant to pay to appellee the sum of $1,298.08, the amount of the tax bill for the year 1901, "together with the accrued penalties and fees provided by law."

The order was affirmed by the District Court as to the amount of taxes, but disapproved as to accrued penalties and fees. A decree was duly entered, which was affirmed by the Circuit Court of Appeals. 120 Fed. Rep. 256.

The argument of appellant has taken somewhat wide range. The case, however, is in narrow compass. The question is not the extent of the power of Congress over the subject of bankruptcy, but what Congress intended by the act of 1898. By section seven of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. Though the opinion of the Circuit Court of Appeals is brief, it is difficult to add anything to its conclusiveness. But, as showing the trend of judicial opinion, we may refer to *In re Conhaim*, 100 Fed. Rep. 268; *In re Keller*, 109 Fed. Rep. 131; *In re Sims*, 118 Fed. Rep. 356.

Decree affirmed.

OHIO *ex rel.* LLOYD *v.* DOLLISON.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 262. Argued April 28, 29, 1904.—Decided May 16, 1904.

The first eight articles of the amendments to the Constitution of the United States have reference to powers exercised by the government of the United States, and not to those of the States.

The power of the State over the liquor traffic is such that the traffic may be absolutely prohibited, and that being so it may be prohibited conditionally and a local option law does not necessarily deny to any person equal protection of the laws because the sale of liquor is by the operation of such a law a crime in certain territory and not in other territory.

This court will not anticipate the judgment of the state court by deciding what persons are qualified to act as jurors before the trial and one who is to be tried cannot complain until he is made to suffer.

It is not necessarily a deprivation of liberty or property without due process of law to commit to the judgment of a court the amount of punishment for illegal liquor selling.

The Ohio local option law regulating the sale of liquor is not unconstitutional as depriving one attempting to sell liquor in that if the State in which such sale is prohibited of his liberty or property without due process of law or denying him the equal protection of the laws.

THE plaintiff in error was committed to custody upon a warrant for violating the law of Ohio called the "Beal Local Option Law." He petitioned in *habeas corpus* for his discharge to one of the judges of the State having jurisdiction. On hearing he was remitted to custody and the judgment was affirmed by the Supreme Court of the State. This writ of error was then sued out. The question involved is the constitutionality of the law.

The facts constituting the violation of the law were alleged to be the unlawful selling and furnishing to one E. L. Scott, a resident of the city of Cambridge, six pints of beer, and with keeping a place where intoxicating liquors are kept for sale,

given away and furnished for beverage purposes. The sale was not within any of the exceptions of the law.

In the petition for *habeas corpus* it was alleged that plaintiff in error was arrested by a constable of the township of Cambridge, upon a warrant issued by a justice of the peace in and for the township of Center, Guernsey County, Ohio, which township is outside of the geographical boundaries of the city of Cambridge, where the violation of the law was claimed to have occurred.

That by virtue of the arrest plaintiff in error was committed to jail in the county of Guernsey, and there imprisoned by J. B. Dollison, the sheriff of the county.

Mr. F. S. Monnett, with whom *Mr. D. F. Pugh* and *Mr. R. M. Nevin* were on the brief, for plaintiff in error.

Mr. W. B. Wheeler, with whom *Mr. A. V. Taylor* was on the brief, for defendant in error.

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

The petition alleged that the law violated the constitution of the State in certain particulars. We omit the allegations, as the Supreme Court of the State decided against their sufficiency, and its judgment is not open to our review.

Wherein the law offends the Constitution of the United States was expressed as follows:

"It contravenes section 1, article 14, of the Constitution of the United States, in that it denies to this defendant and other persons within its jurisdiction the equal protection of the law; it deprives said defendant and other citizens of their liberty and property without due process of law; it contravenes article 5 of the Constitution of the United States; it contravenes article 6 of the Constitution of the United States, in that the accused cannot enjoy the right to a speedy and public trial

by an impartial jury of the State and district wherein the crime is and shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation in this, to wit, that said jury cannot be selected by any previously enacted law from the territorial district, to wit, of the city of Cambridge, which district, and within which district alone, said crime, if any, is, was and could have been committed."

All of these objections, however, are not open to the plaintiff in error to make. It is well established that the first eight articles of the amendments to the Constitution of the United States have reference to powers exercised by the government of the United States, and not to those of the States. *Eilenbecker* v. *Plymouth County*, 134 U. S. 31. Our consideration, therefore, must be confined to the contentions under the Fourteenth Amendment. Those contentions are that the Ohio statute denies plaintiff in error the equal protection of the law and deprives him of liberty and property without due process of law.

The first contention can only be sustained if the statute treat plaintiff in error differently from what it does others who are in the same situation as he. That is, in the same relation to the purpose of the statute. The statute is too long to quote at length. It is a local option law. It permits the municipal corporations of the State to prohibit "the selling, furnishing and giving away of intoxicating liquors as a beverage, or the keeping of a place where such liquors are sold, kept for sale, given away or furnished." It excepts druggists in certain cases and manufacturers when selling in wholesale quantities to "*bona fide* dealers trafficking in intoxicating liquors or in wholesale quantities to any party residing outside of the limits of said municipality." What constitutes a "giving away" is expressed in the statute as follows: "The words, 'giving away,' where they occur in this act, shall not apply to the giving away of intoxicating liquors by a person in his private dwelling, unless such private dwelling is a place of

public resort." By a subsequent statute it was enacted that each railway corporation which shall maintain or conduct dining or buffet cars upon any one of its trains and shall desire to dispense intoxicating liquors on such cars may do so by obtaining a license from the State upon the payment of $300 or $700, accordingly, as the corporation operates either 200 or 700 miles of railway within the State. It is not clear whether plaintiff in error relies on that act as a part of the other and an addition to its discriminations. Assuming him to do so, the exceptions in the statute are druggists, manufacturers, persons who give away liquors in their private dwellings, and railway corporations dispensing liquors in dining and buffet cars under state license.

These exceptions constitute the inequalities of the statute upon which plaintiff in error bases his contention. He is not one of the excepted classes. He is a retail dealer of liquor; may be a saloon keeper, but of that the record does not clearly inform us. If between his occupation and the excepted occupation there is such difference as to justify a difference of legislation, necessarily he cannot complain, and, we think, there is a manifest difference. It is equally manifest if we should regard him as "giving away" his liquor. That act may not have the same objectionable consequences when done in a private dwelling as when done in a saloon or other place of business. The State may look beyond the mere physical passing of liquor from one person to another and regard and constitute the place where it is done the essence of the offense. But even if the discriminations of the statute were less obviously justifiable we might not be able to condemn them. *Missouri, Kansas & Texas R. R. Co.* v. *May, ante,* p. 267.

Plaintiff in error further urges that to make an act a crime in certain territory and permit it outside of such territory is to deny to the citizens of the State the equal operation of the criminal laws, and this he charges against and makes a ground of objection to the Ohio statute. This objection goes to the power of the State to pass a local option law, which, we think,

is not an open question. The power of the State over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a State. *Cronin* v. *Adams*, 192 U. S. 108. That being so, the power to prohibit it conditionally was asserted, and the local option law of the State of Texas was sustained. *Rippey* v. *Texas*, 193 U. S. 504.

The next contention of plaintiff in error is that under the statute he is not on equal terms with all others accused of crime. He attempts to support this contention by a provision of the constitution of Ohio and a decision of the Supreme Court of that State. By the constitution of the State those charged with crimes are guaranteed "a speedy, public trial by an impartial jury of the county or district in which the offence is alleged to have been committed." The Supreme Court, considering this provision, said in *Cooper* v. *State*, 16 Ohio St. 328:

"The right of the accused to an impartial jury cannot be abridged. To secure this right it is necessary that the body of triers should be composed of men indifferent between the parties and otherwise capable of discharging their duty as jurors, . . . This duty is enjoined by the constitution, and, it is true, cannot be impaired or the right abridged by legislative action."

Applying the constitution and the decision, plaintiff in error asserts that the district in which his offense was committed was necessarily the area of the operation of the statute, and it is only jurors selected from such district that will be indifferent between the State and him. It is only such jurors, he urges, that are his peers, and he defines a peer to be one "capable of committing a like crime and suffering a like punishment and liable to a like disgrace."

There are two answers to the contention. First, it must be inferred from the decision of the Supreme Court in the case at bar that plaintiff in error does not construe correctly either the constitution of the State or the opinion he cites. Second,

plaintiff in error has not yet been tried. What the courts of the State may decide as to jurors we do not wish to anticipate, and plaintiff in error cannot complain until he is made to suffer.

The final contention of plaintiff in error is that the statute of Ohio deprives him of due process of law. The only additional argument advanced on this contention is that the statute does not define the words "wholesale" and "retail," and fails to limit the amount of the fine or penalty to be imposed by the court. This omission of the General Assembly, it is said, vests legislative power in the judiciary, which cannot be done in a republican form of government.

Of this contention we need only observe that if a case can exist in which the kind or degree of power given by a State to its tribunals may become an element of due process under the Fourteenth Amendment, it would have to be a more extreme example than the Ohio statute. Wholesale and retail are pretty well known terms, and present less uncertainties than many terms submitted to courts for interpretation. Besides, would it not be strange to hold that a statute unaccompanied by a glossary of its terms leaves unfulfilled the legislative power?

The statute declares a person guilty of a violation of its provisions to be guilty of a misdemeanor and imposes a penalty for a first and second offense a maximum and minimum fine, and for any subsequent offense a fine of not less than two hundred dollars and imprisonment of not more than sixty days and not less than ten days. Revised Statutes of Ohio, sections 4364–20*b*. As we understand the argument of plaintiff in error, his objection is directed to the penalty for the third and subsequent offenses. We might dispose of the objection by saying it anticipates the future too much. He is not now concerned with that penalty. He has not yet been convicted of a first offense as far as the record shows. Indeed the charge against him presumably is based on his first offense. But considering him entitled to make the objection, we may answer

it and close the discussion by observing that it is not an extreme discretion to commit to the judgment of a court in the manner provided by the Ohio statute the amount of punishment to fix for illegal liquor selling.

Judgment affirmed.

DAVIS *v.* MILLS.

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

No. 235. Argued April 19, 1904.—Decided May 16, 1904.

Section 554 of the Montana Code of Civil Procedure, limiting actions to enforce a special statutory director's liability to three years, applies to liabilities incurred before its passage under a different statute and goes with them as a qualification when they are sued upon in other States.

If such a statute of limitations allows over a year in which to sue upon an existing cause of action it is sufficient. A statute of limitations may bar an existing right as well as the remedy.

THIS case came here on a certificate of which the following is the material portion:

"The plaintiff is a citizen of Montana and the owner by assignment of three causes of action (for goods sold and on a promissory note) against the Obelisk Mining and Concentrating Company, a Montana corporation. The indebtedness of the company upon these causes of action accrued July 31, 1892, July 1, 1892, and December 12, 1892, respectively. The defendants are and always have been citizens and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company. The statutes of Montana provide that within twenty days from the first day of September every such company shall annually file a specified report, and that if it 'shall fail to do so, all the trustees of the company shall be jointly and severally liable

for all of the debts of the company then existing, and for all that shall be contracted before such report shall be made.' Section 460 of chapter 25 of the fifth division, Compiled Statutes of Montana, which was in force when the cause of action arose. Reënacted as section 451 of the Civil Code of Montana, which went into effect July 1, 1895.

"The Obelisk Company failed to file certain of the required reports and the causes of action sued upon here, against the defendants as trustees to recover debts of the company, accrued September 22, 1893, or prior thereto. This action was brought to enforce the joint and several liability of the defendants under the statute on July 30, 1897.

"When the cause of action accrued the Compiled Statutes of Montana contained these sections:

" 'SEC. 45. 1. In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the Territory, except where the statute imposing it prescribes a different limitation; 2, an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process shall be commenced within one year.'

" 'SEC. 50. If when the cause of action shall accrue against a person he is out of the Territory, the action may be commenced within the time herein limited, after his return to the Territory; and if after the cause of action shall have accrued he depart from this Territory, the time of his absence shall not be a part of the time limited for the commencement of the action.'

"Both of those sections were repealed by the Code of Civil Procedure, section 3482, which went into effect July 1, 1895. On the last-named date the Civil Code of Montana went into effect, containing section 451 above cited. The Code of Civil Procedure contains a separate title, numbered II, and containing four chapters (sections 470 to 559), which deals exhaustively with 'the time of commencing actions.' It contains these sections:

" 'SEC. 515. Within two years:

"'1. An action upon a statute for a penalty or forfeiture, "when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation." '

"'SEC. 541. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.'

"'SEC. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created (*sic*).'

"Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court, for its proper decision, is:

"'May a defendant in an action of the kind specified in section 554 of the Code of Civil Procedure of Montana avail of the limitation therein prescribed, when the action is brought against him in the court of another State?' "

Mr. John A. Shelton, with whom *Mr. T. J. Walsh* was on the brief, for Davis.

Mr. William Waldo Hyde, with whom *Mr. Charles E. Perkins* was on the brief, for Mills.

MR. JUSTICE HOLMES, after making the foregoing statement, delivered the opinion of the court.

The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio*, which, having been attached to the person by the law then having that person within its power, will be

treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad*, 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori*, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

If, then, the only question were one of construction and as to liabilities subsequently incurred, it would be a comparatively easy matter to say that section 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by section 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought. But the question certified raises greater difficulties both as to construction and as to power. We have first to consider whether section 554 purports to qualify, or to impose a condition upon, liabilities already incurred under the earlier act taken up into section 451. In doing so we assume that the

word "directors" in the later act means the same as "trustees" in the earlier one. The contrary was not suggested.

At the argument we were pressed with section 3455 of the Code of Civil Procedure: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." But the trouble made by this is more seeming than real. The following section deals specifically with limitations, and must be taken to override a merely general precaution against the disturbance of vested rights. By § 3456: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." The language clearly imports that the limitations in the Code are to apply to existing obligations upon which the previous limitation already had begun to run. The result is that § 554 purports to substitute a three years' limitation for the one year previously in force, assuming that the previous one year limitation applied to this case, as under the decisions it did. *State Savings Bank* v. *Johnson*, 18 Montana, 440; *Park Bank* v. *Remsen*, 158 U. S. 337, 342. But if § 554 purported to make this substitution, it purported to introduce important changes. It lengthened the time on the one hand, but it took away the exception in case of absence from the State on the other. This last is disputed, but it seems to us a part of the meaning of the words "This title does not affect actions against directors," etc. The section as to absence from the State is a part of the title, and whatever necessary exceptions may be made from the generality of the words quoted, this is not one of them.

A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. We express no opinion as to the earlier act, but we think that this § 554 so definitely deals

with the liability sought to be enforced that upon the principles heretofore established it must be taken to affect its substance so far as it can, although passed at a different time from the statute by which that liability first was created. We do not go beyond the case before us. Different considerations might apply to the ordinary statutes as to stockholders. We express no opinion with regard to that.

We come then to the question of power. It is said that a statute of limitations cannot take away an existing right but only remedies, and therefore that, whatever the effect of § 554 on subsequently accruing liabilities, it cannot bar the plaintiff in this suit. Before considering this it is to be observed in the first place that, so far as the State of Montana was concerned, the only practical difference made by the statute was to take away the allowance for absence from the State while giving over a year for the prosecution of the action within it. The cause of action accrued on September 22, 1893, and the new statute went into effect on July 1, 1895, so that the plaintiffs had at least until September 22, 1896, in which to sue there. As to action within the State, it could not be contended that the change took away constitutional rights. It did not shorten liability unreasonably. *Wheeler* v. *Jackson*, 137 U. S. 245. The only way in which it could be made out that the attempt to take away a remedy outside the State after the same lapse of time was unconstitutional is through the theoretical proposition which we have stated. It is said that remedies outside the State can be affected only by destroying the right, and that no statute of limitations can do that.

It is quite incredible that such an unsubstantial distinction should find a place in constitutional law. Prescription which applies to easement the analogy of the statute of limitations unquestionably vests a title. There is no such thing as a merely possessory easement. A disseisor of a dominant estate may get an easement which already is attached to it, but the easement is attached to the land by title or not at all. Again, as to land the distinction amounts to nothing, because to deny

all remedy, direct or indirect, within the State is practically to deny the right. "The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder." *Leffingwell* v. *Warren*, 2 Black, 599, 605. So far as we have observed, the cases which have had occasion to deal with the matter generally hold that the title to chattels, even, passes where the statute has run. *Campbell* v. *Holt*, 115 U. S. 620, 623; *Chapin* v. *Freeland*, 142 Massachusetts, 383, 386. Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight. But that demand is not founded more certainly by creation or discovery than it is by the lapse of time, which gradually shapes the mind to expect and demand the continuance of what it actually and long has enjoyed, even if without right, and dissociates it from a like demand of even a right which long has been denied. *Dunbar* v. *Boston & Providence Railroad*, 181 Massachusetts, 383, 385. Constitutions are intended to preserve practical and substantial rights, not to maintain theories. It is pretty safe to assume that when the law may deprive a man of all the benefits of what once was his, it may deprive him of technical title as well. That it may do so is shown sufficiently by the cases which we have cited and many others.

In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident. If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. We can see no constitutional obstacle in the way, and we are of opinion that they have purported to do it and have done it.

The question is answered in the affirmative, and it will be so certified.

MATTER OF CHRISTENSEN ENGINEERING COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 15, Original. Submitted April 25, 1904.—Decided May 31, 1904.

When an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

Where, however, the fine is payable to the United States and is clearly punitive and in vindication of the authority of the court, it dominates the proceeding and is reviewable by the Circuit Court of Appeals on writ of error, *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, and the court should take jurisdiction and in case of its refusal mandamus will issue from this court directing it so to do.

THIS is a petition for a writ of mandamus commanding the Circuit Court of Appeals for the Second Circuit to reinstate and take jurisdiction of a writ of error filed by the petitioner in that court, by which it sought to have reviewed an order of the Circuit Court for the Southern District of New York adjudging the petitioner guilty of contempt. The facts are, that on August 13, 1900, the Westinghouse Airbrake Company filed in the Circuit Court its bill of complaint, alleging the ownership of certain letters patent, an infringement by this petitioner, and praying an injunction restraining such infringement and an accounting of profits and damages. A preliminary injunction was ordered on October 18, 1901. On February 21, 1903, the petitioner was adjudged guilty of contempt in disobeying that injunction, and ordered to pay a fine of $1,000, one-half to the United States and the other half to the complainant. On March 23, 1903, a writ of error to revise this order was allowed by the Circuit Court, and a full transcript of the proceedings in that court duly certified to the Circuit Court of Appeals. On March 18, 1903, the Circuit Court entered a decree sustaining the validity of the patent,

directing a permanent injunction and an accounting of profits and damages. On April 16, 1903, an appeal was taken from this decree. A hearing on the writ of error was had before the Circuit Court of Appeals and, on February 13, 1904, that court dismissed the writ of error.

Mr. W. A. Jenner for petitioner.

Mr. Frederic H. Betts for respondent.

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

The examination in *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, just decided, of the right of review in contempt cases precludes the necessity of extended discussion.

In that case Bessette was not a party to the suit, and the controversy had been settled by a final decree, from which, so far as appeared, no appeal had been taken. He was found guilty of contempt of court, and a fine of $250 imposed, payable to the United States, with costs.

In this case the Christensen Engineering Company was a party. The contempt was disobedience of a preliminary injunction and the judgment in contempt was intermediate the preliminary injunction and the decree making it permanent. The fine was payable, one-half to the United States, and the other half to the complainant.

The distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court, is pointed out in *Bessette's* case, and disclosed by some of the cases referred to in the opinion.

In *New Orleans* v. *Steamship Company*, 20 Wall. 387, the act in contempt was by one not then a party to the suit. No order was entered against him until the final decree in the case,

and then he was punished for the act of disobedience, purely as an act of a criminal nature, and without compensation to the plaintiff in whose favor the injunction was originally ordered. No review under the then existing law was allowable. In *Hayes* v. *Fischer*, 102 U. S. 121, the contempt proceeding was remedial and compensatory, and the entire amount of the fine was ordered paid to the plaintiff in reimbursement. It was held that, if the remedial feature was alone to be considered, and the proceeding regarded as a part of the suit, it could not be brought to this court by writ of error, but could only be corrected on appeal from the final decree; if to be regarded as a criminal action, then it was one of which this court had no jurisdiction, either by writ of error or appeal. In *Ex parte Debs et al.*, 159 U. S. 251, there was nothing of a remedial or compensatory nature. No fine was imposed, but only a sentence of imprisonment. This court had no jurisdiction of a writ of error in such a case. And see *O'Neal* v. *United States*, 190 U. S. 36. In *Worden* v. *Searls*, 121 U. S. 14, the proceeding was remedial and compensatory, in that for violations of a preliminary injunction the defendants were ordered to pay the plaintiff $250 "as a fine for said violation," by one order, and, by another order, to pay a fine of $1,182 to the clerk, to be paid over by him to the plaintiff for "damages and costs," the $1,182 being made up of $682 profits made by the infringement, and $500 expenses of plaintiff in the contempt proceedings. These interlocutory orders were reviewed by this court on appeal from the final decree, and as that decree was reversed, the orders were also set aside, this being done "without prejudice to the power and right of the Circuit Court to punish the contempt referred to in those orders, by a proper proceeding." It was also said "that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses."

These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse

the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction.

Petitioner entitled to mandamus.

CROWLEY *v.* UNITED STATES.

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

No. 205. Submitted April 12, 1904.—Decided May 31, 1904.

Where the accused contends in the District Court of the United States for the District of Porto Rico, that under the provisions of the Foraker act of April 12, 1900, 31 Stat. 77, the qualifications of the grand jurors by whom he was indicted should have been controlled by the local law of January 31, 1901, and the court decides adversely, a right is claimed under a statute of the United States and denied; and under § 35 of the Foraker act this court has jurisdiction on writ of error to review the judgment.

Under §§ 14 and 34 of the Foraker act providing that the District Court of the United States for the District of Porto Rico shall have jurisdiction in all cases cognizant in the Circuit Courts of the United States and shall proceed therein in the same manner as a Circuit Court, the provisions of § 800, Rev. Stat., apply to criminal prosecutions, and the court must recognize any valid existing local statute as to the qualification of jurors in the same manner as a Circuit Court of the United States is controlled in criminal prosecutions by the applicable statute of the State in which it is sitting.

The disqualification of a grand juror prescribed by statute is a matter of substance which cannot be regarded as a mere defect or imperfection within the meaning of § 1025, Rev. Stat.

After April 1, 1901, there was a local statute in Porto Rico, regulating the qualifications of jurors and the presence of persons on the grand jury of the District Court of the United States for the District of Porto Rico disqualified under that act and who were summoned to serve after the act took effect, vitiates the indictment when the facts are seasonably brought to the attention of the court.

An objection by pleas in abatement, and before arraignment of the accused, to an indictment on the ground that some of the grand jurors were disqualified by law, was in due time and was made in a proper way.

Quære and not decided whether the presence of jurors disqualified by the act, but summoned before it took effect, would affect an indictment found after the act took effect.

THE plaintiff in error was indicted in the District Court of the United States for the District of Porto Rico as constituted by the act of Congress of April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." 31 Stat. 77, c. 191.

The indictment was based upon certain sections of the Revised Statutes of the United States relating to crimes committed by persons employed in the postal service. Rev. Stat. §§ 5467, 5468 and 5469. The punishment for the offence here charged was imprisonment at hard labor for one year and not exceeding five years.

After the return of the indictment the accused filed a plea in abatement, which questioned the competency of certain jurors who participated in the finding of the indictment.

As the action of the court on that plea constitutes the controlling question in the case, the plea is given in full as follows:

"Now comes the defendant, Harold Crowley, and pleads in abatement to the indictment returned herein, and says that on Monday, the 8th day of April, 1901, there appeared in this court at San Juan, it being the first day of said term, the following-named persons: Manuel Romero Haxthausen, Pedro Fernandez, Alex. Nones, John D. H. Luce, Antonio Blanco, Manuel Andino Pacheco, E. L. Arnold, Henry V. Dooley, J. Ramon Latimer, Miguel Olmedo, Ramon Gandie, Charles H. Post, numbering twelve in all, which said persons were then and there, by the direction of the court and the marshal,

placed in the jury box, to constitute the panel for the grand jury of this said April term, 1901, of this court.

"Whereupon the court then ordered the marshal to summon other persons to fill up the panel of the said grand jury, and immediately the marshal of the court sent his deputy out of the court room and into the city of San Juan to summon other jurors for such grand jury. Within a few minutes thereafter the marshal brought into court Frank Antonsanti, (returned as Antonio Santi and Frank Santi, as appears by the minutes of this court,) Hugo Stern and William Bowen, the said persons not having been then and there bystanders in the court. The said panel then being incomplete, the marshal placed W. H. Holt, Jr., in the box, he being at the time a bystander in said court.

"Defendant says that thereupon the grand jury was constituted from the persons above named, and, after being sworn, proceeded to render a true bill against the defendant, which said alleged true bill on indictment was by the said grand jury, constituted as aforesaid, returned and presented to this court on Wednesday, April tenth, 1901.

"Defendant says that by an act of the legislative assembly of Porto Rico, which took effect January 31, 1901, it was provided (§ 3) that jurors shall have the following qualifications, among others:

"1st. A male citizen of the United States or of Porto Rico, of the age of twenty-one years and not more than sixty years, who shall have been a resident of the island one year, and of the district or county ninety days before being selected and returned.

"4th. Assessed on the last assessment roll of the district or county on property of the value of at least two hundred dollars belonging to him.

"SEC. 4. A person is not competent to act as a juror, 1st, who does not possess the qualifications prescribed by the preceding section—which said provisions were in full force and effect at and before the time that all of the persons were sum-

moned and impanelled and returned said indictment as aforesaid.

"That by the law of Porto Rico as aforesaid causes of challenge to jurors are and were at said time last above mentioned a want of any of the qualifications prescribed by law to render a person a competent juror. Defendant [states] that Manuel Adino is and was at the time above mentioned a citizen of the Republic of Venezuela. That W. H. Holt, Jr., has not been a citizen of Porto Rico for one year prior to the dates and time above mentioned when said jury was so summoned, impanelled and returned and when said alleged indictment was returned.

"Defendant says that at the same time last above mentioned the following persons, composing and constituting the said grand jury, were not assessed on the last assessment roll of any of the districts of Porto Rico on property of the value of two hundred dollars belonging to him: Antonio Blanco, Manuel Andino Pacheco, Miguel Olmedo, Charles H. Post, Frank Antonsanti, or Frank Santi, or Antonio Santi, W. H. Holt, Jr., William Bowen.

"Defendant further says that the following persons, composing and constituting said grand jury, were not at the time above mentioned publicly drawn from the box, containing at the time of each drawing the names of not less than three hundred persons, possessing the qualifications prescribed in section 800 of the Revised Statutes, and which said names (hereinafter set out) had not been placed therein by the clerk of this court and a jury commissioner, as provided by act of June 30, 1879.

"Such persons whose names were not in said box and selected and summoned in the manner as aforesaid at the dates and times aforesaid were Hugo Stern, W. H. Holt, Jr., Frank Antonsanti, *alias* Frank Santi, *alias* Antonio Santi, William Bowen.

"Defendant says that no writs of *venire facias* were directed by the court against the said last above named persons from

the clerk's office, signed by the clerk or his deputy, nor returned in the manner provided by Revised Statutes, § 803. Defendant says that he was not present in court at the time of the selection, summoning and impanelling of the jury aforesaid, and has had no opportunity to make any challenges to the same as the members thereof, because he did not know of said action and was not at the time represented by counsel, but that he has this day learned of the aforesaid acts for the first time and therefore immediately presents this plea.

"Defendant says that he has been and would be greatly prejudiced by the improper and illegal selection and impanelling of such grand jury as aforesaid, as it was composed at the time aforesaid of persons disqualified to act and who were not residents or taxpayers of Porto Rico, as required by law and because of their unfamiliarities with the island and the conditions and circumstances, material matters in this case and relevant thereto, some of said jurors as aforesaid having been but a few months in the island and temporarily sojourning herein.

"In addition to W. H. Holt, Jr., and William Baun, the following gentlemen of the grand jury were American citizens: John D. H. Luce, E. L. Arnold, Henry W. Dooley, J. Ramon Latimer, foreman thereof, Charles H. Post, Frank Antonsanti, by reason of which and their supposed knowledge of such practices by grand juries in the courts of the United States might, and as defendant believes did, *contend* the deliberations of said jury so as to induce a finding of indictment where the Porto Rican citizens thereof might not have otherwise done."

The United States demurred to the plea upon the ground that the matters set forth in it, so far as they controlled or were applicable to the summoning and empanelling of a grand jury in the court below, disclosed no illegality therein and constituted no reason why the accused should not be required to plead to the indictment.

The demurrer to the plea was sustained and the plea overruled. The defendant then demurred to the indictment, and, the demurrer being overruled, he pleaded to the jurisdiction

of the court upon the ground that it had no authority to proceed at its then special term, but could only proceed at a regular term. That plea was also overruled. The accused was then arraigned and pleaded not guilty, and a trial was had, resulting in a verdict of guilty and a sentence to four years' imprisonment in the penitentiary.

Mr. Richard Crowley for plaintiff in error.

Mr. Assistant Attorney General McReynolds for the United States.

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

The first question is one of the jurisdiction of this court; the Government insisting that, under existing statutes, we are without authority to review the judgment in this case.

By the thirty-fifth section of the Foraker act of April 12, 1900, 31 Stat. 85, c. 191, it is provided, among other things, that writs of error and appeals to this court from the final decisions of the District Courts of the United States shall be allowed in all cases where "an act of Congress is brought in question and the right claimed thereunder is denied." In this case that act was brought in question by the contention of the parties—the contention of the accused being, in substance, that pursuant to that act of Congress the court below, in the matter of the qualifications of grand jurors, should have been controlled by the provisions of the local law relating to jurors, in connection with the statutes of the United States relating to the organization of grand juries and the trial and disposition of criminal causes; and the court below deciding that, notwithstanding the Foraker act, the local act of January 31, 1901, referred to in the plea, was not applicable to this prosecution, and that the grand jury finding the indictment, if a grand jury was necessary, was organized consistently with the laws of the United States under which the court proceeded. It

thus appears that the accused claimed a right under the act of Congress and under the Revised Statutes of the United States, which, it is alleged, was denied to him in the court below. This court has, therefore, jurisdiction to inquire whether there is anything of substance in that claim.

The question presented by the opposing views of the parties is not free from difficulty. By section 14 of the Foraker act it is provided that the statutory laws of the United States, not locally inapplicable, except as otherwise provided, shall have the same force and effect in Porto Rico as in the United States, § 14. And by section 34 it is provided that, in addition to the ordinary jurisdiction of District Courts of the United States, the District Court of the United States for Porto Rico shall have jurisdiction "of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court." § 34.

Turning to the statutes of the United States, we find that "jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications" (subject to certain provisions and exceptions not material to be mentioned here) "as jurors of the highest court of law in that State may have and be entitled to *at the time* when such jurors for service in the courts of the United States *are summoned*." § 800.

Taking these statutory provisions all together, and having regard to the general scope of the Foraker act, it is manifest that Congress intended that criminal prosecutions in the District Court of the United States in Porto Rico, for offences against the United States, should be conducted in the same manner as like prosecutions in the Circuit Courts of the United States; the court in Porto Rico recognizing any valid *existing* local statute relating to the qualifications for jurors, just as a Circuit Court of the United States, in criminal prosecutions, would be controlled, (Rev. Stat. § 800,) in respect of the qualifications of jurors, by the applicable statutes of the State in which it was sitting.

So that we must inquire whether there was in existence any local statute relating to the qualifications of jurors by which the court below should have been controlled.

The plea in abatement, referring to certain provisions in a statute of Porto Rico prescribing the qualifications of jurors, states that it took effect January 31, 1901. That is a mistake. It is true that the statute was passed on that day, but it did not take effect until April 1, 1901. Rev. Stat. & Codes of Porto Rico, 1902, pp. 172, 210, § 160.

The plea correctly states that by that statute—the authority of the legislature of Porto Rico to pass it not being questioned—it was provided that a person was not competent to act as a juror who was not a male citizen of the United States or of Porto Rico, of the age of twenty-one years, and not more than sixty years; who had not been a resident of the island one year and of the district or county ninety days before being selected and returned; or who was not assessed on the last assessment roll of the district or county on property of the value of at least two hundred dollars, belonging to him. § 3.

In a brief opinion, made part of the record, the court below referred to the date on which the local statute took effect—April 1, 1901—and stated that the record showed that the venire of grand jurors for the term was executed and the jurors summoned *prior to that date.* This must be construed as applying only to those jurors who were summoned under the regular venire; for, it is distinctly shown by the record that the court convened April 8, 1901, after the local statute went into effect, and that of those participating in the finding of the indictment, four—Antonsanti, Stern, Bowen and Holt—were summoned by the marshal, after that date, under the order of the court, to complete the panel of the grand jury. And the demurrer to the plea admits that Antonsanti, Bowen, and Holt were of those thus specially summoned after the court convened, and were not, when selected as jurors, assessed on the last assessment as owners of property of the required value; and that Holt had not been a resident of the island for one

year prior to his being summoned to serve on the grand jury. It thus appears that after the local statute took effect three persons were summoned by the marshal and put on the grand jury who were disqualified by that statute to serve. We perceive no reason why the District Court of the United States for Porto Rico should not have followed that statute when organizing the grand jury. It was then the law of Porto Rico. There was no difficulty in applying its provisions prescribing the qualifications of jurors to pending criminal prosecutions in the court below. One of the functions of that court was to enforce the laws of Porto Rico. If the court had given effect to the above act and held those to be disqualified as jurors who were declared by its provisions to be incompetent, then it would have proceeded—as it was required by the Revised Statutes of the United States and by the Foraker act to proceed—"in the same manner as a Circuit Court" of the United States sitting in a State would proceed under the law of such State prescribing the qualifications of jurors. But it did not proceed in that manner. It refused to follow the local statute.

It remains now to inquire whether the objection to the jurors above named was taken in the proper way and in due time. Can such an objection be made, as was done here, by plea in abatement after the return of the indictment? Upon this point the authorities are not in harmony. The question is not controlled by any statute, and must depend on principles of general law applicable to criminal proceedings in civilized countries.

Some of the cases have gone so far as to hold that an objection to the personal qualifications of grand jurors is not available for the accused unless made before the indictment is returned in court. Such a rule would, in many cases, operate to deny altogether the right of an accused to question the qualifications of those who found the indictment against him; for he may not know, indeed, is not entitled, of right, to know, that his acts are the subject of examination by the

grand jury. In *Commonwealth* v. *Smith*, 9 Massachusetts, 106, a case often referred to, the court said that "objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found." But the court took care to observe that the decision was not rested on that ground. And in the later case of *Commonwealth* v. *Parker*, 2 Pick. 550, 563, Chief Justice Parker, referring to *Commonwealth* v. *Smith*, remarked: "It is there said that objections to the personal qualifications of the grand jurors, or to the legality of the returns, are to be made before the indictment is found. It is not necessary to apply the remark here, and we have some doubts as to the correctness of it in all cases; and the case in which it was made was determined on another point."

One of the earliest cases in this country in which the question arose was that of *Commonwealth* v. *Cherry*, 2 Va. Cas. 20, decided in 1815. It was there held that if a grand juror was disqualified, the indictment or presentment, after being found, could be avoided by plea in abatement.

With rare exceptions this rule is recognized and followed in the different States. It will be appropriate to refer to some of the cases.

In *State* v. *Symonds*, 36 Maine, 128, 132, an objection that the indictment was not found by the required number of legal grand jurors, being taken on motion in writing in the nature of a plea of abatement at the arraignment of the accused, was held to be in season and available. Later, in *State* v. *Carver*, 49 Maine, 588, 594, it was said that objections to the competency of grand jurors by whom an indictment was found came too late if made after verdict, but must be pleaded in abatement. See also *State* v. *Clough*, 49 Maine, 573, 577. In *State* v. *Herndon*, 5 Blackf. 75, it was ruled that if a grand juror was disqualified for any reason, the accused may, before issue joined, plead the objection in avoidance. In *Doyle* v. *State*, 17 Ohio, 222, an objection, by special plea, that one of the grand jurors by whom the indictment was found was dis-

qualified to act, was held not to come too late—the court saying that "no objection can come too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights."

In *McQuillen* v. *State*, 8 S. & M. 587, 597, the High Court of Errors and Appeals of Mississippi fully considered the question. Chief Justice Sharkey, delivering the judgment of the court, after observing that no one can be called to answer a charge against him, unless it has been preferred according to the forms of law, and that any one indicted by a grand jury can deny their power, said: "The question is, how is this to be done? A prisoner who is in court, and against whom an indictment is about to be preferred, may undoubtedly challenge for cause; this is not questioned. But the grand jury may find an indictment against a person who is not in court; how is he to avail himself of a defective organization of the grand jury? If he cannot do it by plea, he cannot do it in any way, and the law works unequally by allowing one class of persons to object to the competency of the grand jury, whilst another class has no such privilege. This cannot be. The law furnishes the same security to all, and the same principle which gives to a prisoner in court the right to challenge gives to one who is not in court the right to accomplish the same end by plea, and the current of authorities sustains such a plea. True some may be found the other way, but it is believed that a large majority of the decisions are in favor of the plea. To the list of authorities cited by counsel may be added the name of Sir Matthew Hale, which would seem to be sufficient to put the question at rest. 2 Hale's Pleas of the Crown, 155. *Vide* also *Sir William Withipole's Case*, Cro. Car. 134, 147." See also *Rawls* v. *State*, 8 S. & M. 599, 609.

The same court, in a later case, sustaining the right of accused to challenge, by plea in abatement, the competency of the grand jury by which he is indicted, said: "This privilege arises not alone from the legal principles, that indictments not found by twelve good and lawful men at the least are void and

erroneous at common law, and, therefore, some mode must be left open for ascertaining the fact, but is well sustained as a method for insuring to accused persons a fair and impartial trial. Such persons are not present when the grand jurors are empanelled, perhaps have not been made subjects of complaint or even suspicion. It certainly would not be right to estop a party from pleading a matter to which he could not otherwise except.

"The interest of an accused person under indictment with the grand jury commences at the time of the finding of the indictment. This is the point of time when, as to him, the legal number of qualified men must exist upon the grand inquest. Indictments not found by at least twelve good and lawful men are void at common law. Cro. Eliz. 654; 2 Burr. 1088; 2 Hawk. P. C. 307. It is said by Hawkins, P. C. B. 2, ch. 25, sec. 28, that if any one of the grand jury, who find an indictment, be within any one of the exceptions in the statute, he vitiates the whole, though ever so many unexceptionable persons joined with him in finding it." *Barney* v. *State*, 12 S. & M. 68, 72.

In *State* v. *Seaborn*, 4 Dev. 305, 311, and again in *State* v. *Martin*, 2 Iredell, 101, 120, the Supreme Court of North Carolina, speaking in each case by Chief Justice Ruffin, held that a plea in abatement, filed at the time of arraignment, was an appropriate mode of raising the question of the validity of an indictment as affected by the disqualification of a grand juror.

A leading case upon the question is *Vanhook* v. *State*, 12 Texas, 252, 268. The court there said: "The better opinion, to be deduced from the authorities to which we have access, seems to be that irregularities in selecting and impanelling the grand jury, which do not relate to the competency of individual jurors, can, in general, only be objected by a challenge to the array. But that the incompetency, or want of the requisite qualifications of the jurors, may be pleaded in abatement to the indictment. And this doctrine and distinction

seems founded on principle. It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right, in the first place, to have the accusation passed upon, before he can be called upon to answer to the charge of crime, by a grand jury composed of good and lawful men. If the jury be not composed of such men as possess the requisite qualifications, he ought not to be put upon his trial upon a charge preferred by them; but should be permitted to plead their incompetency to prefer the charge and put him upon his trial, in avoidance of the indictment. Otherwise he may be compelled to answer to a criminal charge preferred by men who are infamous, or unworthy to be his accusers."

In *State* v. *Duncan and Trott*, 7 Yerger, 271, 275, the accused pleaded in abatement that one of the grand jurors who participated in the finding of the indictment was disqualified. The Supreme Court of Tennessee, speaking by Chief Justice Catron, afterwards a member of this court, said: "Suppose an indictment was found by a grand jury, no person composing which was qualified? All will admit the indictment would be merely void in fact, and ought not to be answered if the fact was made legally to appear. So, if any one be incompetent, it is equally void, because the proper number to constitute the grand inquest is wanting; and because he who is incompetent shall not be one of the triers of the offence at any stage of the prosecution. There seems, at some early stage of the proceeding by indictment, to have been some doubt whether the indictment was void because of the incompetency of one of the grand jurors, to set which at rest the 2 Henry IV, ch. 9, enacted 'that any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect.'" See also *Mann* v. *Fairlee*, 44 Vermont, 672; *State* v. *Williams*, 3 Stew. 454; *State* v. *Bryant*, 10 Yerger, 527; *State* v. *Cole*, 17 Wisconsin, 695; *State* v. *Brooks*, 9 Alabama, 9; *Jackson* v. *State*, 11 Texas, 261; *State* v. *Freeman*, 6 Blackf. 248; 1 Bishop Cr. Pro. § 883, and authorities cited; 1 Amer. Cr. Law, § 472,

and authorities cited; 1 Chitty's Cr. Law, 307; Bacon's Abridg. Indictment, C. Bouvier's ed. p. 53; 2 Hale, 155; 3 Inst. 34; 2 Hawk. c. 35, §§ 18, 26, 29 and 30.

We are of opinion that the objection here, that grand jurors were disqualified by the statute of Porto Rico, was made in the proper way and in due time. The accused was not in court when the grand jurors were selected and the grand jury empaneled. So far as appears from the record he was not aware that his case would be taken up by the grand jury. It does not appear he had, prior to the assembling of the grand jury, been arrested for the offences for which he was indicted. But upon the return of the indictment he was brought to the bar of the court and gave bond for his appearance and trial. His objection to the qualifications of the grand jurors was made promptly—three days after the indictment was returned—before he was arraigned and as soon as he learned of the facts upon which the objection was based. All this was admitted by the demurrer to the plea in abatement. If the objection in this case was not sufficient, then an objection made by plea in abatement prior to arraignment, that a majority or even all of the grand jurors returning an indictment against the accused were disqualified by law, would have been equally unavailing. Such a result is not to be thought of.

In this connection the Government calls attention to § 1025 of the Revised Statutes, providing that "No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This section can have no bearing in the present case, for the disqualification of a grand juror is prescribed by statute, and cannot be regarded as a mere defect or imperfection in form; it is matter of substance which cannot be disregarded without prejudice to an accused.

It is said that under the Spanish law prior to the cession

of Porto Rico indictments and grand juries were unknown; that it was allowable under the law to proceed against an accused by a criminal information; and that the Legislative Assembly of Porto Rico had not made any alteration of the Spanish law in this particular when the grand jurors in this case were summoned. The contention in this view is that the indictment in question, having been signed by the United States Attorney, can be treated as an information. The indictment embodies charges made by grand jurors, and the signature of the United States Attorney merely attests the action of the grand jury, whereas an information rests upon the responsibility of the attorney representing the Government, and imports an investigation of the facts by him in his official capacity. But, apart from these considerations, we cannot treat the indictment as an information, for the reason, if there were no other, that, as the defendant was accused of an infamous crime against the United States, this prosecution could not have been commenced in a Circuit Court of the United States except on presentment or indictment of a grand jury; and the positive command of the act of Congress relating to the District Court of the United States for Porto Rico, that the court below "shall proceed in the same manner as a Circuit Court" of the United States, precluded the prosecution of the accused in the latter court except by presentment or indictment.

We have seen that some of the grand jurors alleged in the plea of abatement to be disqualified were summoned prior to the date on which the local statute went into effect; and if the local statute were applied to them, they would have been held incompetent to act as jurors. But there is some ground to hold under section 800 of the Revised Statutes of the United States, that if they were qualified when summoned, then they did not become disqualified by reason of anything in the local statute which went into operation after they were summoned. By what law the qualifications of those particular jurors were to be tested we need not determine; for what has been said

as to disqualified jurors summoned after the court convened, and after the local statute went into operation and who were nevertheless permitted to participate in the finding of the indictment, is sufficient to dispose of the case.

For the reasons stated, and without considering other questions arising upon the plea in abatement as well as upon the record, we adjudge only that the presence on the grand jury of persons summoned after the local statute took effect and who were disqualified by that statute—those facts having been seasonably brought to the attention of the court by a plea in abatement filed before arraignment—vitiated the indictment.

The judgment is reversed, and the case is remanded with directions to overrule the demurrer to the plea in abatement, and for such further proceedings as may be consistent with law.

Reversed.

MR. JUSTICE MCKENNA concurs in result.

MR. JUSTICE WHITE dissents.

KNEPPER *v.* SANDS.

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

No. 233. Submitted April 19, 1904.—Decided May 31, 1904.

Section 4 of the act of March 3, 1887, 24 Stat. 556, for the adjustment of forfeited railroad grants providing for issuing patents under the conditions specified for lands sold by the grantee company to purchasers in good faith, has no reference to any unearned lands purchased after the date of the act from a company to which they had never been certified or patented, although such company might have acquired an interest in them had it completed its road. Nor can one who purchased unearned

lands from a grantee company whose grant was made by Congress through the State in which its road was to be built, be regarded as a purchaser in good faith, within the meaning of the act of 1887, when the purchase was made after the passage of the act and after the State had, by legislative enactment, resumed its title to the lands and then relinquished them to the United States on account of the failure to complete its road.

THE facts are stated in the opinion of the court.

Mr. I. S. Strubble for appellant.

Mr. John H. King and *Mr. M. B. Davis* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This cause is before us upon questions certified by the Circuit Court of Appeals pursuant to the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826.

The controlling facts in the extended statement sent up by the Judges of the Circuit Court of Appeals, as the basis of the questions propounded, are these:

By an act approved May 12, 1864, c. 84, Congress made a grant of lands to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City to the south line of Minnesota at such point as the State might select—the lands to be held subject to the disposal of its Legislature, for that purpose only. Upon the completion of each section of ten consecutive miles of road it became the duty of the Secretary of the Interior to issue to the State patents for one hundred sections for the benefit of the constructing company; and so on, until the road was completed, when the whole of the lands granted were to be patented "*to the State* for the uses aforesaid, and none other." 13 Stat. 72, §§ 1, 2, 3.

If the road was not completed within ten years from the acceptance of the grant by the constructing company, then the lands granted and not patented were to "revert to the State" for the purpose of securing the completion of the road within such time, not exceeding five years, and upon such

terms as the State should determine—the lands not in any manner to be disposed of or encumbered except as the same were patented under the provisions of the act, and upon the failure of the State to complete the road within five years after the above ten years then the lands undisposed of were to "revert to the United States." § 4.

The State accepted the grant, April 3, 1866, upon the conditions prescribed by Congress, and authorized the Sioux City and St. Paul Railroad Company, a Minnesota corporation, to construct the road. The company entered upon the work of construction, and completed only five sections of ten miles each, receiving the full amount of land to which it was entitled by reason of such construction.

In consequence of the failure of the railroad company to complete the construction of the road, the State declared by an act approved March 16, 1882, that, in respect of all lands and rights to land granted or intended to be granted to that company, they "are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said company." Before the passage of that act the State, through its executive officers, ascertained by computation that the railroad company had received conveyances for all lands it was entitled to receive under the terms of the grant, and that the State then held legal title to 85,457.41 acres pertaining to the grant, no part of which had then or ever since been earned by the company. The land in question here was a part of those unearned lands.

Subsequently, by an act which took effect April 2, 1884, the State relinquished to the United States all its right, title and interest in the lands which by the above act of 1882 were declared vested in the State.

The land here in dispute, being section 9, township 95, north of range 42, west of the fifth principal meridian, in O'Brien County, Iowa, was open and unoccupied when the above act of April 2, 1884, was passed. In 1885 Sands settled

upon it, erected thereon a house, and made improvements with a view of establishing a homestead in accordance with the laws of the United States. He has continuously since resided upon the land, claiming it as a homestead. Shortly after he settled upon it he made application to enter it as a homestead, but his application was rejected; for what reason rejected, does not appear.

Later, by an act approved March 3, 1887, Congress provided for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands. 24 Stat. 556, c. 376.

The first section of that act provided for the immediate adjustment, in accordance with the decisions of this court, of each of the railroad land grants which then remained unadjusted. The second section provided for the recovery by the United States of the title to lands erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad. That section made it the duty of the Secretary of the Interior to demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits, and, if the demand was not complied with, then it became the duty of the Attorney General to institute suit against the company. The third section provided that homestead or preëmption entries of *bona fide* settlers which were found to have been erroneously cancelled might be perfected, upon compliance with the public land laws and certain conditions and the settler reinstated in his rights. If the settler did not renew his application within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands were to be disposed of under the public land laws—according a priority of right to *bona fide* purchasers of the unclaimed lands, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

The fourth section, upon the construction of which the present case mainly depends, is in these words: "§ 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and *which have been sold by the grantee company* to citizens of the United States, or to persons who have declared their intention to become such citizens, *the person or persons, so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased,* upon making proof of the fact of such purchase, at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall revert back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands, of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided,* That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required. . . ." 24 Stat. 556, c. 376.

As showing the nature of the title of the State under the act of 1864, reference may here be made to a suit brought by the United States against the Sioux City and St. Paul Railroad Company, under which company, as will presently appear, the appellant claims. By the final decree in that case the title of the United States was quieted as to certain lands situated in Dickinson and O'Brien Counties, and claimed by the railroad company under the act of 1864. In the

opinion in that case, which was decided here October 21, 1895, the court said: "Another contention is, that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit of the railroad company the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee* v. *Oregon & California Railroad*, 139 U. S. 663, 674, 676, 677; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 6. But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the State for the benefit of the company. So that, until the State disposed of the lands, the title was in it, as trustee, and not in the railroad company. *Schulenberger* v. *Harriman*, 12 Wall. 44, 59; *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354. See also *McGregor &c. Railroad* v. *Brown*, 39 Iowa, 655; *Sioux City & St. Paul Railroad* v. *Osceola County*, 43 Iowa, 318, 321. In the case last named the Sioux City Company was relieved from the payment of taxes upon some of the lands patented to the State for its benefit, upon the ground that the legal title was in the State, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents to these lands had been issued, or if the State had conveyed them directly to that company." *Sioux City &c. Railroad* v. *United States*, 159 U. S. 349, 363. It was there adjudged that the railroad company had received 2,004.89 acres more than, in any view of its rights, should have been awarded to it.

After the decision of that case the Secretary of the Interior,

under date of November 18, 1895, published a circular, in which he declared the land here in controversy and other like land subject to disposal by the Land Department. This was after the above application by Sands to enter this land as a homestead.

Subsequently, on the 10th of March, 1896, Sands renewed his application for the land in question as a homestead. That application was contested in the local land office by the present appellant, who asserted a right to the land in virtue of a *purchase* of it *from the Sioux City and St. Paul Railroad Company on June* 21, 1887, and in virtue of the provisions of the fourth section of the above adjustment act of March 3, 1887. She had never resided upon the land in controversy or cultivated the same or in any manner attempted to comply with the homestead laws of the United States for the purpose of obtaining a title under them. This contest was determined at the local office in favor of Sands—that office finding that he had, by virtue of his settlement of and continued residence upon and cultivation of the land, and by full compliance with the homestead laws of the United States, become entitled to a patent. That decision was confirmed by the Commissioner of the Land Office. But upon appeal to the Secretary of the Interior the decisions of the local land office and of the Commissioner were reversed, and Sands' application to enter the land as a homestead was rejected. Thereupon the present suit was commenced by Sands, charging that the officers of the General Land Office, proceeding under the decision of the Secretary, were about to issue or had issued a patent to the present appellant solely by virtue of her alleged purchase on June 21, 1887, from the Sioux City and St. Paul Railroad Company, after the passage of the adjustment act of March 3, 1887, and in virtue of its fourth section. Sands, alleging that such action, if taken, would be unlawful and contrary to law, prayed that the Commissioner be required to accept his proofs showing settlement upon and continuous cultivation of the land for the period of five years or more, and that the patent

to appellant Knepper be either declared null and void, or for a decree declaring that she holds the legal title in trust for him.

Such is the case made by the statement by the Judges of the Circuit Court of Appeals, who propound to this court the following questions:

"First. In view of the provisions of the act of Congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesaid by the Governor and Legislature of the State of Iowa operate as a final adjustment of the grant, so far as the Sioux City and St. Paul Railroad Company was concerned, and, by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3, 1887?

"Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through its Governor and Legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3, 1887, as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon, in manner and form aforesaid, when said purchase was made?"

We have seen that the appellant claims an interest in the lands here in question in virtue of a purchase made by her from the railroad company, June 21, 1887, *after* the passage of the adjustment act of March 3, 1887. But what interest had the company at that time in these particular lands constituting a part of the 85,457.41 acres of unearned lands, no part of which the company earned or could have earned except on account of road actually constructed by it. For such road as the company had constructed, lands had been conveyed to it, and there never was a moment, according to the record, when the company could have rightfully demanded from the State

a conveyance or patent for the lands here in dispute or for any of the unearned lands. The legal title to the lands granted by the act of 1864 was, first in the United States, next in the State, (*Sioux City &c. Railroad Co.* v. *United States, above cited,*) but never in the company until a conveyance to it by the State. The State could only have conveyed lands to the company in consideration of constructed road; and subject to that condition the company undertook to construct the road. When it abandoned the work of construction it lost the right to claim lands except for such road as it had previously constructed. The State therefore properly resumed, as by the act of 1882 it did resume, after the company's default, such title to the unearned lands as it had before authorizing the company to construct the road. The State after thus resuming the title could have used the unearned lands to aid in the construction of that portion of the road which the railroad company failed to construct. But it did not do so, and hence by the act of April 2, 1884,—eighteen years after it accepted, in 1866, the grant of 1864 and the completion of the road having been abandoned—the State, by statute, formally relinquished to the United States all its right, title and interest in the unearned lands pertaining to the Sioux City and St. Paul Railroad Company. This statute was perhaps unnecessary, as by the act of 1864 the title to the unearned lands granted by that act was to revert to the United States after the expiration of fifteen years from the acceptance of the grant without the completion of the road. But the relinquishment by the State saved the necessity, if there was a necessity, of formal proceedings, legislative or judicial, by the United States to reinvest itself with full title. Thus the title to the unearned lands was put back into the United States. So that when the adjustment act of 1887 was passed, the title of the United States to the unearned lands, including the particular lands here in dispute, was complete and perfect. No interest then remained in the State or in the railroad company requiring an adjustment; for, as stated, the State had

relinquished all its claim, and the railroad company had received all the lands it was entitled to demand for constructed road. When, therefore, Congress made provision in the fourth section of the act of 1887 for the protection of those who in good faith had purchased from any "grantee company," to whom lands had been erroneously certified or patented, it could not have intended to refer to purchases made from the railroad company, after that act took effect, of lands originally certified or patented to the State and not to the railroad company, and the legal title to which was in the United States at the date of the passage of the act. A chief purpose of the act of 1887 was to declare forfeited unearned lands and restore them to the public domain, and not to give third parties and speculators an opportunity to purchase such lands from companies which had defaulted in the work of construction, and to whom the State had never conveyed, and thereby obtain a preference over actual settlers in possession. The policy of the Government has always been favorable to actual settlers. As late as *Ard* v. *Brandon*, 156 U. S. 537, it was said that "the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon." See also *Northern Pacific Railroad* v. *Amacker*, 175 U. S. 564; *Moss* v. *Dowman*, 176 U. S. 413; *Rector* v. *Gibbon*, 111 U. S. 276; *Nelson* v. *Northern Pacific Railway*, 188 U. S. 108, 123.

We are of opinion that the fourth section of the adjustment act of 1887 has no reference to any unearned lands purchased after the date of that act from a company to whom they had never been certified or patented, although, if it had kept its engagement with the State and completed the road, in due time, it could have acquired an interest in them; and that, as the State by legislative enactment, had resumed the title it acquired from the United States, and afterwards relinquished its interest to the United States—all before the passage of the adjustment act—the appellant could not, within the meaning of the act, and after its passage, have become a purchaser in good faith of the lands here in dispute. The sale by the rail-

road company to the appellant was a sale of something it did not possess, a mere device to bring its purchaser within the provisions of the adjustment act of 1887 when that act was never intended to apply to such a case.

We, therefore, answer the second question in the negative, and omit as unnecessary any answer to the first one.

It will be so certified.

BINNS *v.* UNITED STATES.

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

Nos. 196, 266. Submitted April 6, 1904.—Decided May 31, 1904.

While it may not be within the power of Congress by a special system of license taxes to obtain, from a Territory of the United States, revenue for the benefit of the Nation as distinguished from that necessary for the support of the territorial government, Congress has plenary power, save as controlled by the provisions of the Constitution, to establish a government of the Territories which need not necessarily be the same in all Territories and it may establish a revenue system applicable solely to the Territory for which it is established.

The fact that the taxes are paid directly into the treasury of the United States and are not specifically appropriated for the expenses of the Territory, when the sum total of all the revenue from the Territory including all the taxes does not equal the cost and expense of maintaining the government of the Territory, does not make the taxes unconstitutional if it satisfactorily appear that the purpose of the taxes is to raise revenue in that Territory for the Territory itself.

The license taxes provided for in § 460, Title II, of the Alaska Penal Code, are not in conflict with the uniformity provisions of § 8 of Article I of the Constitution of the United States.

The general rule that debates of Congress are not appropriate sources of information from which to discover the meaning of the language of statutes passed by that body does not apply to the examination of the reports of committees of either branch of Congress with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464.

SECTION 460 of Title II of the Alaska Penal Code, act of March 3, 1899, 30 Stat. 1253, 1336, as amended by the act of June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes," 31 Stat. 321, 330, reads "that any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit: . . . Transfer companies, fifty dollars per annum."

Section 461 provides: "That any person, corporation or company doing or attempting to do business in violation of the provisions of the foregoing section, or without having first paid the license therein required, shall be deemed guilty of a misdemeanor," etc.

Section 463: "That the licenses provided for in this act shall be issued by the clerk of the District Court or any subdivision thereof . . . duly made and entered: . . . Provided, That . . . all moneys received for licenses by him . . . under this act shall, except as otherwise provided by law, be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe."

Under this statute, plaintiff in error was prosecuted and convicted in the District Court for the District of Alaska, Second Division. This conviction has been brought to this court on writ of error, and the question presented is whether the statute is in conflict with section 8 of Article I of the Constitution of the United States, which reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Mr. J. C. Campbell and *Mr. W. H. Melson* for plaintiff in error.

Mr. Assistant Attorney General Purdy for the United States:

The power to impose these license fees is not derived from the general power of taxation provided for in Article I, section 8, of the Constitution, but from the plenary power "to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States." Art. IV, § 3, par. 2. The exercise of such power is therefore not subject to the provisions limiting the general power of taxation as to apportionment and uniformity.

It is unnecessary to ascertain or attempt to define the precise political relations existing between the Territory of Alaska and the Federal Government. That Alaska is territory belonging to the United States is settled beyond controversy, and that Congress has plenary powers, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542; *Benner* v. *Porter*, 9 How. 235, 242; *Cross* v. *Harrison*, 16 How. 164, 193; *National Bank* v. *Yankton County*, 101 U. S. 129, 133; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *McAlister* v. *United States*, 141 U. S. 174, 181; *Shively* v. *Bowlby*, 152 U. S. 1, 48; *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197.

The particular law here under discussion was enacted by Congress as a needful regulation for the government of that Territory.

The license fees imposed by this law are a part of a penal code, and in the nature of police regulations, which, in the judgment of Congress, are necessary for the government of the Territory of Alaska by reason of its social conditions. *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Ficklen* v. *Shelby County*, 145 U. S. 1, 23; *Munn* v. *Illinois*, 94 U. S. 113.

The licensing of persons to sell liquor is not an exercise of the taxing power of the State to raise revenue, but of the police power for the regulation and restriction of a dangerous business; it follows that the adjustment of fees for the license is not governed by the constitutional provisions requiring equality and uniformity of taxation. Black on Intoxicating Liquors; *Thomason* v. *State*, 15 Indiana, 449. See also Black on Intoxicating Liquors, §§ 108, 109, 179, and cases there cited; *Lovingston* v. *Board of Trustees*, 99 Illinois, 564.

The Constitution requires uniformity of taxation, but does not require uniformity of police supervision. The power of Congress to adapt its police regulations, or, to use the term of the framers of the Constitution, its "needful regulations," to the peculiar conditions and needs of each separate Territory seems clear. The framers wisely avoided any attempt to create uniformity where uniformity was impossible. *Downes* v. *Bidwell*, 182 U. S. 292.

Congress has the power to license various trades and occupations in the Territories independently of and apart from the power to tax, and the mere fact that revenue is derived as an incident to the exercise of such power will not operate to characterize the license fee as a tax. For the distinction between a license which grants authority to engage in a particular business, thus conferring a privilege, and a tax granting no such authority, see the *License-Tax Cases*, 5 Wall. 462. As to the revenue feature, see *Baker* v. *Cincinnati*, 11 Ohio St. 534; *Marmet* v. *State*, 45 Ohio St. 63.

Congress could not make these licenses uniform throughout the United States.

If taxes at all, these license fees are local taxes imposed by Congress as the legislature of Alaska, and paid into the Treasury of the United States as the only treasury of Alaska, and obviously intended to meet the expenses of governing that Territory.

The only legislative body in Alaska is Congress, and similarly the only executive in Alaska is the national executive

acting through its local appointees. Alaska has no distinct treasury and no officer known as treasurer.

Admitting, for the purpose of the argument, that these license fees are local taxes imposed by Congress in the Territory of Alaska and appropriated by Congress to the support of the General Government, such a law would be constitutional under the plenary power of Congress to govern the Territories. *Downes* v. *Bidwell*, 182 U. S. 244, 299.

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

The contention of plaintiff in error is that the license tax is an excise, that it is laid and collected "to pay the debts and provide for the common defence and general welfare of the United States," because by section 463 it is provided that "all moneys received for licenses . . . under this act shall . . . be covered into the Treasury of the United States," that it is imposed only in Alaska, and is not "uniform throughout the United States."

It is unnecessary to consider the decisions in the *Insular* cases, for, as said by Mr. Justice White in his concurring opinion in *Downes* v. *Bidwell*, 182 U. S. 244, 335: "Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation and was acted upon;" and by Mr. Justice Gray, in his concurring opinion (p. 345): "The cases now before the court do not touch the authority of the United States over the Territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the Territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign State."

It had been theretofore held by this court in *Steamer Coquitlam* v. *United States*, 163 U. S. 346, 352, that "Alaska is

one of the Territories of the United States. It was so designated in that order (the order assigning the Territory to the Ninth Judicial Circuit) and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory." Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884, 23 Stat. 24, entitled "An act providing a civil government for Alaska," provided: "That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." See also 31 Stat. 321, sec. 1.

We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska.

It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative

power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes.

In reference to the power of Congress reference may be had to *Gibbons* v. *District of Columbia*, 116 U. S. 404, in which it was held that "it is within the constitutional power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates;" and further, after referring to the case of *Loughborough* v. *Blake*, 5 Wheat. 317, it was said (pp. 407, 408):

"The power of Congress, legislating as a local legislature for the District, to levy taxes for district purposes only, in like manner as the legislature of a State may tax the people of a State for state purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318; *Welch* v. *Cook*, 97 U. S. 541; *Mattingly* v. *District of Columbia*, 97 U. S. 687. In the exercise of this power Congress, like any state legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In view of this decision it would not be open to doubt that, if the act had provided for a local treasurer to whom these local taxes should be paid and directed that the proceeds be used solely in payment of the necessary expenses of the government of Alaska, its constitutionality would be clear, but the contention is that the statute requires that the proceeds of these licenses shall be paid into the Treasury of the United States, from which, of course, they can only be taken under

an act of Congress making specific appropriation. In fact, all the expenses of the Territory are, in pursuance of statute, paid directly out of the United States Treasury. Act of June 6, 1900, Title I, sections 2 and 10, 31 Stat. 322, 325; Act of March 3, 1901, 31 Stat. 960, 987; April 28, 1902, 32 Stat. 120, 147, and February 25, 1903, 32 Stat. 854, 882. True, there are some special provisions for revenues and their application. Thus, the fees for issuing certificates of admission to the bar and for commissions to notaries public are to be retained by the secretary of the district and "kept in a fund to be known as the District Historical Library Fund" and designed for "establishing and maintaining the district historical library and museum," act of June 6, 1900, Title I, sec. 32, 31 Stat. 333, and municipal corporations are authorized to impose certain taxes for local purposes. Title III, sec. 201, 31 Stat. 521. By section 203, fifty per cent of all the license moneys collected within the limits of such corporations are to be paid to their treasurers to be used for school purposes. By subsequent legislation, 31 Stat. 1438, it is provided that if the amount thus paid is not all required for school purposes the District Court may authorize the expenditure of the surplus for any municipal purpose. And by the same statute it is also provided that fifty per cent of all license moneys collected outside municipal corporations and covered into the Treasury of the United States shall be set aside to be expended for school purposes outside the municipalities. By still later legislation, (although that was enacted after the commencement of this prosecution, 32 Stat. 946,) the entire proceeds of license taxes within the limits of municipal corporations are to be paid to the treasurer of the corporation, for school and municipal purposes.

But outside of these special matters there are no provisions for collecting revenue within the Territory for the expenses of the territorial government other than these license taxes and charges of a similar nature. According to the information furnished by the officers of the Treasury Department,

as shown in the brief of counsel for the Government, all the revenues of every kind and nature which can be considered as coming from Alaska are not equal to the cost and expense of administering its territorial government. How far we are at liberty to rely upon this information, which was not presented upon the trial of this case, or how far we can take judicial notice of the facts as shown by the records of the Treasury Department, need not be determined, for if an excess of revenue above the cost and expense of administering the territorial government must be shown to establish the unconstitutionality of the license taxes the fact should have been shown by the plaintiff in error. The presumptions are that the act imposing those taxes is constitutional, and anything essential to establish its invalidity which does not appear of record or from matters of which we can take judicial notice must be shown by the party asserting the unconstitutionality.

The question may then be stated in this form: Congress has undoubtedly the power by direct legislation to impose these license taxes upon the residents of Alaska, providing that when collected they are paid to a treasurer of the Territory and disbursed by him solely for the needs of the Territory. Does the fact that they are ordered to be paid into the Treasury of the United States and not specifically appropriated to the expenses of the Territory, when the sum total of these and all other revenues from the Territory does not equal the cost and expense of maintaining its government, make them unconstitutional? In other words, if, under any circumstances, Congress has the power to levy and collect these taxes for the expenses of the territorial government, is it essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys and specifically and solely appropriated to the interests of the Territory? We do not think that the constitutional power of Congress in this respect depends entirely on the mode of its exercise. If it satisfactorily appears that the purpose of these license taxes is to raise revenue for use in Alaska, and that the total revenues

derived from Alaska are inadequate to the expenses of the Territory, so that Congress has to draw upon the general funds of the Nation, the taxes must be held valid. That the purpose of these taxes was to raise revenue in Alaska for Alaska is obvious. They were authorized in statutes dealing solely with Alaska. There is no provision for a direct property tax to be collected in Alaska for the general expenses of the Territory. The entire moneys collected from these license taxes and otherwise from Alaska are inadequate for the expenses of that Territory. So far as we may properly refer to the proceedings in Congress, they affirm that these license taxes are charges upon the citizens of Alaska for the support of its government. While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, *United States* v. *Freight Association*, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464. When sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

"The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the governor

and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them." Vol. 32, Congressional Record, Part III, page 2235.

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued, when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government.

We see no error in the record, and the judgment is

Affirmed.

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

WYNN-JOHNSON *v.* SHOUP.

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

No. 266. Submitted April 28, 1904.—Decided May 31, 1904.

Decided on authority of *Binns* v. *United States*, *ante*, p. 486.

Mr. S. M. Stockslager and *Mr. George C. Heard* for plaintiff in error.

Mr. Assistant Attorney General Purdy for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is similar to the one just decided, and, for the reasons given in that opinion, the judgment of the District Court of Alaska is

Affirmed.

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

PUBLIC CLEARING HOUSE *v.* COYNE.

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

No. 224. Argued April 18, 1904.—Decided May 31, 1904.

The power vested in Congress to establish post offices and post roads embraces the regulation of the entire postal system of the country; Congress may designate what may be carried in, and what excluded from, the mails; and the exclusion of articles equally prohibited to all does not deny to the owners thereof any of their constitutional rights.

Due process of law does not necessarily require the interference of judicial power nor is it necessarily denied because the disposition of property is affected by the order of an executive department.

Each executive department of the Government has certain public functions and duties the performance of which is absolutely necessary to the existence of the Government and although it may temporarily operate with seeming harshness upon individuals, the rights of the public must, in these particulars, overrule the rights of individuals provided there be reserved to them an ultimate recourse to the judiciary.

Where a person is engaged in an enterprise which justifies the Postmaster General in issuing a fraud order, it is not too much to assume that *prima facie* at least all of his letters are identified with the business and § 3929, Rev. Stat., as amended by the act of September 19, 1890, is not unconstitutional because the Postmaster General in seizing and detaining all letters under a fraud order may include some having no connection whatever with the prohibited enterprise.

The rights of the sender, and the addressees of letters returned to the sender under a fraud order issued by the Postmaster General are not affected by the order except so far as the same is a refusal on the part of Congress to extend the facilities of the Post Office Department to the final delivery of the letter, and § 3929, Rev. Stat., as amended, is not unconstitutional and does not operate as a confiscation of the property of the person against whom the order is issued.

The misrepresentation of existing facts is not always necessarily involved in a scheme or artifice to defraud and where, after examination made, the Postmaster General has issued a fraud order on the ground that the defendants were engaged in a scheme for obtaining money or property by means of false representations, and the master in the court below has found that the scheme was, in effect, a lottery, the significant fact is that the parties were engaged in a scheme within the meaning and prohibition of §§ 3929 and 4101, Rev. Stat., and this court will not hold that the Postmaster General exceeded his authority in making the fraud order.

THIS was a bill in equity by the Public Clearing House against the Postmaster of the city of Chicago, praying for an injunction to restrain him from seizing and detaining appellant's mail, stamping it "fraudulent," and returning it to the senders thereof, and from denying to appellant the use of the money order and registered letter system of the Post Office Department.

An answer and replication were filed and the cause referred to a master in chancery to take the testimony and report the same with his conclusions thereon.

The following contains the substance of the master's report:

"1. The complainant is a corporation organized under the laws of the State of Illinois, for the purpose, as stated by its charter, of doing a general brokerage and commission business, collecting and disbursing money and conducting an exchange or information bureau for the benefit of patrons. The evidence shows that the said complainant had made a beginning of several different kinds of business and its managers had opened negotiations with different laundry proprietors, preparing to place laundries on a coöperative basis; also to handle fruits and poultry in the same manner, and also to purchase and sell goods on behalf of its patrons on commission, and to exchange goods in specie in the same manner for a commission,

and had actually transacted some small amount of such business, but the principal business and object for which the said complainant was organized appears to have been to act as the fiscal agent of a certain voluntary association called the League of Equity. This League of Equity consists of a large number of people, approximately five thousand at present, of various occupations and scattered throughout the United States and Canada, each of whom, in his application for membership, consents that the Public Clearing House shall act as fiscal agent for said League of Equity. The said League of Equity was in a way successor to a prior organization called the League of Educators, and this in turn succeeded to a still prior organization called the League of Eligibles, and a certain organization or partnership called the board of managers of the League of Educators and the board of managers of the League of Eligibles were respectively fiscal agents for the two organizations.

"The League of Eligibles was established in the year 1898, and was a voluntary association of unmarried people. Their certificates became matured or realized upon the contingency of marriage, provided that such marriage did not occur within one year from the time when they joined the league. The certificate had a fixed realization value of five hundred dollars, and was paid out of the monthly *pro rata* assessment levied upon all members of the league for the benefit of those members whose certificates were matured or realized.

"The plan of the League of Educators was the same, except that it substituted a fixed time for the realization of the certificates, and eliminated the marriage contingency feature.

"2. The plan of the League of Equity differed from that of the League of Educators only in having a fixed monthly payment of one dollar, instead of a fluctuating or variable assessment. When the first change was made there were about thirteen hundred members of the League of Eligibles, all of whom were given an opportunity to become members of the League of Educators without additional cost and without

losing the benefit of their previous term of coöperation, and many of them availed themselves of this opportunity and became members of the League of Educators. Again, when the League of Equity was formed, the League of Educators consisted of some nine thousand members, who were allowed the same privilege of joining the League of Equity, and up to the time when the fraud order was issued against the latter concern between four and five thousand members of the League of Educators had joined the League of Equity.

"3. The evidence showed that up to about the first of November, 1902, during the period of the existence of the League of Eligibles and League of Educators, there had been collected from about 13,784 members a total of $137,390.66, out of which the board of managers had taken about $36,000 for their expenses and compensation for themselves and agents in the field. The remainder had been distributed among some 600 or 700 members, and at that time the board of managers had no money in their hands.

"In other words, 600 or 700 members had received an average of something less than $170 each, and over ten thousand members had received nothing.

"4. The board of managers of the League of Educators had during its business as fiscal agent for said league accumulated a large number of address cards of different persons throughout the country, which had been secured through the members or cöoperators, and these address cards were at or about the time of the organization of the Public Clearing House sold to said Public Clearing House by the said board of managers, for the sum of $2,500.

"5. The complainant, The Public Clearing House, as such fiscal agent of the League of Equity, invites people to join the said league, and holds out inducements in the shape of a large return for small amounts of money and for services to be rendered by members or cöoperators in inducing others to become members or coöperators. There is no contract or agreement issued or entered into with members by the League of Equity

itself as a body or association, but a certain so-called co-operator's agreement, a copy of which is attached to the bill herein, is issued to each member or coöperator, and is signed by said Public Clearing House by its president and secretary as fiscal agents for the League of Equity.

"In order to carry on successfully the business of the complainant it is necessary that it have the use of the United States mails; but it has not had the use of the mails since November 13, 1902, by reason of a 'fraud order' issued against it, dated November 10, 1902, by the Postmaster General, and as a result the business has practically been stopped.

"6. The plan or scheme of the League of Equity as set forth in the coöperator's agreement and in other literature issued by said complainant may be briefly stated as follows: Each person who becomes a member or coöperator pays three dollars as enrollment fee, and agrees to pay the sum of one dollar per month for sixty months or five years, and also agrees to 'coöperate' by inducing other persons to become members or coöperators. The agreement states that in consideration of said enrollment fee 'and the faithful compliance with the terms of this agreement hereinafter contained, the above-named person shall receive his *pro rata* share of the total amount realized (less ten per cent) when entitled to a realization as hereinafter provided, said realization to be in accordance with the following ordinary causation and realization table.' Then follows a table showing that if the league grows at the rate of fifteen to one the total realization of the member at the end of five years will be at the same rate of increase, that is, he will receive nine hundred dollars for his sixty dollars paid in; if the growth is at the rate of ten to one he will receive six hundred dollars at the end of five years, and so forth and so on down to a growth of only one to one, in which case he will receive only his money back, less the ten per cent which is in each case deducted as the compensation of the complainant for its services and existence as fiscal agent, and less also the three dollars enrollment fee. Aside from this

ten per cent and the three dollars enrollment fee, the plan does not contemplate that complainant shall retain any of the money paid in by coöperators, or that any reserve fund shall be accumulated or invested, but that the money paid in each month shall be regularly paid out each month (less ten per cent) to the so-called realizing coöperators, *i. e.*, those whose five years' period has expired and who have continued to make the requisite monthly payments during said five years. There is an additional provision that each coöperator who shall have secured three new members in any one year may realize or receive at the end of each year one-fifth of the amount which he would be entitled to receive at the end of five years, assuming that the growth for the five years continued at the same rate; but the plan contemplates that in the end the member who secures new members and the one who does not shall receive the same amount.

"5. All members who join the League of Equity during the same month constitute a class by themselves and are entitled to realize in all respects precisely the same amount and at the same time, excepting the member who obtains new coöperators may receive his realization in yearly installments, instead of in one lump at the end of the five years' period.

"The only source of income to the league and the only funds to which its members can look for payment of the promised amount, or any amount whatever, is the fund created each month by the payment of monthly dues, and the realization of any amount whatever by the new members is conditioned absolutely upon the constant acquisition of other new members and the new payments to be made by such new members. And what amount the members or coöperators will realize, as is stated by the league literature, depends entirely upon the ratio of growth of the league. No reserve fund is accumulated and no investments whatever are made of any portion of the money paid in by members."

Upon this state of facts the master came to the conclusion that the scheme of the complainant was, in effect, a lottery,

and as such was not entitled to the use of the mails, and also reported to the court that the fraud order which had been issued by the Postmaster General in November, 1902, was fully justified and that the injunction should be denied. His action was affirmed by the Circuit Court, and the bill dismissed for the want of equity.

Mr. D. I. Sicklesteel for appellant:

The appellant challenges the constitutionality of the statutes above set forth, which authorize the Postmaster General "upon evidence satisfactory to him," and which do not provide for any trial, hearing or inquiry of any kind, to arbitrarily seize the honest mail of any citizen of the United States as alleged in the bill, and to interdict and prohibit its receiving any mail, to destroy its business, and its property and property rights, and to subject its papers and sealed packets to unreasonable searches and seizures. 4th, 5th, 14th Amendments and § 8, Art. I of the Constitution; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Boyd* v. *United States*, 116 U. S. 616; *Murray's Lessees*, 18 How. 276; *In re Zeibold*, 23 Fed. Rep. 791; *Palairets's Appeal*, 67 Pa. St. 49; *Hoover* v. *McChesney*, 81 Fed. Rep. 472; *Fairfield Floral Co.* v. *Bradbury*, 87 Fed. Rep. 411; *United States* v. *Rider*, 50 Fed. Rep. 406; *United States* v. *Keokuk & H. B. Co.*, 45 Fed. Rep. 178; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

The master and the court confirming his report have found that appellant, its officers and agents "have not been guilty of making false or fraudulent misrepresentations in order to induce persons to become members of the league, but that full opportunity has been given for all persons to become fully conversant with the details and workings of the league's system."

Even if these statutes are constitutional, yet the appellant corporation, from the facts as proven at the trial and found by the court, is not as a matter of law, engaged "in conducting any lottery, gift enterprise or scheme for the distribution of money or of any real or personal property, by lot, chance or

drawing of any kind" within the meaning of said statutes, and the Postmaster General having assumed and exercised jurisdiction in a case not covered by said statutes, and having acted outside of the scope of the said statutes, the injunction prayed for should have been granted in any event. The Master's findings were confirmed by the court. Bouvier Law Dict.; Webster's Dict.; *United States* v. *Olney*, 1 App. (U. S.) 278; Deady (U. S.), 461; *Horner* v. *United States*, 147 U. S. 458; *United States* v. *Politzer*, 59 Fed. Rep. 276; *People* v. *Elliott*, 74 Michigan, 264; *Ex parte Kameta*, 36 Oregon, 251; *Meyer* v. *State*, 112 Georgia, 20; *State* v. *Kansas Merc. Assn.*, 45 Kansas, 231; *State* v. *Boneil*, 42 La. Ann. 1112; *Barclay* v. *Pearson* (1893), 2 Chy. 154; *Taylor* v. *Smeaton*, 11 Q. B. D. 210; *State* v. *Clark*, 66 Am. Dec. 723; *McDonald* v. *United States*, 63 Fed. Rep. 426, affirming *S. C.*, 59 Fed. Rep. 565; *Lynch* v. *Rosenthal*, 144 Indiana, 90; *United States* v. *Wallis*, 58 Fed. Rep. 942; *United States* v. *Fulkerson*, 74 Fed. Rep. 627; *State* v. *Interstate Investment Co.*, 60 N. E. Rep. 220; 14 Am. & Eng. Ency. of Law, 2d ed. 600; *Dunn* v. *People*, 40 Illinois, 465; *Thomas* v. *People*, 59 Illinois, 160; *Elder* v. *Chapman*, 176 Illinois, 142, p. 150, overruling *Elder* v. *Chapman*, 70 Ill. App. 293; *Wilkinson* v. *Gill*, 74 N. Y. 67; 23 Att. Gen. Op. 263.

The appellee not having excepted to any of the findings of the master and the court, the report of the said master, as confirmed by the court is absolutely binding upon him and precludes appellee from now raising the question in this court as to the correctness of the finding of the Postmaster General, set forth in the fraud order complained of.

Mr. Assistant Attorney General Purdy, with whom *Mr. William A. Day*, Assistant to the Attorney General, was on the brief, for appellee.

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

By section 3929 of the Revised Statutes, as amended by the

act of September 19, 1890, 26 Stat. 465, "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post-office at which *registered* letters arrive directed to any such person or company . . . to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof."

By section 4041, the Postmaster General is authorized in similar terms to forbid the payment by any postmaster of any postal money order drawn in favor of any person engaged in the prohibited business; and by section 4 of the act of March 2, 1895, 28 Stat. 963, the power thus conferred upon the Postmaster General by the preceding section, 3929, is extended and made applicable to *all* letters or other matter sent by mail.

These acts apply to two classes of cases: First, to schemes for the distribution of money, etc., by lot, chance or drawing of any kind; second, to all schemes or devices for obtaining money or property of any kind by means of false or fraudulent pretenses, representations or promises.

It seems the Postmaster General, in issuing the fraud order in this case, acted upon the theory that the complainant was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, etc., and not in conducting a lottery; but if the order detaining the letters was properly issued, in view of all the evidence introduced in the court below, we do not think it was vitiated by the fact that the Postmaster General acted upon the hypothesis that the business in which complainant was engaged

was a fraudulent scheme instead of a lottery, since both are within the purview of these statutes.

We find no difficulty in sustaining the constitutionality of these sections. The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years the transmission of private letters was either entrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high and the methods of transmission so slow and uncertain that it was not until 1845, when the postage was reduced to five and ten cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses.

It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty and property, the defence of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress. The legislative body in thus establishing a postal service may annex such conditions to it as it chooses.

The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system

of the country; that Congress might designate what might be carried in the mails and what excluded, and that in the enforcement of such regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets and other printed matter, and that the constitutional guarantee against unreasonable searches and seizures extended to letters but did not extend to printed matter. In establishing such system Congress may restrict its use to letters, and deny it to periodicals; it may include periodicals, and exclude books; it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employés or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact, such, for instance, as liquids, poisons, explosives and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the Government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making

use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *In re Rapier*, 143 U. S. 110.

It is contended, however, that the laws in question are unconstitutional in that they authorize the Postmaster General to seize and return to sender all letters addressed to a particular person, firm or corporation which he is satisfied is making use of the mail for an illegal purpose. Their constitutionality is attacked upon three grounds: First, because they provide no judicial hearing upon the question of illegality; second, because they authorize the seizure of all letters without discriminating between those which may contain and those which may not contain prohibited matter; and, third, because they empower the Postmaster General to confiscate the money, or the representative of money, of the addressee, which has become his property by the depositing of the letter in the mails.

1. It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106. That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and

by many eminent writers upon the subject of constitutional limitations. *Murray's Lessee* v. *Hoboken Co.*, 18 How. 272, 280; *Bushnell* v. *Leland*, 164 U. S. 684. As was said by Judge Cooley, in *Weimer* v. *Bunbury*, 30 Michigan, 201: "There is nothing in these words, ('due process of law,') however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government. Even in the recent case of the *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, the constitutionality of the law authorizing seizures of this kind by the Postmaster General was assumed, if not actually decided, the only reservation being that the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority or his action is palpably wrong. So, too, in the recent case of *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, the law was also assumed to be constitutional, the only doubtful question being whether this court should accept the findings of the Postmaster General as to the classification of the mail matter as final under the circumstances of the case. Inasmuch as the action of the postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the Government in cases where the Postmaster General has exceeded his authority under the statute, *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, we think it within the power of Congress to entrust him with the power of seizing and detaining

letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases.

2. Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. In view of the fact that by these sections the postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, *prima facie* at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annullment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts. *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Lawton* v. *Steele*, 152 U. S. 133. Whether, in case a private registered letter was thus seized and detained, and damage was thereby occasioned to the addressee, an action would lie against the Postmaster General, is not involved in this case. It certainly is not made the basis of the present suit.

Another answer to this argument, which seems to be conclusive, is that the fraud order in this case is not open to this objection, as the Postmaster General only forbids the postmaster at Chicago to pay any postal money orders, drawn to the order of the League of Equity and the Public Clearing House, or their officers or agents in their capacity as such, and to inform the remitter of any such postal money order that payment thereof has been forbidden, etc., and "to return all

letters, whether registered or not, or other mail matter which shall arrive at your office directed to such concerns or their officers or agents as such, to postmasters at the office at which they were originally mailed." There is nothing in the order thus worded that would authorize the postmaster at Chicago to return letters addressed to an individual unless addressed to such individual as officer or agent of the League of Equity of the complainants. There is nothing in this order that would authorize the interference with the private or domestic mail matter of individuals.

3. The objection that the Postmaster General is authorized by statute to confiscate the money, or the representative of money, of the addressee, is based upon the hypothesis that the money or other article of value contained in a registered letter becomes the property of the addressee as soon as the letter is deposited in the post office. The action of the Postmaster General in seizing the letter does not operate as a confiscation of the money, or the determination of the title thereto; but merely as a refusal to extend the facilities of the Post Office Department to the final delivery of the letter. Congress might undoubtedly have authorized the postmaster at the depositing office to decline to receive the letter at all if its forbidden character were known to him; but as this would be impossible, we think the power to refuse the facilities of the department to the transmission of such letter attends it at every step from its first deposit in the mail to its final delivery to the addressee, and as the character of the letter cannot be ascertained until it arrives at the office of delivery, the Government may then act and refuse to consummate the transaction. If the letter and its contents become the property of the addressee when deposited in the mail, the subsequent seizure by the Government would not impair his title or prevent an action by him for the amount of the remittance. True, this might be of no practical value to him, but it is a sufficient reply to show that the title to the letter did not change by its seizure by the postmaster.

4. The main question involved in this case, however, is whether the scheme of the complainant was within the language of sections 3929 and 4041. The Postmaster General, in his fraud order, a copy of which is found in the bill, assumed that the League of Equity and the Public Clearing House were engaged in conducting a scheme for obtaining money by means of false and fraudulent representations or promises, but as the master found in his report that the Clearing House and its officers had dealt fairly and honestly in respect to the collection and distribution of funds collected by them, and had not been guilty of false or fraudulent representations in order to induce persons to become members of the League, this theory was abandoned by the Government, and the case put upon the ground that these corporations were engaged in conducting a "lottery or scheme for the distribution of money . . . by lot, chance, or drawing." That they were not engaged in conducting a lottery in the sense in which that word is ordinarily used is entirely clear, since this involves fixed prizes and the allotment of the prizes to the holder of numbered tickets which are drawn from a box. In such case the word lot or chance attaches only to the name or number of the ticket drawn, and not to the amount of the prize, but the statute covers any scheme for the distribution of money by lot or chance, as well as by drawing, and by the word chance, as defined by Webster, is meant "something that befalls, as the result of unknown or unconsidered forces; the issue of uncertain conditions; an event not calculated upon; an unexpected occurrence; a happening; accident, fortuity, casualty." As stated by the master, the plan contemplates that each person who becomes a member or coöperator pays three dollars as enrollment fee, and agrees to pay the sum of one dollar per month for sixty months or five years; and also agrees to coöperate by inducing other members or persons to become coöperators, shall receive his *pro rata* share of the total amount realized when entitled to a "realization" as provided at the end of five years; or in case he shall have secured three new

members in any one year, he may realize or receive at the end of each year one-fifth of the amount which he would be entitled to receive at the end of five years, assuming that the growth of the five years continued at the same rate. The plan also contemplates that in the end the member who secures new members, and the one who does not, shall receive the same amount. All members joining the league during the same month constitute a class by themselves and are entitled to realize in all respects precisely the same amount and at the same time, excepting the member who obtains new co-operators may receive his realization in yearly installments instead of in one lump at the end of the five years' period.

We do not consider it necessary to enter into the details of the plan, which is a somewhat complicated one, and the success of which obviously depended upon constantly and rapidly increasing the number of subscribers or coöperators. The only money paid in was a small enrollment fee of three dollars and a monthly payment of one dollar for five years. The return to the subscribing member, which is called a realization, is not only uncertain in its amount, but depends largely upon the number of new members each subscriber is able to secure, as well as the number of members which his coöperators are able to secure. The return to members who have been able to secure a large number of other members, and to pay their own monthly dues, may be very large in comparison with the amount paid in, but the amount of such return depends so largely, and indeed almost wholly, upon conditions which the member is unable to control, that we think it fulfills all the conditions of a distribution of money by chance. In becoming a coöperator each new member evidently contemplates that a large number, probably a large majority, of those subscribing will drop out before the end of five years. That some will and some will not induce others to become members, and that the amount ultimately realized depends not only upon his own prompt payment of dues and his own exertions, but upon a corresponding action by other

coöperators. One thing, however, is entirely clear, and that is, the success of the scheme depends wholly upon the ability of the members to increase the number of subscribers, and, as there is no reserve fund provided for their indemnification, there is sure to be a loss to every one interested in the enterprise as soon as the number of new members ceases to increase.

Counsel for complainant liken the scheme to that of an ordinary life insurance company, which at an early date was thought by some to involve the elements of chance, but was finally held to be a legitimate business. In such policies there is the payment of a fixed sum which matures either at the death of the assured or upon the happening of some other contingency expressly provided for in the policy. There is no uncertainty as to the amount to be paid, as in this case, nor does it depend upon the conduct of other persons insured in the same company, but simply upon payment of premiums by insured. The only contingency is the time as to when the policy is to mature, and the profits are calculated upon the theory that the premiums paid, with the interest thereon, will in the end amount to more than the sum becoming due upon the happening of the contingency. There is also a reserve fund provided for the security of policy holders in case no new applications are made for insurance or the business of the company is abandoned. As the only funds provided in this scheme are small monthly payments which are constantly being divided in the shape of monthly realizations, there is no possibility of a reserve fund for the security of the coöperators. The uncertainty of the amount realized upon these settlements is evident from the fact that while a member may possibly realize as high as fifteen dollars for every dollar invested by him, he may realize no profit at all, or, in case the business is suspended may realize nothing.

In the careful and satisfactory report of the master the plan of the complainant is briefly described "as a plan for securing money from a constantly increasing large number for the benefit of a constantly increasing smaller number, with an

absolute certainty that when the enterprise reaches an end for any reason the large number will lose every dollar they have put into it, and in the meantime the smaller number will have realized such amounts as may have resulted from the growth of the larger number; but no one can predict what that growth will be."

It is true, as urged by the counsel for complainant, that in investing money in any enterprise the investor takes the chance of small profits, or even of failure, as well as the hope of large profits; but such enterprises contemplate the personal exertions of the investor, or of his partners, agents or employés, while in the present case his profits depend principally upon the exertions of others, over whom he has no control and with whom he has no connection. It is in this sense the amount realized is determinable by chance.

The scheme lacks the elements of a legitimate business enterprise, and we think there was no error in holding it to be a lottery within the meaning of the statute. Indeed, we think that no scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise. The cases upon the subject of the definition of a lottery are carefully collated and criticised by Mr. Justice Blatchford in *Horner* v. *United States*, 147 U. S. 449, 458, and are held to extend to all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., and various forms of gambling.

That the party injured has a right to invoke the judicial power of the Government whenever his property rights have been invaded by the exercise of such power, was settled by this court in *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, as well as in the *McAnnulty* case. But as already indicated, it would practically arrest the executive arm of the Government if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments, before action were taken, in any matter which might involve the temporary disposition of private

property. Each executive department has certain public functions and duties, the performance of which is absolutely necessary to the existence of the Government, but it may temporarily, at least, operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must in these particulars override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary.

In the view we have taken of this case, and of the action of the court below, as well as of the course of the argument here, we have not found it necessary to inquire whether the action of the Postmaster General in basing his fraud order upon the theory that the defendants were engaged in a scheme for obtaining money or property by means of false representations, was sustainable or not. As already stated, the master found that there had been no false representations of existing facts and no unfair dealing with the coöperators; yet, as we held in *Durland* v. *United States*, 161 U. S. 206, the misrepresentation of existing facts is not necessary to a conviction under a statute applying to "any scheme or artifice to defraud." As was observed by Mr. Justice Brewer, (p. 313,) "Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. . . . In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." But, notwithstanding this question, we are satisfied the Postmaster General did not exceed his authority in making the order in this case, and the judgment of the court below is therefore

Affirmed.

Mr. Justice Brewer, Mr. Justice White and Mr. Justice Holmes concurred in the result.

Mr. Justice Peckham dissented.

CITY OF CLEVELAND v. CLEVELAND CITY RAILWAY COMPANY.

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

No. 255. Argued April 27, 1904.—Decided May 31, 1904.

Where the complainant does not base the contract alleged to have been impaired upon the original ordinance granting the franchise which reserved the power of altering fares but asserts that the contracts impaired resulted from subsequent ordinances which deprived the municipality of exercising the rights reserved in the original ordinance, the Circuit Court has jurisdiction of the suit as one arising under the Constitution of the United States.

The passage by the municipality of an ordinance affecting franchises already granted in prior ordinances amounts to an assertion that the legislative authority vested in it to pass the original ordinance gave it the continued power to pass subsequent ordinances, and it cannot assail the jurisdiction of the Circuit Court on the ground that its action in impairing the contracts which resulted from prior ordinances was not an action by authority of the State.

In view of the continuous confusion, risks and multiplicity of suits, which would result from, and the public interests and vast number of people which would be affected by, the enforcement of an ordinance reducing the rates of fare of street railways, which ordinance the companies claim is unconstitutional as impairing the obligation of the contracts resulting from the ordinances granting the franchises, a court of equity has jurisdiction of an action to enjoin the enforcement of the ordinance, especially when the ordinance affects only a part of the system and would engender the enforcement of two rates of fare over the same line leading to dangerous consequences.

In this case it was held that the consolidated ordinance of February, 1885, of the city of Cleveland, and ordinances thereafter passed by the municipality and accepted by the companies, constituted such binding contracts in respect to the rate of fare to be exacted upon the consolidated and extended lines of the railway companies as to deprive the city of its right to exercise the reservations in the original ordinances as to changing the rates of fare; and the ordinance of October 17, 1898, reducing the rate of fare to be charged was void and unconstitutional within the impairment clause of the Constitution of the United States.

THIS suit was brought in the Circuit Court to restrain the

enforcement of an ordinance of the city of Cleveland, passed October, 1898, fixing the rates of fare to be charged by the appellee on a portion of its line of street railroad.

The bill based the right to relief upon two grounds, that is, a violation of the contract clause of the Constitution of the United States and of the due process clause of the Fourteenth Amendment, the latter because the rates fixed by the ordinance, if enforced, would be confiscatory.

After hearing, a temporary injunction was allowed. The court, in stating its reasons, confined them exclusively to the alleged impairment of the obligations of contracts, and decided that it was unnecessary to consider the rights alleged under the Fourteenth Amendment. 94 Fed. Rep. 385.

Both parties thereupon amended their pleadings, so that upon the face of the record the facts concerning the alleged impairment of contract rights appeared as found by the court in awarding the temporary injunction. The bill as amended, however, also reiterated the facts originally claimed to constitute a violation of the due process clause of the Fourteenth Amendment. The pleadings being thus amended, the complainant moved as follows:

"The above-named complainant, The Cleveland City Railway Company, now comes and moves the court to enter final decree in its favor as prayed for in the amended bill of complaint herein, adjudging the ordinance in said amended bill of complaint described, entitled 'An ordinance to provide for a diminution of the rate of fare under section 7 of an ordinance passed August 25th, 1879, entitled "An ordinance granting a renewal of franchise to the Kinsman Street Railroad Company to reconstruct, maintain and operate its street railroad in and through certain streets of the city of Cleveland,"' passed October 17, 1898, to be null and void and of no effect, in that, as appears by the amended bill of complaint and the admissions of the amended answer herein, said ordinance is in violation of the contract obligations existing between the complainant and the defendant herein, and impairs the contract rights of the

complainant, in violation of the Constitution of the United States.

"Complainant further shows that, upon the amended bill, amended answer and replication it is entitled to the decree without a determination of any of the matters in respect to which issues are raised by the amended answer of the defendant herein."

The court granted this motion for the reasons which it had expressed in the opinion by it delivered on the allowance of the temporary injunction. A final decree was thereupon entered, perpetually enjoining the enforcement of the assailed ordinance. Because of the constitutional question the case was then appealed directly to this court.

Mr. Newton D. Baker and *Mr. D. C. Westenhaver* for appellant:

The Circuit Court of the United States had no jurisdiction in this action, both parties being citizens of the State of Ohio, and no Federal question being involved in the controversy.

It is admitted that the power to regulate fares cannot be inferred from a statute conferring upon cities the care, supervision and control of streets, and imposing upon them the duty to keep public highways open, in repair and free from nuisance; and further, that such a power to be conferred at all, must be given by express delegation from the supreme legislative authority of the state to subordinate legislatures. In the case at bar, however, the ordinance of October 17, 1898, which is attacked by its terms, says that it is passed pursuant to a reservation of power contained in the original renewal ordinance of August 25, 1879. The council of the city of Cleveland, in passing the ordinance in issue, relying upon a contractual reservation of the right of further legislation, and not upon any delegation of authority from the legislature of the State, the case falls within the rule laid down by this court in *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, and *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142.

A court of equity did not have jurisdiction of the controversy in this question for any of the reasons assigned in the bill of complaint, it not appearing that the complainants did not have adequate remedy at law, or that there was any danger of irreparable injury or threatened multiplicity of suits. In support of this contention, the doubt expressed by this court in *Detroit* v. *Citizens' Street Railway*, 184 U. S. 379, is urged.

The Circuit Court erred in adjudging that the ordinance of October 17, 1898, was null and void, for the reason that if enforced it would impair the obligation of the contract between the appellant and the appellee.

If it be assumed that the legislature has conferred upon the city of Cleveland the right to regulate fares, this power being conferred for the benefit of the public, can neither be bargained away nor surrendered, but is a governmental power, continuing in its nature, and any limitation upon it arising from the action of the depositary of the power, must be by positive grant, any reasonable doubt with regard thereto being resolved in favor of the continuance of the power. *Owensboro* v. *Water Company*, 191 U. S. 358; *Ruggles* v. *Illinois*, 108 U. S. 526; *Stone* v. *Farmers', etc.*, 116 U. S. 307; *Munn* v. *Illinois*, 94 U. S. 113.

The statutes of Ohio empower municipalities to renew street railroad grants at their expiration for periods not in excess of twenty-five years, and municipalities are expressly prohibited from releasing the grantee of such franchises from any obligation or liability imposed by the terms of their grants during the time for which such grants are made. It is true that in various Ohio cases, the Supreme Court of Ohio, and inferior courts, have inferentially held that upon consolidations new terms may be made involving a change in the liabilities and obligations of the constituent companies of the consolidation; but no final and authoritative decision has been made upon these points by the Supreme Court of Ohio, and on principle the powers of municipalities being strictly con-

strued, no council of a city should be permitted to release grantees of street railroad rights from obligations and liabilities previously imposed, even though the device of an apparent concession of new benefits to the public is adopted to show consideration.

All of the ordinances passed subsequent to the original renewal ordinance of 1879, which are relied upon by the appellee as new contracts, are either silent upon the subject of fares, or else stipulate that the fare to be charged upon the consolidated or extended lines shall in no case *exceed* five cents. This limitation of the maximum rate is not a grant of the right to charge the maximum rate, but is a *pro tanto* limitation, and under the powers reserved in the ordinance of 1879, which are nowhere expressly abandoned or surrendered, such subsequent reference to rates of fare must be deemed a regulation pursuant to the ordinance of 1879, and not a surrender of it. *Zanesville* v. *Gas Light Co.*, 47 Ohio St. 1; *State* v. *Cleveland Gas Light & Coke Co.*, 3 C. C. R. 251; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587; *Danville Water Co.* v. *Danville*, 180 U. S. 619; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624; *Ruggles* v. *Illinois*, 108 U. S. 526.

Mr. William B. Sanders, for appellee, in this case and in No. 256, argued simultaneously herewith:

The Circuit Court had jurisdiction; the complainant claiming to have contracts with the defendant which the latter had attempted to impair by municipal legislation passed under power delegated by the legislature of the State. Ohio Statutes, §§ 2501, 2502. These ordinances, when accepted, became contracts and cannot be annulled or amended without the consent of both parties. *Railway Co.* v. *Smith*, 29 Ohio St. 292; *Cincinnati St. Ry. Co.* v. *Carthage*, 36 Ohio St. 634; *Columbus* v. *Columbus St. Ry. Co.*, 45 Ohio St. 104; *Citizens' Railway Co.* v. *Citizens' St. Ry. Co.*, 166 U. S. 557.

It is not essential to Federal jurisdiction, in enforcement of the guaranties of the Fourteenth Amendment, that there

should be a valid contract or that the impairment or depreciation should really be effected through legislative or other action of the State; but it is sufficient if these grounds of suit are claimed in good faith and the contention is not wholly destitute of merit. *Citizens' R. R. Co.* v. *Citizens' St. Ry. Co., supra; Illinois R. R. Co.* v. *Chicago,* 176 U. S. 646; *Yazoo & M. V. R. R. Co.* v. *Adams,* 180 U. S. 1; *Illinois Cent. R. R. Co.* v. *Adams,* 180 U. S. 28.

In *Detroit* v. *Detroit Citizens' St. Ry. Co.,* 184 U. S. 368, a bill in essential respects similar to those in the cases at bar was sustained; and that a bill in equity, irrespective of diverse citizenship, will lie to protect complainant against the impairment of contract right or the taking of its property without due process of law, has been repeatedly recognized by this court. *C. M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 460; *Smyth* v. *Ames,* 169 U. S. 446.

The contention that the Circuit Court was without jurisdiction because the ordinances attacked were not passed under delegated power, in that the power sought to be exercised had been reserved in an original ordinance, is without merit. *Los Angeles* v. *Los Angeles City Water Co.,* 177 U. S. 558; *American Water Works & Guaranty Co.* v. *Home Water Co.,* 115 Fed. Rep. 171.

The bills present cases clearly within the jurisdiction of a court of equity. *Detroit* v. *Detroit Citizens' St. Ry. Co., supra,* and *Smyth* v. *Ames, supra.*

Equity may properly maintain a bill seeking to have a law of the State declared void as one which in practical operation impairs contracts. *Chicago, M. & St. Paul Ry. Co.* v. *Minnesota, supra.*

The ordinances complained of clearly impair the contract obligations of the city of Cleveland.

It is clear that the reserved power of subsequent legislative regulation is not an "obligation" or "liability," but it has been long settled by the law of Ohio that this provision does not prevent modification at any time of contracts between street

railway companies and cities. *Clement* v. *Cincinnati*, 16 Wkly. L. Bull. 335. And see also 19 Wkly. L. Bull. 74; *Cincinnati* v. *Street Railway Co.*, 31 Wkly. L. Bull. 308; *Woodson* v. *Murdock*, 22 Wall. 351.

If the ordinances consenting to extension, consolidation, and changes of motive power, are treated as renewals of the ordinance of 1879, there is no merit in the contention of counsel that such renewals were beyond the power of the municipal council because made before the expiration of existing grants.

"Renewals may be made before the expiration of the original grant." *State ex rel.* v. *East Cleveland Railroad Co.*, 6 C. C. R. 318, affirmed 27 Wkly. L. Bull. 64; *Cincinnati* v. *Cincinnati St. Ry. Co.*, 31 Wkly. L. Bull. 308.

The several resolutions of the city council, approving the various consolidations made, were passed in pursuance of § 3443 of the Revised Statutes.

A contract to charge "not more than five cents" confers the right for the term to charge five cents. *Detroit* v. *Detroit Citizens' Railway Co.*, *supra*.

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

As will appear by the statement just made, whilst two grounds under the Constitution of the United States were asserted in the bill as originally filed and as amended, the cause was in effect submitted to the court for decree upon one of the constitutional grounds alone—that is, the alleged impairment of the obligations of certain asserted contracts. Conceding that the alleged rights based on the due process clause were not waived, but were merely reserved for future action, it is manifest that the motion of the complainant for decree on the face of the pleadings confined the controversy exclusively to the alleged contract rights, and we shall therefore treat the case as if it solely involved such rights. The facts necessary to a determination of the question of contracts

and their impairment appear on the face of the pleadings, and may be summarized as follows:

On August 25, 1879, an ordinance was passed by the city council of Cleveland, granting to the Kinsman Street Railroad Company, an Ohio corporation, a renewal franchise for twenty-five years from September 20, 1879, to reconstruct, maintain and operate its street railroad in and through certain streets of the city of Cleveland. The ordinance was duly accepted. A section of the ordinance was as follows:

"SEC. 7. Said company shall not charge more than five cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient."

In 1880 another Ohio corporation, known as the Woodland Avenue Railway Company, then operating a line of street railroad under several grants from the city of Cleveland, became, by purchase, the owner of the Kinsman Street Railroad, and thereafter operated such road.

The Woodland Avenue Railway Company in May, 1883, was granted by ordinance the right to construct an extension of its line, and provision was made in the ordinance for a charge of one fare over the entire line, including the extension. The extension was built and operated as required by the ordinance.

At the time the ordinance extending the Woodland Avenue road just referred to was passed there was in existence another Ohio corporation, styled the West Side Street Railroad Company, operating a line of railroad in Cleveland under a franchise granted by the city council of Cleveland for a term of twenty-five years from February 10, 1883. This road was independent of the Woodland Avenue Railway Company, and operated its cars chiefly upon the west side of the Cuyahoga River, the Woodland Avenue line being upon the east side. There was no exchange of traffic between the roads by way

of transfers, and each was charging a fare of five cents over its line. In 1885, with this condition of affairs existing, the roads named were consolidated as the Woodland Avenue and West Side Street Railroad Company, and the consolidated company became vested with all the property, rights and privileges of the two constituent companies. The ordinance, the acceptance of which accomplished such consolidation, was as follows:

"An ordinance to fix the terms and conditions upon which the railway tracks of the West Side Street Railroad Company and the tracks of the Woodland Avenue Railway Company and said companies may be consolidated.

"SEC. 1. Be it ordained by the city council of the city of Cleveland, That the consent of the city is hereby given to the consolidation of the West Side Street Railroad Company and the Woodland Avenue Railway Company on the following conditions:

"The said consolidated company to carry passengers through without change of cars by running all cars through from the workhouse on the Woodland Avenue Railway to the point on the West Side Street Railroad where Condon avenue crosses Lorain street, and, when practicable in the judgment of the council, to do likewise on the branches of the consolidated line, and that for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or twenty-two for one dollar shall at all times be kept for sale on the cars by conductors.

"SEC. 2. Said consolidated company shall be subject to all the liabilities, conditions and penalties to which said several companies are liable; and said consolidated company and its tracks shall at all times be subject to the control, regulation and supervision of the city council, to the same extent that the same several companies and their tracks are now liable.

"SEC. 3. This ordinance shall take effect and be in force from and after its passage and legal publication, the filing with

the city of a written agreement accepting and agreeing to the terms thereof, signed by the proper persons for the companies consolidated, and the payment to the city of the expenses of printing and publishing this ordinance.

"Passed February 16, 1885."

By ordinance dated April 8, 1887, duly accepted, the Woodland Avenue and West Side Street Railroad Company was authorized to lay an additional track and extend its line of railroad. The first section of the ordinance reads as follows:

"SEC. 1. Be it ordained by the city council of the city of Cleveland, That the Woodland Avenue and West Side Street Railroad Company, its successors and assigns, be and the same is hereby authorized and empowered to lay an additional track in Franklin avenue, between Pearl street and the westerly line of Franklin circle, and to extend its line of railroad to Franklin avenue from the westerly line of Franklin circle to Kentucky street, as a single track railroad, and connect with the tracks of said company in Kentucky street, as shown on a plan accompanying the petition of said railroad company and referred to the board of improvements March 14, 1887, and to equip and operate said extension as herein provided, but on the express condition that no increase of fare shall be charged by said railroad company on any part of its main line or on said extension, and so that but one fare, not to exceed five cents, shall be charged between any points on said company's main line or extension, including the extension herein granted, and said company shall sell tickets on its cars as follows: Eleven (11) tickets for fifty cents, and twenty-two (22) for one dollar. And the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908."

By ordinance dated August 12, 1887, duly accepted, the Woodland Avenue and West Side Street Railroad Company was authorized to build, equip and operate an extension of its road therein provided for, the first section containing a provision as to rates of fare and the time of expiration of the right

granted, similar to that contained in the first section of the ordinance of April 8, 1887, above quoted. The said railroad company also duly accepted an ordinance, passed on or about June 20, 1892, by the city council of Cleveland, relating to the laying of an additional track on Kinsman street, and the first section of the ordinance contained a similar provision to that embodied in the two ordinances last referred to, respecting rates of fare and the time when the right granted should expire.

Prior to May, 1893, besides the Woodland Avenue and West Side Street Railroad Company, there existed in Cleveland a railroad corporation known as the Cleveland City Cable Railway Company. This corporation, as the successor in right of previous corporations, operated two street railroad lines, one by horse power and the other by cable, and each of said lines charged a cash fare of five cents.

In June, 1893, with the approval of the common council of the city of Cleveland, the Cleveland City Cable Railway Company and the Woodland Avenue and West Side Street Railroad Company became a consolidated corporation, under the name of the Cleveland City Railway Company, the complainant in this cause. By the consolidation it was provided that the lines should be operated as one system, that proper transfers should be issued, and that but one fare should be charged for a continuous passage upon any portion of the consolidated lines.

It is admitted that, as the result of the various ordinances and consolidations above referred to, the corporations ceased to charge a cash fare of five cents for riding over the roads embraced in the Kinsman street railroad ordinance of 1879, and on the other roads which had been at that time in existence; and, on the contrary, in consequence of the ordinances and authorized consolidations, there was charged only five cents for a ride over the whole system or systems, and tickets were sold and transfers issued as provided in the various ordinances. It is not asserted that the corporations at any time failed to perform the additional obligations imposed upon them by the various ordinances passed subsequently to 1879.

On October 17, 1898, an ordinance was adopted by the council of the city of Cleveland, reading as follows:

"An ordinance to provide for a diminution of the rate of fare under section 7 of an ordinance passed August 25, 1879, entitled 'An ordinance granting a renewal of franchise to the Kinsman Street Railroad Company to reconstruct, maintain and operate its street railroad in and through certain streets of the city of Cleveland.'

"Whereas, the city council did, on the 25th day of August, 1879, pass an ordinance entitled 'An ordinance granting a renewal of franchise to the Kinsman Street Railroad Company to reconstruct, maintain and operate its street railroad in and through certain streets of the city of Cleveland,' by which ordinance said Kinsman Street Railroad Company, its successors, and assigns, were authorized to reconstruct, maintain and operate its double-track street railroad, commencing on Superior street at the intersection of Water street, thence to and around the southwest corner of Monumental square to Ontario street; thence through Ontario street to and through a portion of Broadway street to Woodland avenue (formerly Kinsman street), thence through said avenue to Madison avenue, subject to certain conditions and limitations; and

"Whereas, it was ordained, as part of these conditions and limitations (section 7), that 'said company shall not charge more than five cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient;' and

"Whereas, the council does now deem justifiable and expedient a diminution of the rate of fare, therefore—

"SEC. 1. Be it ordained by the city council of the city of Cleveland, That the rate of fare for a single continuous passage over the lines, and all extensions thereof, operated under the aforesaid grant to the said Kinsman Street Railroad Company,

be, and is hereby, fixed at four (4) cents cash fare over the whole or any part thereof.

"SEC. 2. For the better accommodation of the public any person, company or corporation operating said line of railway under said grant shall at all times keep on sale on the cars, when in operation, tickets good for a single continuous passage over said lines and all extensions thereof at the rate of seven tickets for twenty-five cents.

"SEC. 3. This ordinance shall take effect and be in force from and after its passage and legal publication."

And this ordinance is the one complained of, the enforcement of which the final decree below enjoined.

Bearing the facts above stated in mind, we come to consider the merits of the case. Before proceeding, however, to do so we must dispose of contentions made below and reiterated in the argument in this court, concerning the jurisdiction of the Circuit Court.

The alleged want of jurisdiction in the Circuit Court is based upon two propositions, first, that the suit is not one arising under the Constitution of the United States; and, second, that the subject matter of the suit is not within the cognizance of a court of equity.

The argument in support of the first contention presents a twofold aspect: (*a*) That as the reduction of fares provided in the assailed ordinance only related to carriage over that portion of the consolidated road which was formerly owned by the Kinsman Street Railroad Company, no impairment of the obligation of a contract could or did arise, because in the ordinance of 1879 there was an express reservation of the right of the city to alter the rates of fare as to the road affected by that ordinance.

The proposition is without merit. It assumes a false issue and upon that erroneous premise, the challenge to the jurisdiction is based. The complainant did not rely upon a contract arising from the ordinance of 1879, but upon the contracts alleged to have resulted from the subsequent ordinances, which

it was in substance asserted had deprived the city of the power to exercise the right reserved in the ordinance of 1879, and it was these subsequent contracts which it was contended were impaired by the assailed ordinance.

(*b*) That there was no jurisdiction, even although the complainant relied upon contracts arising from the ordinances adopted subsequent to that of 1879. To constitute the impairment of a contract within the sense of the Constitution, it is correctly argued, requires that some subsequent action taken by the State or under its authority should have been given effect as against the contract. The argument is that as there had not been delegated by the State of Ohio to the city of Cleveland independent authority to reduce rates of fares on street railroads, and as the power asserted by the assailed ordinance was based solely on the right reserved in the ordinance of 1879, it follows that the assailed ordinance, even if unwarranted was not an impairment of a contract right in the constitutional sense.

This proposition is in conflict with the one just considered, and in effect assumes, that the defence of the city was without merit, and hence there was no jurisdiction. But irrespective of the assumption upon which it rests, the proposition is untenable, and the argument by which it is sought to be sustained is somewhat wanting in consistency. The passage by the city of the assailed ordinance necessarily amounted to an assertion on its part that the legislative authority vested in it to pass the ordinance of 1879 gave the continued power to pass subsequent ordinances executing the rights initiated by the ordinance of 1879, despite the ordinances which had supervened. This in its very essence was the assertion of a delegated power to legislate against the contracts embodied in the ordinances relied upon. We have said that the argument is somewhat wanting in consistency, because the contention of the city on the record is that the ordinances asserted as contracts, passed subsequently to 1879, did not deprive the city of the continued power to exert authority as to rates, because

the statutes of Ohio prevented the city from abrogating, by the subsequent contracts, the rights reserved in the ordinances of 1879. And this is but to assert that, as a consequence of the continued effect of the legislation of the State of Ohio, the city had the power to pass the assailed ordinance, even although it had apparently disabled itself from so doing by the passage of many ordinances adopted after 1879 and up to the time when the assailed ordinance was passed. These considerations distinguish this case from *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, and *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, relied upon by the appellant.

Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates of fare over the same line, leading to consequences dangerous to the public interest, peace and tranquillity, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368.

We come then to the merits. For convenience of reference we copy in the margin[1] pertinent sections of the Revised Stat-

[1] *Copied from Bates' Annotated Statutes of Ohio—Revision of* 1897.

Sec. 2501. (Terms and conditions of construction and operation to be fixed by council; renewal of grant.)—No corporation, individual or indi-

utes of Ohio, embracing all which, either directly or indirectly, during the period covered by the ordinances set out in the bill, vested the municipal council of Cleveland with power to regu-

viduals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest.

SEC. 2502. (Proceedings to establish a street railroad route; grant not valid for more than twenty-five years.)—Nothing mentioned in the next preceding section shall be done: no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon the recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board: and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property-holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant or renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal, except in cities of the second grade of the second class, in which no grant or renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than fifty years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.

SEC. 2504. (Pavement of streets where railroads are constructed; proviso.)—The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders or the Nicholson or other wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders or the Nicholson, or other wooden

late or to contract in respect to the rates of fare to be charged by street railways.

The statutes show that there was lodged by the legislature

---

or asphaltic pavement, shall not be required; provided, that in cities of the second grade of the first class the council may require of any street railroad company to pave and keep in constant repair, sixteen feet for a double track or seven feet for a single track, all of which pavement shall be of the same material as the balance of the street is paved with.

SEC. 2505. (Council of city or village may grant extension of street railroad.)—The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hundred and forty-three, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation.

* * * * * * * *

SEC. 2505*b*. (Consolidation.)—Wherever the lines or authorized lines of road of any street railroad corporations or companies meet or intersect, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation or any railroad operated by electricity or other means of rapid transit may be conveniently connected, to be operated to mutual advantage, such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation; or whenever a line of road of any street railroad company or corporation organized in this State is made, or is in process of construction to the boundary line of the State, or to any point either within or without the State, such corporation or company may consolidate its capital stock with the capital stock of any corporation or company, or corporations or companies in an adjoining State, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391 and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections and each of them; and the said sections, including these so amended and supplemented, are adopted and made a part of this section.

* * * * * * * *

of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed.

That in passing ordinances, based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the State, as an agency of the State, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts.

The question for decision then is Did the consolidated ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?

That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Railway Co.* v. *Village of Carthage*, 36 Ohio St. 631, 634; *City of Columbus* v. *Street Railroad Co.*, 45 Ohio St. 98. But let us consider the question without

---

Sec. 3443. (Council, &c., may fix terms and conditions.)—Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such [street] railways may be constructed, operated, extended, and consolidated.

* * * * * * * *

(3443-12.) Sec. 5. (Consolidation.)—Such street railroad companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation.

treating the Ohio decisions as conclusive. It is undoubtedly true that immediately before and for a long time prior to the passage of the ordinances concerning the various consolidations and extensions referred to the respective roads affected thereby were charging a cash fare of five cents over their respective lines, and that the effect of the consolidations and extensions was to secure to the public the benefit of a cash fare of five cents over the whole length of the consolidated and extended lines.

Now, undoubtedly, the common council of Cleveland, in authorizing the extension and consolidation of the lines of street railroads in question, did so because in its opinion such extensions and consolidations would operate beneficially to the public. See near the close of sec. 2505, Rev. Stat. Ohio, previously inserted in the margin. That in exercising these powers it was the intention of the city to avail of the authority conferred by section 3443 of the Revised Statutes of Ohio, "to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated," and that it was also the intention of the city to execute binding agreements in respect to the rates of fare to be thereafter charged by the railroad companies, will, we think, become clearly apparent by considering the language employed in the ordinances. Thus in the ordinance of February 16, 1885, fixing the terms and conditions upon which the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the tracks of those companies, might be consolidated, it was specifically provided "that for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or twenty-two for one dollar shall at all times be kept for sale on the cars by conductors." The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing, and filed with the city. Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying

of an additional track and the extension of the lines of the Woodland Avenue and West Side Street Railroad Company, and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that "The right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908." The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language.

In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in *Detroit* v. *Detroit Citizens' Street Railway Company*, 184 U. S. 368, and approvingly referred to in *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437. This being the case, the question is whether the ordinance of 1898 impaired the obligations of those contracts.

By the assailed ordinance the city of Cleveland, assuming to assert continuing delegated power and upon the theory that the subsequent contracts were void as to that power, disregarded the provisions for consolidations, extensions, etc., and

whilst retaining all the benefits procured by the ordinances for the public, reduced the cash and ticket fares over the portions of the line embraced in the ordinance of 1879, of the Kinsman Street Railroad, which had long since lost its identity and become merged with other roads. That this was an impairment of the contracts embodied in the prior ordinances, we think is free from doubt.

Finally, it is contended that the ordinances embodying the contracts were void in so far as they attempted to deprive the city of the continuing legislative power to act on the reservation contained in the ordinance of 1879. This is based on the assumption that the right reserved in that ordinance to increase or reduce rates of fare was an obligation and liability imposed upon the railroad corporation within the meaning of section 2502 of the Revised Statutes of Ohio, declaring that a municipal corporation should not, during the term of a grant or renewal thereof, release the grantee from any obligation or liability imposed by grant. But it has been held in Ohio, on reasoning commending itself, that a modification of a contract between a municipality and the owner of a street railroad, made in good faith for the better accommodation of the public, is not void by virtue of said section 2502 of the Revised Statutes of Ohio. *Clement* v. *City of Cincinnati*, 16 Weekly Law Bulletin, 355, (decided June 14, 1886, by the general term of the Superior Court of Cincinnati; leave to file a petition in error refused by the Supreme Court of Ohio, on January 17, 1888. 19 Weekly Law Bulletin, 74).

It is further contended "that any attempt to treat the consent to extensions, consolidations or change of motive power as renewals of the rights renewed by the ordinance of 1879, must be nugatory in view of the positive provisions of the statute above cited, which confer upon municipal corporations power to make such renewals only at the expiration of existing grants." This contention has also been passed upon by the courts of Ohio, construing the provisions of the Revised Statutes of that State, relied upon, and it has been held that re-

newals may be made before the expiration of the original grant. *State* v. *East Cleveland Railroad Company*, 6 Ohio Circuit Court Rep. 318, affirmed by the Supreme Court of Ohio without opinion, 27 Weekly Law Bulletin, 64.

Concluding, as we do, that the ordinance of 1898, impaired the obligations of contracts entered into by the city of Cleveland fixing the rate of fare to be charged on the lines of railroad operated by the complainant, the decree of the Circuit Court adjudging the nullity of this ordinance was right, and it is therefore

Affirmed.

MR. JUSTICE HARLAN took no part in the decision of this cause.

CLEVELAND *v.* CLEVELAND ELECTRIC RAILWAY COMPANY.

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

No. 256. Argued April 26, 27, 1904.—Decided May 31, 1904.

Decided on authority of *Cleveland* v. *City Railway Co.*, *ante*, p. 517.

THE facts are stated in the opinion of the court.

Mr. D. C. Westenhaver and *Mr. Newton D. Baker* for appellant.

Mr. W. B. Sanders for appellee.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

This case is analogous in the facts shown by the record to

[1] For abstracts of arguments in this case, which was argued simultaneously with *Cleveland* v. *City Railway Co.*, see *ante*, p. 517.

the one just decided, *Cleveland* v. *City Railway Company, ante,* p. 517, and presents identical questions of law.

We shall briefly advert to some only of the material facts.

An ordinance was passed by the city council of Cleveland in 1879, granting a renewal of franchise to the East Cleveland Railroad Company, and in section 6 of the ordinance it was provided as follows:

"Said company shall not charge more than five cents fare each way for one passenger over the whole or any part of the line herein renewed, but said company may charge a reasonable compensation for carrying packages. The council, however, reserves the right to hereafter increase or diminish the rate of fare, as it may deem justifiable and expedient."

By ordinances duly accepted, passed in 1886, 1888 and 1889, extensions were authorized, the right was given to double track portions of the line, the franchise was extended, and additional obligations were assumed by the railroad company in respect to paving, etc. It was expressly stipulated in the ordinances of 1886 and 1887 that the company should charge and collect for passage over its lines in either direction but one fare, of not more than five cents; there was no reservation of the future right to alter rates of fare; and it was agreed that the rights conferred should continue during the life of the franchise.

In 1893 the East Cleveland Railroad Company was consolidated with three other corporations, independent lines of railway, in the city of Cleveland, each of them operating under contracts or grants from the city, and charging, as authorized in the ordinance permitting their operation, a cash fare of five cents. As to no one of these companies was there any right remaining in the city council to increase or diminish the rate of fare during the period of the several grants. The fare then being charged by all the constituent companies was five cents. Since the consolidation the system has been operated in its entirety, and but a single fare of five cents has been charged.

On October 17, 1898, the city council of Cleveland passed

an ordinance reducing the cash fare to be charged by the complainant on the portion of its line affected by the ordinance of 1879 to four cents, and required seven tickets to be sold for twenty-five cents. The validity of this ordinance was assailed by the bill filed in this cause, and similar contentions were urged against its constitutionality as are contained in the bill filed in the suit brought by the Cleveland Railway Company. Like jurisdictional objections were also interposed in this case by the city of Cleveland as were raised in the other case.

The Circuit Court granted a motion for judgment upon the pleadings and decreed that the ordinance of 1898 was void because it impaired the obligations of prior contracts. 94 Fed. Rep. 385. The principles applied in the case of the Cleveland City Railway Company, just decided, govern this case, and, as a result, the decree of the Circuit Court must be and it is

Affirmed.

MR. JUSTICE HARLAN took no part in the decision of this cause.

DIMMICK *v.* TOMPKINS.

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

No. 528. Submitted May 16, 1904.—Decided May 31, 1904.

An appeal directly to this court from the Circuit Court denying a writ of *habeas corpus* is proper where the petition contains averments that the imprisonment is in violation of the Federal Constitution.

A sentence at hard labor in the state prison does not commence until the person sentenced is taken to the prison, and if by his own efforts to obtain a review and reversal of the judgment he secures a *supersedeas* pending appeal his detention meanwhile in the county jail cannot be counted as a part of the time of imprisonment in the state prison.

Although for some purposes different counts in an indictment may be regarded as in effect separate indictments, where there is nothing to show

that the court was without jurisdiction to impose a sentence of two years for the crime of which the defendant was convicted, this court will not presume that the sentence was for not exceeding one year on each of the two counts on which he was convicted, thus making the sentences in the state prison at hard labor illegal under Rev. Stat. §§ 5541, 5546, 5547. *In re Mills*, 135 U. S. 263, distinguished.

A writ of *habeas corpus* to release the petitioner from imprisonment cannot be made to do the office of a writ of error and this court will not on such a proceeding review errors of law on the part of the trial court.

This court may take judicial notice of its own records in proceedings formerly had by the parties to proceedings before it.

DIMMICK, the appellant, presented his petition for a writ of *habeas corpus* to the Circuit Court of the United States, Northern District of California. The petition was denied and an appeal taken to this court from the order denying the application. The appellant alleged in his petition for the writ that he was unlawfully imprisoned in the state prison of the State of California; that the imprisonment was illegal and in contravention of the Constitution of the United States, Article Five of the amendments to the same; that on October 16, 1901, he was sentenced to imprisonment in the state prison by the District Court of the United States in and for the Northern District of California for the period of two years, to date from October 16, 1901; that he had been imprisoned, under the judgment, in the state prison ever since April 13, 1903, and that prior thereto, and from the date of the judgment to April 13, 1903, he was imprisoned, under said judgment, in the county jail of Alameda county by order of the District Court.

The appellant also alleged that, notwithstanding the foregoing facts, the warden refused to discharge or release him from imprisonment, although the term of said imprisonment expired, according to its terms, on October 16, 1903. The appellant then set forth in the petition a copy of the record of the proceedings of the District Court of the United States, which showed that he was convicted in the District Court on the 16th of October, 1901, of making and presenting a false claim, as charged in the first count of the indictment, and of using a portion of the public moneys of the United States for

a purpose not prescribed by law, as charged in the fourth count; and that he was sentenced "to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the state prison of the State of California, at San Quentin, Marin County, California." The record was signed by the district judge who held the court.

The petition also set forth a copy of the indictment under which the trial was had. It was founded upon sections 5438 and 5497 of the United States Revised Statutes, and charged in substance the presentation to the cashier of the mint at San Francisco of a certain false, fictitious and fraudulent claim against the United States and known to be fraudulent by the defendant at the time he presented it; also, with having unlawfully used a portion of the public moneys for a purpose not prescribed by law. The appellant averred that neither the first nor the fourth count charged any crime or public offense against the United States nor the violation of any law of the United States, and that both counts were fatally defective. The appellant also averred that the judgment of the court, in as far as it required his imprisonment in the state prison, was void, because the United States District Court sentenced him for one year, and no more, upon each of the two counts of the indictment referred to in the judgment, and did not sentence him to imprisonment for a period of more than one year upon each of said counts, and that a sentence to the state prison for a period of not more than one year violated the statutes of the United States.

Mr. George D. Collins for appellant:

The imprisonment was for two years from a date specified and must expire two years therefrom. A court can fix the date of commencement of the sentence. *Ex parte Gibson*, 31 California, 627; *Woodward* v. *Murdock*, 124 Indiana, 439; *State* v. *Gaskins*, 65 N. Car. 320; *Kelly* v. *State*, 3 Sm. & Mar.

518. Under some circumstances the term might end before the imprisonment begins. *Johnson* v. *People*, 83 Illinois, 431, 437. The judgment cannot be changed after partial execution. *Ex parte Lange*, 18 Wall. 163, 173. The day on which a prisoner is sentenced will be reckoned as a part of the term. Bishop on Stat. Crimes, § 218; *Commonwealth* v. *Keniston*, 5 Pick. 420.

The sentence has been fully satisfied. The period of confinement in the county jail must be counted. Bishop, *supra; People* v. *Lincoln*, 62 How. Pr. 412. The conviction in this case was for a misdemeanor. *Ex parte Wilson*, 114 U. S. 422; *Mackin* v. *United States*, 117 U. S. 350; *Bannon* v. *United States*, 156 U. S. 466; *Regan* v. *United States*, 157 U. S. 303. As to law of California, see *Ex parte Ah Cha*, 40 California, 426, and see §§ 5438, 5497, Rev. Stat.

The sentence is void because it directs imprisonment in the penitentiary for a period not exceeding one year on each count. *Ex parte Mills*, 135 U. S. 270. Each count is in law a separate indictment. *Selvester* v. *United States*, 170 U. S. 262, 266. The sentence as rendered is an entirety. If void in part it is void *in toto* and if imprisoned for what is not a crime against the United States he is entitled to his discharge on *habeas corpus*. *Ex parte Siebold*, 100 U. S. 376; *Ex parte Hollis*, 55 California, 407; *Ex parte Corryell*, 22 California, 181. The first count contains mere epithets which signify nothing. *Van Well* v. *Winston*, 115 U. S. 237. The mere fact that a *paid* claim was presented for repayment is not a crime. The statute requires a *fraudulent* claim to be presented.

The statute can have sufficient scope and operation if it is confined to claims that have never been real or genuine; and it is the duty of the courts to give it that construction in favor of liberty. *United States* v. *Hartwell*, 6 Wall. 396. There can be no constructive offenses, and the case must be unmistakably within the statute. *United States* v. *Lacher*, 134 U. S. 628; *United States* v. *Brewer*, 139 U. S. 288. Statutes creating and defining crimes cannot be extended by intendment, and no

act, however wrongful, can be punished under such a statute unless clearly within its terms. *Todd* v. *United States*, 158 U. S. 282; *France* v. *United States*, 164 U. S. 676, 682.

The fourth count of the indictment also fails to charge any offense that is made a crime by any law of the United States. Section 5497, Rev. Stat., applies only to bankers, brokers, or other persons and to presidents, cashiers, tellers, directors, or other officers of any bank or banking association. This statute was amended by act of February 3, 1879, chap. 42, and by the amendment extended to officers and their assistants in the internal revenue service, 20 Stat. 280, thus indicating that the words "or other person" as used in the main section only relate to persons of the same general class as bankers and brokers. If all persons were meant, there was no need of the specific enumeration. Bishop on Stat. Crimes (3d ed.), § 245; Sutherland on Stat. Constr. § 272.

The prisoner was a clerk in the mint and not within the provisions of § 5497.

Mr. Solicitor General Hoyt for appellee:

The petition shows on its face that Dimmick has not served his sentence. The allegation that prior to April 13, 1903, and from the date of the sentence, October 16, 1901, Dimmick was confined in the county jail "under said judgment" is inconsistent with the judgment, which was for imprisonment in the state prison for two years at hard labor in the state prison. The time from which the sentence was to commence was directory merely. *Ex parte Bell*, 56 Mississippi, 282; *Ex parte Duckett*, 15 S. Car. 210.

The general rule is that the time when the imprisonment is to begin or end need not be and, according to the better practice, is not specified in the sentence, it being sufficient to state its duration merely. Bish. New Crim. Proc. sec. 1310, par. 3; 25 Am. & Eng. Ency. Law (2d ed.), p. 303, and cases cited in note.

The rule as to the place of imprisonment is different. Ac-

cording to the prevailing practice, when the sentence is imprisonment the place of imprisonment should be specified. 25 Am. & Eng. Ency. Law (2d ed.), p. 302, and cases cited in note.

The nature of the punishment—whether infamous or not—depends upon the place of imprisonment. Imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. *Ex parte Wilson*, 114 U. S. 417, 428; *Mackin* v. *United States*, 117 U. S. 348, 352; *United States* v. *De Walt*, 128 U. S. 393.

The records of this court show that Dimmick was not confined under the judgment in the county jail prior to his removal to the state prison, but that said judgment had been superseded pending his appeals. See record in No. 592, October term, 1902, 189 U. S. 509.

Courts will take judicial notice of their own records with reference to prior proceedings in the case at bar. Am. & Eng. Ency. Law (2d ed.), p. 925, and numerous English and American cases cited in note. An appellate court will take judicial notice of its own record on a former appeal. *Gans* v. *Holland*, 37 Arkansas, 483; *Bell* v. *Williams*, 10 La. Ann. 514; *Thornton* v. *Webb*, 13 Minnesota, 498; *Dawson* v. *Dawson*, 29 Mo. App. 521. This court also has held that it will take judicial notice of its own records on a former appeal. *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217.

The time a convicted person is detained pending his appeal does not run upon the sentence, even where no *supersedeas* is granted. *Ex parte Duckett*, 15 S. Car. 210; *Ex parte Espalla*, 109 Alabama, 92.

The rule announced in *In re Mills*, 135 U. S. 263, that a sentence to imprisonment in the penitentiary must be for a longer period than one year, has no application. Petitioner was sentenced for a longer period than one year.

In this case there was but one indictment and the district court gave but one sentence, for two years, upon the verdict of conviction. *Claasen* v. *United States*, 142 U. S. 140, 146;

Evans v. *United States*, 153 U. S. 584, 608; *Dimmick* v. *United States*, 116 Fed. Rep. 825.

This court cannot undertake to divide and distribute the sentence between the two counts. If the sentence is erroneous in this respect, opportunity should be given the United States to have Dimmick resentenced in accordance with law upon the verdict against him. *In re Bonner*, 151 U. S. 242, 262; *Haynes* v. *United States*, 101 Fed. Rep. 817, 820; *Jackson* v. *United States*, 102 Fed. Rep. 473, 490.

The question whether the facts charged in the indictment constituted an offense under the statute are not open to review on *habeas corpus*, since the District Court had general jurisdiction of the class of offenses to which the alleged offense belonged. *Ex parte Parks*, 93 U. S. 18; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731; *In re Eckart*, 166 U. S. 481.

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

The appeal directly to this court from the decision of the Circuit Court denying the writ of *habeas corpus* was proper under the averments contained in the petition, that the imprisonment of the appellant was in violation of the Federal Constitution. *Craemer* v. *Washington State*, 168 U. S. 124, 127.

The appellant contends that, as his sentence was imprisonment "at hard labor for the term of two years from October 16, 1901," his term of imprisonment under that sentence necessarily expired by its own limitation on October 16, 1903, even without any deduction for credits earned by good behavior.

If the appellant had been at once transported to the state prison under the sentence imposed upon him after his conviction, it is of course plain that two years from the time of his sentence (if he remained there in the meantime) would be the extent of his legal detention. In fact, he was not taken

to the state prison until April 13, 1903, but he avers that he had been previously and from October 16, 1901, the date of the judgment, to April 13, 1903, imprisoned under said judgment in the county jail of the county of Alameda, by the order of said District Court. The sentence upon the verdict of guilty is given in the record, which is made a part of the petition, and that record shows that the appellant was "sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the state prison of the State of California, at San Quentin, Marin County, California."

The imprisonment of the appellant in the county jail could not, therefore, have been under the judgment which prescribes imprisonment in the state prison. But such detention may have been owing to his efforts to obtain a review and reversal of the judgment and in the meantime a *supersedeas* thereon, so as to prevent his transportation to the state prison, and in that case such detention should not be counted as any part of the time of imprisonment in the state prison. In that event his imprisonment in the state prison, under the judgment, should be counted from the time it actually commenced, notwithstanding the statement of the sentence that it should be for two years from October 16, 1901. The time of commencement was postponed by his own action, and he cannot take advantage of it and thus shorten the term of his imprisonment *at hard labor in the state prison.*

Upon this writ the question to be examined is one of jurisdiction, and in this case it is whether the warden of the prison has the legal right to continue the imprisonment under the sentence and warrant of commitment notwithstanding the expiration of two years from the time of sentence. If, as we have said, the detention in the jail was the result of his own action, and his imprisonment at hard labor in the state prison did not, for that reason, commence until April 13, 1903, then the legal term of his imprisonment in the state prison has not

expired and he is properly detained. As it was incumbent upon the appellant to show his continued imprisonment was illegal, (there being no presumption that it was,) the duty and the burden rested upon him to aver, and, if the averment were traversed, to prove that his detention in jail had not been by reason of the fact suggested. This he has not done. There is no such averment in the petition for the writ and there is no proof of such fact to be found. *Non constat*, that he was not detained for the very reason already stated. This is fatal to the appellant, so far as this point is concerned.

As might be surmised, there was ample reason for not making the allegation. It would not have been true.

It appears from our own records that a petition for a certiorari was filed in this court by appellant February 2, 1903, asking for a review of the above-mentioned judgment, and in that petition it is stated that the appellant had taken proceedings to have the judgment reviewed by the Circuit Court of Appeals, and had obtained a *supersedeas* thereon, and after the judgment had been affirmed by that court and on January 13, 1903, the District Court ordered the execution of the judgment thus affirmed to be stayed for the period of thirty days from that date to enable the appellant to make application to this court for a writ of certiorari, which application was made, and denied by this court March 2, 1903. 189 U. S. 509. In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler* v. *Eaton*, 141 U. S. 240, 242; *Craemer* v. *Washington State*, 168 U. S. 124, 129; *Bienville Water Supply Company* v. *Mobile*, 186 U. S. 212, 217.

That the party seeking to review a judgment of imprisonment in a state prison cannot take advantage of his own action in so doing as to thereby shorten the term of imprisonment in the state prison is, as we think, plain. To hold otherwise would be inconsistent with the general principle that a person

shall not be permitted to take advantage of any act of another which was committed upon his own request or was caused by his own conduct. See *McElvaine* v. *Brush*, 142 U. S. 155, 159. The question has arisen in some of the state courts and has been so decided. See *Ex parte Duckett*, 15 S. Car. 210, decided in 1881; *Ex parte Espalla*, 109 Alabama, 92, decided in 1896. In such cases the provision of the sentence that the imprisonment is to commence on or to continue from a certain day is rendered impossible of performance by the act of the defendant, and he will not be permitted to obtain an advantage in such manner. The appellant cites no case which questions this principle. Those cited by him have, generally, reference to the construction to be given the language of the sentence as to the time of its commencement. They do not deny the rule as to the action of defendant in preventing its execution.

Johnson v. *The People*, 83 Illinois, 431, is not in point. The case arose on error brought by the defendant after conviction in the court below. He was convicted under several counts of an indictment for selling intoxicating liquors and the sentence fixed a day and hour when the imprisonment should commence under each count. This was held to be error, as the sentence to imprisonment should have been for a specified number of days under each count upon which conviction is had, and the imprisonment under each succeeding count would begin when it ended under the preceding one, without fixing the day or hour of any. It appeared in that case that a *supersedeas* had been granted, and that it had become impossible that the judgment of imprisonment could be carried into effect, as the time fixed by the court had elapsed. The sentence was held to be an erroneous one, and the judgment was reversed and the case remanded with directions that the court should enter a proper judgment on the verdict.

In *Dolan's Case*, 101 Massachusetts, 219, the prisoner, after imprisonment, had escaped before the term of the sen-

tence had expired, and having been retaken claimed his discharge at the expiration of the time that he would have been entitled to it if he had not escaped. Neither the date of its commencement nor of its expiration was fixed by the terms of the sentence. His application was denied, and it was held that the defendant must be imprisoned for a time which corresponded with his original sentence, and that the expiration of the time without imprisonment was in no sense an execution of the sentence.

Also, in *State* v. *Cockerham*, 2 Ired. Law (24 N. Car.), 204, it was held that the time at which the sentence should be carried into execution forms no part of the judgment. The judgment is the penalty of the law as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. So here, in the case before us, the material part of the sentence is imprisonment for two years in the state prison, and that sentence is not satisfied by a detention in the county jail for a portion of the two years by reason of the proceedings of appellant to review the judgment under which the sentence was given.

As to the time of the commencement of the sentence, *State* v. *Gaskins*, 65 N. Car. 320, is based upon a statute, which declared that the term of imprisonment "shall begin to run upon and shall include the day of conviction." The question did not arise by reason of the act of the defendant in taking proceedings to review the judgment.

Woodward v. *Murdock*, 124 Indiana, 439, simply holds that the period the prisoner is out of jail under parole is part of the time for which he was sentenced, and when the original time expires he is entitled to his discharge just the same as if he had been in prison the whole time. It was held that he was constructively in prison, although in fact conditionally at large under his parole, and that while thus on parole his sentence ran on.

The sentence given in this case could only have been satisfied by imprisonment in the state prison at San Quentin for the

period of time mentioned in the sentence. This is not the case of an arbitrary detention in jail, without excuse or justification, alter sentence to imprisonment in a state prison. If in such case the defendant were helpless, the question might arise whether the time of such improper detention in jail should not be counted, as to that extent, a satisfaction of the sentence.

It is also objected that the sentence is void because it directs imprisonment in the state prison for a period that does not exceed one year on each count of the indictment, and *In re Mills*, 135 U. S. 263, 268, is cited to sustain the proposition. In that case the prisoner was sentenced upon two indictments to imprisonment in the penitentiary, in one case for a year and in the other for six months, and it was held that the imprisonment was in violation of the statutes of the United States. See Rev. Stat. §§ 5541, 5546, 5547.

In the case at bar the sentence was for two years upon one indictment, and there is no statement in the record that there was a separate sentence each for one year upon the first and fourth counts of the indictment. In this we think there was no violation of the statute, and the sentence was therefore proper and legal. The appellant may have been sentenced upon one count only for two years. Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases. But this record shows a sentence for two years to the state prison, and there is nothing to show the court was without jurisdiction to impose such sentence for the crime of which the defendant was convicted.

It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. We are not by any means prepared to adjudge that the indictment did not properly charge an offense in both the first and fourth counts. See *Dimmick* v. *United States*, 116 Fed. Rep. 825, involving this indictment, where

it is set forth. It is not, however, necessary in this case to decide the point, for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reëxamined on *habeas corpus*. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be reëxamined on *habeas corpus*. *Ex parte Parks*, 93 U. S. 18; *In re Coy*, 127 U. S. 731; *In re Eckart*, 166 U. S. 481. In the last case it was stated that (page 483)—

"The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient, acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime."

The order refusing the writ was right, and is

Affirmed.

SHEPARD *v.* BARRON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 217. Argued April 14, 15, 1904.—Decided May 31, 1904.

Where a public improvement is completed, and the assessment made at the instance and on the petition of the owners of the property, and pursuant, in form at least, to an act of the legislature of the State, and in strict compliance with its provisions, and with the petition there is an implied contract that the parties, at whose request and for whose benefit the work was done, will pay for it in the manner provided for by the act, and after completion of the work they cannot set up the unconstitutionality of the act to avoid the assessment.

An assessment made under such circumstances does not deprive the owners of their property without due process of law nor take their property without just compensation.

There are circumstances under which a party who is illegally assessed may be held to have waived his remedy by conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality.

An agreement that work for which their property is assessed was legally done and that the improvement was legally constructed, executed by property owners for the purpose of obtaining a market for the sale of bonds by the municipality to enable it to make the improvement in effect provides that the lien of the assessment to pay the bonds is valid, and they are estopped from asserting the unconstitutionality of the law under which the assessment is made.

THIS bill was filed in the Circuit Court of the United States for the Southern District of Ohio, against the defendant, as the treasurer of the county of Franklin, in the State of Ohio, to enjoin him from taking any proceedings towards the collection of the balance of an assessment for a local improvement upon land belonging to the appellants near the city of Columbus, in the State of Ohio, because, among other grounds alleged in the bill, the assessment to pay for the improvement as provided for in the act was to be made by the foot front and not in proportion to the special benefit which might result from the improvement to the property assessed, and on this ground it

was averred that the act violated the Fifth Amendment and also section 1 of the Fourteenth Amendment to the Federal Constitution. The bill was dismissed by the Circuit Court, and from the judgment of dismissal the plaintiffs have appealed directly to this court, because the law of Ohio referred to in the bill is claimed to be in contravention of the Federal Constitution. Act of 1891, sec. 5; 1 U. S. Comp. Stat. 549.

The original plaintiffs were partners doing business under the name of the Alum Creek Ice Company and as such were the owners of the land described in the bill, and soon after the commencement of this suit one of the plaintiffs sold out his interest in the property, including the land, and his grantees were substituted as plaintiffs in his stead and assumed his liabilities with regard to the land. Hereinafter they will all be described as the plaintiffs, as if they had all originally been parties to the suit, and had signed the papers and made the representations hereinafter mentioned.

The answer denied the averments of the bill and also set up facts which, as defendant insisted, precluded the plaintiffs from obtaining relief by injunction as prayed for in the bill.

Upon the trial it appeared that the plaintiffs and others were separate owners of distinct portions of a tract of land adjoining the city of Columbus, Ohio, and bounded by the Columbus and Granville turnpike road, which was a public highway leading to and from the city of Columbus. The tract had a frontage on the road of 9,615.38 feet, of which the plaintiffs owned 1,111 feet. On March 26, 1890, an act was passed by the Ohio legislature, 87 Ohio Laws, 113, which authorized the county commissioners in counties in which there were situate cities of the first grade of the second class to improve roads extending from such cities and other roads and streets in certain cases. The act provided for an assessment by the foot front on the adjoining land in order to pay the cost of the improvement. Immediately upon the passage of the act and on or about March 31, 1890, the owners of the tract, including the plaintiffs, who were owners of a part thereof, inaugurated proceedings

under the act and presented a petition to the county commissioners asking for the improvement of the road through their property, as provided for in the act. The petition has been lost, but the evidence shows it was signed in behalf of all the owners of the land (including the plaintiffs) fronting or abutting on that part of the road proposed to be improved. The persons who signed this petition and subsequently other papers, on behalf of plaintiffs, were duly authorized so to do. The petition was granted and the commissioners made an order to that effect, and for the execution of the work at an expense of $7.25 per front foot. On or about August 1, 1890, a contract was entered into for the construction of the improvement, and between that time and October 16, 1891, the improvement was completed. An assessment was, on October 15, 1891, laid upon the whole tract to pay for the cost of the improvement, which amounted to $11.25 per front foot, thus largely exceeding the amount originally contemplated as such cost. This cost was thus enhanced by reason of changes of plans regarding the improvement made from time to time as the work progressed, and which were assented to or asked for by the land owners, including the plaintiffs.

In order to pay the cash for the cost of this improvement bonds were issued and sold by the county commissioners as provided for in the act, amounting to $110,000, in two issues, the first of $50,000 and the second of $60,000.

The total amount of the assessment on the plaintiffs' land, assessed per front foot, as provided for in the act, was $12,812.61, which, as the plaintiffs insist, largely exceeded the special benefit arising from the improvement, and would result, if enforced to its full extent, in the confiscation of plaintiffs' property. The bonds not having been paid, an action was brought on them against the county commissioners in the Federal Circuit Court in Ohio, and judgment recovered by the bondholders, which was affirmed by the United States Circuit Court of Appeals, 119 Fed. Rep. 36, without, however, passing upon the validity of the assessment now before this

court (p. 48). The act under which the improvement is made is set forth in full in the above report.

After the plaintiffs had paid seven annual installments of the assessment, each installment amounting to $1,256.61, and the total being $8,810.27, there remained a balance due on the assessment of $4,002.34, and this bill was filed on June 12, 1899, for the purpose of enjoining the collection of the balance remaining unpaid on the assessment, on the grounds already stated.

Immediately after the contract for doing the work of improvement was entered into between the county commissioners and the contractor, and in compliance with the provisions of the act, (section 13,) the commissioners designated two of the owners of the abutting property, who, together with the county surveyor, were to constitute a board, which was authorized to elect a superintendent to see that the contract was performed according to its true intent, and that all orders of the county surveyor in furtherance thereof were obeyed. Mr. Shepard, one of the plaintiffs, was designated as a member of the board, and acted as such, with another land owner and the county surveyor, and elected a superintendent as provided for in the act.

Mr. Shepard was also frequently present during the progress of the work and knew of the alterations in the work as they were subsequently and from time to time made. He was familiar with the law under which the action of the county commissioners was invoked and knew that it provided for an assessment upon the abutting property by the front foot for the payment of the cost of the improvement.

During the progress of the work, and on June 29, 1891, the agent of the Columbus Land Association (one of the owners of a portion of the tract) made a written proposal to the commissioners in relation to the improvement in question, and agreed that the land association would secure and pay the entire expense in removing the earth upon the circle in East Broad street and in beautifying and adorning the circle, upon

the condition that the street around the circle should be completed and paved in accordance with the plat, order and contract mentioned. The plaintiffs, acting under the name of the Alum Creek Ice Company, together with the other owners of real estate abutting upon these improvements, addressed a written communication to the county commissioners in connection with the foregoing proposal of the land company, in which they spoke of the improvements "now being made under proceedings by and before this board of county commissioners of Franklin County," and in which they also said that they "hereby withdraw all objection to said improvement and the assessment of their said real estate therefor on condition that the foregoing agreement shall be kept by said Columbus Land Association." The offer of the company was accepted, and there is no claim made that the company did not fulfill the agreement.

On September 2, 1891, the owners of the tract (plaintiffs among them) petitioned the commissioners to cancel the contract, with the assent of the contractor, for sodding the sides of the improved roadways, and gave as a reason therefor that a number of the property owners had informed the contractor that they would rather have grass seed sown thereon. The petitioners concluded: "We therefore petition that you cancel the above-mentioned contract, and that each one, for their respective frontage upon said street, will see to it that grass seed is sown upon said sideways of East Broad street this fall, and take upon themselves the care and charge of the same." The contract was cancelled, as asked for, with the consent of the contractor.

There was also presented to the commissioners a communication signed by the owners of the land, including the plaintiffs, asking the commissioners to cause all bonds issued by them for the expense of the improvement to be made for a period of twenty years from the date thereof, "and if you can extend the time to twenty years for the bonds already sold the extension of the time at which they would mature would be

satisfactory to the undersigned, all of which we respectfully petition for."

There was also signed by the plaintiffs Shepard and McLeish, among others, as members of the board appointed under the act, (section 13,) a resolution, "That the board for the improvement of said street hereby respectfully requests the county commissioners to do all in their power to carry out the prayer of said petition," the petition being to the board of county commissioners to take steps to have the bonds for the improvement extended so as to run twenty years.

There was also signed by all the land owners, including the plaintiffs, a communication, which, on account of its recitals and statement, is set forth at length:

"Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was by us presented to the board of county commissioners of Franklin County, Ohio, praying for the improvement of the extension of East Broad street, in this county, beginning at the bridge across Alum Creek on said street and extending eastwardly therefrom to the Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the general assembly of Ohio, entitled 'An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities, and other roads or streets in certain cases. Passed March 26, 1890.' Which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters and other passages for carrying off the water, and between what points said street was to be improved and the kind of material of a permanent character said petitioners desired used in said improvement; and whereas said petition was signed by all the persons owning property abutting upon the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement;

"And whereas, such proceedings were had by said board of county commissioners on said petition and in accordance with said act of the general assembly that the prayer of said petition was granted and said improvement made in accordance with the prayer of said petition; and

"Whereas said original petition as well as other papers relating to said improvement have been lost or mislaid:

"Now, in consideration of said improvement and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers,

"We hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defence against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof any informality arising from the absence or loss of any of said papers but agree that said improvement was legally made and constructed."

This paper was signed before the bonds, spoken of therein, were issued by the commissioners. It was required by the proposed purchasers of the bonds before they were taken and paid for. After the paper was signed the county commissioners thereupon issued the bonds and delivered them to the Ohio National Bank of Columbus, as agents for the purchasers.

After the improvements were completed the plaintiffs, in connection with other property owners, signed a petition to the county commissioners to lay sewer pipe, (a 15 and a 24-inch pipe,) and the petition provided: "The expense of said work to be assessed against the respective property on the street, the same as other expenses for making said improvement are levied and paid."

This is claimed to be a recognition of the assessment after the improvement had been made and after the land owners knew what it was, of their willingness to be still further assessed to effect a complete work.

Another paper, containing somewhat more in detail the

alleged facts regarding the improvement, and ending with the statement, "Said improvement has been and is now being legally made and constructed, and we hereby request that you execute and issue such further amount of bonds as shall be necessary to pay the cost of improvement," and purporting to be signed by the plaintiffs, among others, was offered (though it does not appear to have been received) in evidence. It was objected to by the plaintiffs on the ground that there was no proof that the paper had been signed by the plaintiffs, and that if the paper was a copy of another paper of similar import, the original was already in evidence. The record does not disclose what was the decision upon the objection thus made. The paper, it was stipulated between the parties, was a copy of the county commissioners' record of Franklin County, Ohio. A motion was also subsequently made to suppress this testimony, but no decision of the motion is disclosed by the record.

During the making of the improvement and for some time thereafter all parties assumed the act of 1890, under which the improvement was made, was constitutional.

The court below upon all the evidence held that it would consider but one matter of defence, that of estoppel, and held that it was sufficiently made out, and accordingly dismissed the bill.

Mr. David F. Pugh for appellants:

The assessment was illegal; it exceeded the value of the property. The front foot method of assessment is arbitrary and not according to benefits received. *Fay* v. *Springfield*, 94 Fed. Rep. 409; *Chamberlain* v. *Cleveland*, 34 Ohio St. 551, 567.

The statute under which the assessment was levied deprived the property owners of due process of law. There is no provision for notice. *Charles* v. *City of Marion*, 98 Fed. Rep. 166; *County of San Mateo* v. *Southern Pacific*, 13 Fed. Rep. 722.

This case is controlled by *Norwood* v. *Baker*, 172 U. S. 269, and see cases cited in that opinion. *Agens* v. *Mayor*, 37 N. J. L. 416; *Bogert* v. *Elizabeth*, 27 N. J. Eq. 568; *Hammett* v. *Philadelphia*, 65 Pa. St. 146; *Barns* v. *Dyer*, 56 Vermont, 469.

Norwood v. *Baker* was not reversed by *French* v. *Barber Asphalt Co.*, 181 U. S. 324, or any of the other cases simultaneously decided. The market value as proved showed that the property was not benefited by the assessment. *Chicago Traction Co.* v. *Chicago*, 68 N. E. Rep. 519.

There is no merit in appellee's claim that appellants were estopped. Either fraud or its equivalent must be proved in order to make the principles of estoppel available in this case. *Bank* v. *Morgan*, 117 U. S. 108; *Henshaw* v. *Bissel*, 18 Wall. 271. And see also *Lyon* v. *Tonawanda*, 98 Fed. Rep. 361; *O'Brien* v. *Wheelock*, 95 Fed. Rep. 883. The signing of the petition is not an estoppel. *Birdseye* v. *Clyde*, 61 Ohio St. 27. The highest court of the State has declared the act unconstitutional. *Bennignus* v. *County Treasurer*, 62 Ohio St. 666. The petitioners did not get what they petitioned for, so estoppel does not apply. They were only bound up to the constitutional limit of assessment and that has been exceeded by payments already made. See *Walsh* v. *Barron*, 61 Ohio St. 15; *Storer* v. *Cincinnati*, 4 C. C. 278; *S. C.*, affirmed 24 Wkly. L. Bull. 371. Appellee's claim that appellants are guilty of laches is not good. *Brown* v. *Sutton*, 129 U. S. 238; *Hammond* v. *Hopkins*, 143 U. S. 224. They were not obliged to sue until efforts were made to collect the assessment. *Columbus* v. *Angler*, 44 Ohio St. 485; *Lewis* v. *Taylor*, 61 Ohio St. 471; *Cincinnati* v. *James*, 55 Ohio St. 180. Estoppel is a question of general law. This court can so decide it by independent judgment. *Olcott* v. *Supervisors*, 16 Wall. 678.

That the appellants purchased property subject to assessment does not estop them. *Lewis* v. *Taylor*, *supra*; *State* v. *Jersey City*, 35 N. J. L. 381. No personal obligation rested upon the owners to pay the assessment under the statute.

Dreake v. *Beasley*, 26 Ohio St. 315. And the agreement of the grantee does not create an obligation. *Brewer* v. *Maurrier*, 38 Ohio St. 550; *Crowell* v. *Hospital*, 27 N. J. Eq. 656, cited in *Keller* v. *Ashford*, 133 U. S. 610.

Cases on appellee's brief can be distinguished and are not applicable to the case at bar.

Mr. Henry A. Williams and *Mr. Augustus T. Seymour* for appellee:

The foot front method of assessment for local surface improvement of streets is not necessarily contrary to the Federal Constitution. *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 397; *Tonawanda* v. *Lyon*, 181 U. S. 389; *Detroit* v. *Parker*, 181 U. S. 399; *Schumate* v. *Heman*, 181 U. S. 402; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 325; *Webster* v. *Fargo*, 181 U. S. 623; *Paulsen* v. *Portland*, 149 U. S. 30; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112; *Bauman* v. *Ross*, 167 U. S. 548; *Parsons* v. *Dist. of Columbia*, 170 U. S. 45.

Foot front method of assessing the cost of local improvements upon abutting property has been uniformly sustained by the Supreme Court of Ohio. *Ernst* v. *Kunkle*, 5 Ohio St. 521; *Northern Indiana R. R. Co.* v. *Connelly*, 10 Ohio St. 160; *Hill* v. *Higdon*, 5 Ohio St. 246; *Upington* v. *Oviat*, 24 Ohio St. 232; *Wilder* v. *Cincinnati*, 26 Ohio St. 284; *Cincinnati* v. *Oliver*, 31 Ohio St. 371; *Jaeger* v. *Burr*, 36 Ohio St. 371; *Haviland* v. *Columbus*, 50 Ohio St. 471; *Parsons* v. *Columbus*, 50 Ohio St. 460; *Sandrock* v. *Columbus*, 51 Ohio St. 317; *Findlay* v. *Frey*, 51 Ohio St. 390; *Schroeder* v. *Overman*, 61 Ohio St. 1; *Walsh* v. *Sims*, 65 Ohio St. 211; *Shoemaker* v. *Cincinnati*, 68 Ohio St. 603.

The statute is not subject to the objection that due process of law is denied by its provisions for want of notice to property owners before the levy of the assessment therein provided for. *Hager* v. *Reclamation Dist.*, 111 U. S. 701; *Hurtado* v. *California*, 110 U. S. 516; *Turpin* v. *Lemon*, 187 U. S. 51.

A party who might otherwise complain, may waive constitutional provisions enacted for his protection. *State* v. *Mitchell*, 31 Ohio St. 592; *Tone* v. *Columbus*, 39 Ohio St. 281; *Columbus* v. *Sohl*, 44 Ohio St. 479; *Columbus* v. *Slyh*, 44 Ohio St. 484; *Corry* v. *Gaynor*, 22 Ohio St. 584; *Treasurer* v. *Martin*, 50 Ohio St. 197; *Mott* v. *Hubbard*, 59 Ohio St. 199.

The Ohio decisions are consistent with the holdings of this court. *Daniels* v. *Tearney*, 102 U. S. 415; *Pierce* v. *Railway Co.*, 171 U. S. 641; *Wight* v. *Davidson*, 181 U. S. 371; *O'Brien* v. *Wheelock*, 184 U. S. 450.

The constitutionality of statutes similar to the one in question was uniformly upheld prior to the enactment of this law. *State ex rel. Hibbs* v. *Commissioners*, 35 Ohio St. 458.

Since its enactment, such statutes have been declared unconstitutional, because of their lack of uniformity of operation. *Hixson* v. *Burson*, 54 Ohio St. 470; *State ex rel.* v. *Davis*, 55 Ohio St. 15; *Mott* v. *Hubbard*, 59 Ohio St. 199.

The doctrine of the waiver of constitutional protection has become a rule of property in Ohio, and not presenting a Federal question is as binding upon the United States courts as if it were a part of the statute. *Lippincott* v. *Mitchell*, 94 U. S. 767; *Leffingwell* v. *Warren*, 2 Black, 599; *Olcott* v. *Bynum*, 17 Wall. 44; *Burgess* v. *Seligman*, 107 U. S. 20; *Electric Company* v. *Dow*, 166 U. S. 409; *Beaupré* v. *Noyes*, 138 U. S. 397; *Israel* v. *Arthur*, 152 U. S. 355; *Marrow* v. *Brinkley*, 129 U. S. 178; *Adams* v. *Burlington & U. R. R. Co.*, 112 U. S. 123; *Schaefer* v. *Werling*, 188 U. S. 516; *Gillis* v. *Stinchfield*, 159 U. S. 658; *Beals* v. *Cone*, 188 U. S. 184.

Two of appellants were estopped by reason of their assuming and agreeing to pay the assessment in a deed of conveyance accepted by them after the improvement was completed. *Thompson* v. *Thompson*, 4 Ohio St. 333; *Cramer* v. *Lepper*, 26 Ohio St. 59; *Freeman* v. *Auld*, 44 N. Y. 50; *Crawford* v. *Edwards*, 36 Michigan, 355; *Caldwell* v. *Columbus*, 56 Ohio St. 759; *Welsh* v. *Sims, Treas.*, 65 Ohio St. 211; *Keller* v. *Ashford*, 133 U. S. 610.

MR. JUSTICE PECKHAM, after making the above statement of facts, delivered the opinion of the court.

Both parties in this case seem to agree that the statute of 1890, under which these proceedings were taken, is void as in violation of the state constitution. As authority for that proposition the case of *Hixson* v. *Burson*, 54 Ohio St. 470, is cited. The case holds that a statute of a nature similar to the one under consideration violated the provision of the Ohio constitution, because, while its subject matter was general, its operation and effect were local, thus violating the provisions of section 26 of article 2 of the constitution of that State, which provides that "All laws of a general nature shall have a uniform operation throughout the State." The act under consideration in the case at bar seems to come within the principle of the above case.

The invalidity of the act as in violation of the state constitution has also been recognized by the Circuit Court of Appeals in the Sixth Circuit, in the case of *Board of Commissioners* v. *Gardiner Savings Institution*, 119 Fed. Rep. 36.

The bonds were held in that case to be valid obligations of the county, notwithstanding the unconstitutionality of the act under which they were issued, because at the time of their issue, which was before the decision in *Hixson* v. *Burson*, the Supreme Court of Ohio had held in *State* v. *Board of Franklin County Commissioners*, 35 Ohio St. 458, that an act which was in all respects similar in its nature to the one under consideration was constitutional and valid, and the Circuit Court of Appeals, therefore, held that under those circumstances the law as it had been declared at the time when the bonds were issued was the law applicable to them.

But the plaintiffs also insist that the act is void as a violation of the Fifth and Fourteenth Amendments to the Federal Constitution. The assessment per foot front, it is contended, leads in this case to a confiscation of the property of the plaintiffs, and is not based upon the fact of benefits received, and

it results in taking the property of plaintiffs without due process of law.

Before coming to the consideration of the validity of these objections to the statute the defendant insists that by virtue of the facts already detailed in the foregoing statement the plaintiffs are not in a position to raise the question. We regard this objection as well taken.

The facts upon which the defence rests are above set forth at length, not including the paper, which does not appear to have been received in evidence. A defence of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts, by which the party obtaining the benefit of the work agrees to pay for it in the manner provided in the statute under which it is done, even though the statute turn out to be unconstitutional. It does not in the least matter what we may call the defence, whether it be estoppel or implied contract, or one partaking of the nature of both, the result arrived at being that the plaintiffs are told that under all the facts proved in the case they cannot set up the unconstitutionality of the act or that they are bound by their contract to pay the assessment. Where, as in this case, the work is done and the assessment made at the instance and request of the plaintiffs and the other owners, and pursuant to an act (in form, at least) of the legislature of the State, and in strict compliance with its provisions and with the petition of the land owners, there is an implied contract arising from such facts that the party at whose request and for whose benefit the work has been done will pay for it in the manner provided for by the act under which the work was done.

In this case the manner of payment was, as provided for in the act, by an assessment upon the land by the foot front. The money thus collected would form a fund to be used to pay the bonds which were to be issued in accordance with the act by the county commissioners acting for the county. The

county thus became the debtor for a debt which was incurred entirely for the benefit and at the request of the owners of the land. Under such facts the county has the right to look at the assessment upon the land as the fund out of which to pay the bonds. In this view the constant and frequent promises and representations made by the plaintiffs after the work was embarked upon are material evidence of the implied contract to pay for the work arising from the request for its performance. It is, therefore, upon these facts, immaterial that the law under which the proceedings were conducted was unconstitutional, because the work was done at the special request of the owners, under the provisions of the act and upon a contract, both implied and in substance expressed, that the bonds would be paid and the assessment to be imposed for the raising of a fund to pay them would be legal and proper.

Although the land owners have been greatly disappointed in the results of the improvement and the affair has proved somewhat disastrous, yet they have obtained just such an improvement as they asked for and expected, and they are the ones to bear the disappointment and loss.

It is true this action is not between the bondholders and the owners of the land. The representations and agreement of the land owners were, however, made for the purpose of obtaining a market for the sale of the bonds, and, in order that there should not be any suspicion of their invalidity, the land owners agreed that the work was legally done and the improvement legally constructed. The representation and agreement were, in fact, directed to all who might be interested in the matter, including the county commissioners, who were to issue the bonds as representatives of the county. The effect was to provide, in substance, that the lien of the assessment should be valid and the assessment should create a fund for the payment of the bonds. The defendant, representing the county, must be permitted to take advantage of the representations and agreement of the land owners, as the county has a direct interest in sustaining the validity of the assessment, and the representa-

tions were made, among others, to the county commissioners, who represented the county in issuing the bonds and in doing the work.

On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken and that the assessment should be made in accordance with those provisions. This principle has been recognized in Ohio many times. See *State* v. *Mitchell*, 31 Ohio St. 592, 609; *Tone* v. *Columbus*, 39 Ohio St. 281, 296; *City of Columbus* v. *Sohl*, 44 Ohio St. 479, 481; *City of Columbus* v. *Slyh*, 44 Ohio St. 484; *Mott* v. *Hubbard*, 59 Ohio St. 199, 211.

In *Wight* v. *Davidson*, 181 U. S. 371, this court, while not positively deciding the proposition, yet strongly intimated, (p. 377,) that by reason of the acts of the appellees they were not in a position to question the validity of the statute there under consideration, but as there were others than the appellees concerned, and a decision of the Court of Appeals had declared the act void as to the appellees, it was thought better to pass by the question whether they were estopped by having made the dedication provided for in the act, and to decide the question of the constitutionality of the act of Congress under which the proceedings were had. The act was held to be valid.

Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go so far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. Cooley on Taxation, p. 573, and cases cited in note 5; *Tagh* v. *Adams*, 10 Cush. 252; *Bidwell* v. *City of Pittsburg*, 85 Pa. St. 412; *Shutte* v. *Thompson*, 15 Wall. 151.

Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid and the expense thereof, which he ought to pay, transferred to a third person.

Plaintiffs argue that, although the work was to be done under the provisions of the act of 1890, yet they had the right to assume that the assessment to be imposed for the payment of the bonds would be what they term a valid assessment; or, in other words, would be made as they insist, not upon the foot front, (as provided for in the act,) but according to the actual benefit received from the improvement, and they cite *Birdseye* v. *Village of Clyde*, 61 Ohio St. 27, as authority for the proposition.

In that case it was held that the land owner was not estopped to object to the assessment because he had acquiesced in the construction of the improvement and had petitioned therefor, and thereby consented to the raising of a certain proportion of its cost by an assessment on all abutting property. There was, however, a statute which provided that no assessment should be made on any lot or land for an improvement in excess of twenty-five per cent of the value of the property as assessed for taxation. Although the plaintiff had petitioned for the improvement, it was held that he was not on that account estopped from objecting to any assessment which was over twenty-five per cent of the value of the property. It was not to be assumed that the plaintiff waived the benefit of the general statute because he asked for the work. The case has

no application, as we think, to the one before us. Certainly in the *Birdseye* case the plaintiff had a right to assume, notwithstanding his petition that the work should be done, that the assessment on his land should not be greater than the law provided for. But in the case at bar the petition asked for the doing of the work under the very statute which in terms provided that the assessment should be made by the foot front, exactly as in fact it was made, and in making such assessment the commissioners but complied with the request of the petitioners.

The plaintiffs have referred to *O'Brien* v. *Wheelock*, 184 U. S. 450, as the chief authority to support their contentions as to estoppel. In that case, while the estoppel contended for was denied, yet, (at page 491,) it is stated, in the opinion of the court, which was delivered by the Chief Justice, that: "The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."

In the case at bar it is seen that the plaintiffs did in fact receive the full consideration for the contract. They obtained the improvement asked for, so far as the doing of the work was concerned, although the results arising therefrom were a great disappointment to them.

Looking at the facts in the case cited, they show that the scheme proposed and under which the proceedings were taken was of large proportions, and consisted of a plan to redeem from overflow by the Mississippi River a large amount of land, from three to five miles in width, extending along the river for more than fifty miles, containing over one hundred thousand acres, lying in portions of three different counties, varying greatly in condition and value, and owned severally by a great

number of people. The work was to be done by building levees and digging drains and ditches, and doing other work by which to drain the land and render it valuable for agricultural purposes. Certain of the land owners had at all times opposed the proceedings instituted to assess their land. The permanent success of the scheme rested in the character of the work and in its maintenance by compulsory process after it had been constructed in its various branches. The case is one seldom equalled in respect to the size of the tract to be reclaimed at the expense of the land owners, the numbers interested as such owners, and the immense expense of the work. The first requisite was a valid act of the legislature authorizing the work and providing a means for its accomplishment. To that end the act of 1871 was passed. The history of the proceeding thereafter is given, commencing at page 457 of the report in 184 U. S., but it is entirely too long to be referred to here in detail. It is enough to say that, after perusing it, there will be found great difficulty in perceiving even a slight analogy to the case before us. The facts cannot be summarized. They must be appreciated in all their fullness and detail, and when thus examined the result arrived at will, as we think, seem inevitable. The case was *sui generis*.

The one great purpose was, not alone to build, but to maintain a work which in its nature would require constant supervision and repair. Unless the work could be maintained by compulsion when necessary, it plainly would have appeared at the very beginning to involve an idle waste of money. It could not be maintained unless the act upon which the whole scheme rested was valid, and could from time to time and always be enforced. But that act was held to be unconstitutional long before the work was completed, and the land owners, on account of the inability to compel either the completion or the maintenance of the work, were unable to receive the benefit which it had been supposed would accrue under the act thus declared illegal. The work never was

fully and in all things completed, while the credit of the bonds, which were issued to the contractors for doing the work and sold by them, was maintained by reference simply to the law under which they were issued and upon the opinion of counsel as to its validity.

It also appears that the land owners never gave any assurances to the contractors for the work or to those who purchased the bonds after they were delivered to the contractors, regarding their validity or value, but they supposed if the work were done it could and would be kept up under the sanction of the law which provided for it.

Upon the facts as detailed in the report the court held that there was nothing in the general principles of implied contract which would prevent the land owners from resisting the enforcement of the lien of the bonds upon the land.

In contrast with these facts it is seen that in the case at bar the plaintiffs and other land owners have received full consideration for their promise, and have obtained precisely what they asked for and in the manner they asked it. We have also the written petition for the improvement, an active participation of the plaintiffs in carrying it out under the act, the frequent statements on their part and upon the part of the other land owners of the validity of the work and the regularity of the assessment to be made under the terms of the act, and the specific statement, made for the purpose of inducing the issuing of the bonds and their purchase by the individuals who took them, that practically the work had been done properly and there was no defence to the bonds. This is equivalent to saying the assessment to be laid as requested, under the act of 1890, would be valid and no defence interposed to its collection. The differences of fact in the two cases show that the *O'Brien* case furnishes no authority for the plaintiffs herein. We concur in the remarks of the District Judge in this case, when he said that: "The complainants invoked the action of the county commissioners to enhance the value of their land; they actively promoted the improvement, knowing that its

cost must be paid by a front foot assessment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual installments of the assessment for seven years and until they were tempted by the decision of the Supreme Court, in *Baker* v. *Norwood*, to cast their burden upon the general public, and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the 'boom.' "

We do not consider the validity of the contention on the part of the plaintiffs, that the act or the assessment in furtherance of its provisions violates in any particular the Federal Constitution. For the reason given above we are of opinion the judgment is right, and it is

Affirmed.

BURRELL *v.* MONTANA.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 218. Submitted April 13, 1904.—Decided May 31, 1904.

A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he could not have been compelled to give it. The time to avail of a statutory protection is when the testimony is offered.

The provision in the bankruptcy act of July, 1898, requiring the bankrupt to testify before the referee, but providing that no testimony then given by him shall be offered in evidence against him in any criminal proceeding, does not amount to exemption from prosecution, nor does it deprive the evidence of its probative force after it has been admitted without objection in a criminal prosecution against the bankrupt in a state court.

THE facts are stated in the opinion of the court.

Mr. E. C. Day for plaintiff in error:

Plaintiff in error submitted to the cross-examination in the state court relative to his testimony before the referee in

bankruptcy without objection, and error was not assigned in the Supreme Court upon the cross-examination. It was assigned with reference to the giving of the instruction to the effect that the examination before the referee in bankruptcy amounted to a voluntary admission which was competent evidence in a criminal prosecution against the bankrupt.

Prior to this examination and the institution of these criminal proceedings the Circuit Court of Appeals for the Ninth Circuit in May, 1900, decided in *Mackel* v. *Rochester*, 102 Fed. Rep. 314; *S. C.*, 42 C. C. A. 427, that a bankrupt could not refuse to answer questions relating to his transactions on the ground that his answers would tend to incriminate him, for the reason that his constitutional privilege against his self-incriminating evidence was protected by the Bankruptcy Act of 1898, ch. 3, § 7, subd. 9. See also *Brown* v. *Walker*, 161 U. S. 591. *Mackel* v. *Rochester* has never been reversed or overruled. At the time of the examination and at the time of the criminal trial, it was the law of the circuit that the bankrupt could not decline to answer questions put to him upon his examination upon the ground that his answer might tend to incriminate him, and his submission to the examination was to that extent not voluntary.

The ultimate jurisdiction over questions involving the constitutionality of the United States bankrupt laws rests in the Federal courts, and such courts having pronounced said law to be constitutional, a defendant who brings himself within its provisions will have a complete defence. *Keene* v. *Mould*, 16 Ohio St. 12. The decision of this court upon the constitutionality of the legal tender act is of paramount authority, and state courts are bound by whatever construction that court places upon the law. *Black* v. *Lusk*, 69 Illinois, 70; *Barringer* v. *Fisher*, 45 Mississippi, 200; *Kellogg* v. *Page*, 44 Vermont, 356.

The state court is bound to follow the decisions of this court as to whether an act of Congress is constitutional or not. *Hicks* v. *Hotchkiss*, 7 Johns. Ch. 297; *Burwell* v. *Burgess*, 32

Grat. 472; *Ex parte Bushnell*, 9 Ohio St. 77; *Mooney* v. *Hinds*, 160 Massachusetts, 469; *State* v. *Sioux City &c. Ry. Co.*, 46 Nebraska, 682.

The decision of the Circuit Court of Appeals, until it was reversed or overruled, was entitled to the same credit and force and effect in the courts in the State of Montana as the decision of the Supreme Court of the United States. Consequently when it appeared in the state court that the defendant, now plaintiff in error, had been examined before the referee in bankruptcy touching the matters out of which grew the transaction complained against in the criminal proceeding, it was the duty of the state court to have dismissed the proceeding. The immunity given by the Bankruptcy Act, if any, goes further than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy. It goes, and must go, if it is to secure to him his constitutional privilege, to the extent of protecting him from prosecution for any crime growing out of the transaction about which he has been examined. *Brown* v. *Walker*, 161 U. S. 591; *Mackel* v. *Rochester*, 102 Fed. Rep. 314.

This then was a jurisdictional question touching the right of the state court to prosecute him for offenses growing out of these transactions, and being jurisdictional in its character could be raised at any time, even after conviction and sentence. It was contended by counsel for the State that the immunity granted by the act extended only to prosecutions by the Federal government. That question, however, has been otherwise decided by this court in the case of *Brown* v. *Walker*, *supra*.

Mr. James Donovan, Attorney General of Montana, for defendant in error:

Mackel v. *Rochester* cited as sustaining plaintiff in error is mere dictum and is clearly against the well considered decision of the Supreme Court in the case of *Counselman* v. *Hitchcock*, 142 U. S. 564, and against the great weight of Federal author-

ity. See editorial note to *Mackel* v. *Rochester*, 4 Am. Bk. Rep. page 1, and cases therein cited; *In re Scott*, 1 Am. Bk. Rep. 49; *In re Hathorn*, 2 Am. Bk. Rep. 298; *In re Rosser*, 2 Am. Bk. Rep. 755; *In re Feldstein*, 4 Am. Bk. Rep. 321; *In re Walsh*, 4 Am. Bk. Rep. 693.

As to whether or not the provision of the Bankruptcy Act referred to above can have effect upon the courts of the State of Montana, or be applicable thereto, or whether or not Congress has any power to say what shall be or what shall not be evidence in a state court, Congress has no such power. See dissenting opinion in *Brown* v. *Walker*, 161 U. S. 591; *Barron* v. *Mayor*, 7 Pet. 247; *Bowlin* v. *Commonwealth*, 92 Am. Dec. 468; *Knox* v. *Rossi*, 48 L. R. A. 305; *Thomas* v. *State*, 46 L. R. A. 481, and notes; *Small* v. *Slocumb*, 37 S. E. Rep. 481, and cases cited; *Clemens* v. *Conrad*, 19 Michigan, 170; *Sammons* v. *Halloway*, 21 Michigan, 162; *People* v. *Gates*, 43 N. Y. 40; *Moore* v. *Moore*, 47 N. Y. 467; *Moore* v. *Quirk*, 105 Massachusetts, 49.

While defendant was examined by the referee, and the testimony so taken was used by counsel for the State reading from the testimony produced and left with him by the referee in bankruptcy, and interrogating the witness with the aid of such testimony it does not appear that any objection was interposed by defendant to the questions asked or to the use of such testimony, and he must therefore be deemed to have waived all such objections by failing to make them at the proper time. *State* v. *Burrell*, 27 Montana, 282.

An objection to the reception of evidence cannot be raised for the first time on appeal. *Griswold* v. *Boley*, 1 Montana, 553; *Stafford* v. *Hornbuckle*, 3 Montana, 488; *Rutherford* v. *Talent*, 6 Montana, 134; *Bass* v. *Buker*, 6 Montana, 447; *Brand* v. *Servoss*, 11 Montana, 87; *Bank* v. *Greenhood*, 16 Montana, 458.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error was convicted upon information filed in the District Court of the Eighth Judicial District of the State

of Montana of the crime of obtaining money under false pretenses. The judgment of conviction was affirmed by the Supreme Court of the State. 27 Montana, 282.

The false pretenses consisted of a false statement in writing made to the Royal Milling Company, a corporation, concerning his assets and liabilities, whereby he induced the company to sell him goods of great value.

Plaintiff in error testified in his own behalf, and during the cross-examination he was questioned in regard to statements made by him in testimony made before the referee in bankruptcy in his own proceedings. No objection was made.

In view of the examination the trial court instructed the jury as follows:

"The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or charged with a criminal offense when he made such admission, if he did make any such."

Plaintiff in error excepted to the instruction as follows: "For the reason that said instruction invades the province of the jury, in that it directs their attention to the alleged admissions of the defendant and is a charge upon the effect and weight of the evidence. The defendant excepts to the instruction for the further reason that the same does not correctly state the law, in this, that it appears from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the act of Congress, approved July 1, 1898, which said act provides as follows: Chapter III, section, etc. 'But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding.' And the said instruction is against the law."

The instruction seems to oppose the provisions of the statute, but the circumstances of the case must be considered. There was no objection made to the introduction of the testimony, and, as we understand the instruction, it was but the expression of the value of the testimony. The contention of plaintiff in error must have been in the trial court as it was in the Supreme Court and is here, to wit, that section 7 of the bankruptcy act grants more than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy—that it grants him protection from prosecution for any crime growing out of the transaction about which he was examined; and this necessarily to secure to him the full protection of that clause of the Constitution of the United States which provides that "no person shall be compelled in criminal cases to be a witness against himself." Upon this broad contention he must now rely. A narrower contention might have been yielded to by the state courts. It certainly should have been submitted to them. The statute does not prohibit the use of testimony against the consent of him who gave it. It prescribes a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered. After the testimony is admitted its probative force cannot be limited. This could not be contended even under the broader provision of the Constitution. A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he was not compellable to give it.

In the case at bar, the court dealt with testimony which had been admitted without question or objection. We are brought, therefore, to the broad and ultimate contention of the plaintiff. We think it is untenable. There is no ambiguity in section seven of the bankrupt act. It requires a bankrupt to submit to an examination concerning his property and affairs, and provides: "But no testimony given by him shall be offered in evidence against him in any criminal proceed-

ing." It does not say that he shall be exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him.

The two things are different, and cannot be confounded. The difference is illustrated by the different constructions this court has given to section 860 of the Revised Statutes and the provisions of the act of Congress of February 11, 1893, c. 83, 27 Stat. 443.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, it was contended that the protection of section 860 was that of the Constitution, and it was sought to compel a witness to testify to matters which he claimed would incriminate him. This court held against the contention, and the witness was justified. We did not attempt to extend the section to the prohibition of criminal prosecutions, but confined its immunity to that which was expressed, to wit, that the testimony given should not "be given in evidence, or in any manner used, against him or his property or estate, in any court of the United States, in any criminal proceeding. . . ."

The act of February 11 was different and the ruling upon it was different. It provided as follows:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them or in any such case or proceeding."

It was held in *Brown* v. *Walker*, 161 U. S. 591, that the act was virtually one of "general amnesty," and the protection of the Constitution was "fully accomplished by the statutory immunity." As in *Counselman* v. *Hitchcock* a witness before a grand jury which was investigating alleged violations of the Interstate Commerce Act, claimed that questions addressed to him "would tend to accuse and incriminate him." Upon proceedings in the District Court he was adjudged guilty of contempt and ordered to pay a fine of five dollars and to be

taken into custody, until he should answer the question. He petitioned the Circuit Court for writ of *habeas corpus*, and from the judgment remanding him to custody prosecuted an appeal to this court. It was held that he was compellable to answer.

In the case at bar, as we have already said, plaintiff in error did not claim the protection afforded him by the bankrupt act. He made no objection to the use of the testimony which he gave before the referee, nor does he now urge its use as error. He broadly claimed and now claims exemption from prosecution. For the reasons we have given the claim is untenable.

Judgment affirmed.

TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY *v.* INDIANA *ex rel.* KETCHAM.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 264. Argued April 29, May 2, 1904.—Decided May 31, 1904.

Where the state court has sustained a result which cannot be reached except on what this court deems a wrong construction of the charter without relying on unconstitutional legislation this court cannot decline jurisdiction on writ of error because the state court apparently relied more on the untenable construction than on the unconstitutional statute.

A provision in a charter of a railroad company that the legislature *may* so regulate tolls that not more than a certain percentage be divided as profits to the stockholders and the surplus shall be paid over to the state treasurer for the use of schools, *held*, in this case to be permissive and not mandatory and that until the State acted or made a demand the railroad company could act as it saw fit as to its entire earnings.

When, therefore, the company surrendered its original charter and accepted a new one without any such provision and there had up to that time been no attempt on the part of the State to regulate tolls nor any demand made for surplus earnings the company was free from liability under the original charter, and subsequent legislation attempting to amend its charter or the general railroad law would not affect its rights.

THE facts are stated in the opinion of the court.

Mr. Lawrence Maxwell, Jr., and *Mr. John G. Williams*, with whom *Mr. Samuel O. Pickens* was on the brief, for plaintiff in error:

The State, having accepted an unconditional surrender of the company's original charter, could not thereafter impose an obligation upon the company by virtue of power contained in the surrendered charter. The surrender was equivalent to the repeal of the charter with the consent of the company. The repeal of a statute takes away all powers which depend upon the statute, that have not been exercised and are not reserved. *Surtees* v. *Ellison*, 9 B. & C. 750; *Moor* v. *Seaton*, 31 Indiana, 11; *Kay* v. *Goodwin*, 6 Bing. 576, 582; *Miller's Case*, 1 W. Bl. 451; *Yeaton* v. *United States*, 5 Cranch, 281; *Schooner Rachel* v. *United States*, 6 Cranch, 329; *Ex parte McCardle*, 7 Wall. 506, 514; *Railroad Co.* v. *Grant*, 98 U. S. 398, 401; *Gurnee* v. *Patrick County*, 137 U. S. 141; *In re Hall*, 167 U. S. 38; *Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet. 492; *Clapp* v. *Mason*, 94 U. S. 589; *Mason* v. *Sargent*, 104 U. S. 689; *Sturges* v. *United States*, 117 U. S. 363; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Aspinwall* v. *Commissioners*, 22 How. 364; *Baltimore &c. S. R. R. Co.* v. *Nesbit*, 10 How. 395; *Lamb* v. *Schottler*, 54 California, 319, 323; *Terry* v. *Dale*, 27 Tex. Civ. App. 1; *Cushman* v. *Hale*, 68 Vermont, 444; *Van Inwagen* v. *Chicago*, 61 Illinois, 31; *Curran* v. *Owens*, 15 W. Va. 208; *Dillon* v. *Linder*, 36 Wisconsin, 344; *Bennett* v. *Hargus*, 1 Nebraska, 419; *Kertschacke* v. *Ludwig*, 28 Wisconsin, 430; *Rood* v. *C. M. & St. P. Ry. Co.*, 43 Wisconsin, 146; Sutherland Stat. Cons. §§ 162, 163; 26 Am. & Eng. Ency. of Law (2d ed.), 745, 747, 752; Endlich, Interp. Stats. §§ 478, 480; Hardcastle, Stat. Law (3d ed.), 374.

The judgment of the Superior Court of Marion County in 1876 created a vested right which it was not within the power of the legislature to impair. *McCullough* v. *Virginia*, 172 U. S. 102, 123; *Memphis* v. *United States*, 97 U. S. 293; *Atkinson* v. *Dunlap*, 50 Maine, 111, 115; *Davis* v. *Menasha*, 21 Wisconsin, 497, 502; *Lancaster* v. *Barr*, 25 Wisconsin, 560;

Beaupre v. *Hoerr*, 13 Minnesota, 366; *Germania Savings Bank* v. *Suspension Bridge*, 159 N. Y. 362, 368; *Gompf* v. *Wolfinger*, 67 Ohio St. 144, 152; *McCabe* v. *Emerson*, 18 Pa. St. 111; *Griffin's Executors* v. *Cunningham*, 20 Grat. 31; *Wieland* v. *Schillock*, 24 Minnesota, 345; *Dorsey* v. *Dorsey*, 37 Maryland, 64, 74.

The legislation of 1897 does not provide a remedy for a preëxisting cause of action, but creates a new cause of action. *Commissioners* v. *Rosche Bros.*, 50 Ohio St. 103, 112.

If the company was indebted to the State prior to 1897, there was ample authority for a suit to collect the debt. *State ex rel.* v. *Denny*, 67 Indiana, 148, 159; *Carr* v. *State ex rel.*, 81 Indiana, 342; *Board* v. *State*, 92 Indiana, 353; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278.

The opinion of the Supreme Court of Indiana concedes that there was no cause of action in 1875, and that the present suit could not be maintained but for the legislation of 1897.

The effect given to the legislation of 1897 by the judgment under review is to destroy the vested right of the company under the judgment of 1876 in its favor, and to impair the obligation of the contract of surrender of 1873.

In determining whether the legislation of 1897 impairs the obligation of prior contracts between the company and the State, or destroys its vested rights, this court will construe the contracts for itself, and will determine the effect thereon of the subsequent legislation. *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 486, 492; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Wilson* v. *Standefer*, 184 U. S. 399, 411; *Yazoo & Miss. R. R.* v. *Adams*, 180 U. S. 41; *Citizens' Bank* v. *Parker*, 192 U. S. 73, 85.

The statutes of 1897 are all repugnant to the Constitution of the United States. The act of January 27, without constitutional right and in pursuance of the authority of a charter which had been surrendered twenty-four years before, required the company to account to the State for its earnings and private property commencing fifty years back. The act of Febru-

ary 18 declared the contract of surrender made twenty-four years before to be inoperative. The act of February 24 undertook to amend the charter, which never was subject to amendment and which, moreover, had been surrendered twenty-four years before, by imposing new and different obligations and declaring that the liability of the company should "be the same as though this amendment had been originally a part of the charter of said railroad and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the State." The act of March 4 appropriated the company's private property to the use of the State and directed the Attorney General to sue for its recovery.

The company never was liable to account to the State for surplus earnings, in the absence of legislation regulating its tolls. This was the thing adjudged by the Superior Court of Marion County in 1876. The adjudication of a question of law, such as the construction of a contract, is as binding as the adjudication of an issue of fact. *Tioga Railroad* v. *Blossburg &c. Railroad*, 20 Wall. 137; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Birckhead* v. *Brown*, 5 Sandf. 134, 149.

What was adjudged in 1876 may be shown by parol proof, and is established by the opinion of the Superior Court of Marion County in sustaining the demurrer to the complaint. *Russell* v. *Place*, 94 U. S. 606; *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316, 329; *Miles* v. *Caldwell*, 2 Wall. 35, 42; *Bottorff* v. *Wise*, 53 Indiana, 32; *Packet Company* v. *Sickles*, 5 Wall. 580, 590; *Doty* v. *Brown*, 4 N. Y. 71; *Campbell* v. *Gross*, 39 Indiana, 155, 159; *Walker* v. *Chase*, 53 Maine, 258; *Wood* v. *Faut*, 55 Michigan, 185; *Carleton* v. *Lombard, Ayers & Co.*, 149 N. Y. 137; *Hargus* v. *Goodman*, 12 Indiana, 629; *Campbell* v. *Cross*, 39 Indiana, 155; *Roberts* v. *Norris*, 67 Indiana, 386; *Birckhead* v. *Brown*, 5 Sandf. 134 (N. Y. Superior Court); *Spicer* v. *United States*, 5 C. Cl. 34.

Mr. William A. Ketcham and *Mr. Robert S. Taylor*, with

whom *Mr. Roscoe O. Hawkins* and *Mr. Ferdinand Winter* were on the brief, for defendant in error:

The judgment does not depend in any respect upon the denial of any right secured by the Constitution of the United States, and no Federal question is involved. The jurisdiction of this court in the present case depends upon whether in the court below the defendant in error asserted the validity of the legislation by the general assembly of the State of Indiana, of 1897, and that the plaintiff denied such validity on the ground of its being repugnant to the Constitution of the United States, and that the decision was in favor of its validity, or whether any right claimed under the Constitution of the United States, and specially set up and claimed by the plaintiff in error, has been denied. 1 Compiled Statutes, U. S. 1901, § 709; *Duncan* v. *Mississippi*, 152 U. S. 377; *De Saussure* v. *Gaillard*, 125 U. S. 18; *Missouri* v. *Andriano*, 138 U. S. 497; *McNulty* v. *The People*, 149 U. S. 645; *Carothers* v. *Mayer*, 164 U. S. 325. Only the Federal question thus presented can be reviewed in this court. *Ashley* v. *Ryan*, 153 U. S. 436.

Where the case was decided in the court below on an independent ground, broad enough to maintain the judgment, and not involving a Federal question, this court will dismiss the writ of error without considering the Federal question. *Beatty* v. *Benton*, 135 U. S. 244; *Marrow* v. *Brinkley*, 129 U. S. 178; *Hale* v. *Akers*, 132 U. S. 554; *Eustis* v. *Bolles*, 150 U. S. 361; *Costello* v. *McConnico*, 168 U. S. 674; *Missouri Pac. Ry. Co.* v. *Fitzgerald*, 160 U. S. 556.

If merely the construction of state statutes is involved the writ of error will not lie. *Insurance Co.* v. *Treasurer*, 11 Wall. 204; or to review the decision of the court below upon questions of fact. *Dower* v. *Richards*, 151 U. S. 658; *Hedrick* v. *Atchison &c. Ry. Co.*, 167 U. S. 673; *Egan* v. *Hart*, 165 U. S. 188; or on questions of the admission or rejection of evidence which does not bear directly upon some matter of a Federal nature. *Cleveland &c. R. R. Co.* v. *Backus*, 154 U. S. 439; *Central Pac. Ry. Co.* v. *California*, 162 U. S. 91.

A Federal question is not presented simply because the party litigant asserts that the claim made against him by his adversary depends upon the assertion, or involves the denial, of some right secured to him by the Constitution or laws of the United States. The record must affirmatively show such to be the fact. *Crowell* v. *Randall*, 10 Pet. 368.

The assignment of errors, asserting the existence and decision against the plaintiff in error, of a Federal question, counts for nothing, unless from the record itself the facts appear. *Fowler* v. *Lamson*, 164 U. S. 252; *Clarke* v. *McDade*, 165 U. S. 168; *Walker* v. *Villavaso*, 6 Wall. 124.

And as to absence of Federal question, see *California* v. *Hollady*, 159 U. S. 674; as to when state legislation relating to remedy does not impair contracts, see Cooley's Con. Lim. 346, 357; *Ogden* v. *Saunders*, 12 Wheat. 213; *Been* v. *Haughton*, 9 Pet. 329; *Tennessee* v. *Speed*, 96 U. S. 69; *Chicago &c. R. R. Co.* v. *State*, 153 Indiana, 135; *Citizens' Bank* v. *Parker*, 192 U. S. 73, 85; *Yazoo & Miss. R. R. Co.* v. *Adams*, 180 U. S. 41.

Regulation of tolls by the legislature was not a condition precedent to the obligation of plaintiff in error to pay its surplus earnings to the Treasurer of State for the use of the common schools. Section 23 of the act of 1847 limited the amount that plaintiff in error should ever appropriate in profits to its own use.

When these sums were realized, the surplus, if any, after the payment of the expenses, and reserving such proportion as might be necessary for future contingencies, was payable to the Treasurer of State for the use of common schools, without reference to whether the State had taken action to regulate the tolls and freights of the company.

The road held the profits in trust upon demand of the State.

Corporations are mere creatures of law and have no powers except those expressly granted or indispensably necessary to the exercise of those expressly granted. *Commonwealth* v. *Erie & N. E. R. R. Co.*, 27 Pa. St. 339, 351; *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 511; *Stourbridge Canal Co.* v. *Wheeley*,

2 B. & Ad. 792; 4 Thompson on Corp. § 5661; *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the State of Indiana to ascertain and to recover from the plaintiff in error the total net profits made by the latter over fifteen per cent on the true cost of construction of its railroad, from the time when the net earnings equalled that cost with ten per cent on the same added. The claim of the State was made under § 23 of the charter of the railroad, approved January 26, 1847, and four acts of 1897 to be referred to. The complaint admits, and the answer sets up, a surrender on January 17, 1873, of the charter of 1847, on which the supposed obligation was based, and an acceptance of the general railroad law by the company, and also a judgment for the company in March, 1876, on a former complaint for the same cause. The answer also makes a general denial and invokes the Fourteenth Amendment and other relevant parts of the Constitution of the United States. The case was referred to a master, who ruled that the former judgment was not a bar, but ruled also that the company was not liable. The superior court ruled the other way and gave judgment against the company for $913,905.01. This judgment was affirmed by the Supreme Court of the State, and the case then was brought here by writ of error.

By § 22 of the charter the railroad is given absolute discretion in the fixing of charges. Then, by § 23: "When the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving?] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State, for the use of common schools, but the cor-

poration shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses," etc. By § 24: Semi-annual dividends of so much of the profits as the corporation may deem expedient are to be made, and "the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper." By § 35, repealed in 1848, the corporation is to keep a fair record of the whole expense of making and repairing its road, etc., and also a fair account of the tolls received, and the State is to have the right to purchase the stock of the company after twenty-five years for a sum equal, with the tolls received, to the cost and expenses of the railroad with ten per cent.

The complaint relied also upon an amendment of section 23, on February 24, 1897, attempting to make the above mentioned surplus profits a debt and to make the company accountable from the beginning of such profits. The complaint still further relied upon an act of January 27, 1897, requiring the railroad to account; an act of March 4, 1897, appropriating the net earnings of the company above fifteen per cent, etc., as above, to the use of common schools, and authorizing a demand and a suit; and an amendment of the general railroad law on February 18, 1897, after the surrender of this company's charter, providing that all liabilities to the State, whether inchoate or complete, under special charter, were and should be reserved, notwithstanding the past or future acceptance of the surrender of such special charters.

The Supreme Court, while agreeing that the right of the State must depend on the original charter, did give force to this later legislation, in terms, as providing a remedy, and, on the construction which we are compelled to give to the charter, did also give force in fact to the amendment to the provision attempting retrospectively to save the charter obligations after

a surrender had been accepted. Therefore the question is properly here whether these statutes impaired the rights of the railroad under the Constitution of the United States. For in order to determine whether the later legislation impairs those rights, this court must decide for itself what those rights were. If in the opinion of this court the State had lost all right to demand any sum whatever under § 23 of the charter, legislation necessary to enforce such a demand is invalid and may be pronounced so by this court, notwithstanding the fact that the cause of action now is based upon the original act. We shall recur to the question of our jurisdiction after discussing the merits of the case, which we must do to make what little we have to add plain.

The Supreme Court of the State seems, although it is not clear, to have construed § 23 as creating by itself alone a debt to the State which accrued as fast as surplus profits were realized, which, under that section, might have been required to be paid over to the treasurer of State. It is pointed out that in 1847 the State had no credit and was in need of roads and schools, and that therefore it was natural to provide for the handing over of any surplus after a liberal return to the owners of the road. It is thought that the express grant of an absolute right to fifteen per cent negatives the right to more, that the provisions for an account in §§ 23 and 35 and the mandatory language as to the surplus confirm this result, and that it is unreasonable to suppose that the legislature, after indicating what by the agreement of the parties would be a fair demand of the State, should leave the right of the State in abeyance until a future legislature should choose to act. In this way the amendment of § 23 in 1897 is practically carried into effect. While repudiated as legislation it is adopted by construction, and is found to express only the meaning of the original act.

We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a state court upon state laws. The language is plain. The

legislature "may so" regulate tolls "that" not more than fifteen per cent shall be divided, "and" the surplus profit shall be paid over. The word "may," it is agreed, is permissive, not mandatory. In the next place it is only upon its regulation of tolls, so that not more than fifteen per cent shall be divided, that dividends are confined to that sum. Otherwise the general power, given by § 24, to declare such dividends as the company deems expedient, remains in force. Finally, the payment over of the surplus profits above fifteen per cent is not a separate, independent and absolute mandate, but is connected with "so regulate tolls that" by "and." Like the cutting down of dividends, it is a result of the regulation. Again, the duty of the corporation to furnish the legislature a statement of expenditures is only "if required." It might be required in order to be certain whether it was advisable to regulate tolls. Perhaps if the legislature had regulated them it might be required in order to find out what was due. The provision for a record and an account in the repealed § 35 seems to us to have little bearing. They were required there, primarily at least, with reference to the possible purchase of the stock by the State. We infer that the state courts considered the words "regulate tolls" to refer solely to fixing the amount to be charged, and regarded the payment over of the surplus as an independent mandate. It seems to us that the words as here used meant more, and embraced not only fixing the amount to be charged to the public, but an order for the division of earnings between the railroad and the schools. The provision as to the surplus over fifteen per cent is not sufficiently accounted for if the regulation of tolls is intended to make the profits as near fifteen per cent as may be.

Not only the absolute discretion as to dividends given by § 24, but the similar discretion given by the same section as to the proportion of profits to be retained, confirms the grammatical construction of § 23. Circumstances might change, and knowledge might change. It is agreed that they did not know much about railroads in 1847. The corporation

was allowed to make and to distribute or retain such earnings as it could, subject to the power of the State in certain events to require it to pay over extra profits, or to sell its stock. But which, and whether the State would make either demand, was left undecided, and until the State elected the whole earnings of the company were its own.

It follows that when the company surrendered its charter in 1873, there having been no attempt by the State to regulate tolls before that time, the company was free from liability or the possibility of demand. Therefore it is only by attempting, as it did attempt in its complaint, to apply the subsequent amendment of the general railroad law that the State can come into court. That law, it will be remembered, purported retrospectively to save rights under surrendered charters. It does not need argument to show that this amendment could not affect the plaintiff.

The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697. We may add that it is admitted that one of the acts of 1897 was necessary to authorize a demand and so to create a cause of action. It was for want of an authorized demand that the former suit was held no bar. But in our opinion the State had no right in 1897 to make a demand.

Judgment reversed.

CHANDLER *v.* DIX.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 261. Argued April 28, 1904.—Decided May 31, 1904.

An action cannot be maintained in the Federal courts to set aside tax sales on the ground that the sales are void, where the property has been bought, and is claimed, by the State without making the State a party, and where there is no statutory provision permitting such an action it cannot be maintained against the State under the Eleventh Amendment.

A state statute providing for the procedure in, and naming the officials who are necessary parties to, actions to set aside tax sales the language whereof clearly indicates that the legislature contemplated that such actions should only be brought in the courts of the State, will not be construed as permitting such actions to be brought in the Federal courts.

An action to enjoin the enforcement of tax liens cannot be maintained against a state official who has retired from office.

THE facts are stated in the opinion of the court.

Mr. John A. McKay and *Mr. George W. Weadock* for appellant.

Mr. John H. Goff, with whom *Mr. Charles A. Blair*, Attorney General of the State of Michigan, and *Mr. Henry E. Chase* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This bill is not artificially drawn, but we take it to be primarily, at least, a bill to remove a cloud upon the plaintiff's title to certain lands which have been sold for taxes, brought upon the ground that the tax laws of Michigan for a series of years named were unconstitutional and deprived the plaintiff of his property contrary to the Fourteenth Amendment. The Circuit Court dismissed the bill on demurrer and the plaintiff

appealed. The dismissal was so plainly right that it is less necessary than otherwise it might be to pick out and analyze the meagre allegations of fact from the much more lengthy suggestions and arguments of matter of law. It is to be gathered that all of the lands referred to have been sold, and that in some, if not all, cases the State was the purchaser under the state laws. It does not appear that the State has sold to any one else, or that, if it has, the purchaser is a party to the bill. It does appear that the State claims title and, it would seem, possession of a large part, if not all, of the lands. It does not appear by sufficient allegations that any defendant claims either possession or title.

It is obvious, without going further, that the bill cannot be maintained. The Auditor General and County Treasurer claim no interest in the land and have none in the question whether the State's title is good. The State's title, so far as appears, is the only one assailed. The State, therefore, is a necessary party, *Burrill* v. *Auditor General*, 46 Michigan, 256, and, as this suit cannot be maintained against a State, the bill, so far as it seeks to have tax sales declared void, must be dismissed, whether it be admitted that Michigan is not represented, or be said that it is represented by the Auditor General. The plaintiff relies upon the Public Acts of Michigan, 1899, act 97, adding § 144 to the general tax law of 1893. That act provides that "the Auditor General shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made." But we are of opinion that if the foregoing words otherwise would apply to this case they should not be construed as expressing a waiver by the State of its constitutional immunity from suit in a United States Court. The provisions indicate that the legislature had in mind only proceedings in the courts of the State. A copy of the com-

plaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. Of course, a taxpayer denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest courts of the State. But the statute does not warrant the beginning of a suit in the Federal court to set aside the title of the State. *Smith* v. *Reeves*, 178 U. S. 436, 445.

It is true that the statute deals also with suits for setting aside taxes for which sales have not been made, and that apart from the statute, injunctions against officers proceeding unconstitutionally under color of their office are well known. *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Fargo* v. *Hart*, decided at this term. It is true also that while the prayers of the bill are directed mainly to the setting aside of conveyances supposed to have been made before the filing of the bill, there is also a prayer that the defendants be enjoined from levying taxes on the lands, from selling them, or from taking further proceedings under the said laws. It seems to be the practice in Michigan to continue to assess lands sold for taxes while in the hands of the State, for reasons which are easily understood but do not need to be explained. It is unnecessary to consider whether an injunction could be granted against this without disposing of the title alleged by the State or whether sufficient foundation is laid for the prayer in the vague allegations of the bill. It is enough to say that, as the defendant Dix has retired from office, the bill must be dismissed. It does not appear upon the record that any amendment was sought to be made or that, if one had been offered, it could have been allowed. *Warner Valley Stock Co.* v. *Smith*, 165

U. S. 28. The case was disposed of properly by the Circuit Court on the foregoing grounds. Therefore the merits cannot be discussed.

Decree affirmed.

SHAW v. CITY OF COVINGTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 246. Argued April 22, 25, 1904.—Decided May 31, 1904.

Corporations having consolidated under a state statute providing that on the recording of the agreement the separate existence of the constituent corporations should cease and become a single corporation subject to the provisions of that law, and other laws relating to such a corporation, and should be vested with all the property, business, credits, assets and effects of the constituent companies, and one of the corporations claimed to possess an exclusive franchise to furnish water to a city under which the city could not for a period erect its own works, and the constitution and laws of the State at the time of the consolidation, but passed after the franchise was granted, prohibited the granting of such exclusive privileges.

Held that on the consolidation the orginial corporations disappeared and the franchises of the consolidated corporation were left to be determined by the general law as it existed at the time of the consolidation and the corporation did not succeed to the right of the original company to exclude the city from erecting its own plant.

THE facts are stated in the opinion of the court.

Mr. Miller Outcalt and *Mr. Alfred C. Cassatt*, with whom *Mr. Richard P. Ernst* was on the brief, for appellants:

The consolidation carried the exclusive franchise to the new company. 2 Clark & Marshall, § 355*a*; *Phila. & Wil. R. R.* v. *Maryland*, 16 How. 376; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Citizens' Ry. Co.* v. *Memphis*, 53 Fed. Rep. 713; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *New Orleans Water Co.* v. *Rivers*, 115 U. S. 674.

The franchise was not repealed by the passage of the Covington city charter. *Orr* v. *Bracken County*, 81 Kentucky, 593; *People* v. *O'Brien*, 111 N. Y. 1; *City Railway Co.* v. *Citizens' Railway Co.*, 166 U. S. 557; *Rodgus* v. *United States*, 185 U. S. 83.

Nor was the franchise repealed by § 573, Rev. Stat. of Kentucky. *Williams* v. *Nall*, 21 Ky. L. R. 1526; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 146; *The Binghampton Bridge*, 3 Wall. 51; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Co.* v. *Rivers*, 115 U. S. 674; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 690; *Tammany W. W. Co.* v. *New Orleans Water Co.*, 120 U. S. 64; *California State Telegraph Co.* v. *Alta Telegraph Co.*, 22 California, 423.

Mr. F. J. Hanlon for appellees:

Appellants have no exclusive franchise or irrevocable contract. Act of 1856, § 1987, Kentucky Statutes; *Griffin* v. *Ins. Co.*, 3 Bush, 592; *C. & O. R. R. Co.* v. *Barren Co.*, 10 Bush, 604; *Deposit Bank* v. *Davies Co.*, 102 Kentucky, 208; *Commonwealth* v. *Cov. & Cin. Bridge Co.*, 14 Ky. L. R. 836; *Parker* v. *Railroad Co.*, 109 Massachusetts, 506; *Shields* v. *Ohio*, 95 U. S. 319; *Louisville Water Co.* v. *Clark*, 143 U. S. 1; *Covington* v. *Kentucky*, 173 U. S. 231; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 634; *Louisville* v. *Bank*, 174 U. S. 439; *Gulf & Ship Island R. R. Co.* v. *Hewes*, 183 U. S. 67; *Bienville Water Co.* v. *Mobile*, 186 U. S. 212; *Northern Central Ry. Co.* v. *Maryland*, 187 U. S. 255.

The exclusive franchise claimed by appellants has been repealed by the Legislature of Kentucky and said exclusive franchise ceased to exist September 28, 1897. § 573, act of April 5, 1893; §§ 163, 164, const. Kentucky; *Williams* v. *Nall*, 21 Ky. L. R. 1527; § 3058, sub-sec. 6, Ky. Statutes.

The exclusive franchise of the Covington company did not pass to the consolidated company by virtue of the articles of consolidation. Secs. 556, 573, Ky. Statutes, Corporation Act

of 1893; 6 Am. & Eng. Ency. of Law (2d ed.), 810, 811, 813, 818; *Shields* v. *Ohio*, 95 U. S. 319; *Maine Cent. R. R. Co.* v. *Maine*, 96 U. S. 499; *Atl. & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359; *St. Louis R. R. Co.* v. *Berry*, 113 U. S. 465; *Keokuk & W. R. R. Co.* v. *Missouri*, 152 U. S. 301; *Yazoo & Miss. Valley R. R. Co.* v. *Adams*, 180 U. S. 2.

Corporate grants by the State to corporations are construed strictly, and all doubts are resolved in favor of the public and against the corporation. *Minturn* v. *Larue*, 23 How. 475; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Stein* v. *Bienville Water Co.*, 141 U. S. 67; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646; *Louisville & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677.

An exclusive franchise (exemption from competition) cannot be sold and assigned by one corporation to another. *W. & Lex. T. P. Co.* v. *Vimont*, 5 B. Mon. 1; *Louisville Water Co.* v. *Hamilton*, 81 Kentucky, 517; *Turnpike Co.* v. *Smith*, 1 Ky. L. R. 68; *Old State Road* v. *Smith*, 1 Ky. L. R. 125; *McCabe's Admr.* v. *Maysville &c. R. R. Co.*, 66 S. W. Rep. 1055; 7 Am. & Eng. Ency. of Law (2d ed.), 747, 749; *Black* v. *Del. Canal Co.*, 22 N. J. Eq. 400; *South Yorkshire R. R. Co.* v. *Great Northern R. R. Co.*, 3 DeG., M. & G. 576; *Commonwealth* v. *Smith*, 10 Allen (Mass.), 448; Morawetz on Private Corporations, vol. 2 (2d ed.), § 930; *Atl. Tel. Co.* v. *Union Pac. R. R. Co.*, 1 McCrary, 541; *Memphis & Little Rock R. R. Co.* v. *Berry*, 112 U. S. 609; *Ches. & Ohio R. R. Co.* v. *Miller*, 114 U. S. 176; *Thomas* v. *West Jersey R. R. Co.*, 101 U. S. 71; *Chicago, B. &c. R. R. Co.* v. *Missouri*, 122 U. S. 561; *Oregonian R. R. Co.* v. *Oregon R. R. & Nav. Co.*, 130 U. S. 1; *Gibbs* v. *Cons. Gas Co.*, 130 U. S. 396; *Pitts. C. &c. R. R. Co.* v. *Keokuk & H. Bridge Co.*, 131 U. S. 371; *C. M. & St. P. R. R. Co.* v. *Chicago Third Nat. Bank*, 134 U. S. 276; *Cen. Transp. Co.* v. *Pullman Co.*, 139 U. S. 24; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *Cov. & Lex. T. P. Co.* v. *Sandford*, 164 U. S. 578; *Minn. & St. L. R. R. Co.* v. *Gardner*, 177 U. S. 330.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit in equity brought by the appellants to enjoin the city of Covington from setting up an electric plant to furnish light, heat, and power to the city and its citizens. The ground of the suit is that the intended action of the city will impair the obligations of a contract with the Suburban Electric Company, contrary to article 1, section 10, of the Constitution of the United States. The plaintiff Shaw is trustee in bankruptcy of the Electric Company. The contract set up consists of a clause in a charter granted by the legislature of Kentucky on April 22, 1882, to the Covington Electric Light Company. By § 5 the business of the company is limited to furnishing the City of Covington, its inhabitants, and others near the city, with light, motive power, and heat, and the company is given "the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture." One of the contentions of the defendants is that this privilege was lost by non-user. But as our judgment proceeds upon other grounds we say nothing about that, but assume, for the purposes of decision, that the privilege was acquired, subject to the general reservation by the State of the power to repeal. *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636.

The Circuit Court dismissed the bill on the grounds that this privilege was repealed from and after September 28, 1897, by what is now § 573 of the Kentucky statutes (1894), or would have been repealed if not previously lost by the consolidation of the Covington Electric Light Company with other companies on April 11, 1894, as the court thought that it had been. The plaintiffs appealed to this court. They are met at the outset by the dilemma, that either the action of the municipality is sanctioned by the State, in which case the State must

be taken to have exercised its reserved right to repeal its grant to that extent, or the action of the municipality is not so sanctioned, in which case it cannot be a law impairing the obligation of contracts within the clause of the Constitution, and the plaintiffs are out of court. *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 385. See *Joplin* v. *Southwest Missouri Light Co.*, 191 U. S. 150, 155, 156. But in view of *City Railway Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557, we do not stop to consider this point further, as the result will be the same whatever the ground.

As we have implied, the original grantee of the exclusive privilege consolidated with other companies on April 11, 1894. This was done under what are now §§ 555 and 556 of the Kentucky statutes. By the latter section, when the agreement of consolidation is recorded, etc., "the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities." The old companies disappear and the new company must claim whatever rights it gets from the law which calls it into being. It is absolutely subject to the constitution and laws then in force. Therefore it can claim the franchises and privileges of its constituent companies by succession, only under the words "property," or "assets and effects," if at all. These words certainly are not happily chosen to express the transfer of a franchise, still less to express the continuance of a right not to be competed with, granted by the legislature to a named corporation, after that corporation shall have ceased to exist. The natural meaning of the words would be that the ordinary property of the consolidating corporations, the property such as any one might own without

special franchise and might transfer by deed, shall belong to the new company without deed, but the franchises of the new company would seem to be left to be determined by the general law. The new corporation is to be "subject to all the provisions of this chapter, and other laws relating to it." This interpretation is strengthened by the consideration that other sections show that the legislature had franchises and privileges before its mind, and evidently did not fail to mention them from forgetfulness. In the cases cited by the appellants the privileges and franchises of the constituent companies were continued in the new company by explicit and careful words. *Philadelphia, Wilmington &c. R. R.* v. *Maryland*, 10 How. 376; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650.

The impression that the plaintiffs did not inherit a right to exclude the city of Covington from setting up a plant before 1907 as the result of the consolidation is confirmed still further when we consider the state of the law at the time. By § 191 of the constitution of 1891 "all existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place, . . . shall thereafter be void and of no effect." Again, by § 164, no city can grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years, and the grantee is to be the highest and best bidder at a public offer. We assume that the Covington Electric Light Company escaped these sections, but they show the policy of the State to have been against such a right as it claimed. It is doubtful, at least, whether the legislature could have granted it in 1894; and this is a reason the more for construing the strict language of the consolidation sections to have meant no more than they said. We may add to the foregoing, as indicative of the general jealousy of exclusive rights, § 3 of the bill of rights: "No grant of exclusive . . . privileges shall be made to any man or set of men except in consideration of public services." It was uncertain, until decided, whether

under this section such an exclusive right as that of the Covington Electric Light Company could be granted, and the prevailing local opinion was that such grants were forbidden. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *S. C.*, 81 Kentucky, 263. This, again, goes to show that the meagre words used in describing the rights of the new company were chosen with intelligent care. Everything in the constitution looked to the abolition and refusal of special privileges and to putting all corporations on an equal footing. It was natural, therefore, when old corporations consolidated, that the law should treat the new corporation which it then called into being as it would have treated another corporation coming into being at the same time, but starting fresh, instead of being a consolidation of the old. We refer again to the words, "subject to all the provisions of this chapter, and other laws relating to it," in § 556.

Finally, we add to the language of the constitution the section of the statutes which the Circuit Court adjudged to have repealed the grant of a monopoly to the original company. By § 573 the provisions of all charters "which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897," and the exercise of the repealed powers is made a crime. After September 28, 1897, the provisions of the chapter are to apply to all corporations if they would be applicable to such corporations if organized under that chapter. There was nice discussion, and it is a fair question whether this section did not repeal the exclusive privilege given to the Covington Company in 1897, if that privilege survived the consolidation. But we refer to it only as an aid in construing § 556. It is another evidence of the wish and intent of the legislature to bring all corporations to a level when it could.

Practically it was admitted that the new corporation formed

by consolidation in 1894, was subject to the statutes and constitution then in force. *Yazoo & Mississippi Valley Ry. Co.* v. *Adams,* 180 U. S. 1. To dispute the proposition would be to discredit the whole of the appellants' case. But that being so, we think that we have shown that the policy of the law at the time of the passage of the consolidation statute, Ky. Stats. § 556, act of April 5, 1893, was entirely opposed to the continuance of such a special right as is claimed, and therefore have given a sufficient reason for construing the words as meaning what they seem on their face to mean and no more. It may be doubted whether the legislature could have kept the Covington Light Company monopoly alive in the hands of a new and distinct corporation. *Keokuk & Western R. R.* v. *Missouri,* 152 U. S. 301. But at all events we are satisfied that it did not try to do so. See *Yazoo & Mississippi Valley Ry. Co.* v. *Adams,* 180 U. S. 1.

In the very able argument for the appellants an attempt was made to detach the exclusive privilege, given by § 5 of the Covington Electric Light Company's charter, from "conducting the business," to which it was attached by that section, and to transfer it to the "privilege," granted by § 6, "subject to the regulations of the city authorities, to lay its pipes and mains, and erecting its poles, posts and wires through and along any street," etc. The latter, it is said, is an easement, the exclusive character is part of it, and it all goes, like any other property, to the successors of the Covington Company. We cannot be so ingenious. However the plaintiffs may stand as to using the streets, the Covington Company's monopoly in business was distinct from its rights in the streets. When the Covington Company died its monopoly came to an end.

Decree affirmed.

Mr. Justice White dissented.

INTERNATIONAL POSTAL SUPPLY COMPANY *v.* BRUCE.

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

No. 215. Argued April 13, 14, 1904.—Decided May 31, 1904.

Complainant as the owner of letters patent for a cancelling and postmarking machine brought suit against a postmaster to restrain him from using infringing machines which were in his post office used exclusively by his subordinates, employés of the United States, such use being in the service of the United States, the machines having been hired by the Post Office Department for a term not yet expired from the manufacturer at an agreed rental payable on the order of the Department by whose order they were placed and used in the post office.

Held, that the suit was virtually one against the United States and the Circuit Court of the United States has not the power to grant an injunction against the defendant restraining the use of the machines pending the leased period.

Belknap v. *Schild*, 161 U. S. 10, followed.

THIS case came before the court on the following certificate for instructions:

"The complainant as the owner of letters patent of the United States for new and useful improvements in stamp cancelling and postmarking machines, brought a bill in equity against the defendant, who is postmaster of the United States post office at Syracuse, New York, complaining of the use in said post office of two machines, which infringe the complainant's letters patent, and praying for an injunction against the further use of said machines. The defendant never personally used any stamp cancelling and postmarking machines; but the use of said two machines in said post office at Syracuse is by some of defendant's subordinates, who are employés of the United States government, such use being in the service of the United States.

"The machines so used were hired by the United States Post Office Department for a term, which is as yet unexpired,

from the manufacturer and owner of said machines, at an agreed rental which is payable on the order of the Post Office Department, by whose orders said machines were placed in the Syracuse post office and were and are now used there.

"And the said United States Circuit Court of Appeals for the Second Circuit, further certifies, that to the end that it may properly decide the questions in such cause, and presented in the assignments of error therein filed, it requires the instructions of the Supreme Court of the United States, on the following question, to wit:

"Upon the foregoing facts, has the United States Circuit Court the power to grant an injunction against the defendant, restraining the use of the machines?"

Mr. Louis Marshall, with whom *Mr. George W. Hey* was on the brief, for appellant:

The government of the United States, by granting the letters patent on which the complainant bases its claim for relief, conferred upon it an exclusive property therein which cannot be appropriated or used by the government itself or by any of its officials without the complainant's consent. Walker on Patents, § 167; 3 Robinson on Patents, § 897; *United States* v. *Burns*, 12 Wall. 246; *James* v. *Campbell*, 104 U. S. 356; *Hollister* v. *Mfg. Co.*, 113 U. S. 57; *Solomons* v. *United States*, 137 U. S. 348; *Head* v. *Porter*, 48 Fed. Rep. 481; *Belknap* v. *Schild*, 161 U. S. 15, 16.

The defendant having used an infringing device against the complainant's protest, his tortious act cannot be made the basis of a suit against the United States in the Court of Claims, or in any other court. *Gibbons* v. *United States*, 8 Wall. 269; *Morgan* v. *United States*, 14 Wall. 531; *Langford* v. *United States*, 101 U. S. 341; *United States* v. *Jones*, 131 U. S. 1, 16, 18; *German Bank* v. *United States*, 148 U. S. 573, 579; *Hill* v. *United States*, 149 U. S. 593.

The United States is not liable to a suit for an infringement of a patent, since such a suit is one sounding in tort. *Schil-*

linger v. *United States*, 155 U. S. 163; *United States* v. *Berdan Co.*, 156 U. S. 552.

The complainant would thus be remediless with respect to a conceded infringement of its rights, unless relief by injunction is granted against the defendant for his continuing trespasses against the complainant's property right, and it is believed that such remedy is available, notwithstanding the defendant's official position.

The exemption of the United States and of the several States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the government which they represent. *Little* v. *Barreme*, 2 Cranch, 169; *Osborn* v. *Bank*, 9 Wheat. 738; *Bates* v. *Clark*, 95 U. S. 204; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Kilbourn* v. *Thompson*, 103 U. S. 198.

Actions of ejectment have been maintained against government officers in possession of land under government authority. *United States* v. *Lee*, 106 U. S. 196; *Tindal* v. *Wesley*, 167 U. S. 204. See also *Poindexter* v. *Greenhow*, 114 U. S. 270; *Cunningham* v. *Railroad Co.*, 109 U. S. 446; *Stanley* v. *Schwalby*, 147 U. S. 508, 518; *McGahey* v. *Virginia*, 135 U. S. 662, 684; *Smyth* v. *Ames*, 169 U. S. 518; *Am. School &c.* v. *McAnnulty*, 187 U. S. 94.

As to suits against government officials on patents, see *Cammeyer* v. *Newton*, 94 U. S. 225, 234; *James* v. *Campbell*, 104 U. S. 356; *Hollister* v. *Manufacturing Co.*, 113 U. S. 59; *Head* v. *Porter*, 48 Fed. Rep. 481. And see also *Vavasseur* v. *Krupp*, 9 Ch. Div. 351, 358.

The government does not aver payment of rent in advance so an injunction against using the machines would not be a source of pecuniary loss. Even if the rental had been paid in advance of an injunction issued based on the establishment of an infringement, the government could recover any rental paid in advance, on the theory of a failure of con-

sideration. The granting of an injunction would be equivalent to an eviction by title paramount. *Tomlinson* v. *Day*, 2 B. & B. 680; *Neale* v. *McKenzie*, 1 M. & W. 747; *Fitchburg Manufactory Co.* v. *Melven*, 15 Massachusetts, 268; *Simers* v. *Saltus*, 3 Denio, 214; *Home Life Ins. Co.* v. *Sherman*, 46 N. Y. 370; Walker on Patents (3d ed.), § 307, citing *White* v. *Lee*, 14 Fed. Rep. 791; *McKay* v. *Smith*, 39 Fed. Rep. 557; *Pacific Iron Works* v. *Newhall*, 34 Connecticut, 67; 3 Robinson on Patents, § 1251; *Herzog* v. *Heyman*, 151 N. Y. 587; *Standard Button Co.* v. *Ellis*, 34 N. E. Rep. 682.

Since *Belknap* v. *Schild*, 161 U. S. 10, see *Dashiell* v. *Grosvenor*, 162 U. S. 425; *Scott* v. *Donald*, 165 U. S. 108; *In re Tyler*, 149 U. S. 164. These and other cases relied on by appellee are not applicable and can be distinguished.

Mr. W. K. Richardson, with whom *Mr. J. C. McReynolds*, Assistant Attorney General, was on the brief, for appellee:

Appellee relies on *Belknap* v. *Schild*, 161 U. S. 10, and appellants have failed to distinguish that case.

As to the rights of the lessee, who is practically for the time the owner, see *United States* v. *Shea*, 152 U. S. 178; *The Jersey City*, 51 Fed. Rep. 529; *Smith* v. *Plomer*, 15 East, 607; *Muggridge* v. *Eveleth*, 9 Met. 233; *Fairbank* v. *Phelps*, 22 Pick. 535; *Wade* v. *Mason*, 12 Gray, 335.

The Federal courts have always recognized the hardships arising from an injunction against the use of the alleged infringing machines and it would be an interference with the government's prerogative. *Barnard* v. *Gibson*, 7 How. 650, 658; *Morris* v. *Lowell Mfg. Co.*, 3 Fish. Pat. Cas. 67; *Bliss* v. *Brooklyn*, 4 Fish. Pat. Cas. 596; *Ballard* v. *City of Pittsburg*, 12 Fed. Rep. 783, 786; *Westinghouse Air-Brake Co.* v. *Burton Stock-Car Co.*, 70 Fed. Rep. 619; and on appeal 77 Fed. Rep. 301; *Huntingdon Dry Pulverizer Co.* v. *Alpha Portland Cement Co.*, 91 Fed. Rep. 534. See also *The Davis*, 10 Wall. 21, as to possession of the government.

Besides *Belknap* v. *Schild*, see *Thompson* v. *Sheldon*, 98 Fed.

Rep. 621; *Head* v. *Porter*, 48 Fed. Rep. 481; *Heaton* v. *Quintard*, 7 Blatch. 73; *James* v. *Campbell*, 104 U. S. 356; *Cammeyer* v. *Newton*, 94 U. S. 225, 234; *Dashiell* v. *Grosvenor*, 62 Fed. Rep. 584. Cases on appellant's brief can be distinguished.

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

This case is governed by *Belknap* v. *Schild*, 161 U. S. 10. There an injunction was sought against the Commandant of the United States Navy Yard at Mare Island, California, and some of his subordinates, to prevent the use of a caisson gate in the dry dock at that place, contrary to the rights of the plaintiff as patentee. The case was heard on pleas setting up that the caisson gate was made and used by the United States for public purposes, and, as they were construed, that it was the property of the United States. The pleas were held bad as answers to the whole bill, because the bill also sought damages and the defendants might be personally liable, but it was held that an injunction could not be granted, and the bill was dismissed without prejudice to an action at law. *Vavasseur* v. *Krupp*, 9 Ch. D. 351, was cited for the proposition which was made the turning point of the case, that the court could not interfere with an object of property unless it had before it the person entitled to the thing, and this proposition was held to extend to an injunction against the use of the thing as well as to a destruction of it or to a removal of the part which infringed. It was pointed out that the defendants had no personal interest in the continuance of the use, and that, so far as the injunction was concerned, the suit really was against the United States. Of course, if those defendants were enjoined other persons attempting to use the caisson gate would be, and thus the injunction practically would work a prohibition against its use by the United States.

Belknap v. *Schild* differed from *United States* v. *Lee*, 106 U. S. 196, and *Tindal* v. *Wesley*, 167 U. S. 204, and also from

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, relied on by the appellant, in the fact, among others, that the title of the United States to the caisson gate was admitted, and therefore the United States was a necessary party to a suit which was intended to deprive it of the incident of title, the right to use the gate. As the United States could not be made a party the suit failed. In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property, a right *in rem*, in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right cannot be interfered with behind its back and, as it cannot be made a party, this suit, like that of *Belknap* v. *Schild*, must fail. The answer to the question certified must be no. Whether or not a renewal of the lease could be enjoined is not before us.

The question is answered in the negative, and it will be so certified.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE PECKHAM, dissenting.

It is to be assumed upon this record that the plaintiff, the International Postal Supply Company, is the owner of letters patent granted by the United States for new and useful improvements in stamp cancelling and postmarking machines; and that the defendant Bruce, against the will of the patentee and without paying any royalty to him, is using and, unless enjoined, will continue to use, machines that infringe the plaintiff's letters patent.

Can the defendant be prevented from thus violating rights of the plaintiff in respect of his patent, the validity of which is not here disputed? In answering this question it is necessary to bring together the observations of this court in some cases heretofore decided. That being done but little additional need be said.

In *James* v. *Campbell*, 104 U. S. 356, 357, this court, speaking by Mr. Justice Bradley, said: "That the Government of the United States, when it grants letters patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt. The Constitution gives to Congress power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' which could not be effected if the Government had a reserved right to publish such writings or to use such inventions without the consent of the owner. Many inventions relate to subjects which can only be properly used by the Government, such as explosive shells, rams and submarine batteries, to be attached to armed vessels. If it could use such inventions without compensation, the inventors could get no return at all for their discoveries and experiments. It has been the general practice, when inventions have been made which are desirable for Government use, either for the Government to purchase them from the inventors, and use them as secrets of the proper department; or, if a patent is granted, to pay the patentee a fair compensation for their use. The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters patent to those who entitle themselves to such grants. The Government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." Observe, that the court said that, without compensation to the patentee, the Government could not appropriate or *use* his invention.

These views were reaffirmed by the unanimous judgment of this court in *United States* v. *Palmer*, 128 U. S. 262, 272. And as late as *Belknap* v. *Schild*, 161 U. S. 10, 15, after observing that in England the grant of a patent for an invention was considered as simply an exercise of the royal prerogative, and was not to be construed as precluding the Crown from using the invention at its pleasure, the court said: "But, in this country, letters patent for inventions are not granted in the exercise of prerogative or as a matter of favor, but under art. 1, sec. 8, of the Constitution of the United States, which gives Congress power 'to promote the progress of science and useful arts by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries.' The Patent Act provides that every patent shall contain a grant to the patentee, his heirs and assigns, for a certain term of years, of 'the exclusive right to make, use and vend the invention or discovery throughout the United States.' Rev. Stat. § 4884. And this court has repeatedly and uniformly declared that the United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him"—citing *United States* v. *Burns*, 12 Wall. 246, 252; *Cammeyer* v. *Newton*, 94 U. S. 225, 235; *James* v. *Campbell*, 104 U. S. 356, 358; *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59, 67; *United States* v. *Palmer*, 128 U. S. 262, 270, 272.

In the previous case of *United States* v. *Lee*, 106 U. S. 196, which was a suit to recover certain lands to which the plaintiffs claimed title, but which were in the possession of the defendants, (officers of the Army,) who asserted title to the United States, it was contended that the suit was, in legal effect, one against the United States, and therefore not maintainable. But the contrary was adjudged in that case. The court, upon an extended review of the authorities, held that the suit was not to be deemed one against the Government within the recognized rule that the United States cannot be sued without its consent, and that it was competent for the

courts to protect the rights of the plaintiffs against the wrong acts of the defendants, although they were officers of the Government and acting by its authority. Mr. Justice Miller, speaking for the court, said: "This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man, who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against

each other, but also upon rights in controversy between them and the Government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress, and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10, the court, speaking by Mr. Justice Lamar, after referring to the class of suits in which the defendants, claiming to act as officers of the State, and under color of an unconstitutional statute commit acts of wrong and injury to the rights and property of the plaintiff, said: "Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case, where the remedy at law is inadequate, *for an injunction to prevent such wrong and injury*, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial —is not, within the meaning of the Eleventh Amendment, an action against the State." This principle was reaffirmed by the court, speaking by Mr. Justice Shiras in *In re Tyler*, 149 U. S. 164, 190; and again in *Scott* v. *Donald*, 165 U. S. 58, 68.

In *Tindal* v. *Wesley*, 167 U. S. 204, by an unanimous judgment, the court held that a suit against an individual to recover possession of certain real estate was not one against

a State forbidden by the Eleventh Amendment, although defendant was in possession as an officer of the State, not asserting any interest for himself in the property. It said: "If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the State it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State. Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 236, 241, the citizen is remediless so long as the State, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they held the property thus illegally appropriated."

I cannot agree that the present decision is in harmony with the principles announced in the above cases. The United States is not here sued, although, as in *United States* v. *Lee*, it may be incidentally affected by the result. No decree is asked against it. The suit is against Dwight H. Bruce, who is proceeding in violation of the plaintiff's right of property, and denies the power of any court to interfere with him solely upon the ground that what he is doing is under the order and sanction of the Post Office Department. He is, so to speak, in the possession of and wrongfully using the plaintiff's patented invention, and denies the right of any court, by its mandatory order, to prevent him from continuing in his lawless

invasion of a right granted by the Constitution and laws of the United States. But, as shown by the cases above cited, not even the United States, much less the Head of a Department, has a right to use the patent of the plaintiff without its license and without compensation. Although the Constitution and statutes of the United States give to the plaintiff the right to the exclusive use of the invention, nevertheless, according to the present decision, that use may be rendered utterly valueless by the device of an order from the Head of an Executive Department to a subordinate to proceed in disregard of the rights of the patentee. Thus every patented right to an invention which can be profitably or conveniently used in the business of the Government may be destroyed by the arbitrary action of the Head of a Department, and the patentee deprived of any compensation whatever for his invention except such as Congress may, in its discretion, choose to allow.

If Congress, by statute, and in the exercise of its power of eminent domain, had chosen to take the plaintiff's patent right for public use, at the same time opening the way, by some appropriate proceeding, through which the patentee could secure compensation from the Government for his property so taken, different considerations would arise. But no such action has been taken by Congress. The case before us is one in which it is held that the court cannot, by any direct process against the defendant, stop him from doing that which confessedly he has no legal right to do, namely, to use an invention against the will of the patentee. It was supposed that this court announced an incontrovertible proposition when, in *United States* v. *Lee*, it said that "no man in this country is so high that he is above the law," and that "all the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." But it seems that some officers are above the law and may trample upon the rights of private property—Heads of Departments who may upon their own motion seize the property of a patentee and use it in the public business, and then close the doors of the courts

with such effect that a subordinate officer, acting under Departmental orders, may not be stopped in his wrongful violation of the rights of the patentee. Such arbitrary destruction of the property rights of the citizen might be expected to occur under a despotic government, but it ought not to be tolerated under a government whose fundamental law forbids all deprivation of property without due process of law, or the taking of private property for public use without compensation. Both the Constitution and the acts of Congress recognize the patentee's right to the exclusive use of his invention. But, for every practical purpose, the present decision not only places it in the power of an Executive Department to destroy the rights of the patentee, but recognizes the helplessness of the judiciary in the presence of such a wrong.

Suppose Congress, under its power to regulate commerce, should enact a statute regulating rates for freight and passengers on interstate carriers, and that such statute, by reason of some provisions in it, was unconstitutional or incapable of execution without destroying the legal rights of such carriers. Could it be doubted that the courts might, at the instance of an interstate carrier directly affected by the act, enjoin the public officers charged with the execution of the act from enforcing its provisions? Would their hands be stayed by the suggestion that as the United States, in its corporate capacity, could not be made a party defendant of record, no relief could be granted against the persons who sought, under the cover of official station, to enforce an unconstitutional statute destructive of private rights?

Or, suppose Congress should, by statute, expressly direct the Postmaster General to use a particular patented invention, paying nothing for such use, and at the same time withhold from the courts jurisdiction of any suit against the Government by the patentee to obtain compensation for his property so taken for public use? Ought it to be doubted that such an act would be declared unconstitutional and void, and that the courts would, at the suit of the patentee, although

the Government was not, and could not be made a party defendant of record, prevent the person holding the office of Postmaster General from proceeding under the act? Such a suit would not be regarded as a suit against the United States in its governmental capacity, any more than a suit by a railroad company against the official representatives of a State, charged with the execution of an unconstitutional statute fixing confiscatory rates for freights, would be deemed a suit against a State within the meaning of the Eleventh Amendment. *Smyth* v. *Ames*, 169 U. S. 466, and authorities cited.

Let me give another illustration. Suppose Congress should, by statute, in a time of peace, direct the Secretary of War to take possession of the private residence of a citizen and use it for a quartermaster's office, and at the same time exclude from the jurisdiction of any court a suit against the United States to recover compensation for the property so taken for public use. Would the court refuse to stay the hands of the Secretary of War in executing the provisions of such a statute, simply because the United States could not be made a party of record to the suit? Surely not.

The court regards *Belknap* v. *Schild* as decisive of this case. I cannot assent to that view. That case was exceptional in its facts, and its doctrines ought not to be extended so as to embrace the present one. If there are expressions in the opinion in that case which seem to sustain the present decision, they should be withdrawn, or so modified as not to impair the force of previous decisions. The relief asked in that case was not only an injunction against the defendants from using the caisson gate which had been constructed, as was alleged, in violation of the plaintiff's right as patentee for an improvement in caisson gates, but an order for the destruction or delivery to the plaintiff of the particular gate in question, which had been built for the United States, according to plans furnished by its officers, and had been placed in such position that it had become a part, physically, of the docks at the Government Navy Yard. The destruction or displacement

of the gate, by order of the court, would have seriously disturbed the general business of the entire Navy Yard. In the present case the facts are altogether different. To enjoin the present defendant from using the plaintiff's invention may produce some inconvenience, for a time, at his particular office, but it will only make it necessary for the Government to be honest and either pay the plaintiff for the right to use its invention, or direct that some mode of stamp cancelling be employed other than that involved in the plaintiff's patent. A government employer cannot justify the illegal use of a patentee's invention upon the ground that such use will subserve his convenience, or enable him more efficiently to serve the public. The effective relief sought here is not the physical destruction of the machines leased by the Government, but an injunction to prevent the defendant Bruce from using the plaintiff's invention, embodied in whatever machine, without its license and without compensation to it. No relief is asked against any other person than the defendant. It is admitted that the United States cannot, any more than a private individual, use a patented invention without the license of the patentee. It is admitted that the Head of an Executive Department cannot legally authorize a postmaster to use such invention against the will of the patentee. It is admitted that no postmaster can legally justify his invasion of the patentee's right by any order given by the Postmaster General which was made or issued in derogation of the rights of the patentee. And yet it is now adjudged that, although a postmaster may be confessedly proceeding in direct violation of the legal rights of the patentee, the court cannot, by any direct process, stop him in his destruction of the patentee's right of property. Under the present decision, the Post Office Department not only may use, without compensation, the particular postmarking machines in question here, but it can lease others and continue its violation of the patentee's rights at its discretion, thereby making the exclusive use granted by the patent of no value whatever.

It may be said that the patentee has a remedy in an action for damages against the infringer. But clearly such a remedy is not at all adequate or efficacious. The slightest reflection will show this. The only effectual remedy is an injunction against him. In *Pennoyer* v. *McConnaughy* and in *In re Tyler*, above cited, it was held that in suits against public officers on account of wrongful acts done under color of an unconstitutional statute, where the remedy at law was inadequate, an injunction to prevent such wrong and injury was proper. The books are full of cases in support of that principle. I submit that the immunity of the United States from direct suit is an all-sufficient reason why the court shall lay its hands upon the defendant, who happens to be a local postmaster, and prevent him by injunction from disregarding the admittedly legal rights of the plaintiff. No other remedy is adequate. If that relief cannot be granted, then the rights of all patentees, whose inventions can be used in the prosecution of the business of the Government, are subject to be destroyed by the arbitrary action of Heads of Departments and their subordinate officers.

I am of opinion that every officer of the Government, however high his position, may be prevented by injunction, operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when the Government itself cannot be made a party of record.

The courts may, by mandamus, compel a public officer to perform a plain, ministerial duty prescribed by law; and that may be done, although the Government itself cannot be made a party of record. Can it be possible that the court is without authority to enjoin the same officer from doing a direct, affirmative wrong to the property rights of the citizen, upon the ground that the Government whom he represents and in whose interest he is acting is not and cannot be made a party of record? The present decision—erroneously, I take leave to say—answers this question favorably to the defendant.

But that answer cannot, I submit, be made consistently with the declaration which this court has often repeated, that no officer of the law, however high his position, can set that law at defiance with impunity; that the Government, as well as the citizen, is subject to the Constitution, and therefore cannot legally appropriate or use a patented invention without just compensation any more than it can appropriate or use, without compensation, land that it had patented to a private purchaser. Instead of a patentee having the exclusive use or control of his invention—which is the mandate of both the Constitution and the statute—Heads of Departments, it seems, are not bound to respect the rights of inventors, but can enjoy the exclusive privilege of appropriating to the use of the Government, without compensation to the patentee, any patented invention that may be beneficial in the prosecution of the public business. In my judgment it is not possible to conceive of any case, arising under our system of constitutional government, in which the courts may not, in some effective mode, and properly, protect the rights of the citizen against illegal aggression, and to that end, if need be, stay the hands of the aggressor, even if he be a public officer, who acts in the interest or by the direction of the Government.

MR. JUSTICE PECKHAM concurs in this dissent.

FIELD *v.* BARBER ASPHALT PAVING COMPANY.

BARBER ASPHALT PAVING COMPANY *v.* FIELD.

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

Nos. 201, 202. Argued April 11, 1904.—Decided May 31, 1904.

Where there are allegations of diverse citizenship in the bill, but the jurisdiction of the Circuit Court is also invoked on constitutional grounds the case is appealable directly to this court under § 5 of the act of March 3, 1891, as one involving the construction or application of the Constitution of the United States, and where both parties have appealed the entire case comes to this court, and the respondent's appeal does not have to go to the Circuit Court of Appeals.

It is not the purpose of the Fourteenth Amendment to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.

The provision in § 5989, Rev. Stat. of Missouri, that certain improvements are not to be made if a majority of resident owners of property liable to taxation protest, is not unconstitutional because it gives the privilege of protesting to them and not to non-resident owners.

Only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States by the constitution, and the Sherman Act of July 2, 1890, is not intended to affect contracts which have only a remote and indirect bearing on commerce between the States. The specification in an ordinance, not invalid under the laws of the State, that a particular kind of asphalt produced only in a foreign country does not violate any Federal right.

Although the agent of the company obtaining a paving contract may have been active and influential in obtaining signatures to the petition, in the absence of proof of fraud and corruption, the levies will not be set aside after the improvement has been completed.

The necessity for an improvement of streets is a matter of which the proper municipal authorities are the exclusive judges and their judgment is not to be interfered with except in cases of fraud or gross abuse of power.

THESE cases are appeals from the decree of the Circuit Court of the United States for the Western District of Missouri.

Richard H. Field, as owner of certain lands abutting on Main street, Baltimore avenue and Wyandotte street in Westport, Missouri, which city was then a suburb, and has since become a part, of Kansas City, filed a bill of complaint against the paving company. The relief sought was against certain tax bills, issued to pay for the paving of the above-named streets, held by the defendant company, and to have the same declared void because (1) the act under which they were assessed violated the Fourteenth Amendment to the Constitution of the United States; (2) that the paving in question was unnecessary and the contract for the same was the result of undue and illegal influence on the part of the agents of the defendant company exercised upon the board of aldermen of the city of Westport; (3) that the contracts for the paving required the same to be constructed of Trinidad Lake asphalt, thereby cutting off competition with other kinds of asphalt suitable for street paving; (4) that the proceedings and agreements by which such asphalt was designated in the resolutions, ordinances and rules for the construction of said pavements were in violation of the interstate commerce clause of the Constitution of the United States (Art. 1, sec. 8); and (5) that the said resolutions, ordinances and contracts and the action of the defendant company in securing the same were in violation of the Federal Anti-Trust Act of July 2, 1890.

Upon the trial, the Circuit Court held against the prayer of the complainant for relief upon the Federal grounds alleged, but, holding that the paving of Wyandotte street was unnecessary, granted the prayer of the bill as to the tax bills issued for work done on that street, and dismissed the bill as to the other two streets.

From so much of the decree as held the tax bills for the work done on Wyandotte street invalid the paving company also appealed. (Case No. 202.)

Mr. Richard H. Field, attorney in person, for appellant in No. 201, and appellee in No. 202.

Mr. William C. Scarritt, with whom *Mr. John K. Griffith, Mr. Elliott H. Jones* and *Mr. Edward L. Scarritt* were on the brief, for appellee in No. 201, and appellant in No. 202.

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

A motion was filed by the appellant to dismiss the appeal of the paving company, which was postponed to the hearing of these appeals upon the merits. An examination of the motion and a consideration of the briefs filed and arguments made in support of and in opposition to the same leads us to the conclusion that it cannot be sustained. The appellant appealed directly to this court; for while there was an allegation of diverse citizenship in the bill, jurisdiction was also invoked on the constitutional grounds above stated. This made the case appealable directly to this court under section 5 of the act of March 3, 1891, 1 Comp. Stat. U. S. 549, as one which "involves the construction or application of the Constitution of the United States."

The contention is that the prayer of the complainant on the constitutional grounds having been denied, the appeal of the respondent should have been to the Circuit Court of Appeals. But we cannot agree to this view. There was no cross bill filed in the case and none was required. The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights. It is well settled that in such cases the entire case may be brought to this court by the appeal. In *Holder* v. *Aultman,* 169 U. S. 81, 88, discussing the act of March, 1891, Mr. Justice Gray said:

"Upon such a writ of error, differing in these repects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but

includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn. Ins. Co.* v. *Austin*, 168 U. S. 685." *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472. See also *Chappell* v. *United States*, 160 U. S. 499, 509; *Horner* v. *United States*, *No. 2*, 143 U. S 570, 577.

If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed. *Mail Company* v. *Flanders*, 12 Wall. 130; *Chittenden* v. *Brewster*, 2 Wall. 191, 196.

The motion to dismiss the cross appeal must be denied.

Coming to the merits of the case, the grounds of Federal relief will first be considered. It is claimed that certain sections of the act of the general assembly of Missouri, which make the tax bills levied to pay the contract price for the paving a lien upon the complainant's real estate, deprive him of his property without due process of law, and deny to him the equal protection of the laws. This argument is predicated on section 5989 of the Revised Statutes of Missouri.

The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all

persons similarly situated are treated alike in privileges conferred or liabilities imposed. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Hayes* v. *Missouri*, 120 U. S. 68; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Gulf, Colorado & Santa Fé Railroad* v. *Ellis*, 165 U. S. 150. The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. *Buchan* v. *Broadwell*, 88 Missouri, 31. If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution.

Further objection on Federal grounds is urged, in that the specification of Trinidad Lake asphalt for this improvement is in violation of the interstate commerce clause of the Constitution of the United States, and of the so-called Sherman Act of July, 1890. The right to provide for this paving was vested by the Missouri statute in the board of aldermen. The right to select the material for the paving was vested in that body; they saw fit to choose Trinidad Lake asphalt for the paving. Their right so to do, under the charter powers of such cities as Westport, notwithstanding competitive bidding is thereby rendered impossible, has been sustained by the Supreme Court of Missouri. *Barber Asphalt Paving Co.* v. *Hunt*, 100 Missouri, 22; *Warren* v. *Paving Co.*, 115 Missouri, 572; *Verdin* v. *St. Louis*, 131 Missouri, 26. With the wisdom of this choice the courts have nothing to do, and in this case we are only concerned to inquire as to the alleged violation of Federal rights

in such selection. The argument is that Trinidad Lake asphalt, being a product of a foreign country and brought into Missouri, and there being other deposits in other States within the United States from which suitable asphalt could be had, the specification of this kind of asphalt is an interference with and a regulation of interstate commerce, in violation of the exclusive right of Congress conferred by the Constitution. It is unnecessary to cite largely from cases in this court, which hold that only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States, *Kidd* v. *Pearson*, 128 U. S. 1, in which case, Mr. Justice Lamar, speaking for the court, said (p. 23): "As has been often said legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution." *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, and cases cited in the opinion. The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the State, will in a limited degree affect interstate commerce, but it certainly is not one of those direct interferences with the power over and express control of the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation.

The attempt to invoke the provisions of the Sherman Act in this case is equally unavailing. That act has been recently considered in the *Northern Securities* cases, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce

between the States. *Hopkins* v. *United States*, 171 U. S. 578; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211.

In addition to the ground by which Federal jurisdiction was established in the courts below, it is alleged that the tax bills should be held void because they were obtained by undue influence of the agents of the paving company, improperly exercised to obtain the needed municipal action. The court below held, and an examination of the testimony has brought us to the same conclusion, that there was nothing in the case to establish the charges of fraud and corruption, although the record does show that an agent of the defendant company was active and perhaps influential in obtaining signatures to the petition which specified Trinidad Lake asphalt for this improvement; yet in the absence of proof of fraud or corruption we do not think the contract and resulting levies can be set aside for this reason. It is one thing to disapprove of such measures as a matter of propriety of action, but quite another to set aside a contract, especially after the full performance of its terms.

Upon the cross appeal, the learned judge in the court below held that the Wyandotte street tax bills were void, because that street had been previously paved with macadam in the years 1892–1893, four or five years before the asphalt paving was laid, which macadam he found to be in good condition, and but little worn. The effect of this decree was while finding against complainant as to the allegations of fraud and collusion in obtaining the contract, to hold that, in the opinion of the trial judge, the repaving of Wyandotte street was unnecessary. We think this conclusion overlooks the fact that the power to construct, improve and pave streets was vested by the law of Missouri, as it generally is, in the board of aldermen. (Laws of Missouri, 1895, 65, § 85 to § 95, inclusive.) The necessity of such improvements is a matter of which they are the exclusive judges, and their judgment is not to be interfered with by the courts, except in cases of fraud or gross abuse of power. This power of the city board is a continuing

one, and the mere fact that a pavement has been once laid does not require the interference of the courts when the governing body of the city, in the exercise of its judgment, has determined that the necessity for repaving has arisen. The law has vested this power in the representatives of the city and the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely. If this were not so, a contractor, who acts under the direction and because of the action of the city authorities in determining the necessity of an improvement, must lose his compensation, if, upon the suit of a property owner, the courts shall take a different view of the necessity of the improvement. In other words, the contractor, though acting in good faith and complying in all respects with his agreement, lawfully made, must abide the judgment of the courts as upon appeal from the tribunal solely empowered by law to pass upon the necessity of the improvement, and to make the necessary contracts to carry it out.

As we have said, there may be cases of fraud or arbitrary abuse of power, when the courts will intervene. Under other circumstances the municipality and property owners interested are bound by the acts of their agents. The authorities amply sustain this view. 2 Dillon Mun. Corp. (4th ed.) § 686; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88; *Skinker* v. *Heman*, 148 Missouri, 349; *Warren* v. *Paving Co.*, 115 Missouri, 572, 580.

Applying the principles settled by the authorities to the facts disclosed in this case, we do not find such evidence of fraud or gross abuse of power as would warrant the setting aside of the tax bills for this improvement. The testimony tends to show that the macadam was considerably worn; its replacement, to the extent of laying an asphalt pavement on top of it, was deemed necessary by the city authorities. It does not appear that any protest or objection was made during the progress of the work. A majority of the resident owners of lots abutting upon the part of the street to be improved had petitioned for the asphalt pavement. There is considerable

testimony tending to show that the value of abutting property was enhanced by the improvement. These and kindred matters were before the board. It is not our province to review their judgment, and we do not think the courts are authorized to interfere with the discretion vested in them in making the improvement under the circumstances shown To hold otherwise would be, as we have said, to substitute the judgment of the court as to the expediency or necessity of making such improvement for that of the body delegated by law with the power and responsibility of action in the premises.

The court below, having properly held that the case alleged must fail on the other grounds, should have regarded the judgment of the board of aldermen as to the necessity of repaving Wyandotte street as conclusive upon it. The conclusion reached renders it unnecessary to consider whether the complainant, having failed to protest or object to the work before it was begun or during its progress, can be heard in a court of equity to object to the tax bills assessed for the benefit of the contractor after the work is completed in compliance with the contract.

We think the court below erred in adjudging the tax bills on Wyandotte street to be void, and so much of the decree is reversed with costs, the decree as to the other streets is affirmed, and the case remanded to the court below with instructions to dismiss the bill.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1903.

AS TO NEW SEAL.

Order: Ordered that the clerk of the court be, and he is hereby, authorized and directed to procure a new seal for the court. Said seal shall be the arms of the United States, with these words in the margin: "Seal of the Supreme Court of the United States," engraved on a circular piece of steel not exceeding two and one-fourth inches in diameter. May 31, 1904.

AS TO ORDER APPOINTING REPORTER.

Order: Whereas J. C. Bancroft Davis, the former reporter of this court, resigned his office on September 11, 1902, to take effect at once, which resignation was accepted; and whereas Charles Henry Butler was appointed his successor December 4, 1902, and was charged by the order appointing him with the duty of reporting all the decisions of October term, 1902, and has accordingly reported all decisions delivered prior to December 4, during October term, 1902; it is

Ordered, That the order of December 4, 1902, appointing Charles Henry Butler reporter of this court be given effect *nunc pro tunc* as of the first day of October term, 1902, to wit, October 13, 1902. May 31, 1904.

OPINIONS PER CURIAM, ETC., FROM APRIL 5, 1904, TO MAY 31, 1904.

No. 168. CHARLES L. RAWSON ET AL., PETITIONERS, *v.* WESTERN SAND BLAST COMPANY ET AL. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. Argued March 2 and 3, 1904. Decided April 11, 1904.

Decree affirmed with costs by a divided court, and cause remanded to the Circuit Court of the United States for the Northern District of Illinois. Announced by Mr. Justice Harlan. (Mr. Chief Justice Fuller did not sit in this case or take any part in its decision.) *Mr. James H. Raymond* and *Mr. Otto R. Barnett* for petitioners. *Mr. John W. Munday* for respondents.

No. 508. PHŒBE R. E. E. LINTON ET AL., PLAINTIFFS IN ERROR, *v.* FRED HEYE ET AL. In error to the Supreme Court of the State of Nebraska. Motions to dismiss or affirm submitted March 21, 1904. Decided April 11, 1904. *Per Curiam.* Judgment affirmed with costs, on the authority of *Campbell* v. *Holt*, 115 U. S. 620; *Richardson* v. *Louisville and Nashville Railroad Company*, 169 U. S. 128; *Giles* v. *Little*, 134 U. S. 645. See *Lantry* v. *Wolff*, 49 Nebraska, 374; *Murphy* v. *Evans Steam Laundry Company*, 52 Nebraska, 593; *Linton* v. *Heye*, 95 N. W. Rep. 1040. *Mr. John C. Watson* and *Mr. John V. Morgan* in support of motions. *Mr. Joseph H. Blair* opposing.

No. 203. ST. LOUIS MERCHANTS' BRIDGE TERMINAL RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THOMAS CALLAHAN. In error to the Supreme Court of the State of Missouri. Argued and submitted April 11, 1904. Decided April 18, 1904. *Per Curiam.* Judgment affirmed with costs, on the authority of *Tullis* v. *Railroad Company*, 175 U. S. 348, 351, and cases cited. Reported in state court, 170 Missouri, 473. *Mr. Robert A. Holland, Jr.*, *Mr. J. E. McKeighan* and *Mr. M. F. Watts* for plaintiff in error. *Mr. William F. Woerner* for defendant in error.

No. 216. MARGARET BREWSTER ET AL., PLAINTIFFS IN ERROR, *v.* JOHN D. CAHILL ET AL. In error to the Supreme Court of

the State of Illinois. Submitted April 12, 1904. Decided April 18, 1904. *Per Curiam.* Dismissed for the want of jurisdiction *nunc pro tunc* as of April 7, 1904, on the authority of *Lehigh Water Company* v. *Easton*, 121 U. S. 388; *Eustis* v. *Bolles*, 150 U. S. 361; *Central Land Company* v. *Laidley*, 159 U. S. 103, 112, and cases cited; *Chapin* v. *Fye*, 179 U. S. 127, 129; *New Orleans Waterworks Company* v. *Louisiana*, 185 U. S. 336. *Mr. Fred F. Beers* for plaintiffs in error. *Mr. Thomas N. Haskins* for defendants in error.

No. 622. HAMBURG-AMERICAN STEAMSHIP COMPANY, PLAINTIFF IN ERROR, *v.* MARY W. LENNAN, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOHN M. LENNAN, DECEASED. In error to the Court of Appeals of the State of New York. Motions to dismiss or affirm submitted April 11, 1904. Decided April 18, 1904. *Per Curiam.* Dismissed for the want of jurisdiction. *Staten Island Railway Company* v. *Lambert*, 131 U. S. Appx. ccxi; *Weatherby* v. *Bowie*, 131 U. S. Appx. ccxv; *Murdock* v. *Memphis*, 20 Wall. 590; *Egan* v. *Hart*, 165 U. S. 188, 191; *Hannibal and St. Joseph Railway Company* v. *Packet Company*, 125 U. S. 260, 272; *Eustis* v. *Bolles*, 150 U. S. 361; *New Orleans Waterworks Company* v. *Louisiana*, 185 U. S. 336. And see *Lennan* v. *Hamburg-American Steamship Company*, 73 App. Div. (N. Y.) 357; *The Alene*, 116 Fed. Rep. 57. *Mr. William Lindsay* and *Mr. J. Culbert Palmer* in support of motions. *Mr. Everett P. Wheeler* opposing.

No. 14. Original. STATE OF GEORGIA, COMPLAINANT, *v.* STATE OF TENNESSEE ET AL. Motions for leave to file amended bill; for leave to dismiss as to defendant, the State of Tennessee, and for leave to file stipulation as to further proceedings and then dismiss as to the other defendants, submitted April 18, 1904. Decided April 18, 1904. Motions granted and bill and amended bill dismissed. *Mr. John C. Hart* and

Mr. Ligon Johnson for complainant. *Mr. Charles T. Cates, Jr., Mr. Howard Cormick* and *Mr. John H. Frantz* for defendants.

No. 728. CARRIE M. WARD, PLAINTIFF IN ERROR, *v.* CLEVELAND TRUST COMPANY ET AL. In error to the Supreme Court of the State of Ohio. Motion to docket and dismiss submitted May 16, 1904. Decided May 31, 1904. Motion to docket and dismiss granted, and case docketed and dismissed with costs. *Mr. James Rudolph Garfield* for defendants in error in support of motion. No one opposing.

No. 227. NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK, PLAINTIFF IN ERROR, *v.* G. R. FARNHAM, EXECUTOR, ETC. In error to the Supreme Court of the State of Mississippi. Submitted April 18, 1904. Decided April 25, 1904. *Per Curiam.* Judgment affirmed with costs and interest, on the authority of *The National Mutual Building and Loan Association of New York* v. *Brahan*, 193 U. S. 635. *Mr. J. S. Sexton* and *Mr. A. S. Bozeman* for plaintiff in error. *Mr. J. C. Bryson* for defendant in error.

No. 249. BERLIN IRON BRIDGE COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM BRENNAN. In error to the Supreme Court of Errors of the State of Connecticut. Argued April 26, 1904. Decided May 16, 1904. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Wabash Railroad Co.* v. *Flannigan*, 192 U. S. 29; *New Orleans Waterworks Company* v. *Louisiana*, 185 U. S. 336; *Union and Planters' Bank* v. *Memphis*, 189 U. S. 71; *Phœnix Insurance Company* v. *Tennessee*, 161 U. S. 174. See *Brennan* v. *Berlin Iron Bridge Company*, 75 Connecticut, 393. *Mr. Seymour C. Loomis* and *Mr. Edward C. Jones* for plaintiff in error. *Mr. John O'Neill, Mr. William Kennedy* and *Miss Susan C. O'Neill* for defendant in error.

No. 258. CHARLES B. KIMBELL ET AL., APPELLANTS, *v.* CHICAGO HYDRAULIC PRESS BRICK COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Argued April 27, 28, 1904. Decided May 16, 1904. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Continental National Bank* v. *Buford*, 191 U. S. 119; *Tennessee* v. *Bank*, 152 U. S. 454; *Ansbro* v. *United States*, 159 U. S. 695; *Colorado Company* v. *Turck*, 150 U. S. 138. *Mr. Edmund Harvey Smalley* for appellants. *Mr. Edward Cunningham, Jr.*, and *Mr. Edward C. Eliot* for appellees.

Decisions on Petitions for Writs of Certiorari from April 5, 1904, *to May* 31, 1904.

No. 574. LENA S. WALTON ET AL., PETITIONERS, *v.* WILD GOOSE MINING AND TRADING COMPANY. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederic D. McKenney, Mr. John M. Thurston, Mr. J. W. Hughes* and *Mr. D. W. Burchard* for petitioners. *Mr. Charles Page, Mr. E. J. McCutchen* and *Mr. A. B. Browne* for respondent.

No. 614. DEXTER HORTON & CO., PETITIONER, *v.* LONDON AND SAN FRANCISCO BANK (LIMITED). April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William E. Humphrey* for petitioner. *Mr. Charles E. Shepard* and *Mr. Thomas P. Shepard* for respondent.

No. 626. UNITED STATES TO USE OF J. EDWARD CHAPMAN, PETITIONER, *v.* CITY TRUST, SAFE DEPOSIT AND SECURITY COMPANY OF PHILADELPHIA. April 11, 1904. Petition for

a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Merillat* for petitioner.

No. 629. MORNING JOURNAL ASSOCIATION, PETITIONER, *v.* JAMES H. DUKE. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence J. Shearn* for petitioner. *Mr. Abram J. Rose* and *Mr. Alfred C. Pette* for respondent.

No. 634. F. AUGUSTUS HEINZE ET AL., PETITIONERS, *v.* BUTTE AND BOSTON CONSOLIDATED MINING COMPANY. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. McHatton* for petitioners. *Mr. James W. Beck* and *Mr. John A. Garver* for respondent.

No. 635. NATIONAL RAILROAD COMPANY OF MEXICO, PETITIONER, *v.* G. A. O'LEARY. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas W. Dodd* for petitioner.

No. 637. HERMAN R. MURRAY, PETITIONER, *v.* ISAAC C. WILSON, TRUSTEE, ETC. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Vincent A. Sheehy* for petitioner. *Mr. Thomas D. Rambaut* for respondent.

No. 638. J. RAYMOND SMITH, PETITIONER, *v.* STEAMSHIP ONEIDA, ETC. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wilhelmus Mynderse* for petitioner. *Mr. Henry G. Ward* for respondent.

No. 624. NEDERLAND LIFE INSURANCE COMPANY (LIMITED), PETITIONER, *v.* MARY MEINERT. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. George W. Wickersham* for petitioner. *Mr. Albert J. Beveridge* for respondent.

No. 632. GREAT WESTERN MINING AND MANUFACTURING COMPANY, ETC., PETITIONER, *v.* CHARLES A. HARRIS ET AL., EXECUTORS, ETC., ET AL. April 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Harlan Cleveland* for petitioner. *Mr. Julien T. Davies* and *Mr. Brainard Tolles* for respondents.

No. 627. HENRY P. BOOTH, SURVIVING PARTNER, ETC., PETITIONER, *v.* NORWEGIAN BARK ELIZA LINES, ETC., ET AL. April 18, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Lewis S. Dabney* and *Mr. Frederic Cunningham* for petitioner.

No. 641. ATLANTIC LUMBER COMPANY, PETITIONER, *v.* L. BUCKI & SON LUMBER COMPANY. April 18, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. R. H. Liggett* for petitioner. *Mr. H. Bisbee* and *Mr. George C. Bedell* for respondent.

No. 642. MANHATTAN LIFE INSURANCE COMPANY, PETITIONER, *v.* FRANK B. ALBRO, EXECUTOR, ETC. April 25, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Artemas H. Holmes* and *Mr. Edward S. Rapallo* for petitioner. *Mr. John W. Cummings* for respondent.

No. 648. BOARD OF TRADE OF THE CITY OF CHICAGO, PETITIONER, *v.* CHRISTIE GRAIN AND STOCK COMPANY ET AL. April 25, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Henry S. Robbins* for petitioner. *Mr. James H. Harkless, Mr. Clifford Histed, Mr. W. H. Rossington* and *Mr. Charles Blood Smith* for respondents.

No. 649. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PETITIONER, *v.* WEST COAST NAVAL STORES COMPANY. April 25, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. A. Blount* and *Mr. A. C. Blount, Jr.,* for petitioner. *Mr. John C. Avery* for respondent.

No. 326. GLOBE-WERNICKE COMPANY, PETITIONER, *v.* FRED MACEY ET AL. May 2, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward Taggart* and *Mr. Arthur C. Denison* for petitioner. *Mr. Fred L. Chappell* for respondents.

No. 644. WILLIAM H. HANLEY ET AL., PETITIONERS, *v.* UNITED STATES. May 2, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joel M. Marx* for petitioners. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 647. JOHN SEBECK, PETITIONER, *v.* PLATTDUETSCHE VOLKFEST VEREIN. May 2, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence P. Moser* for petitioner. *Mr. Rudolph F. Rabe* for respondents.

No. 662. JOHN E. KERR ET AL., PETITIONERS, *v.* UNION MARINE INSURANCE COMPANY, LIMITED. May 16, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wilhelmus Mynderse* for petitioners. *Mr. Albert A. Wray* for respondent.

No. 665. HELEN HACKLEY LITTELL, PETITIONER, *v.* CHARLES H. HACKLEY ET AL. May 16, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Morse Ives* for petitioner. *Mr. Willard Kingsley* for respondents.

No. 666. WILLIAM J. BRAKE, AS ADMINISTRATOR, PETITIONER, *v.* N. A. CALLISON. May 16, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. Bisbee, Mr. James E. Padgett* and *Mr. George C. Bedell* for petitioner. *Mr. C. D. Rinehart* for respondent.

No. 661. W. L. WELLS COMPANY, PETITIONER, *v.* GASTONIA COTTON MANUFACTURING COMPANY. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Charles W. Tillett* and *Mr. Murray F. Smith* for petitioner. *Mr. Charles Price* for respondent.

No. 699. CALIFORNIA REDUCTION COMPANY ET AL., PETITIONERS, *v.* SANITARY REDUCTION WORKS OF SAN FRANCISCO. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles Page, Mr. E. J. McCutchen* and *Mr. Garret W. McEnerney* for petitioners.

No. 663. Mexican Central Railway Company (Limited), Petitioner, *v.* H. A. Robinson. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. B. Browne, Mr. Alexander Britton* and *Mr. Eben Richards* for petitioner. *Mr. Millard Patterson* for respondent.

No. 664. Westinghouse Electric and Manufacturing Company, Petitioner, *v.* Bullock Electric Manufacturing Company. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Drury W. Cooper, Mr. F. H. Betts* and *Mr. Thomas B. Kerr* for petitioner. *Mr. John R. Bennett* and *Mr. Arthur Stein* for respondent.

No. 671. Roy M. Arrighi, Petitioner, *v.* Denver and Rio Grande Railroad Company. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harvey Riddell* for petitioner. *Mr. Edward O. Wolcott* and *Mr. Joel F. Vaile* for respondent.

No. 673. Andrew L. Eaton, Petitioner, *v.* E. J. Lewis. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John H. Hazelton* and *Mr. George C. Hazelton* for petitioner. *Mr. Seabury C. Mastick* for respondent.

No. 680. City of Johnson City, Tennessee, Petitioner, *v.* Municipal Trust Company (Limited). May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. H. Carr* for petitioner. *Mr. Horace B. Hord* for respondent.

No. 681. INSURANCE COMPANY OF NORTH AMERICA, PETITIONER, *v.* NORWICH AND NEW YORK TRANSPORTATION COMPANY; No. 682. SECURITY INSURANCE COMPANY OF NEW HAVEN, PETITIONER, *v.* NORWICH AND NEW YORK TRANSPORTATION COMPANY; No. 683. FIREMAN'S FUND INSURANCE COMPANY OF SAN FRANCISCO, PETITIONER, *v.* NORWICH AND NEW YORK TRANSPORTATION COMPANY; and No. 684. PERCY CHUBB ET AL., PETITIONERS, *v.* NORWICH AND NEW YORK TRANSPORTATION COMPANY. May 31, 1904. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Laurence Kneeland* for petitioners. *Mr. Wilhelmus Mynderse* for respondent.

No. 685. FIDELITY MUTUAL LIFE INSURANCE COMPANY, PETITIONER, *v.* PAUL RIGGS ET AL., EXECUTORS, ETC.; No. 686. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, PETITIONER, *v.* PAUL RIGGS ET AL., EXECUTORS, ETC.; No. 687. AMERICAN CENTRAL LIFE INSURANCE COMPANY, PETITIONER, *v.* PAUL RIGGS ET AL., EXECUTORS, ETC.; and No. 688. HARTFORD LIFE INSURANCE COMPANY, PETITIONER, *v.* PAUL RIGGS ET AL., EXECUTORS, ETC. May 31, 1904. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Stephen S. Brown, Mr. John E. Dolman* and *Mr. Augustin Boice* for petitioners. *Mr. Kendall B. Randolph* for respondents.

No. 692. WORLD MARINE INSURANCE COMPANY (LIMITED) ET AL., PETITIONERS, *v.* LACKAWANNA TRANSPORTATION COMPANY ET AL. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wilhelmus Mynderse* for petitioners. *Mr. Jno. G. Milburn* and *Mr. Harvey D. Goulder* for respondents.

No. 694. INSURANCE COMPANY OF NORTH AMERICA, PETI-

TIONER, *v.* STEAMSHIP WESTMINSTER, ETC. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Horace L. Cheyney* and *Mr. Jno. F. Lewis* for petitioner. *Mr. J. Parker Kirlin* for respondent.

No. 697. JOHN C. FETZER ET AL., RECEIVERS, ETC., ET AL., PETITIONERS, *v.* DAVID A. KOHN ET AL.; and No. 698. JOHN C. FETZER ET AL., RECEIVERS, ETC., ET AL., PETITIONERS, *v.* JACOB MILLER ET AL. May 31, 1904. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jno. S. Miller, Mr. Henry Crawford* and *Mr. Charles H. Aldrich* for petitioners. *Mr. Thomas A. Moran* and *Mr. Levy Mayer* for respondents in No. 697. *Mr. Horace K. Tenney* and *Mr. Henry R. Platt* for respondents in No. 698.

No. 700. EDWARD S. CAMPBELL, AS ANCILLARY RECEIVER, ETC., PETITIONER, *v.* NATIONAL BROADWAY BANK. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George W. Wickersham* and *Mr. Walter D. Davidge* for petitioner. *Mr. W. J. Curtis* for respondent.

No. 701. N. A. CALLISON, PETITIONER, *v.* WILLIAM J. BRAKE, ADMINISTRATOR, ETC. May 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. D. Rinehart* and *Mr. E. P. Axtell* for petitioner. *Mr. H. Bisbee* and *Mr. George C. Bedell* for respondent.

No. 705. KIMBALL STEAMSHIP COMPANY, PETITIONER, *v.* ELLA M. WEISSHAAR, ADMINISTRATRIX, ETC. May 31, 1904.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward M. Cleary* for petitioner. *Mr. N. A. Acker* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 5, 1904, TO MAY 31, 1904.

No. 248. AMERICAN WATER WORKS AND GUARANTY COMPANY, APPELLANT, *v.* CITY OF LITTLE ROCK ET AL. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. April 8, 1904. Dismissed with costs, on authority of counsel for the appellant. *Mr. J. M. Moore* for appellant. *Mr. W. L. Terry* and *Mr. Morris M. Cohn* for appellees.

No. 237. JAMES F. CUNNINGHAM, PLAINTIFF IN ERROR, *v.* JOSEPHUS MORRIS. In error to the Supreme Court of the Territory of Oklahoma. April 12, 1904. Dismissed with costs, on the authority of counsel for the plaintiff in error. *Mr. S. H. Harris* for plaintiff in error.

No. 236. NORA ARMSTRONG, PLAINTIFF IN ERROR, *v.* BOARD OF CONTROL OF THE STATE PUBLIC SCHOOLS ET AL. In error to the Supreme Court of the State of Minnesota. April 18, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. J. A. Sawyer* for plaintiff in error. *Mr. W. A. Sperry* for defendants in error.

No. 241. NEW YORK AND PORTO RICO STEAMSHIP COMPANY, PLAINTIFF IN ERROR, *v.* J. OCHOA Y HERMANO, ETC.; and No. 242. NEW YORK AND PORTO RICO STEAMSHIP COMPANY, PLAINTIFF IN ERROR, *v.* SUCCESSORS OF M. LOMBA & CO., ETC. In error to the District Court of the United States for the

District of Porto Rico. April 20, 1904. Dismissed with costs, on motion of *Mr. James H. Hayden* for plaintiff in error. *Mr. John G. Carlisle, Mr. F. Kingsbury Curtis* and *Mr. Joseph K. McCammon* for plaintiff in error. *Mr. Frederic D. McKenney* and *Mr. F. H. Dexter* for defendants in error.

No. 251. CHARLES WEIL ET AL., PLAINTIFF IN ERROR, *v.* EMANUEL W. BLOOMINGDALE, AS ASSIGNEE, ETC., ET AL. In error to the Supreme Court of the State of Washington. April 21, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. Louis D. Brandeis* and *Mr. John G. Palfrey* for plaintiffs in error. *Mr. Daniel P. Hays* for defendants in error.

No. 260. AUGUST A. BUSCH ET AL., APPELLANTS, *v.* G. P. WEBB ET AL. Appeal from the Circuit Court of the United States for the Eastern District of Texas. April 27, 1904. Dismissed with costs, on authority of counsel for appellants. *Mr. A. G. Moseley* and *Mr. Louis B. Eppstein* for appellants. *Mr. Amos L. Beaty* for appellees.

No. 729. ATLANTIC, GULF AND PACIFIC COMPANY, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the Northern District of California. May 31, 1904. Docketed and dismissed, on motion of *Mr. Solicitor General Hoyt* for the defendant in error. No one opposing.

INDEX.

ACCOUNTING.

See NATIONAL BANKS.

ACTION.

For damages for seizure and detention, as act of war, of vessel owned by Spanish subjects not maintainable—Cessation of hostilities affecting rights—Relinquishment of claim by treaty of peace.

The seizure and detention by the military and naval forces of the United States during the war with Spain, of a vessel owned by Spanish subjects, was a seizure of enemy's property and an act of war within the limits of military operations, although the owners were not directly connected with military operations, and a claim for damages for such seizure and detention is not founded on the Constitution of the United States, or on any act of Congress, or regulation of an Executive Department, or on any contract express or implied, and an action based thereon is not sanctioned by the Tucker Act and cannot be maintained thereunder. The fact that the vessel was retained pending negotiations for a treaty of peace and during a cessation of hostilities does not connect the original seizure with an implied contract to compensate the owners for the detention of the vessel. If the owners had any claim against the United States it was relinquished by the stipulation in the treaty of peace relinquishing claims, such stipulation covering all claims arising prior to the exchange of ratifications of the treaty. *Hijo* v. *United States*, 315.

See ANTI-TRUST ACT;
CONSTITUTIONAL LAW, 19;
COURTS, 1;
EVIDENCE, 1;
EQUITY, 1;
INDIANS;
INTERSTATE COMMERCE COMMISSION;
JURISDICTION, C 1, 3; D 1;
MINING CLAIMS, 2;
NATIONAL BANKS;
PARTIES;
REMOVAL OF CAUSES;
STATUTES, A 8.

ACTS OF CONGRESS.

ALASKA PENAL CODE, Title II, sec. 460 (see Constitutional Law, 24): *Binns* v. *United States*, 486.

ANTI-TRUST ACT OF 1890 (see Anti-Trust Act): *Minnesota* v. *Northern Securities Co.*, 48.

APPEALS FROM CIRCUIT COURTS to Supreme Court, Act of February 19, 1903, proviso in sec. 3 (see Statutes, A 8): *Interstate Commerce Commission* v. *Baird*, 25.

ACT OF WAR.

See ACTION.

ADMIRALTY.

Injury to seamen—Duty of master.

While a master is not bound in every instance where a seaman is seriously injured to disregard every other consideration, and put into the nearest port where medical assistance can be obtained, his duty to do so is manifest, if the accident happens within a reasonable distance of such a port. The duty of the master in each case depends upon its own circumstances, and although the case may not be free from doubt this court will apply its general rule both in equity and admiralty cases, not to reverse the concurring decisions of two subordinate courts upon questions of fact unless there be a clear preponderance of evidence against their conclusion. *The Iroquois*, 240.

ALASKA.

See CONSTITUTIONAL LAW, 24.

ALIENS.

See CONGRESS, POWERS OF, 1;
CONSTITUTIONAL LAW, 9;
JURISDICTION, A 4.

ALIEN IMMIGRANT LAW.

Power of Congress to require proof of citizenship—Procedure necessary to establish right of entry.

It is one of the necessities of the administration of justice that all questions —even though fundamental—should be determined in an orderly way, and it is within the power of Congress to require one asserting the right to enter this country on the ground that he is a citizen, to establish his citizenship in some reasonable way. A mere allegation of citizenship by a person of Chinese descent is not sufficient to oust the inspector of jurisdiction under the alien immigrant law and allow a resort to the courts without taking the appeal to the Secretary provided for in the act, and unless such appeal has been taken and decided a writ of *habeas corpus* will be denied. *United States* v. *Sing Tuck*, 161.

See CONSTITUTIONAL LAW, 9.

ALLOTMENT.

See INDIANS.

AMOUNT IN CONTROVERSY.

See JURISDICTION, A 1; C 5

14. *Equal protection of laws—Privilege given by State to resident but not to non-resident owners of property.*

It is not the purpose of the Fourteenth Amendment to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. The provision in § 5989, Rev. Stat. of Missouri, that certain improvements are not to be made if a majority of resident owners of property liable to taxation protest, is not unconstitutional because it gives the privilege of protesting to them and not to non-resident owners. *Field* v. *Barber Asphalt Paving Co.*, 618.

15. *Equal protection of laws—Due process—Municipal regulation subject to exceptions.*

It is within the power of a municipality when authorized by the law of the State, to make a general police regulation subject to exceptions, and to delegate the discretion of granting the exceptions to a municipal board or officer and the fact that some may be favored and some not, does not, if the ordinance is otherwise constitutional, deny those who are not favored the equal protection of the law. The ordinance of the city of St. Louis, prohibiting the erection of any dairy or cow stable within the city limits without permission from the municipal assembly and providing for permission to be given by such assembly, is a police regulation, and is not unconstitutional as depriving one violating the ordinance of his property without due process of law, or denying him the equal protection of the laws. Whether such an ordinance is violated is not a Federal question, and this court is bound by the decision of the state court in that respect. *Fisher* v. *St. Louis*, 361; *Schefe* v. *St. Louis*, 373.

16. *Equal protection of laws—Due process—Validity of Ohio local option law.*

The power of the State over the liquor traffic is such that the traffic may be absolutely prohibited, and that being so it may be prohibited conditionally and a local option law does not necessarily deny to any person equal protection of the laws because the sale of liquor is by the operation of such a law a crime in certain territory and not in other territory. The Ohio local option law regulating the sale of liquor is not unconstitutional as depriving one attempting to sell liquor in that part of the State in which such sale is prohibited of his liberty or property without due process of law or denying him the equal protection of the laws. *Lloyd* v. *Dollison*, 445.

17. *Full faith and credit clause—Extent of application.*

Article IV of the Constitution of the United States only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. It has nothing to

permitting such actions to be brought in the Federal courts. *Chandler* v. *Dix*, 590.

2. *Circuit—Abuse of discretion justifying reversal.*

It is exceedingly disputable whether it is an abuse of discretion justifying reversal by this court, for the Circuit Court to deny a motion to file an amended bill after judgment entered. *Brown* v. *Schleier*, 18.

See ALIEN IMMIGRANT LAW;
CONSTITUTIONAL LAW, 17, 19;
CONTEMPT OF COURT;
EQUITY;
EXECUTIVE OFFICERS;
FEDERAL QUESTION;
INSTRUCTIONS TO JURY;
INTERSTATE COMMERCE COMMISSION;
JURISDICTION;
MINING CLAIMS, 2;
PRACTICE;
REMOVAL OF CAUSES.

COURT AND JURY.

Question for jury where evidence of substantial character bearing upon general issue.

Where there is evidence of a substantial character bearing upon the general issue, the question is for the jury even though the court may think there is a preponderance of evidence for the party moving for a direction. *City & Suburban Railway* v. *Svedborg*, 201.

CRIMINAL LAW.

1. *Indictment—One sufficient under Constitution—Prima facie evidence of probable cause.*

One inquiry and adjudication is sufficient under the Fifth Amendment and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found. *Beavers* v. *Henkel*, 73.

2. *Trial—Place of indictment the place of trial.*

The place of indictment is the locality in which by the Constitution and laws the final trial must be had. *Ib.*

3. *Sentence—Term of imprisonment; detention in jail pending final adjudication not part of—Different counts in indictment affecting validity of sentence.*

A sentence at hard labor in the state prison does not commence until the person sentenced is taken to the prison, and if by his own efforts to obtain a review and reversal of the judgment he secures a *supersedeas* pending appeal, his detention meanwhile in the county jail cannot be counted as a part of the time of imprisonment in the state prison. Although for some purposes different counts in an indictment may be regarded as in effect separate indictments, where there is nothing to show that the court was without jurisdiction to impose a sentence of two years for the crime of which the defendant was convicted, this

EVIDENCE.

1. *Expert testimony in proof of foreign statute.*

Where foreign statutes are the basis of a claim for damages in an action in the Circuit Court of the United States parol evidence of a properly qualified expert is admissible as to the construction of such statutes upon any matter open to reasonable doubt, notwithstanding certified copies of such statutes and agreed translations thereof are already in evidence. *Slater* v. *Mexican National R. R. Co.*, 120.

2. *Relevancy; upon what dependent.*

Relevancy of evidence does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. *Interstate Commerce Commission* v. *Baird*, 25.

See COMMON CARRIER;
CONSTITUTIONAL LAW, 7, 21, 22;
CRIMINAL LAW, 1;
EXTRADITION;
FEDERAL QUESTION, 2;
INTERSTATE COMMERCE COMMISSION;
JURISDICTION, C 10;
PRACTICE, 2;
STATUTES, A 12;
WITNESS.

EXECUTIVE DEPARTMENTS.

Necessary functions overruling rights of individuals.

Each executive department of the Government has certain public functions and duties the performance of which is absolutely necessary to the existence of the Government and although it may temporarily operate with seeming harshness upon individuals, the rights of the public must, in these particulars, overrule the rights of individuals provided there be reserved to them an ultimate recourse to the judiciary. *Public Clearing House* v. *Coyne*, 497.

EXECUTIVE OFFICERS.

Decision of questions of fact and law by—Power of courts to review.

Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing. *Bates & Guild Co.* v. *Payne*, 106.

See CONSTITUTIONAL LAW, 12;
INJUNCTION;
POSTAL LAWS.

EXEMPTIONS.

See CONSTITUTIONAL LAW, 4;
TAXATION.

EXPERT TESTIMONY.

See EVIDENCE, 1.

EXTRADITION.

1. *Nature of offense—Requisite degree of criminality.*

Where an extradition treaty provides that the surrender shall only be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed," one whose surrender is demanded from this Government and who is arrested in one of the States cannot be delivered up except upon such evidence of criminality as under the laws of that State would justify his apprehension and commitment for trial if the crime had there been committed. *Pettit* v. *Walshe*, 205.

2. *Power of United States commissioner to issue warrant for arrest to be executed in State other than where office located.*

A United States commissioner appointed to execute the extradition laws has no power to issue a warrant on a requisition made under existing treaties with Great Britain, under which a marshal of a district in another State can arrest the accused and deliver him in another State before the commissioner issuing the warrant, without a previous examination being had before some judge or magistrate authorized by the acts of Congress to act in extradition matters, and sitting in the State where he is found and arrested. *Ib.*

FEDERAL QUESTION.

1. *Compliance with requirements of statute not in conflict with Federal Constitution.*

Whether the requirements of a statute affecting foreclosure sales and redemption, and which does not conflict with the Federal Constitution, have been complied with, is not a Federal question. *Hooker* v. *Burr*, 415.

2. *Construction of state statutes, etc., relative to reading depositions in criminal trials.*

The construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses in criminal trials is not a Federal question and this court is bound in such cases by the construction given thereto by the state court. *West* v. *Louisiana*, 258.

See CONSTITUTIONAL LAW, 5, 15;
JURISDICTION;
REMOVAL OF CAUSES, 1.

FELLOW SERVANTS.

Telegraph operator, giving information on call of train dispatcher, a fellow servant of train operatives.

A local telegraph operator called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, acts in the matter of giving such information as a fellow servant

INDIAN TERRITORY.

See STARE DECISIS.

INDICTMENT.

See CRIMINAL LAW, 1, 3, 4;
CONSTITUTIONAL LAW, 18;
LOCAL LAW (P. R.).

INJUNCTION.

Publishers not entitled to injunction against Postmaster General to prevent re-classification of publications.

The fact that publishers may have made contracts for the future delivery of their publications at prices founded on confidence in the continuance of the certificate of admission to the mails at second-class rates, issued under a former administration of the Post-Office Department, does not entitle them to an injunction restraining the present administration from ascertaining the true character of the publication and charging the legal rate accordingly. *Houghton* v. *Payne*, 88.

See ANTI-TRUST ACT;
EQUITY;
JURISDICTION, B 1; C. 9.

INSTRUCTIONS TO JURY.

1. *Addition of words extending question of negligence, not error.*

Plaintiff is entitled to a verdict if the injury is caused by any of defendant's employés and it is not error for the court to insert "for other employés" in a requested instruction to the jury that they must find for defendant in absence of negligence on the part of the particular employés against whom the evidence was principally directed. *City & Suburban Railway* v. *Svedborg*, 201.

2. *Affecting rights of railroads under act relating to automatic couplers.*

In instructing the jury that railroads are required to keep their appliances in good and suitable order, no right arising under the act of March 2, 1893, in respect of automatic couplers was denied nor was any such specially set up or claimed within § 709, Rev. Stat. *Southern Railway Co.* v. *Carson*, 136.

INTERSTATE COMMERCE.

Direct interference by State—Sherman Act of July 2, 1890, not applicable to contract having remote bearing on.

Only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States by the Constitution, and the Sherman Act of July 2, 1890, is not intended to affect contracts which have only a remote and indirect bearing on commerce between the States. The specification in an ordinance, not invalid under the laws of the State, that a particular kind of asphalt produced only in a foreign country does not violate any Federal right. *Field* v. *Barber Asphalt Paving Co.*, 618.

See ANTI-TRUST ACT;
CONSTITUTIONAL LAW, 21.

NATIONAL BANKS.

Ultra vires—Conveyance of bank building in satisfaction of liability under lease, not invalid.

A national bank erected a building on leased property, the lease securing the landlord by a lien on the building and the personal obligation of bank. While a large amount of rent and taxes were unpaid the bank became insolvent, the property was not paying fixed charges; after notice to, and no objections by, the stockholders, and no creditors intervening, the bank conveyed the property, with the building back to the landlord in consideration of his releasing the bank and the stockholders from all liabilities accrued and to accrue under the lease. *Held* that the proceeding was not *ultra vires*, and that as the judgment of the stockholders and officers had been prudently exercised in good faith the landlord acquired title to the land and building and was not liable to account for the value of the building in an action brought by a creditor who had knowledge of, and had not protested against, the conveyance when made. *Brown* v. *Schleier*, 18.

NAVY PERSONNEL ACT.

Pay of retired officers.

Under § 1444, Rev. Stat., and § 11 of the Navy Personnel Act of March 3, 1899, a captain in the navy who is retired as a rear admiral receives three-fourths of the pay of rear admirals in the nine lower numbers of the eighteen rear admirals provided for by the act and not three-fourths of the pay of those in the nine higher numbers. While repeals by implication are not favored where the same subject matter is covered by two acts which cannot be harmonized with a view to giving effect to the provisions of each, the latter act prevails, to the extent of the repugnancy between them when it is apparent that the latter act was intended as a substitute for the earlier one (*District of Columbia* v. *Hutton*, 143 U. S. 18). Provisions as to allowances which are fixed for naval officers in the Navy Personnel Act of March 3, 1899, supersede the statutory provisions as to the same allowances in the earlier statutes. *Gibson* v. *United States*, 182.

NEGLIGENCE.

Relation to circumstances—Failure of common carrier to take precautions against fire.

Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. The failure to keep a watchman and fire apparatus at a switch track plantation station, maintained for ten years for the convenience of shippers, who thereby were saved the expense of sending their cotton two and a half miles to a regular station and who never demanded the additional protection, no accident or fire occurring during such period, is not negligence on the part of the carrier and in the absence of any evidence whatever as to the origin of the fire, justi-

averment of residence in a designated *State* was intended to mean, and, reasonably construed must be interpreted as averring, that plaintiff was a *citizen* of that State, it is sufficient. *Sun Printing & Publishing Assn.* v. *Edwards*, 377.

See CONSTITUTIONAL LAW, 4; COURTS, 2; JURISDICTION, C 5, 6; LOCAL LAW (P. R.); MINING CLAIMS, 3; REMOVAL OF CAUSES.

POLICE POWER.

See CONSTITUTIONAL LAW, 15, 16.

PORTO RICO.

See JURISDICTION, A 5, 7; D 2; LOCAL LAW.

POSTAL FRAUD ORDERS.

See CONSTITUTIONAL LAW, 12; POSTAL LAWS.

POSTAL LAWS.

Periodical publications defined—Power of Postmaster General to exclude publications from second class mail—Construction of act of March 3, 1879.

Periodical publications as defined in the Post Office bill of March 3, 1879, do not include books complete in themselves and which have no connection with each other, simply because they are serially issued at stated intervals more than four times a year, bound in paper, bear dates of issue and numbered consecutively; and the Postmaster General can exclude them from second class mail notwithstanding they have been heretofore transmitted as such by his predecessors in office. The terms "periodical" and "periodical publication," as used in the act of March 3, 1879, are used in their obvious and natural sense, and denote the well-recognized and generally understood class of publications commonly called by the name of "periodical." The provisions of § 14, act of March 3, 1879, are not descriptive of the kind of publication which is to be admitted to the class of periodical publications provided for by §§ 7 and 10 of said act, but are express limitations added to the description in those sections. The provisions of § 14 are not to be taken to determine what is a periodical publication, but to ascertain whether, being such a publication as is contemplated by § 10, it also answers the additional conditions there imposed. *Houghton* v. *Payne*, 88; *Smith* v. *Payne*, 104.

See CONGRESS, POWERS OF, 2; CONSTITUTIONAL LAW, 20; INJUNCTION.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF; CONSTITUTIONAL LAW, 20, 24.

13. *Words "court" and "judge"—Appeals from United States Commissioners under act of September* 13, 1888.

The words "court" and "judge" have frequently been used interchangeably in Federal statutes, and this court adheres to the construction it has heretofore recognized as correct, and which has been adopted generally in practice, and in Congressional legislation that the appeal from a United States Commissioner provided for in § 13 of the act of September 13, 1888, 25 Stat. 476, 479, is an appeal to the District Court, and should so be regarded. The papers or proceedings below should be filed by the clerk of the District Court as an appeal pending in that court, and the final judgment should be accordingly recorded. *United States, Petitioner,* 194.

See ALIEN IMMIGRANT LAW; ANTI-TRUST ACT; CRIMINAL LAW, 4; FEDERAL QUESTION; INDIANS; INTERSTATE COMMERCE; LOCAL LAW (MONT.); POSTAL LAWS; WITNESS, 2.

B. OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. OF STATES AND TERRITORIES.

See LOCAL LAW.

STREET RAILWAYS.

See CONSTITUTIONAL LAW, 3, 6; EQUITY.

TAXATION.

Exemption of property in hands of trustee in bankruptcy.

Where Congress has the power to exempt property from taxation the intention must be clearly expressed. There is nothing in the Bankruptcy Act of 1898 which exempts property in the hands of a trustee in bankruptcy from the State and municipal taxes to which similar property in the same locality is subject. *Swarts* v. *Hammer,* 441.

See CONGRESS, POWERS OF, 3; CONSTITUTIONAL LAW, 1, 10, 24; ESTOPPEL; RAILROADS; REMEDIES.

TAX SALES.

See CONSTITUTIONAL LAW, 19; COURTS, 1.

TERRITORIAL COURTS.

See JURISDICTION, A 5.

TERRITORIES.

See CONGRESS, POWERS OF, 3; CONSTITUTIONAL LAW, 24; JURISDICTION, A 5, 7; B 2; D 2; LOCAL LAW (P. R.).

WITNESS.

1. *Effect of voluntary testimony not compellable.*

A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he could not have been compelled to give it. The time to avail of a statutory protection is when the testimony is offered. *Burrell* v. *Montana,* 572.

2. *Protection, under Bankruptcy Act, of bankrupt as witness before referee.*

The provision in the bankruptcy act of July, 1898, requiring the bankrupt to testify before the referee, but providing that no testimony then given by him shall be offered in evidence against him in any criminal proceeding, does not amount to exemption from prosecution, nor does it deprive the evidence of its probative force after it has been admitted without objection in a criminal prosecution against the bankrupt in a state court. *Ib.*

See CONSTITUTIONAL LAW, 7, 22;
FEDERAL QUESTION.

WORDS AND PHRASES.

See STATUTES, A 13.

WRIT AND PROCESS.

Writ of habeas corpus cannot be made to do office of writ of error.

A writ of *habeas corpus* to release the petitioner from imprisonment cannot be made to do the office of a writ of error and this court will not on such a proceeding review errors of law on the part of the trial court. *Dimmick* v. *Tompkins,* 540.