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CASES ADJUDGED

IN

THE SUPREME COURT

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AT

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AND

OCTOBER TERM, 1904.

CHARLES HENRY BUTLER

REPORTER

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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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.

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WILLIAM HENRY MOODY, Attorney General.[2]
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[1] Resigned June 30, 1904.
[2] Appointed July 1, 1904.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1903.

BRADLEY *v.* LIGHTCAP.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 243. Argued April 21, 1904.—Decided May 31, 1904.

1. By the law of Illinois in respect of mortgages the legal title passes to the mortgagee, who is entitled to possession, at least after condition broken. The mortgagor has an equity of redemption, and, in case of foreclosure by sale, has by statute twelve months within which to redeem by payment.
2. Where a mortgagee has rightfully taken possession of the mortgaged premises on condition broken, the filing of a bill to foreclose is in aid of the legal title, and not inconsistent with it.
3. Prior to the passage of a certain statute, where at the sale on foreclosure, the mortgagee bid in the property conveyed by the mortgage at less than the amount due, and the mortgagor did not redeem, failure by the mortgagee to take out a deed had no effect so far as the mortgagor was concerned on the original title of the mortgagee as against the mortgagor, though it might let in the right of redemption.
4. When by a statute passed subsequently to a mortgage, and going into effect after the mortgagee has taken possession as such, on condition broken, it is enacted that if the mortgagee, being in possession, bids in the mortgaged premises at sale on foreclosure at less than the amount found due on the mortgage, and the mortgagor does not redeem, the legal title of the mortgagee and his right of possession shall be forfeited by failure to obtain a deed within the time prescribed to the mortgagor, who has not redeemed or in fact paid anything in extinguishment of the mortgage, such statute impairs the obligation of the prior mortgage contract and operates to deprive the mortgagee of property rights without due process.

PROPERTY OF UNITED STATES SENATE

FIVE ejectment suits were brought by Lightcap against tenants of Mrs. Bradley, July 13, 1895, in the Circuit Court of Mason County, Illinois, and taken on change of venue to Fulton County, where they were consolidated, Mrs. Bradley was let in to defend, and the case went to judgment in her favor. This judgment was reversed by the Supreme Court of Illinois, after several hearings, and the case remanded to the Circuit Court. 186 Illinois, 510. On the retrial judgment was recovered by Lightcap, which was affirmed by the Supreme Court, 201 Illinois, 511, and this writ of error prosecuted.

On the disposition of the case when brought to the Supreme Court the second time the division of opinion among the seven members of the court found expression. Mr. Chief Justice Magruder, Mr. Justice Carter and Mr. Justice Ricks concurred in the opinion of Mr. Justice Cartwright in affirmance of the judgment. Mr. Justice Wilkin and Mr. Justice Boggs filed dissents, and Mr. Justice Hand, while agreeing that the legal title was in Lightcap, was of opinion that the full beneficial interest was in Mrs. Bradley, and that she, being in possession, a court of chancery might protect her equitable interest and possession by enjoining the prosecution of the ejectment suit.

The facts are in substance these:

Tobias S. Bradley loaned T. B. Breedlove, June 3, 1867, $19,616, evidenced by notes payable in one, two, three, four and five years, respectively, and secured by a trust deed on 1,200 acres of land in Mason County, Illinois. On Bradley's death, Lydia, his widow, became the sole owner of the trust deed and notes. October 8, 1867, Breedlove conveyed the 1,200 acres to Prettyman, subject to the mortgage to Bradley. August 13, 1868, Prettyman conveyed 680 acres to McCune, and McCune gave a trust deed thereon to E. G. Johnson, trustee, to secure the payment of $15,000, evidenced by three notes, to the order of Lydia Bradley, and due in one, two and three years after date. Mrs. Bradley, through her agent, accepted these notes and trust deed as part payment of the

Breedlove notes and Prettyman paid the difference, and the 1,200 acres were released from the Breedlove trust deed or mortgage.

November 13, 1868, McCune conveyed the 680 acres to Prettyman, subject to the trust deed to Johnson. No taxes were paid by McCune or by Prettyman, and no part of the mortgage debt was ever paid.

May 24, 1871, Mrs. Bradley redeemed from the tax sales for taxes of 1868 and 1869, and in 1872 for the taxes of 1871, and she has paid all other taxes assessed on the land since the trust deed or mortgage was given.

Early in the summer of 1871, Austin Johnson, whom Mrs. Bradley, in July, 1870, had appointed her business agent, went on the land on her behalf, and in 1872, Mrs. Bradley and Austin Johnson together went upon the land and she took personal and exclusive possession of it, which by herself and her tenants she has retained ever since.

February 22, 1872, Mrs. Bradley filed a bill in the Circuit Court of Mason County to set aside the release of the Breedlove trust deed or mortgage, on the ground of fraud, and for the foreclosure of that mortgage on the 1,200 acres for the payment of the balance of the original debt. McCune was a party but seems to have left the State and was brought in by publication. The bill was contested, and on August 22, 1879, the Mason Circuit Court entered a decree of foreclosure and sale on the McCune trust deed, finding the amount due Mrs. Bradley to be $31,500. The 680 acres were sold by the master in chancery, October 27, 1879, bid in for Mrs. Bradley for $10,000, and a certificate was issued to her.

Mrs. Bradley proceeded to develop and improve the 680 acres, drained the tract, erected farm buildings, laid tiles, reduced the land to cultivation, and has maintained exclusive possession to this date.

September 4, 1893, Prettyman gave a quitclaim deed of the land to Lightcap, which was recorded November 30, 1894. July 13, 1895, these actions in ejectment were commenced.

The McCune trust deed or mortgage was executed August 13, 1868, and at that time chapter 57 of the Revised Statutes of Illinois contained these sections: (see ed. 1845, p. 302).

"SEC. 12. Whenever any lands or tenements shall be sold by virtue of any execution, it shall be the duty of the sheriff or other officer, instead of executing the deed for the premises sold, to give to the purchaser or purchasers of such lands or tenements a certificate in writing describing the lands or tenements purchased, and the sum paid therefor, or if purchased by the plaintiff in the execution, the amount of his bid, and the time when the purchaser will be entitled to a deed for such lands or tenements, unless the same shall be redeemed, as is provided in this chapter, and such sheriff or other officer shall, within ten days from such sale, file in the office of the recorder of the county, a duplicate of such certificate, signed by him; and such certificate, or a certified copy thereof, shall be taken and deemed evidence of the facts therein contained.

"SEC. 13. It shall be lawful for any defendant, his heirs, executors, administrators or grantees, whose lands or tenements shall be sold, by virtue of any execution within twelve months from such sale, to redeem such lands or tenements, by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same, for the benefit of such purchaser, the sum of money which may have been paid on the purchase thereof, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of ten per centum from the time of such sale, and on such sum being made as aforesaid, the said sale and the certificate thereupon granted shall be null and void."

"SEC. 22. If such lands or tenements so sold, shall not be redeemed as aforesaid, either by the defendant or by such creditor as aforesaid, within fifteen months from the time of such sale, it shall be the duty of the sheriff or other officer, who sold the same, or his successor in office, or his executors

or administrators, to complete such sale, by executing a deed to the purchaser; . . ."

"SEC. 24. In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity, for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantors to redeem the same in the manner prescribed in this chapter, for the redemption of lands sold by virtue of executions issued upon judgments at common law, and judgment creditors may redeem lands sold under any such decree in the same manner as is prescribed for the redemption of lands, in like manner sold upon executions issued upon judgments at common law."

The statutes contained no limitation of time within which a sheriff's or master's deed must be taken after the period for redemption had expired, and prescribed no penalty or loss of right to the purchaser by reason of delay or failure in taking out such deed.

In *Rucker* v. *Dooley*, 49 Illinois, 377, the Supreme Court of Illinois, at its September term, 1868, reasoning by analogy, held in an equity suit, as against a purchaser of real estate at an execution sale, who was never in its possession, and had no claim to it, except under his judgment and sale, and who had taken out a sheriff's deed twenty-nine years after the sale, and in favor of a *bona fide* purchaser, in possession, claiming by mesne conveyances from the judgment debtor, that for the protection of purchasers for a valuable consideration, without notice, from the judgment debtor, and those claiming under him, a sheriff's deed ought not to be issued after the lapse of twenty years, and that application for a deed made after the lapse of seven years, during which the judgment was a lien, and fifteen months, the time given for redemption, and within twenty years, should be made to the proper court by rule on the sheriff and notice to the parties interested.

March 22, 1872, an act of the general assembly of Illinois was approved, entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution,

and to provide for the redemption of real estate sold under execution or decree," which went into force July 1, 1872, the provisions of which were not materially different from those above quoted, but section 30 was as follows, the additions to former acts being indicated by italics:

"SEC. 30. When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor *at any time within five years from the expiration of the time of redemption.* The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. *If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed.*"

Mr. John S. Miller, with whom *Mr. Merritt Starr* and *Mr. W. W. Hammond* were on the brief, for plaintiff in error:

The law of the land, at the time the contract in question was made, as recognized and enforced by the courts, providing means of enforcement of contracts, became a part of the contract the same as though included in its terms; and the statute of 1872, changing such law, after plaintiff in error's contract was made and title vested thereunder, as such law has been here construed and applied by the state court, is a law impairing the obligations of her contract, and is obnoxious to section 10, article 1 of the Constitution of the United States. *Tennessee* v. *Sneed,* 96 U. S. 69; *Edwards*

v. *Kearzey*, 96 U. S. 595; *Louisiana* v. *New Orleans*, 102 U. S. 203; *Walker* v. *Whitehead*, 16 Wall. 314; *Field* v. *Brokaw*, 148 Illinois, 654; *Barnitz* v. *Beverly*, 163 U. S. 118; *Seibert* v. *Lewis*, 122 U. S. 284; *Bronson* v. *Kinzie*, 1 How. 311, 319; *Gunn* v. *Barry*, 15 Wall. 610; *Shapleigh* v. *San Angelo*, 167 U. S. 646, 657; *Ogden* v. *Saunders*, 12 Wheat. 213, 257; *McCracken* v. *Hayward*, 2 How. 608, 613.

For the purpose of passing upon its constitutionality the statute must be understood to mean what the court of last resort of the State has construed it to mean. *Bell* v. *Morrison*, 1 Pet. 351; *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Van Rensselaer* v. *Kearney*, 11 How. 297; *Tioga R. Co.* v. *Blossburg & C. R. Co.*, 20 Wall. 137; *Townsend* v. *Todd*, 91 U. S. 452; *Scipio* v. *Wright*, 101 U. S. 665; *Wilson* v. *North Carolina*, 169 U. S. 586.

The English common law of mortgages was adopted in Illinois. A mortgage is a conditional conveyance of the fee. After condition broken, the title becomes absolute in the mortgagee, who may recover possession as against the mortgagor. After condition broken the mortgagor has only an equity of redemption. After decree of foreclosure and sale, the right of redemption was limited to twelve months from the sale, and if not exercised within that time, it was barred. *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Illinois, 327. The estates in the land remain the same in such case, with the qualification that the amount and time of redemption are absolutely fixed by the decree and sale. *Stephens* v. *Ill. Mut. Ins. Co., supra; Wedgbury* v. *Cassell*, 164 Illinois, 622.

Such was the law of the State as promulgated by the courts of last resort at and before the date of the mortgage contract in question in this case. *Williams* v. *Brunton*, 3 Gilm. 600, 622; *Kruse* v. *Scripps*, 11 Illinois, 98, 104; *Carroll* v. *Ballance*, 26 Illinois, 9, 16; *Chickering* v. *Failes*, 26 Illinois, 507, 519; *Nelson* v. *Pinegar*, 30 Illinois, 473, 481; *Griffin* v. *M. Co.*, 52 Illinois, 130, 145; *Kenyon* v. *Shreck*, 52 Illinois, 382, 386; *Kelgour* v. *Wood*, 64 Illinois, 345; *Longwith* v. *Butler*, 3 Gilm. 32, 36.

The right of the mortgagor, or his grantees, to redeem after condition broken is a purely equitable right—the creation of courts of chancery; and can only be asserted in a court of equity. It could not be recognized in a court of law in an ejectment suit, as is done in the case at bar. *Kenyon* v. *Shreck*, 52 Illinois, 382, 386; *Bracken* v. *Cooper*, 80 Illinois, 221, 231; *Mulvey* v. *Gibbons*, 87 Illinois, 367, 383.

His right of redemption after sale and under the statute was only upon the absolute condition of making full payment, within a prescribed time, of the bid, interest and costs.

And so the law of Illinois remained after said date, and still remains and is enforced in cases where said statute of 1872 does not apply to change it. *Kelgour* v. *Wood*, 64 Illinois, 345; *Vallette* v. *Bennett*, 69 Illinois, 632; *Harper* v. *Ely*, 70 Illinois, 581; *Oldham* v. *Pfleger*, 84 Illinois, 102; *Davis* v. *Conn. Mut. L. I. Co.*, 84 Illinois, 508; *Mulvey* v. *Gibbons*, 87 Illinois, 367, 382; *Fitch* v. *Wetherbee*, 110 Illinois, 475, 487; *Smith* v. *Mace*, 137 Illinois, 68, 74; *Esker* v. *Heffernan*, 159 Illinois, 38; *Walker* v. *Warner*, 179 Illinois, 16, 23; *Ware* v. *Schintz*, 190 Illinois, 189, 193; *Farrar* v. *Payne*, 73 Illinois, 83, 88; *Stone* v. *Tyler*, 173 Illinois, 147, 155.

The legal title here passed to Johnson, the grantee in the trust deed, and became absolute in him as trustee for plaintiff in error, on condition broken, which occurred as early as 1869. That legal title in Johnson, trustee, was not divested and revested in the mortgagor, or affected, by the foreclosure decree in equity and sale thereunder, unless such effect of divesting a title is given to the statute of 1872 here in question.

By the law of Illinois, as promulgated and enforced by the courts of last resort at and prior to the date of said mortgage contract, if the mortgagor and his grantees failed to redeem the mortgaged premises from foreclosure sale within the time limited by the statute, and the decree of foreclosure, his equity of redemption was barred and foreclosed, and thereafter he had no further right, title or claim in or to the premises. *Burgett* v. *Osborne*, 172 Illinois, 227, 238; *Bozarth* v. *Largent*,

128 Illinois, 95, 107; *Smith* v. *Mace*, 137 Illinois, 68, 73; *Stephens* v. *Ill. Mut. Fire Ins. Co.*, 43 Illinois, 327, 331; 2 Jones on Mortgages, § 1661; *Mulvey* v. *Gibbons*, 87 Illinois, 367, 382; *Masey* v. *Westcott*, 40 Illinois, 160; *Herdman* v. *Cooper*, 138 Illinois, 583; *Lucas* v. *Nichols*, 66 Illinois, 41; *McLagan* v. *Brown*, 11 Illinois, 519; *Fitch* v. *Wetherbee*, 110 Illinois, 475, 487.

Defendant in error could only recover in this ejectment suit on the strength of his own title. *Hague* v. *Porter*, 45 Illinois, 318; *Vallette* v. *Bennett*, 69 Illinois, 632; *Hammond* v. *Shepard*, 186 Illinois, 235.

But on the other hand, defendant in error could not recover even if he had the legal title, while plaintiff in error rightfully held the possession of the land under a complete equitable title. *Stow* v. *Russell*, 36 Illinois, 18, 36; *Staley* v. *Murphy*, 47 Illinois, 241, 245; *Kilgour* v. *Gockley*, 83 Illinois, 109; *Sands* v. *Wacaser*, 149 Illinois, 530, 534.

As construed by the Supreme Court of Illinois in the case at bar, the statute of 1872 has so changed the law as it existed at the date of the mortgage contract that notwithstanding the mortgagor and those claiming under him did not redeem said premises from said sale according to law, when the certificate of purchase became void, the title to said premises must, in order to give practical effect to said statute, be still in the mortgagor or in the defendant in error claiming under him.

For the purpose of determining whether it infringes the Constitution, as claimed, the statute must be understood to mean what the courts of last resort of the State have construed it to mean. *Bell* v. *Morrison*, 1 Pet. 351; *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Van Rensselaer* v. *Kearney*, 11 How. 297; *Tioga R. Co.* v. *Blossburg & C. R. Co.*, 20 Wall. 137; *Townsend* v. *Todd*, 91 U. S. 452; *Scipio* v. *Wright*, 101 U. S. 665; *Smyth* v. *Ames*, 169 U. S. 466.

By the law of Illinois, at the time this mortgage was executed, the fee of the land was conveyed by the mortgagor to the trustee, Johnson, for the use of Mrs. Bradley. The condition

of the mortgage was immediately broken, as soon as made, by failure to pay taxes previously and then due, no taxes having ever been paid by the mortgagor, and again by failure to pay the notes maturing in 1869, 1870 and 1871. After condition broken the title became absolute in the mortgagee, and so it was at the time of the enactment of the statute of 1872.

A statutory bar does not satisfy a debt, annul a contract, or deprive the holder of security. *Keener* v. *Crull*, 19 Illinois, 189, 191; *Newland* v. *Marsh*, 19 Illinois, 376, 384; *McCagg* v. *Heacock*, 42 Illinois, 153; *Brockman* v. *Sieverling*, 6 Illinois A. 512; *Hancock* v. *Franklin Ins. Co.*, 114 Massachusetts, 155; *Moses* v. *St. Paul*, 67 Alabama, 168; *Wheelan* v. *Kinsley*, 26 Ohio St. 131; *Waterman* v. *Brown*, 31 Pa. St. 161; *Kemp* v. *Westbrook*, 1 Ves. 278.

If plaintiff in error had a right of entry as against the mortgagor in 1872, when condition was broken and she made her peaceable entry, the statute of 1872, which the Supreme Court of Illinois says is merely a statute of limitation, cannot have destroyed or changed that right of possession without invading the Constitution, for laches will not be imputed to one in the peaceable possession of land. *Mills* v. *Lockwood*, 42 Illinois, 111, 118; *Dorman* v. *Dorman*, 187 Illinois, 154, 160; *Wilson* v. *Byers*, 77 Illinois, 76, 84; *Boyd* v. *Boyd*, 163 Illinois, 611, 615; *Beck Lumber Co.* v. *Rupp*, 188 Illinois, 562, 570; *Parker* v. *Shannon*, 137 Illinois, 376, 392; *Bush* v. *Stanley*, 122 Illinois, 406, 418.

A constitutional statute of limitation does not run against or affect a possessor of real estate, but one out of possession. This was the law of Illinois when this mortgage deed was made. *Mills* v. *Lockwood* (1866), 42 Illinois, 111, 119; *Parker* v. *Shannon* (1891), 137 Illinois, 376, 392.

Such a change in the law, as here applied, deprives plaintiff in error of the right, title and interest vested in her under the laws of the State as they existed at the date of her mortgage and when condition was broken and when she took possession,

and violates the prohibition of the Fourteenth Amendment of the Federal Constitution. *Chicago, Burlington & Quincy Railroad Co.* v. *City of Chicago*, 166 U. S. 226; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Taylor* v. *Beckham*, 178 U. S. 548, 599, 605; *Tindal* v. *Wesley*, 167 U. S. 204, 222.

If the constitutional guaranties referred to protect plaintiff in error from the divestiture of her title, either by the statute of 1872 or by the decision of the Supreme Court of Illinois, she has such an equitable title as is contemplated by the statute of 1835, quoted in our statement of questions involved, and having been in possession, by actual residence thereon by her tenants, since 1872 and paid all the taxes, and for more than seven successive years from and after the expiration of the period of redemption (when her equitable title became complete),—she is protected by said statute from defendant in error's action. *Irving* v. *Brownell*, 11 Illinois, 402; *Collins* v. *Smith*, 18 Illinois, 160; *Martin* v. *Judd*, 81 Illinois, 488; *Dolton* v. *Cain*, 14 Wall. 472; *Gregg* v. *Tesson*, 66 U. S. 150; *Dredge* v. *Forsyth*, 67 U. S. 563.

Mr. George W. Wall and *Mr. E. A. Wallace*, with whom *Mr. Lyman Lacey, Jr.*, was on the brief, for defendant in error:

See § 30, ch. 77, laws of Illinois; it is a statute of limitations. *Ryhiner* v. *Frank*, 105 Illinois, 326, 330; *Petterson* v. *Emerson*, 135 Illinois, 55, 60; *Seeberger* v. *Weinberg*, 151 Illinois, 369, 382; *Brown* v. *Ridenhower*, 161 Illinois, 239; *Lightcap* v. *Bradley*, 186 Illinois, 510, 515; *Bradley* v. *Lightcap*, 201 Illinois, 511, 519.

The Legislature of a State has the right to enact statutes of limitation, and it is no objection to their validity that they are made to apply to existing rights, provided a reasonable time be given in future for complying with the statute, and under repeated decisions of this court, the statute complained of is not unconstitutional. *Wheeler* v. *Jackson*, 137 U. S. 245, 255; *Terry* v. *Anderson*, 95 U. S. 628, 632; *Kashkonong* v. *Benton*, 104 U. S. 668, 674; *Jackson* v. *Lamphier*, 3 Pet. 280,

290; *Bronson* v. *Kinzie*, 1 How. 311, 316; *Ross* v. *Duvall*, 13 Pet. 45, 64; *Vance* v. *Vance*, 108 U. S. 514.

In Illinois the title to land mortgaged is not out of the mortgagor, except as between him and the mortgagee, and then only as an incident of the mortgage debt for the sole purpose of obtaining satisfaction; as to all other persons, and for all other purposes, the mortgagor is the legal owner of the mortgaged premises, and in the case at bar, the Supreme Court of Illinois merely adheres to the law of the State, as it always has existed therein. *Fitch* v. *Pinckard*, 4 Scam. 69, 83; *Ryan* v. *Dunlap*, 17 Illinois, 40; *Sargent* v. *Howe*, 21 Illinois, 149; *Vansant* v. *Allmon*, 23 Illinois, 30; *Hall* v. *Lance*, 25 Illinois, 250; *Harris* v. *Mills*, 28 Illinois, 44, 46; *Pollock* v. *Maison*, 41 Illinois, 516; *Emory* v. *Keigan*, 88 Illinois, 482; *Delano* v. *Bennett*, 90 Illinois, 533; *Barrett* v. *Hinckley*, 124 Illinois, 32; *Lightcap* v. *Bradley*, 186 Illinois, 518, 524; *Ware* v. *Schints*, 190 Illinois, 189; *Hughes* v. *Edwards*, 9 Wheat. 497; *Hutchinson* v. *King*, 1 Wall. 53.

While the mortgage conveys to the mortgagee a legal title, it is only a limited or qualified legal title, and neither before nor after condition broken does the mortgagee have the "absolute legal title" under the law of Illinois. On the contrary it is only a base or determinable fee. Independent of the debt, which the mortgage is given to secure, he has no title whatever. When the debt is paid, released, discharged or barred by the statute of limitations or in any way satisfied, the mortgagee's title is extinguished by operation of law. Cases cited *supra* and *Waughop* v. *Bartlett*, 165 Illinois, 124, 132; *Speer* v. *Hadduck*, 31 Illinois, 439, 443; *Bogardus* v. *Moses*, 181 Illinois, 554.

The title, which the mortgagee gets by the mortgage, can be used by him for one and only one purpose, viz.: as a means for the collection of the debt secured, or so much thereof as the mortgaged premises, when resorted to for that purpose, will satisfy. A valid foreclosure of the mortgage by a decree of a court of equity in a foreclosure suit, followed by a valid

sale in pursuance of the decree, extinguishes the mortgage lien and satisfies the debt so far as the mortgage and land is concerned. *Smith* v. *Smith*, 32 Illinois, 198; *Siligman* v. *Laubheimer*, 58 Illinois, 124, 126; *Ogle* v. *Koerner*, 140 Illinois, 170, 179; *Rains* v. *Mann*, 68 Illinois, 264; *Robins* v. *Swain*, 68 Illinois, 197; *Finley* v. *Thayer*, 42 Illinois, 350, 353; *Trustees of School* v. *Love*, 34 Ill. App. 418; *People* v. *Beebe*, 1 Barb. (N. Y.) 379, 388.

The land having been once applied by sale under a valid foreclosure toward satisfying the debt which was a charge upon it, could not again be sold or applied to the payment of the same charge. *State Bank* v. *Wilson*, 4 Gilm. 57, 67; *Whiteneck* v. *Agritt*, 56 Ill. App. 72; *Smith* v. *Smith*, 32 Illinois, 198; *Hughes* v. *Frisby*, 81 Illinois, 188; *Ogle* v. *Koerner*, 140 Illinois, 170, 180; *Smith* v. *Vandyke*, 17 Wisconsin, 214, 216; *Smith* v. *Luddington*, 17 Wisconsin, 344, 349; *Warrick* v. *Hull*, 102 Illinois, 280.

The authorities already cited show that a mortgagee, or *cestui que trust*, who becomes the purchaser at the foreclosure sale, thereafter sustains the same relation to the property that any stranger would sustain if such stranger had been the purchaser. *Davis* v. *Dale*, 150 Illinois, 239, 243.

In Illinois a certificate of purchase is only a lien. No title passes to the holder of it, and there is none vested in him until the deed is made. Until the deed is made, he is not even entitled to the possession of the premises. *Bennett* v. *Matson*, 41 Illinois, 332, 344; *O'Brien* v. *Fry*, 82 Illinois, 274, 277; *Rockwell* v. *Servant*, 63 Illinois, 425; *Vaughn* v. *Ely*, 4 Barb. 159; *Evertson* v. *Sawyer*, 2 Wend. 507; *Aldrich* v. *Sharp*, 3 Scam. 261, 263; *Kelhotts* v. *Wolf*, 8 Brad. (Ill. App.) 371; *Johnson* v. *Baker*, 38 Illinois, 98, 102; *Hays* v. *Cassell*, 70 Illinois, 669, 672; *Stephens* v. *Ill. M. F. Ins. Co.*, 43 Illinois, 327; *Bowman* v. *The People*, 82 Illinois, 246; *Roberts* v. *Clelland*, 82 Illinois, 538, 542; *Smith* v. *Calvin*, 17 Barb. (N. Y.) 161.

The statute complained of, at most, only operated upon the remedy, and not even upon that until after all contract

rights, obligations and duties given by, or growing out of the McCune trust deed had been enforced, and the trust deed itself extinguished by the foreclosure and sale. From and after the sale, all rights and interest of plaintiff in error, in or to the land, were measured by the certificate of purchase. Cases cited *supra* and *Seeberger* v. *Weinberg*, 151 Illinois, 369, 380; *Smith* v. *Smith*, 32 Illinois, 198; *Rains* v. *Mann*, 68 Illinois, 264; *Wyman* v. *Cochran*, 35 Illinois, 152; *Leslie* v. *Bontil*, 130 Illinois, 501.

A legislative act is not in conflict with the Federal Constitution, prohibiting the impairment of the obligation of a contract, unless it operates directly on the contract and impairs it. *Hanford* v. *Davies*, 163 U. S. 273; *Turner* v. *Wilkes*, 173 U. S. 461; *Central Land Co.* v. *Laidley*, 159 U. S. 109; *Van Hoffman* v. *Quincy*, 4 Wall. 535.

The conclusions of the Supreme Court of Illinois as to the respective rights, title and interest of the mortgagor and mortgagee, being predicated on the general local law of the State governing the same, are not reviewable by this court on a writ of error to the Supreme Court of the State. *New Orleans Water Co.* v. *Louisiana S. R. Co.*, 125 U. S. 18; *Central Land Co.* v. *Laidley*, 159 U. S. 109; *Turner* v. *Wilkes County*, 173 U. S. 461; *Abraham* v. *Casey*, 179 U. S. 210; *Arndt* v. *Griggs*, 134 U. S. 316.

A certificate of purchase is not even color of title, much less does it confer title. *Bride* v. *Watt*, 23 Illinois, 507; *Rigor* v. *Frye*, 62 Illinois, 507; *Shackleford* v. *Bailey*, 35 Illinois, 387; *Perry* v. *Burton*, 111 Illinois, 138.

The title which is required by § 4, ch. 83, must be at least a *prima facie* good title either in law, or equity, and must continue in the party setting up the bar, for seven years, as well as the possession for seven years. *Elston* v. *Kennicott*, 46 Illinois, 207; *Moore* v. *Brown*, 11 How. 414; *Skyle's Heirs* v. *King's Heirs*, 2 A. K. Marshall, 385.

Cases cited *supra* show that the Supreme Court of Illinois has expressly decided that there is no title in the holder of

the certificate of purchase either legal or equitable, and especially after the certificate is barred by the statute.

The construction of state law upon questions affecting the title to real property, by the highest court of the State where the land is located, is binding upon this court, and so also as to statutes of limitation. Rev. Stat. § 721; *De Vaughn* v. *Hutchinson*, 165 U. S. 566; *Clark* v. *Clark*, 178 U. S. 186; *Brine* v. *Ins. Co.*, 96 U. S. 627; *Clark* v. *Graham*, 6 Wheat. 577; *Abraham* v. *Casey*, 179 U. S. 210; *Williams* v. *Kirtland*, 13 Wall. 306; *Turner* v. *Wilkes*, 173 U. S. 461; *Arndt* v. *Griggs*, 134 U. S. 316; *Forsyth* v. *Hammond*, 166 U. S. 518; *Percy* v. *Cockrill* (C. C. A.), 53 Fed. Rep. 872; *Brunswick* v. *Bank*, 99 Fed. Rep. 635; *Morley* v. *Lake Shore Co.*, 146 U. S. 162; *Board* v. *Louisiana*, 179 U. S. 622.

The decision of the Supreme Court of Illinois complained of rests on independent grounds, not involving a Federal question and broad enough to maintain its judgment, viz., the application of the doctrine of *res adjudicata*, and the writ should be dismissed, or the judgment affirmed. *California Powder Works* v. *Davis*, 151 U. S. 389; *Hale* v. *Akers*, 132 U. S. 554, and cases cited; *Murdock* v. *Memphis*, 20 Wall. 590; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Castillo* v. *McConnico*, 168 U. S. 674; *Eustis* v. *Bolles*, 150 U. S. 361.

The statute complained of is not inconsistent with the Fourteenth Amendment, or § 1979, Rev. Stat. *Wheeler* v. *Jackson*, 137 U. S. 245; *Terry* v. *Anderson*, 95 U. S. 628; *Saranac L. Co.* v. *Roberts*, 177 U. S. 318; *Hurtado* v. *California*, 110 U. S. 516; *In re Brown*, 135 U. S. 705.

The Fourteenth Amendment was not designed to limit, and does not limit, the police power of the States which includes statutes of limitation; there is no constitutional objection to their validity provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action or performing an act after its passage and before the bar takes effect. Cooley's Constitutional Limitations, p. 434, (6th ed.); *Wheeler* v. *Jackson*, 137 U. S. 255; *Turner* v. *New*

York, 168 U. S. 90, 94; *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *L. & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Iowa Central R. Co.* v. *Iowa*, 160 U. S. 389, 393; *Leeper* v. *Texas*, 139 U. S. 642; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 518; *Minneapolis R. Co.* v. *Beckwith*, 129 U. S. 26; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Munn* v. *Illinois*, 94 U. S. 113, 134; *Grozza* v. *Tiernan*, 148 U. S. 657, 661; *Stearns* v. *Gettings*, 23 Illinois, 387; *Hurtado* v. *California*, 110 U. S. 516.

The decision of the state court proceeds not only upon the general jurisprudence of the State, but is also based upon rules of property, and by adjudications by the highest court of the State, firmly implanted in its jurisprudence, and this court will apply the rules adopted in the State to the determination of the controversy. *Suydam* v. *Williams*, 24 How. 427; *Chicago* v. *Robbins*, 2 Black. 418; *Gage* v. *Company*, 115 U. S. 454; *Burgess* v. *Seligman*, 107 U. S. 20; *Lane* v. *Vick*, 3 How. 464; *Greene* v. *Lessee of Neal*, 6 Pet. 291.

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

Among the defences, it is stated Mrs. Bradley relied on, were that "under section 6 of chapter 83 of the Revised Statutes, in regard to limitations, the trust deed from McCune to Johnson, the decree of sale and certificate of purchase constituted color of title which, coupled with her possession and payment of taxes for seven successive years, made her the legal owner of the lands to the extent and according to the purport of her paper title;" that "under section 4 of the same act her possession and actual residence, through her tenants, for seven successive years, having a connected title in law or equity deducible of record from the United States, by virtue of the same trust deed, decree and sale, barred the action of plaintiff;" and "that she was mortgagee in possession after condition broken and entitled to possession as such." The Supreme Court of Illinois overruled all these defences, and held

that when the sale was made under the decree and the mortgagee purchased at the sale, the mortgage was satisfied as to the land, and all rights of the mortgagee were represented by the certificate of purchase, and that, by force of the act of 1872, the mortgagee having failed to take the deed within the time limited by the statute, the certificate became null and void, her title terminated as it would on redemption, and she ceased to have any interest whatever in the premises, so that the mortgagor or his grantees, without any payment of the mortgage debt, was entitled to recover the possession from the mortgagee, in ejectment, on the strength of a perfect title.

Before and when the trust deed to Johnson, which may be treated as if a mortgage to Mrs. Bradley, was given, the legal title passed to the mortgagee according to the law of Illinois in respect of mortgages.

After condition broken the mortgagee became entitled to possession of the mortgaged premises and could maintain an action of ejectment. The mortgagor had only an equity of redemption, and in case of sale on foreclosure had by statute the right to redeem within twelve months by making full payment.

The law in general as it is to-day was thus declared in *Ware* v. *Schintz*, 190 Illinois, 189, 193:

"Under the repeated rulings of this court a mortgagee, as against the mortgagor, is held, as in England, in law, to be the owner of the fee, having the *jus in re* as well as *ad rem*, and entitled to all the rights and remedies which the law gives to such owner, and may, after condition broken, maintain ejectment against the mortgagor. The mortgagor or his assignee, however, is the legal owner of the mortgaged estate as against all persons excepting the mortgagee or his assigns. *Delahay* v. *Clement*, 3 Scam. 201; *Vansant* v. *Allmon*, 23 Illinois, 30; *Carroll* v. *Ballance*, 26 Illinois, 9; *Oldham* v. *Pfleger*, 84 Illinois, 102; *Fountain* v. *Bookstaver*, 141 Illinois, 461; *Esker* v. *Heffernan*, 159 Illinois, 38. The fee title held by the mortgagee is in the nature of a base or determinable fee. The term of its

existence is measured by that of the mortgage debt. When the latter is paid or becomes barred by the statute of limitations the mortgagee's title is extinguished by operation of law. *Pollock* v. *Maison*, 41 Illinois, 516; *Harris* v. *Mills*, 28 Illinois, 44; *Gibson* v. *Rees*, 50 Illinois, 383; *Barrett* v. *Hinckley*, 124 Illinois, 32; *Lightcap* v. *Bradley*, 186 Illinois, 510. Until it is extinguished the legal title is in the mortgagee for the purpose of obtaining satisfaction of his debt."

The condition of the McCune mortgage was broken as soon as made by failure to pay taxes previously and then due, and again by failure to pay the notes maturing in 1869, 1870 and 1871, and Mrs. Bradley entered into peaceable possession of the tract of six hundred and eighty acres before the act of 1872 took effect. If the assent of the mortgagor was necessary, which we do not hold it was, it should be implied in the circumstances. Her possession was that of mortgagee in possession, and she could defend as against the owner of the equity of redemption any action except for an accounting of the rents and profits, and to redeem. And as she could pursue concurrent remedies the character of her possession was not affected by the filing and pendency of the bill to set aside the release of the Breedlove mortgage. But that bill went to decree in 1879 of foreclosure of the McCune mortgage by sale, and sale was had. There was no independent purchaser, nor was the whole amount of the mortgage debt bid, but Mrs. Bradley, the mortgagee in possession, bid about one-third of the amount due. By the statute the right of redemption of McCune and his grantee was barred and determined October 27, 1880, at the expiration of twelve months from the date of sale, and so it was by the express provision of the decree of foreclosure.

The certificate of purchase was issued to Mrs. Bradley, but it does not appear that she obtained a deed. It is assumed, and we assume, that she did not, although it is suggested that after the lapse of so many years, and under the circumstances, in an action at law by the original mortgagor against the

mortgagee in possession, an irrebutable presumption of a deed arises on grounds of public policy.

The Supreme Court of Illinois in the present case decides that the act of 1872 applies to mortgagees in possession, and that it operates not simply as a statute of limitations on the right to obtain a deed, but in effect as a statute forfeiting, by the nullification of the certificate, the mortgagee's estate and right of possession by reason of *laches*, and means that if a deed be not taken out within the time specified, the mortgagee has lost his debt and the mortgagor has been reinstated in his former title by operation of law, and without having paid anything in redemption. Accepting the construction of the act by the state court, and its conclusion that it applies to Mrs. Bradley, then the question is whether such a statute so applied does not impair the obligation of the contract previously existing between the mortgagee and the mortgagor, or deprive the mortgagee of property rights without due process. That question was raised in the Supreme Court of Illinois, and the court held that it did not. 201 Illinois, 511.

Confessedly subsequent laws, which in their operation amount to the denial of rights accruing by a prior contract, are obnoxious to constitutional objection.

In *Bronson* v. *Kinzie*, 1 How. 311, the statute objected to gave the mortgagor twelve months to redeem after the sale, and Mr. Chief Justice Taney said:

"It declares that, although the mortgaged premises should be sold under the decree of the Court of Chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. . . . Any such modification of a contract by subsequent legislation, against the consent of

one of the parties, unquestionably impairs its obligations; and is prohibited by the Constitution."

In *Barnitz* v. *Beverly*, 163 U. S. 118, it was held that a state statute which authorized redemption of property sold in foreclosure of a mortgage where no such right previously existed, or extended the period of redemption beyond the time previously allowed, could not apply to a sale under a mortgage executed before its passage, and Mr. Justice Shiras, referring to *Brine* v. *Insurance Company*, 96 U. S. 627, 637, said:

"But this court held, through Mr. Justice Miller, that all the laws of a State existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts, . . . that it is therefore said that these laws enter into and become a part of the contract"—and that "'the remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation.'" . . .

"What we are now considering is, whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act [which provided that the land 'shall not again be liable for sale for any balance'] does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is competent for the States to change the form of a remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties."

In *Hooker* v. *Burr*, 194 U. S. 415, these and many other

cases were considered, and the distinction was pointed out between a purchase by the mortgagee and by an independent purchaser, having no connection whatever with the original contract between the mortgagor and mortgagee, and whose contract was made under the law as then existing; as well as the distinction where the mortgagee bids the whole amount of the mortgage debt, as in *Connecticut Mutual Life Insurance Company* v. *Cushman*, 108 U. S. 51, which was cited with approval. There the company bid enough to pay the full amount of the mortgage debt, principal and interest, and on redemption contended that it was entitled to interest at the rate existing at the time of the execution of the mortgage, which had been reduced before the sale, though subsequent to the mortgage. *Barnitz* v. *Beverly*, was distinguished. In that case the sum bid at the foreclosure sale did not equal the amount due on the mortgage, 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, 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.

And we said: "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."

In Illinois the legal title vests in the mortgagee, but in equity that title is regarded as a trust estate to secure the payment of the money, and where the mortgaged premises are bid off by the mortgagee, at foreclosure sale, for the full amount of the decree, interest and costs, the mortgage may be held to have expended its force, but where the bid is for less than the full amount, a different rule would be applicable. *Bogardus* v. *Moses*, 181 Illinois, 554, 559, 560.

Entitled to pursue different remedies to collect the mortgage debt or to free the mortgaged premises of the right of redemption, foreclosure and sale, purchase and deed are in aid of the original title and not inconsistent with it. *Williams* v. *Brunton*, 3 Gilm. (Ill.) 600. If the right of redemption is determined by efflux of time, which must be before a deed can issue, failure to take out the deed either has no effect so far as the mortgagor is concerned because he is not injured, or the right of redemption still remains and all the mortgagor can claim is that the relation between the parties is unchanged.

In the present case there was no independent purchaser; the bid of the mortgagee was less than one-third of the amount found due; there was no redemption and the right of redemption was cut off; the mortgagee was in possession before and at the time of foreclosure and sale, and when ejectment was brought sixteen years thereafter, and the mortgage debt had never in fact been paid; so that the original mortgagor as plaintiff in ejectment could not recover unless by the subsequent law the mortgagee had been subjected to the loss of all her rights, as against him, by *laches* in obtaining a deed, although as a general rule *laches* are not imputable to a party in possession to the loss of the right thereto.

And if the operation of the subsequent law is to impair the obligation of Mrs. Bradley's mortgage contract or to deprive her of rights protected by the Constitution, we cannot decline jurisdiction because of a construction that we deem untenable.

Louisville Gas Company v. *Citizens' Gas Light Company*, 115 U. S. 683, 697; *Terre Haute & Indianapolis Railroad Company* v. *Indiana*, 194 U. S. 579.

By the judgment in this case Lightcap has been held clothed with the legal title and the immediate right of possession. And this on the ground that the certificate of purchase discharged the McCune mortgage and that the act of 1872 nullified the certificate after the lapse of five years. This gave to the limitation of time for taking out the deed the effect of destroying the right of possession taken under the mortgage, wiping out the mortgage with the certificate, and allowing the mortgagor to assert the legal title and right of possession as against the mortgagee as a wrongdoer. That is to say, though Mrs. Bradley was rightfully in possession and though the mortgage debt had not in fact been paid, the bar of the statute as to the deed is held to be efficacious in turning Mrs. Bradley into a trespasser as respects the mortgagor, who, not having in fact paid anything, is treated as having made payment by the mortgagee's bid, and being at the same time entitled to assert the failure of the purchase by reason of *laches* in taking out the deed.

And yet because a statute may take away the sword which a deed would give a mortgagee out of possession, it does not follow that it can lawfully operate on prior transactions so as to take away the shield afforded by possession. Rightful possession is a defence in ejectment, *Sands* v. *Wacaser*, 149 Illinois, 530, 533, and cases cited, and Mrs. Bradley's possession could only be treated as wrongful as against the original mortgagor by the application of the subsequent law.

As we have said, when Mrs. Bradley took this mortgage there was no statutory limitation as to the time within which a master's deed must be taken out, and no loss of right by reason of failure to do so was prescribed. After she had filed her bill, and while she was in possession, the act of 1872 went into effect, and, it may be conceded, limited Mrs. Bradley's right to obtain a deed on foreclosure sale and so far affected

any remedy through a deed she might have had. But, reading the act, as the view of the Supreme Court compels us to do, as taking away her right to maintain her possession, we are of opinion that it materially impairs the obligation of her contract, and deprives her of property without due process.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

BRADLEY *v.* LIGHTCAP. No. 2.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 306. Argued April 21, 1904.—Decided May 31, 1904.

This case having been decided by the state court on the authority of its own decision in a case between the same parties which has been reversed by this court, this judgment is also reversed on the authority of *Bradley* v. *Lightcap, ante,* p. 1.

THE facts are stated in the opinion of the court.

Mr. John S. Miller, with whom *Mr. Merritt Starr* and *Mr. W. W. Hammond* were on the brief, for plaintiff in error.

Mr. George W. Wall and *Mr. E. A. Wallace,* with whom *Mr. Lyman Lacey, Jr.,* was on the brief, for defendant in error.

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

After the decision reported 186 Illinois, 510, Mrs. Bradley filed her bill in equity in the Circuit Court of Fulton County, Illinois, to quiet her title to the land in controversy in the action in ejectment and for appropriate relief. The bill was dismissed on demurrer and Mrs. Bradley carried the case to the Supreme Court of Illinois, which affirmed the decree below.

Bradley v. *Lightcap*, 202 Illinois, 154, April 24, 1903. Three of the members of the court dissented. The opinion of the Supreme Court proceeded on the strength of the decisions in 186 Illinois, 510, and 201 Illinois, 511.

As we have reversed the judgment in the prior case, this case must take the same course.

Decree reversed and cause remanded for further proceedings not inconsistent with our opinion in No. 243.

BRADLEY *v.* LIGHTCAP. No. 3.

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

No. 343. Argued April 21, 1904.—Decided May 31, 1904.

A case does not necessarily arise under the constitution or laws of the United States every time a writ of error would lie to the judgment of the state court.

THE facts are stated in the opinion of the court.

Mr. John S. Miller, with whom *Mr. Merritt Starr* and *Mr. W. W. Hammond* were on the brief, for plaintiff in error.

Mr. George W. Wall and *Mr. E. A. Wallace*, with whom *Mr. Lyman Lacey, Jr.*, was on the brief, for defendant in error.

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

This was a bill filed by Mrs. Bradley, to quiet her title to the premises in controversy in No. 243, and for appropriate relief, in the Circuit Court of the United States for the Northern District of Illinois, and was dismissed for want of jurisdiction, May 22, 1902.

The Circuit Court, Grosscup, J., was of opinion that the statute of 1872 was not one of limitation in the same sense as a statute limiting the time within which foreclosure proceedings must be brought; that the failure to take out the deed within five years raised no presumption that the mortgage debt had been paid; and that the act was, in effect, simply a limitation on the time within which the foreclosure decree could be availed of, and did not operate to forfeit the mortgagee's title to the mortgagor if the deed were not taken out. But he thought that Mrs. Bradley's title by possession as mortgagee had not been held by the state court to have been cut off by the statute of 1872, as the record in that court stood, as reported in 186 Illinois, 510, and that, therefore, the constitutional question did not arise. If, however, the Supreme Court had ruled that her title as mortgagee in possession had been so destroyed, the remedy was by writ of error from the Supreme Court of the United States. The decision in 201 Illinois, 511, was rendered February 18, 1903. Taking into view the controversy as presented in the two other cases, and that the judgments in those cases are now directed to be reversed, and bearing in mind that a case does not necessarily arise under the Constitution or laws of the United States every time a writ of error would lie to the judgment of the state court, the decree of the Circuit Court will be

Affirmed.

McCRAY *v.* UNITED STATES.

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

No. 301. Argued December 2, 1903.—Decided May 31, 1904.

The judiciary is without authority to avoid an act of Congress lawfully exerting the taxing power, even in a case where to the judicial mind it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress, nor can the judiciary inquire into the motive or purpose of Congress in adopting a statute levying an excise tax within its constitutional power.

While both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in either of them operates to take away the grant of power to tax conferred by the Constitution upon Congress, and that power being unrestrained except as limited by the Constitution, Congress may select the objects upon which the tax shall be levied, and in exerting the power no want of due process of law can possibly result, and the judiciary cannot usurp the functions of the legislature in order to control that branch of the Government in exercising its lawful functions.

The manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

There is such a distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter that the taxing of the latter and not the former cannot be avoided as an arbitrary exertion of the taxing power of Congress without any basis of classification, taxing one article and excluding another of the same class.

The Oleomargarine Act of 1886, 24 Stat. 209, as amended by the act of 1902, 32 Stat. 93, imposing a tax of one quarter of one per cent on oleomargarine not artificially colored any shade of yellow so as to look like butter and ten cents a pound if so colored, levies an excise tax and is not unconstitutional as outside of the powers of Congress, or an interference with the powers reserved to the States, nor can the judiciary declare the tax void because it is too high nor because it amounts to a destruction of the business of manufacturing oleomargarine, nor because it discriminates against oleomargarine and in favor of butter.

Where a manufacturer of oleomargarine uses as an ingredient butter artificially colored he thereby gives to the manufactured product artificial

coloration within the meaning of the Oleomargarine Act as amended in 1902 and the product is subject to taxation at the rate of ten cents per pound.

THE United States sued McCray for a statutory penalty of $50, alleging that, being a licensed retail dealer in oleomargarine, he had, in violation of the acts of Congress, knowingly purchased for resale a fifty-pound package of oleomargarine, artificially colored to look like butter, to which there were affixed internal revenue stamps at the rate of one-fourth of a cent a pound, upon which the law required stamps at the rate of ten cents per pound. The answer of McCray, whilst admitting the purchase of the package stamped as alleged, set up two defences.

First. It was averred that the oleomargarine in question was made by a duly licensed manufacturer, the Ohio Butterine Company, from a formula used by it in making a high grade oleomargarine composed of "the following ingredients and none other, in these proportions: oleo oil, 20 pounds; natural lard, 30 pounds; creamery butter, 50 pounds; milk and cream, 30 pounds; common salt, 7 pounds." It was asserted that whilst it was true that the oleomargarine made from the ingredients in question was of a yellow color, that this result was not caused by artificial coloration, but was solely occasioned by the fact that the butter which was bought in open market and used in making the oleomargarine had a deep yellow color imparted to it (the butter) by a substance known as Wells-Richardson's improved butter color. This preparation, it was averred, was not injurious to health, and was constantly used in the United States in the manufacture of butter made from pure milk or cream, for the purpose of imparting to it a deep yellow color. Averring that a yellow color produced in oleomargarine by the employment of butter, as an ingredient, which was artificially colored, did not amount to an artificial coloration of the oleomargarine within the meaning of the statute, it was asserted that the tax of one-fourth of a cent per pound was a compliance with the law.

Second. If the act of Congress imposing the tax, when rightfully construed, required stamps at the rate of ten cents per pound upon oleomargarine, colored as described in the first defence, the act levying such tax was charged to be repugnant to the Constitution of the United States. As a foundation for this defence the answer contained the following averments:

Whilst butter made from pure milk and cream in the spring season was of a deep yellow color, such butter when made at all other seasons was of a pale yellow; that the taste of consumers of butter in the United States required all butter to possess the deep color naturally belonging to butter made in the spring season, and hence it had come to pass that substantially all butter manufactured for sale in the United States, not made in the spring season and not naturally of a deep yellow, was colored artificially so as to cause it to have the deep yellow of spring butter. It was alleged that this deep yellow coloration of natural butter was universally produced by the use of either Wells-Richardson's compound or some other coloring ingredient, which did not change the taste of the butter, none of which were injurious to health. Oleomargarine, it was alleged, derived its chief value as an article of food as a substitute for butter, and that growing out of the taste of the consumers, unless the oleomargarine which was naturally white could be colored yellow, to present the appearance of butter artificially colored, there was no demand for it, and its manufacture and sale would be commercially impossible. It was then averred that to impose upon the colored oleomargarine a tax of ten cents per pound would burden it with such a charge as to render it impossible to make and sell it in competition with butter, and therefore the result of imposing a tax of ten cents a pound on oleomargarine when artificially colored would destroy the oleomargarine industry. From these averments it was charged that if the law imposed the tax of ten cents upon the oleomargarine in question the statute was repug-

nant to the Constitution, because it deprived the defendant of his property without due process of law; because the levy of such a burden was beyond the constitutional power of Congress, since it was an unwarranted interference by Congress "with the police powers reserved to the several States and to the people of the United States by the Constitution of the United States;" and further, that said acts of Congress were repugnant to the Constitution, since they finally lodged in an executive officer the power to determine what constituted artificial coloration of oleomargarine, and therefore invested such officer with judicial authority; and, finally, because the attempt by Congress to levy a tax at the rate of ten cents a pound arbitrarily discriminated against oleomargarine in favor of butter, to the extent of destroying the oleomargarine industry for the benefit of the butter industry, and was, therefore, violative of "those fundamental principles of equality and justice which are inherent in the Constitution of the United States."

The Government demurred to the answer on the ground that it stated no defence. The demurrer was sustained and McCray electing to plead no further, the court found the facts alleged in the petition to be true, and adjudged that the Government recover "the sum of fifty dollars as a penalty and costs." Because of the questions arising under the Constitution, the case was then brought directly to this court.

Mr. William D. Guthrie and *Mr. Miller Outcalt*, with whom *Mr. Charles E. Prior*, *Mr. Francis J. Kearful*, *Mr. Delavan B. Cole* and *Mr. Charles C. Carnahan*, were on the brief, for plaintiff in error:

As to the power of Congress to levy excise taxes on manufactures, and the power of the courts to prevent abuse of its powers by Congress, see *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *Fairbank* v. *United States*, 181 U. S. 283, 290; the Federalist No. 78; *Barron* v. *Baltimore*, 7 Pet. 243, 250; *Marbury* v. *Madison*, 1 Cranch, 137, 176; *McCulloch* v. *Mary-*

land, 4 Wheat. 316, 421; *Hepburn* v. *Griswold*, 8 Wall. 603, 614; *Smyth* v. *Ames*, 169 U. S. 466, 527; *Re Jacobs*, 98 N. Y. 98, 112.

For the restrictive character of the Fifth Amendment, see *Prout* v. *Starr*, 188 U. S. 537. There are, however, no decisions as to whether there are any limitations on Congress other than those of apportionment and geographical uniformity. *Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Company*, 17 Wall. 322; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178; *Bank* v. *New York*, 121 U. S. 138, 162; *Income Tax Cases*, 157 U. S. 429, 584; *Plummer* v. *Coler*, 178 U. S. 115; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *Snyder* v. *Bettman*, 190 U. S. 249; *Wright* v. *Davidson*, 181 U. S. 371, 377; *Patton* v. *Brady*, 184 U. S. 608, 622; *Knowlton* v. *Moore*, 178 U. S. 41, 92, 110; *Parsons* v. *District of Columbia*, 170 U. S. 45, 51. Congress has no power whatever to regulate the internal commerce of the States, which was expressly reserved to the States by the Tenth Amendment. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 203; *License Cases*, 5 How. 504, 574, 599; *Passenger Cases*, 7 How. 283, 400; *License Tax Cases*, 5 Wall. 462, 470–471; *United States* v. *Dewitt*, 9 Wall. 41, 44; *Trade-Mark Cases*, 100 U. S. 82, 96–97; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13. The police power never was surrendered by the States. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; see also, *In re Rahrer*, 140 U. S. 545, 554, 556; *Plumley* v. *Massachusetts*, 155 U. S. 461, 472; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11, 13; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558. The act now before the court, if grounded upon the attempt to regulate the manufacture of dairy products and oleomargarine and their sale in the internal commerce of the States, would be clearly beyond the powers of Congress and unconstitutional. *United States* v. *Dewitt*, 9 Wall. 41, 45; *United States* v. *Fox*, 94 U. S. 315, 320; *Trade-Mark Cases*, 100 U. S. 82, 96; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13; *United States* v. *Boyer*, 85 Fed. Rep. 424, 432.

The provisions of this act, so far as they affect the internal commerce of a State, can, therefore, only be sustained under the taxing power of Congress. While the act is called a tax law it imposes a burden on a recognized article of commerce of the States. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8; and, whatever its guise a statute must be judged by the practical operation of its provisions. *Henderson* v. *Mayor*, 92 U. S. 259, 268; *Morgan* v. *Louisiana*, 118 U. S. 455, 462; *Collins* v. *New Hampshire*, 171 U. S. 30; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Fairbank* v. *United States*, 181 U. S. 283; *Woodruff* v. *Parham*, 8 Wall. 123; *Postal Tel. Co.* v. *Adams*, 155 U. S. 688, 698; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; *Thomas* v. *Gay*, 169 U. S. 264, 283; *Smith* v. *St. &c. Ry. Co.*, 181 U. S. 248, 257. For cases in which this court has determined the difference between a legal tax and illegal burdens imposed by both state and Federal authorities, see *Pace* v. *Burgess, Collector*, 92 U. S. 372; *Fairbank* v. *United States*, 181 U. S. 283, 290; *Helwig* v. *United States*, 188 U. S. 605, 611; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Smyth* v. *Ames*, 169 U. S. 466, 527; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 351; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 228; *Ficklen* v. *Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180; *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 221. See also cases where confiscation of property cannot be effected by acts purporting to be police regulations. *Ches. & Pot. Tel. Co.* v. *Manning*, 186 U. S. 238, 250; *Cotting* v. *Stock Yards*, 183 U. S. 79, 85, and cases cited.

The tax is so large that it is evident that it was imposed, not as an excise for revenue, but as a prohibition.

A State, under the power to regulate its internal commerce, can prohibit the manufacture and sale of oleomargarine. *Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467, and *Capital City Dairy Co.* v.

Ohio, 183 U. S. 238, 246, but it cannot prohibit the sale of oleomargarine manufactured in other States and offered for sale in the course of interstate commerce. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 21, 25. A State surely cannot indirectly prohibit interstate commerce in oleomargarine by taxing it to death.

If a State should impose a tax upon a commercial commodity as *property* and the effect of such a tax, as to articles brought from other States, was to destroy all opportunity to sell the commodity, the law would be unconstitutional as interfering with interstate commerce even though the same amount of tax should be laid on domestic manufactures as property, and even though such a tax would only apply after the "original package" of importation had been broken and the contents exposed for sale. *Woodruff* v. *Parham*, 8 Wall. 123, 131; *Brown* v. *Houston*, 114 U. S. 622, 634. Where the State may prohibit as a police regulation, different considerations are presented. Cooley on Taxation, 11; *Hinson* v. *Lott*, 8 Wall. 148, 152; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 74; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 453; *Caldwell* v. *North Carolina*, 187 U. S. 622, 633; *May* v. *New Orleans*, 178 U. S. 496, 508; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; *Brennan* v. *Titusville*, 153 U. S. 289, 303; *Fertilizer Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609, 613.

Where a tax is in the form of an inspection tax it is relevant to show that it is not large enough to operate as a penalty or prohibition. *Ward* v. *Maryland*, 12 Wall. 418, 425; *Welton* v. *State of Missouri*, 91 U. S. 275; *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59; *Moran* v. *New Orleans*, 112 U. S. 69; *Walling* v. *Michigan*, 116 U. S. 446, 461; *Emert* v. *Missouri*, 156 U. S. 296, 311.

The principal argument in support of the bill is based on the phrase "the power to tax involves the power to destroy." *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *Veazie Bank* v. *Fenno*, 8 Wall. 533. This applies however only to a

legitimate tax law. *Cohens* v. *Virginia*, 6 Wheat. 264, 399. See *Birney* v. *Tax Collector*, 2 Bailey (S. C.), 654, 674, and *Hepburn* v. *Griswold*, 8 Wall. 603, 636; *National Bank* v. *United States*, 101 U. S. 1, 5; and as to application of the *Veazie Bank Case*, see *Head-Money Cases*, 112 U. S. 580, 596; *Loan Association* v. *Topeka*, 20 Wall. 655, 663, in which the unlimited power to tax is confined to a purpose for which taxation is lawful. To the same effect, see *Parkersburg* v. *Brown*, 106 U. S. 487, 500; *Cole* v. *LaGrange*, 113 U. S. 1, 6; *The State ex rel.* v. *Osawkee Township*, 14 Kansas, 418, 427; *Lowell* v. *Boston*, 111 Massachusetts, 454, 461; *Mead* v. *Acton*, 139 Massachusetts, 341, 344; *Allen* v. *Inhabitants of Jay*, 60 Maine, 124, 128, 138; *Sugar Co.* v. *Auditor General*, 124 Michigan, 674, 678; *State* v. *Foley*, 30 Minnesota, 350, 357; *Weismer* v. *Village of Douglas*, 64 N. Y. 91, 100; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 168; Burroughs on Taxation, pp. 6, 506; Harlan J., in dissenting in *Fairbank* v. *United States*, 181 U. S. 283, 318.

The prohibition of yellow oleomargarine in order to facilitate the collection of the tax on other oleomargarine is too remote to justify the prohibitive tax of ten cents. *United States* v. *Dewitt*, 9 Wall. 41, 44.

As to the restrictions upon the taxing power contained in the Fifth Amendment, see *Loan Association* v. *Topeka*, 20 Wall. 655, 664; *Dartmouth College Case*, 4 Wheat. 514, 644; *The Slaughter-House Case*, 16 Wall. 36, 72; *Ex parte Virginia*, 100 U. S. 339, 347, 361; *Holden* v. *Hardy*, 169 U. S. 366, 382; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 676; *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. Rep. 385, 399; affirmed 118 U. S. 394, 417, 422; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370; Story on the Constitution, § 1945; Cooley's Const. Lim. 6th ed. p. 433. See Justice Johnson's exposition in *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, often quoted with approval; *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Hurtado* v. *California*, 110 U. S. 516,

527; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Taylor* v. *Beckham*, 178 U. S. 548, 592. See also as to due process of law, *Giozzo* v. *Tiernan*, 148 U. S. 657, 662; *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Thomas* v. *Gay*, 169 U. S. 264, 283; *Norwood* v. *Baker*, 172 U. S. 269, 279. This court has never attempted to define "due process of law." *Holden* v. *Hardy*, 169 U. S. 366, 389. But the meaning is no narrower when applied to Federal, than when it is to state government. *Sinking Fund Cases*, 99 U. S. 700, 718; *French* v. *Asphalt Co.*, 181 U. S. 324, 355. And a state statute preventing all sales of oleomargarine as an article of commerce would not be valid. *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467. Congress cannot in exercising its powers act arbitrarily. *Lottery Case*, 188 U. S. at p. 363; *Interstate Com. Com.* v. *Brimson*, 154 U. S. 447, 479. The restrictive clause of the Fifth Amendment applying to the exercise of the taxing power, its prohibition or limitation should be enforced in its spirit and to its entirety as fully as if it were part of the very article conferring the taxing power. *Prout* v. *Starr*, 188 U. S. 537, 543; *Fairbank* v. *United States*, 181 U. S. 283, 288. The act purports strictly to levy an excise tax, *Patton* v. *Brady*, 184 U. S. 608, 618, but an exaction made without regard to any rule of apportionment is not authorized by law, Cooley's Pr. Const. Law, 3d ed. p. 56, and does not come within the definitions of taxation. *Gibbons* v. *Ogden*, 9 Wheat. 1, 199; *Oliver* v. *Washington Mills*, 11 Allen, 268, 274, and cases cited; 15 Op. Atty. Genl. 219.

While the power to tax undoubtedly involves the power to classify for purposes of taxation, due process of law requires that classification shall be something more than mere arbitrary selection as is the case in this statute. As to the exercise of the power of classification, see *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 154; *State* v. *Loomis*, 115 Missouri, 307, 314. The right to earn one's livelihood by any lawful calling constitutes the

liberty and property of the individual and one of the inalienable privileges and immunities of every citizen of the United States which are secured by the Constitution. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757, 764; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *People* v. *Marx*, 99 N. Y. 377, 386; *People* v. *Gillson*, 109 N. Y. 389, 399.

The contention of the plaintiff does not limit the taxing power of the Federal government but simply declares that in the exercise of the taxing power Congress may not impose prohibitory taxes upon internal products based upon the fact that a manufactured article resembles and competes with another product which is not taxed; in other words, that it may not destroy the property of one class of its citizens for the benefit of another class.

Section 14 of the act conferring judicial power upon the Commissioner of Internal Revenue is invalid. *United States* v. *Eaton*, 144 U. S. 677, 688; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Blasingame*, 116 Fed. Rep. 654. *In re Kollock*, 165 U. S. 526, 533, distinguished.

According to the ruling of the Commissioner, the word "artificial" is made to include "natural," a word of opposite meaning, for it is undisputed that the yellow color of palm oil is a natural color, and the exception would be, not of oleomargarine "free from artificial coloration" but of oleomargarine "free from coloration." The established rule is that the intention to tax in a particular manner must be expressed in clear and unambiguous language, else it cannot be enforced, and that words of exception are to receive a liberal rather than a constricted construction, to the end that the burdens imposed upon individuals may be confined rather than extended. The rule together with its supporting authorities is stated in *Eidman* v. *Martinez*, 184 U. S. 578, 583. See also *Adams* v. *Bancroft*, 3 Sumner, 384, 387; *Schoenemann* v. *United States*, 119 Fed. Rep. 584, 587; *In re Southern Pac. Co.*, 82 Fed. Rep. 311, 313; 87 Fed. Rep. 863; *Matheson*

& Co. v. *United States*, 71 Fed. Rep. 394, 395; *Rice* v. *United States*, 53 Fed. Rep. 910, 911; *Dean* v. *Charlton*, 27 Wis. 522, 526.

Mr. Solicitor General Hoyt for the United States:

The tax being an excise, the only limitation upon the power of Congress to impose the tax is that it shall be "uniform" throughout the United States. Const. art. 1, § 8, cl. 1. A tax is "uniform" when it operates with the same force and effect in every place where the subject of it is found. *Head Money Cases*, 112 U. S. 594; *Knowlton* v. *Moore*, 178 U. S. 106.

Congress may classify property for purposes of taxation. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Nicol* v. *Ames*, 173 U. S. 509.

The law does not violate those provisions of the Fifth Amendment which declare that no person shall be deprived of his liberty or property without due process of law; nor shall private property be taken for public use without just compensation. The latter clause refers only to a direct appropriation of property for public purposes and not to a so-called taking as the effect of taxation. *Legal Tender Cases*, 12 Wall. 551; *Transportation Co.* v. *Chicago*, 99 U. S. 642; *Mugler* v. *Kansas*, 123 U. S. 668. *Loan Association* v. *Topeka*, 20 Wall. 665, involved the taking of property by way of taxes in aid of a private enterprise and is not to the contrary.

Due process of law is provided. The law subjects artificially colored oleomargarine to one rate of tax and uncolored oleomargarine to another rate; in case of a dispute respecting the taxability of the article an appeal is provided from the collector to the Commissioner of Internal Revenue; and, in certain cases, a further appeal is allowed. This is due process. Executive process may be due process. *The Japanese Immigrant Case*, 189 U. S. 86.

It is asserted that the tax imposed is confiscatory, and therefore loses its character as an excise and becomes a reg-

ulation of manufacture. But the power to tax is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 431; *Gibbons* v. *Ogden*, 9 Wheat. 196; *License Tax Cases*, 5 Wall. 471; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 443; *Knowlton* v. *Moore*, 178 U. S. 58. The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy. *Austin* v. *The Alderman*, 7 Wall. 699.

Although the power to tax may be exercised oppressively, or unwisely, the responsibility of the legislature is not to the courts but to the people; for the judicial cannot prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. *Veazie Bank* v. *Fenno*, 8 Wall. 548; *Spencer* v. *Merchant*, 125 U. S. 355; *Champion* v. *Ames*, 188 U. S. 363. The decisions in *Hepburn* v. *Griswold*, 8 Wall. 603, and *National Bank* v. *United States*, 101 U. S. 6, are not to the contrary.

By the Constitution, the Government is divided into three distinct and independent branches, and it is the duty of each to abstain from, and to oppose, encroachments on the other. *Hayburn's Case*, 2 Dall. 410. The court cannot, therefore, interpose to declare an act of Congress, passed within the general scope of its constitutional power, void, merely because it may be, in the court's judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard and a court in declaring for that reason only, a law invalid, would be merely substituting its opinion for that of Congress. *Calder* v. *Bull*, 3 Dall. 399; *Griswold* v. *Hepburn*, 8 Wall. 637; *Legal Tender Cases*, 12 Wall. 552; *Kilbourn* v. *Thompson*, 103 U. S. 190.

It is not within the province of the court to consider why one class of property is taxed and another is not taxed. *Treat* v. *White*, 181 U. S. 268; or to inquire into the reasonableness of the excise, either as to the amount, or the property upon which it is imposed. *Patton* v. *Brady*, 184 U. S. 623.

The provision of § 14 which authorizes the Commissioner of Internal Revenue to decide what substances or compounds are subject to the tax, does not confer upon that officer judicial power. He does not hear and decide a case as a judge does; his action is but the ascertainment of a scientific fact by a scientific process and the application of the law to the facts so found. Such action is not judicial, but administrative in its nature and constitutes due process. *Martin* v. *Mott*, 12 Wheat. 19, 31; *Railroad Co.* v. *Stimpson*, 14 Pet. 458; *Murray's Lessees* v. *Hoboken Land Co.*, 18 How. 275; *Craig* v. *Leitensdorfer*, 132 U. S. 211; *Nishimura Ekiu* v. *United States*, 142 U. S. 660; *Fong Yue Ting* v. *United States*, 149 U. S. 714; *Lem Moon Sing* v. *United States*, 158 U. S. 544; *Bushnell* v. *Leland*, 164 U. S. 685; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *United States* v. *Moline*, 82 Fed. Rep. 592; *Chatfield* v. *New Haven*, 110 Fed. Rep. 788; *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *Weimer* v. *Bunbury*, 30 Michigan, 211; *State* v. *Harmon*, 31 Ohio St. 258; *Musser* v. *Adair*, 55 Ohio St. 466; *Anderson* v. *Timme*, 60 Wisconsin, 344; *Donahue* v. *Will County*, 100 Illinois, 107, 110.

If the provision of § 14 of the original act, and amended § 8, be invalid, the entire law does not thereby fall, for the act may be fully executed without those provisions. This is not a penal law, but a revenue measure, and its provisions are to be liberally construed. *Field* v. *Clark*, 143 U. S. 697. If the valid portions of an act are separable and, standing alone, will fully carry out its purposes, the court will not declare the whole act void but will give effect to its valid provisions. *Packet Co.* v. *Keokuk*, 95 U. S. 89; *Allen* v. *Louisiana*, 103 U. S. 83; *Railroad Co.* v. *Schutte*, 103 U. S. 142; *Penniman's Case*, 103 U. S. 716; *Supervisors* v. *Stanley*, 105 U. S. 312; *Virginia Coupon Cases*, 114 U. S. 304; *Presser* v. *Illinois*, 116 U. S. 263; *Huntington* v. *Worthen*, 120 U. S. 102; *Ellenbecker* v. *Plymouth County*, 134 U. S. 40; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 636.

The cases of *Spraigue* v. *Thompson*, 118 U. S. 94; *James* v.

Bowman, 190 U. S. 141, and *Trade Mark Cases*, 100 U. S. 98, can be distinguished from the cases just cited.

If amended § 8 be invalid, then all oleomargarine is subject to the tax of two cents per pound imposed by the original law; for an unconstitutional act is, in legal contemplation, as inoperative as though it had never been passed. *Norton* v. *Shelby County*, 118 U. S. 442.

In construing an act of Congress the court will not recur to the views of individual members in debate, nor consider their motives in voting for or against its passage, but the court may, for its information, with propriety recur to the history of the times when it was passed. *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 79; *Soon Hing* v. *Crowley*, 113 U. S. 710; *Powell* v. *Pennsylvania*, 127 U. S. 685; *United States* v. *Freight Association*, 166 U. S. 318; *Camfield* v. *United States*, 167 U. S. 523; *Dunlap* v. *United States*, 173 U. S. 75; *Maxwell* v. *Dow*, 176 U. S. 601; *Knowlton* v. *Moore*, 178 U. S. 72; *Dobbins* v. *Los Angeles*, 72 Pac. Rep. 971; Cooley's Const. Lim. 6th ed. 231.

The constitutionality of the law being assailed on the ground of the alleged excessive rate of the tax, the court will not confine itself to the testimony in the records, but will take into consideration all facts respecting oleomargarine of which it may take judicial notice.

The court will take judicial notice of general usages of trade and commerce, *Bank of Augusta* v. *Earle*, 13 Pet. 590; of that which is a matter of general knowledge within its jurisdiction and of public records and documents. *Brown* v. *Piper*, 91 U. S. 42; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 185; *Brown* v. *Spillman*, 155 U. S. 670; *Mills* v. *Green*, 159 U. S. 657; *The Delaware*, 161 U. S. 472; *New York Indians* v. *United States*, 170 U. S. 32; *Nicol* v. *Ames*, 173 U. S. 517; *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 698; 1 Greenleaf on Evidence, §§ 5, 6.

The court, then, may properly look to the laws of the various States and to the decisions of the various courts upon the

subject for information. In twenty-nine of the States the line is drawn between uncolored oleomargarine and that colored in imitation of butter, the manufacture and sale of the latter being forbidden. The line is thus drawn between the legitimate article on the one hand and the fraudulent imitation on the other. The States have thus created a classification and Congress, in grading the tax, has merely recognized that classification. This forms a proper basis for classification. The court has recognized this distinction in a number of cases. *Powell* v. *Pennsylvania*, 127 U. S. 678; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Collins* v. *New Hampshire*, 171 U. S. 30; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

The classification may also be sustained as a means to prevent fraud in the collection of the tax laid upon the legitimate or uncolored oleomargarine. If oleomargarine can, by means of coloration, successfully counterfeit butter, an untaxed article, it may in that way evade the tax imposed upon it. The degree of the tax is for Congress to determine.

It rests with Congress to say what means shall be adopted to prevent fraud in the collection of its revenue. *United States* v. *132 Packages of Liquors*, 76 Fep. Rep. 364; *Nicol* v. *Ames*, 173 U. S. 524; *Felsenheld* v. *United States*, 186 U. S. 131; *United States* v. *Three Packages Distilled Spirits*, 125 Fed. Rep. 55; *United States* v. *Singer*, 15 Wall. 120.

The tax of ten cents per pound upon oleomargarine colored in imitation of butter is not prohibitive of its manufacture and sale. See vol. 9, Manufactures, p. 3, Census Report, 1900, for summary of facts respecting the relative cost and value of butter and of oleomargarine. These facts show that the cost and value of oleomargarine, with the ten cent tax added, about equals the cost and value of butter.

In the testimony for the dealers it is stated that good butter costs on an average two cents per pound more than colored oleomargarine in the Chicago market. In the face of this testimony it cannot be said with force that the falling off in

production is due to the rate of tax. The falling off is merely indicative of the quantity of colored oleomargarine fraudulently sold as butter. If one effect of the law be to prevent that fraud, the court for that reason will not declare the law invalid.

If there be a legitimate demand for colored oleomargarine, as such, the fact that it cannot be sold at butter prices will not destroy the demand for it. If people prefer it to butter, they will pay the increase in price, especially when the excess, at most, is very trifling. This is true as to tobacco, liquors, and imports subject to heavy duties.

The law does not deprive citizens of Illinois and Ohio of any right guaranteed them by their States, for both States absolutely prohibit the manufacture and sale of oleomargarine artificially colored so as to resemble butter.

In the manufacture of oleomargarine, the use of butter containing artificial coloration, subjects the product to the ten cent tax; for it cannot be said to be "free from artificial coloration" within the meaning of § 8, when in fact artificial coloring matter has been introduced into the product at any stage of its manufacture, by any means whatever.

As to coloration by means of palm oil: to subject a compound to the tax, it is only necessary that it be composed of some of the substances named in the act and "made in imitation or semblance of butter;" it need not be "calculated or intended to be sold as butter or for butter."

Vegetable oils may properly be used in the manufacture of oleomargarine when of such a character as to be naturally adapted for use as food in the form in which used. Palm oil is not such an oil. Unless chemically refined, in color it is a dark orange, with a large per cent of acids, and with a disagreeable taste and odor. Chemical refining, while taking away most of the acids and odor, also takes away the color, its only desirable property. Unless so refined, it can be used only in very small quantities; for not only would a greater use impart too high a color, but because of the acids, taste,

and odor, would spoil the product. The oil used in this case was not refined, else it would not have imparted the color. Used in such minute quantity as in this case (less than one per cent) the legal presumption is that it was used as a color, and not as a fat. Such use constitutes an artificial coloration. See Lewkowitsch's Chemical Analysis of Oils, 2d ed. p. 517; Allen's Chemical Organic Analysis, vol. 2, pt. 1, 3d ed. p. 161.

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

As the controversy in every aspect involves the acts of Congress concerning the taxation of oleomargarine, a summary of those acts becomes essential.

The original act was passed in 1886. 24 Stat. 209. The first section provided:

"That for the purposes of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter."

The second thus defined oleomargarine:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil and annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

The third, fourth, fifth, sixth and seventh sections imposed

a license on manufacturers and dealers in oleomargarine, and contained many requirements controlling the packing, marketing and supervision of the manufacture and sale of the taxed article. The eighth section provided as follows:

"That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; . . . The tax levied by this section shall be represented by coupon stamps and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

The other provisions of the statute, not necessary to be noticed, contained many regulations looking to the enforcement and collection of the licenses and taxes which the act imposed. In 1902 further provisions were made on the subject, and the act of 1886 was, in many respects, expressly amended. 32 Stat. 193. The title of the act is—

"An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six."

The first section provides that all—

"—oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese, not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory

or the District of Columbia, and remaining therein for use, consumption, sale or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia . . . to the same extent and in the same manner as though such article or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Section 2 amends section 3 of the act of 1886 in particulars not necessary for the purposes of this case to be considered. Section 3 amends section 8 of the act of 1886 by increasing the tax on oleomargarine from two (2) to ten (10) cents per pound, with this proviso:

"*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

Section 4 reiterates the definition of butter contained in the first section of the act of 1886, and besides gives a definition of "adulterated butter," "process butter" or "renovated butter," and imposes taxes upon the manufacture and sale of these articles, the tax upon adulterated butter being at the rate of ten cents a pound.

The section in question as well as those following it contain many administrative provisions for the enforcement of the taxes levied by the act and concerning interstate and foreign commerce in the articles referred to. Bearing, then, the statutes in mind, we come to consider the assignments of error, which are as follows:

"The District Court erred in sustaining the demurrer of the United States to the answer of plaintiff in error (defendant below).

"The District Court erred in refusing to hold that the act of Congress approved August 2, 1886, as amended by the act of Congress approved May 9, 1902, is in contravention of the Constitution of the United States of America and of the amendments thereto, and is illegal and void, for the reasons:

"(*a*) The act deprives the defendant of his property without due process of law.

"(*b*) The act is an unwarranted encroachment upon and an interference with the police powers reserved to the several States and to the people of the United States.

"(*c*) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles which are inherent in the Constitution of the United States.

"The District Court erred in holding, if said act be not in contravention of the Constitution of the United States, that oleomargarine, which contains no artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of ten cents per pound instead of a tax of one-fourth of one cent per pound."

It is to be observed that in the errors thus assigned no reference is made to the contention in the answer that the acts of Congress were void because conferring upon administrative officers the power to finally decide what constituted artificial coloration, such contention therefore may be put out of view. The errors relied upon embrace not only the contention that the act of Congress imposing the tax is repugnant to the Constitution, but also that the penalty was wrongfully enforced, because the one-quarter of a cent per pound which had been

paid on the oleomargarine was the only tax to which it was liable under the act of Congress when rightly construed. As the presence of the constitutional question imposes upon us the duty of considering also the construction of the statute, we shall invert the order in which the errors have been assigned, and come to consider, first, whether the act of Congress, as properly construed, required on the oleomargarine in question a tax of ten cents a pound; and, second, if it did, whether such act is repugnant to the Constitution of the United States.

1st. *The construction of the statute.*

Leaving out of view the proviso to the eighth section of the act of 1886 as amended and reënacted by the third section of the act of 1902, it is beyond question that a tax of ten cents a pound is imposed upon oleomargarine. As the product was admitted by the answer to be oleomargarine, it follows that it was subject to the tax of ten cents a pound, unless, by the proviso the oleomargarine was of such a character as to entitle it to the benefits of a lower rate of taxation. Now the proviso reads: "*Provided,* When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, such tax shall be one-fourth of one cent per pound." As it was admitted that the oleomargarine was of a shade of yellow causing it to look like butter, and as it was also admitted that this shade of yellow had been imparted by an artificial coloring matter used to color the butter which formed one of the ingredients from which the oleomargarine was manufactured, it results, if the text of the statute be applied, that the oleomargarine was not within the proviso, because it was not free from artificial coloring matter causing it to look like butter. This necessarily follows, since the right to enjoy the lower rate of tax is made by the proviso to depend upon whether, as a matter of fact, the oleomargarine was free from artificial coloring matter, and not upon the mere method adopted for imparting the artificial color. As the oleomargarine in question was in fact not free from artificial col-

oration we think that a construction which would take it out of the general rule imposing the ten cent tax upon all oleomargarine, and bring it within the exception embracing only oleomargarine free from artificial coloration, would be not an interpretation of the statute, but a disregard of its unambiguous provisions.

But it is contended that, as section 2 of the act of 1886 defined oleomargarine, for the purposes of that act, to be "certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter," and as not only the act of 1886, but the act of 1902, defined butter, for the purposes of those acts, to mean "the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter," therefore colored oleomargarine produced by using, as one of the ingredients of its manufacture, butter artificially colored must be treated as free from artificial coloration within the meaning of the act of 1902, and the deduction made is that, as the statute treats butter, both with or without artificial coloration, as a legitimate ingredient of oleomargarine, the use of an authorized ingredient did not cause the manufactured product to be other than oleomargarine within the statute. But the proposition goes further, and asserts that because butter, whether artificially colored or not, was an authorized ingredient of oleomargarine, therefore the finished product, in which either of these ingredients was used, was not only oleomargarine, but necessarily also was oleomargarine free from artificial coloration. This is an obvious *non sequitur*. As the benefit of the lower tax depended upon the absence from the manufactured product of artificial coloration, it follows that if in the manufacture an authorized ingredient, which was artificially colored, was used so as to artificially color the product whilst that product would be oleomargarine, it could not be oleomargarine free from artificial coloration within the intendment of the proviso. Nor is there force in the contention that the

plain meaning of the statute is overcome by an amendment to which it was subjected. Before the amendment relied on, the proviso read as follows: "Provided, when oleomargarine is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." By the amendment the word ingredient was stricken out, thus leaving the proviso in the form in which it was enacted. The proposition is that the elimination of the word "ingredient" compels to the conclusion that wherever artificial coloration in the finished product of oleomargarine was produced by artificial coloration used in an authorized ingredient, that such coloration was not artificial within the statute. But this disregards the fact that butter, both when artificially colored and when not so colored, was made an authorized ingredient of oleomargarine. If then the word "ingredient" had not been stricken out, it might have given rise to the contention that the imparting of a yellow color to the finished product of oleomargarine by the use in its manufacture of spring butter of a natural yellow color would have caused the product oleomargarine to be artificially colored within the statute. As the manufacturer of oleomargarine was permitted to use either butter not artificially colored or butter so colored, the effect of striking out the word "ingredient" operated simply to render it certain that the finished product, even although of a yellow color, would be within the proviso where the color was imparted by an authorized ingredient not artificially colored. This overthrows the contention that the finished product, when not free from artificial coloration, must be treated as free from such coloration, because the color was derived from an artificially colored though authorized ingredient. We think, whilst the statute recognized the right of a manufacturer to use any or all of the authorized ingredients so as to make oleomargarine, and also authorized as one of the ingredients butter artificially colored, if the manufacturer elected to use such ingredient last mentioned, and thereby gave to

his manufactured product artificial coloration, such product so colored, although being oleomargarine, was not within the exception created by the proviso, and therefore came under the general rule subjecting oleomargarine to the tax of ten cents a pound.

Nor do the other provisions of the act of 1902, as it is asserted, sustain the contention that artificially colored oleomargarine is to be treated as free from such coloration, because such color was imparted in its manufacture by the use of an artificially colored and authorized ingredient. The provision principally depended upon is section 2 of the act of 1902, which provides that any person who "sells, vends or furnishes oleomargarine for the use and consumption of others, except to his own family table, without compensation, who shall *add to or mix* with such oleomargarine any artificial coloration, . . . shall also be held to be a manufacturer of oleomargarine . . ." But this section relates only to the adding to or mixing artificial coloration with oleomargarine after its manufacture, and therefore does not even remotely support the proposition that, where in the process of manufacture oleomargarine becomes artificially colored, it must be held not to be what it in fact is, that is, must be treated as free from artificial coloration, although such in fact is not the case.

Indeed, the context of the statutes, particularly the provisions as to adulterated and renovated butter in the act of 1902, harmonize with and thus add cogency to the construction which we have given to the provision concerning artificial coloration.

2d. *Did Congress in passing the acts which are assailed, exert a power not conferred by the Constitution?*

That the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement. *Patton* v. *Brady*, 184 U. S. 608, 619; *Knowlton* v. *Moore*, 178 U. S. 41; *Nicol* v. *Ames*, 173 U. S. 509; *In re Kollock*, 165 U. S. 526.

The last case referred to (*In re Kollock*) involved the act of 1886, and the court, speaking through Mr. Chief Justice Fuller, said (p. 536):

"The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

We might rest the answer to the contention as to the want of power in Congress to enact the laws in question upon the foregoing cases. But in view of the earnestness with which the validity of the acts is assailed in argument and the assertion that the necessary effect of the amendment to the act of 1886 by the act of 1902 is to make both of the laws in question so peculiar as to cause them to be beyond the reach of the previous rulings of this court, we propose to review and dispose of the propositions pressed upon us at bar as indubitably demonstrating that the acts in question were beyond the power of Congress to adopt.

The summary which follows embodies the propositions contained in the assignments of error, and the substance of the elaborate argument by which those assignments are deemed to be sustained. Not denying the general power of Congress to impose excise taxes, and conceding that the acts in question, on their face, purport to levy taxes of that character, the propositions are these:

(*a*) That the power of internal taxation which the Constitution confers on Congress is given to that body for the purpose of raising revenue, and that the tax on artificially colored oleomargarine is void because it is of such an onerous character as to make it manifest that the purpose of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article.

(*b*) The power to regulate the manufacture and sale of oleomargarine being solely reserved to the several States, it follows that the acts in question, enacted by Congress for the purpose of suppressing the manufacture and sale of oleo-

margarine, when artificially colored, are void, because usurping the reserved power of the States, and therefore exerting an authority not delegated to Congress by the Constitution.

(*c*) Whilst it is true—so the argument proceeds—that Congress in exerting the taxing power conferred upon it may use all means appropriate to the exercise of such power, a tax which is fixed at such a high rate as to suppress the production of the article taxed, is not a legitimate means to the lawful end, and is therefore beyond the scope of the taxing power.

(*d*) As the tax levied by the acts which are assailed discriminates against oleomargarine artificially colored, and in favor of butter so colored, and creates an unwarranted and unreasonable distinction between the oleomargarine which is artificially colored and that which is not, and as the necessary operation and effect of the tax is to suppress the manufacture of artificially colored oleomargarine, and to aid the butter industry, therefore the acts are void. And with this proposition in mind it is insisted that wherever the judiciary is called upon to determine whether a power which Congress has exerted is within the authority conferred by the Constitution, the duty is to test the validity of the act, not merely by its face, or to use the words of the argument, "by the label placed upon it by Congress," but by the necessary scope and effect of the assailed enactment.

(*e*) Admitting that the power to tax as delegated to Congress by the Constitution as originally adopted was subject to no limitation except as expressed in that instrument, the amendments to the Constitution, it is urged, have imposed limitations on the taxing power not expressed in the original Constitution. Under this assumption it is insisted that the acts in question are void, because the burdens which they impose are repugnant to both the Fifth and Tenth Amendments. To the Fifth Amendment, because the amount of the tax is so out of proportion to the value of the property taxed as to destroy that property, and thus amount to a taking

thereof without due process of law. To the Tenth Amendment, because the necessary operation and effect of the acts is to destroy the oleomargarine industry and thus exert a power not delegated to Congress, but reserved to the several States.

(*f*) Although, as a general rule, it be true that the power of Congress to tax, conferred by the Constitution, is unlimited, except as otherwise expressed in that instrument, and conceding, for the sake of the argument, that there is no express limitation either in the original Constitution or in the amendments thereto, by which the acts may be decided to be unconstitutional, nevertheless, it is urged, that, as the burdens which the acts impose are so onerous and so unjust as to be confiscatory, the acts are void, because they amount to a violation of those fundamental rights which it is the duty of every free government to protect.

It is clear that these propositions in many respects not only reiterate in different forms of expression the same contention, but that they also so intermingle considerations which require separate analysis so as to cause it to be difficult to precisely determine their import. For instance, all of the propositions obviously rest not only on inferences drawn from the face of the acts, but also on deductions made from what it is assumed must have been the motives or purposes of Congress in passing them. To avoid confusion and repetition we shall consider these distinct contentions separately, and we hence come, first, to ascertain how far, if at all, the motives or purposes of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider motive or purpose we shall then approach the propositions relied on by the light of the correct rule on the subject of purpose or motive.

Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution,

and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the gov-

ernment, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. As aptly said by the court, speaking through Mr. Justice Miller, in *Kilbourn* v. *Thompson*, 103 U. S. 168, p. 190 :

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to the government, whether State or National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in *Champion* v. *Ames*, 188 U. S. 321, where, speaking through Mr. Justice Harlan, it was said (p. 363) :

"But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when

he said : 'The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.'"

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton* v. *Moore*, 178 U. S. 41, 60, the often quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. And this view was clearly pointed out by Mr. Chief Justice Marshall in the passage from *Gibbons* v. *Ogden*, 9 Wheat. 1, which was repeated in the passage from the opinion in *Champion* v. *Ames*, previously cited.

And the same doctrine has been again and again expounded. In the *License Tax Cases*, 5 Wall. 462, referring to the extensive power of taxation possessed by Congress, and the express limitations found in the Constitution, it was said (p. 471):

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

In *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, referring to the unlimited nature of the power of taxation conferred upon Congress, it was observed (p. 443):

"Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government."

And after referring to the express limitations as to uniformity and articles exported from any State, it was remarked (p. 446):

"With these exceptions, the exercise of the power is, in all respects, unfettered."

In *Austin* v. *The Aldermen*, 7 Wall. 694, it was again declared (p. 699) that "the right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

Yet again, in *Veazie Bank* v. *Fenno*, 8 Wall. 533, where a tax levied by Congress on the circulating notes of state banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, it was said, as to the first contention (p. 548):

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

True it is, as argued, that the opinion in that case rested the conclusion not alone upon the doctrine just quoted, but also upon the principle that Congress possessed the power to suppress the circulation of the notes of state banks as an incident to the authority concerning the currency delegated to Congress by the Constitution. But whilst this argument may weaken the authoritative force of the statement made in the case in question as to the want of power in the judiciary to examine into motive, it does not affect the persuasive and inherent force of the reasoning by which that view was sustained. Besides, the doctrine has since been affirmed.

In *Spencer* v. *Merchant*, 125 U. S. 345, 355, speaking through Mr. Justice Gray, it was said:

"In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' "

In *Knowlton* v. *Moore*, 178 U. S. 41, the cases which have been referred to, were approvingly cited, and the doctrine which they expressed was restated.

In *Treat* v. *White*, 181 U. S. 264, referring to a stamp duty levied by Congress, it was observed (p. 269):

"The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other."

In *Patton* v. *Brady*, 184 U. S. 608, considering another stamp duty levied by Congress, it was again said (p. 623):

"That it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. The proposition now relied upon was urged in *Knowlton* v. *Moore*, 178 U. S. 41, and was overruled. In that case it was insisted that, although death duties were within the power to levy excise taxation, as the effect of their extreme enforcement would involve the power to destroy the right to the passage or receipt of property on the occasion of death—a subject within the exclusive control of the States—therefore death duties when imposed by Congress must be held to be unconstitutional. In considering this contention, after referring to the statement of Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, that the power to tax involves the power to destroy, it was observed (p. 60):

"This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."

Of course, where a state law is assailed as repugnant to the Constitution of the United States, and on its face such act was seemingly within the power of the State to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the Government of the United States, it must follow, from the paramount nature of the Constitution of the United States, that the act is void. In such a case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed by the Constitution of the United States on the States.

And without attempting to review the numerous authorities cited in the argument, it suffices to say that we think it is apparent that they fall within one or the other of the categories just previously stated.

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language

of one of the cases, (*Spencer* v. *Merchant*,) that "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

3. Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject.

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties. This was aptly pointed out in the extract heretofore made from the opinion in *Treat* v. *White*, 181 U. S. 264.

But it is urged that artificially colored oleomargarine and artificially colored natural butter are in substance and in effect one and the same thing, and from this it is deduced that to lay an excise tax only on oleomargarine artificially colored and not on butter so colored is violative of the due process clause of the Fifth Amendment, because, as there is no possible distinction between the two, the act of Congress was a mere arbitrary imposition of an excise on the one article and not on the other, although essentially of the same class. Conceding merely for

the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, and authorities there cited. Indeed, in the cases referred to the distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great that it was held no violation of the due process clause of the Fourteenth Amendment was occasioned by state legislation absolutely forbidding the manufacture, within the State, of oleomargarine artifically colored. As it has been thus decided that the distinction between the two products is so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient, under the extremest view, to justify a classification, distinguishing between them.

4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored, to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by im-

plied though none the less potential guaranties, or in any event to be within the protection of the due process clause of the Fifth Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if by the perverted exercise of such power so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution by necessary implication forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind

it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

Affirmed.

The Chief Justice, Mr. Justice Brown and Mr. Justice Peckham dissent.

SCHICK *v.* UNITED STATES.
BROADWELL *v.* UNITED STATES.

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

Nos. 222, 223. Argued December 2, 1903.—Decided May 31, 1904.

A written waiver of a jury by a defendant in an action brought by the United States to recover a penalty of fifty dollars under § 11 of the act of 1886 as amended by the act of May 9, 1902, is not in conflict with the laws and constitution of the United States, and does not invalidate the judgment.

McCray v. *United States*, *ante*, p. 27, followed as to constitutionality of the oleomargarine legislation.

THE facts are stated in the opinion of the court.

Mr. Willim D. Guthrie and *Mr. Miller Outcalt*, with whom *Mr. Charles E. Prior*, *Mr. Francis J. Kearful*, *Mr. Delavan B. Cole* and *Mr. Charles C. Carnahan* were on the brief for plaintiff in error.[1]

Mr. Solicitor General Hoyt for the United States:

The proceedings are by way of criminal information to impose the penalty provided for violation of section 11, of the oleomargarine act. They are directed against the persons and do not seek to forfeit their property. They are, therefore, not penal actions but criminal prosecutions.

"Civil proceedings" would seem to include only those in which the object sought is the forfeiture of property, or the recovery of a judgment for the amount of the prescribed penalty. 16 Ency. Pl. & Pr. p. 231; *Atcheson* v. *Everett*, 1 Cowp. 382; *Clifton* v. *United States*, 4 How. 242; *Henderson's Distilled Spirits*, 14 Wall. 33; *Snyder* v. *United States*, 112 U. S. 216; *Ex parte Wilson*, 114 U. S. 417.

[1] These cases were argued simultaneously with *McCray* v. *United States*, and for abstract of arguments as to constitutionality and construction of the statutes, see *ante*, p. 30.

The knowingly purchasing or receiving for sale of oleomargarine not stamped according to law is specifically denominated an "offense," the penalty for which is $50. This being a petty offense, why may not a defendant waive his right to a trial by jury? *Callan* v. *Wilson*, 127 U. S. 552; *Brewater* v. *People*, 183 Illinois, 143. Upon this point the decisions are not uniform. *United States* v. *Shaw*, 59 Fed. Rep. 110, distinctly asserts such a right. Also *Bank of Columbia* v. *Okely*, 4 Wheat. 244. As bearing upon the subject, see *United States* v. *Anthony*, 11 Blatch. 200; *United States* v. *Taylor*, 11 Fed. Rep. 470; *In re Belt*, 159 U. S. 95; *Hallinger* v. *Davis*, 146 U. S. 318; *Thompson* v. *Utah*, 170 U. S. 353.

While the language of Art. 3 of the Constitution is that the trial of all crimes shall be by jury, the language of the Sixth Amendment is that the accused shall enjoy the right to a trial by jury; and similar language is used in the Seventh Amendment. If a trial by jury be imperative, then it cannot be waived, even though a statute authorizes such a waiver; for a statute cannot nullify a constitutional requirement. But it is the right to such a trial that is preserved by these Amendments. And if it be only the right, why may not the accused waive that right, even in the absence of a statute authorizing him to do so, especially in a petty case, where jury trial was not provided for under the common law?

Express written waiver of such right was filed in each of these cases. If that right did not exist, is not a trial by the court, after such an attempted waiver, at most only error? And, not having been assigned as error below, or in this court, how can it be noticed here? *Maxwell* v. *Stewart*, 21 Wall. 71; 22 Wall. 77; *Humphreys* v. *District of Columbia*, 174 U. S. 195.

Mr. Justice Brewer delivered the opinion of the court.

The constitutionality of the oleomargarine legislation hav-

ing been settled in *McCray* v. *United States*, just decided, there is in these two cases only a single question. The plaintiffs in error were severally prosecuted by information in the District Court of the United States for the Northern District of Illinois, under section 11 of the act of August 2, 1886, 24 Stat. 209, which reads: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

In each case the parties in writing waived a jury and agreed to submit the issues to the court. Judgments were entered in favor of the United States and their collection ordered by only the civil process of execution. That the defendants had failed to comply with the section was proved. Indeed, it was not seriously disputed, the defence resting only on the alleged unconstitutionality of the act. The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect upon the judgment was suggested by this court, and briefs were called for from the respective parties. Such briefs have been filed, and both agree that the waiver of a jury did not invalidate the proceedings. Notwithstanding this, the fact of the waiver appears in the record.

We entertain no doubt that the parties could rightfully make such a waiver, and that the judgments are in no way invalidated thereby. It will be noticed that the section characterizes the act prohibited as an offense, and subjects the party to a penalty of fifty dollars. So small a penalty for violating a revenue statute indicates only a petty offense. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. That by other sections of this statute more serious offenses are described and more grave punishments provided does not lift this one to the

dignity of a crime. Not infrequently a single statute in its several sections provides for offenses of different grades, subject to different punishments, and to prosecution in different ways. In some States in the same act are gathered all the various offenses against the person, ranging from simple assault to murder, and imposing punishments from a mere fine to death. This very statute furnishes an illustration. By one clause the knowingly selling of adulterated butter in any other than the prescribed form subjects the party convicted thereof to a fine of not more than one thousand dollars and imprisonment for not more than two years. An officer of customs violating certain provisions of the act is declared guilty of a misdemeanor and subject to a fine of not less than one thousand dollars nor more than five thousand dollars, and imprisonment for not less than six months nor more than three years. Obviously these violations of certain provisions of the statute must be classed among serious criminal offenses, and can be prosecuted only by indictment, while the violations of the statute in the cases before us were prosecuted by information. The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense.

In such a case there is no constitutional requirement of a jury. In the third clause of section 2, Article III, of the Constitution it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury;" and in Article VI of the amendments, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." If there be any conflict between these two provisions the one found in the amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier

one. But that in the body of the Constitution does not include a petty offense like the present. It must be read in the light of the common law. "That," said Mr. Justice Bradley, in *Moore* v. *United States*, 91 U. S. 270, 274, referring to the common law, " is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law." Again in *Smith* v. *Alabama*, 124 U. S. 465, 478, is this declaration by Mr. Justice Matthews: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." In *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654, Mr. Justice Gray used this language:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465." See also *Kepner* v. *United States*, *post*, 100; 1 Kent, Com. 336.

Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it. In this treatise, vol. 4, p. 5, is given a definition of the word "crimes:"

"A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word ' crimes ' is made to denote such offenses as are of a deeper and more atrocious

dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'midemeanors' only."

In the light of this definition we can appreciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was "the trial of all criminal offenses . . . shall be by jury," but by unanimous vote it was amended so as to read "the trial of all crimes." The significance of this change cannot be misunderstood. If the language had remained "criminal offenses," it might have been contended that it meant all offenses of a criminal nature, petty as well as serious, but when the change was made from "criminal offenses" to "crimes," and made in the light of the popular understanding of the meaning of the word "crimes," as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses. But we need not go beyond the express rulings of this court. In *Callan* v. *Wilson*, 127 U. S. 540, reference was made to many decisions of state courts, holding that the trial of petty offenses was not within any constitutional provision requiring a jury in the trial of crimes, and on page 557 it was said:

"Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged."

By section 563, Rev. Stat., the District Courts are given jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital." There is no act of Congress requiring that

the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury. There is no public policy which forbids the waiver of a jury in the trial of petty offenses. On the contrary, by section 44 of the Code of Law for the District of Columbia, Congress provided, in respect to the Police Court, that—

"In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury. In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last named cases wherein the fine or penalty may be $50 or more, or imprisonment as punishment for the offense may be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury."

And it is a well-known fact that in many Territories organized by act of Congress the legislature has authorized the prosecution of petty offenses in the police courts of cities without a jury.

But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and cannot when informed against for a petty offense waive a trial by jury? Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives

him the further right "to be confronted with the witnesses against him . . . and to have the assistance of counsel." Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. Authorities in the state courts are in harmony with this thought. In *Commonwealth* v. *Dailey*, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors, and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said (p. 83): "He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court." The same doctrine was laid down in *Murphy* v. *Commonwealth*, 1 Met. (Ky.) 365; *Tyra* v. *Commonwealth*, 2 Met. (Ky.) 1, and in *State* v. *Kaufman*, 51 Iowa, 578. In *Connelly* v. *State*, 60 Alabama, 89, a statute authorizing the waiver of a jury was sustained. The same rule was made in *State* v. *Worden*, 46 Connecticut, 349, which was a case of a felony. See also *People* v. *Rathbun*, 21 Wend. 509, 542.

We are of opinion that the waiver of a jury by the defendants in these cases and the consent to trial by the court was not in conflict with law, and the judgments are, therefore,

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM concur in the views expressed in this opinion, although they dissent from the judgments on the ground of their dissent in *McCray* v. *United States*, *ante*, p. 64.

MR. JUSTICE HARLAN, dissenting.

These are criminal prosecutions based on the act of Con-

gress of August 2, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," supplemented by the act of October 1, 1890, and amended by the act of May 9, 1902. 24 Stat. 209, c. 840; 26 Stat. 567, 621, c. 1244, § 41; 32 Stat. 193, c. 784.

The informations against Schick and Broadwell were substantially of the same character. Each charged that the defendant, a retail dealer in oleomargarine, unlawfully and knowingly purchased and received for sale certain oleomargarine which had not been stamped according to law.

The parties, in writing, waived a jury, and agreed to submit the issues to the court. The accused, in each case, pleaded not guilty. Evidence having been introduced, the defendant in each case moved the court to render a verdict and judgment of not guilty and that he be discharged, upon the ground that the above act of Congress, as amended, was in contravention of the Constitution of the United States in that it deprived the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law; was an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States; invested an inferior executive officer with the power finally and arbitrarily to determine judicial questions concerning property rights; and so arbitrarily discriminated against oleomargarine in favor of butter as to be repugnant to the fundamental principles of equality and justice that were inherent in the Constitution.

In each case the motion was overruled, the defendant excepting. Motions for new trial and in arrest of judgment having been severally overruled, the court, *no jury having been empanelled*, found the defendant, in each case, guilty, and adjudged that he pay a fine of $50 and costs, and that execution issue therefor. From those judgments the present writs of error were prosecuted.

The assignments of error here present the same questions of constitutional law that were raised on the motion to render judgment for the defendant ; and, in addition, they question the action of the trial court in striking out and refusing to consider certain evidence.

Upon the face of the record the question arises whether the court below, without the aid of a jury, had jurisdiction to ascertain the facts, and, finding the defendants severally guilty of the offense charged, to impose upon each the fine prescribed by the statute.

I. That this is a criminal prosecution, and that the mode of procedure must be determined by the established rules governing the conduct of trials in criminal cases, is in my judgment not to be doubted. The record itself describes the information as a *criminal* information, and the case was tried as if it were a criminal prosecution. It never occurred to the trial court that it was a prosecution of any other kind. It is true that the act provides that all fines, penalties and forfeitures imposed by it may be recovered in any court of competent jurisdiction. § 19. But it is evident from the entire act that it makes all the violations of the provisions imposing a fine, or fine and imprisonment, or fine or imprisonment, criminal offenses to be punished in such mode as was appropriate or allowable by the law of criminal procedure. Throughout the act, when a fine is imposed, the doing of the thing forbidden is described as an "offense." If a person carries on the business of a manufacturer of oleomargarine, without having paid the special tax, he is subject, besides being liable to pay the special tax, to be fined not less than $1,000 and not more than $5,000; if he carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor he is subject, besides being liable for the special tax, to be fined not less than $500 nor more than $2,000; and if he carries on the business of a retail dealer in oleomargarine, without having paid the special tax, he may be fined not less than $50 nor more than $500 for each and every

offense. § 4. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as described, or who packs in any package any oleomargarine in a manner contrary to law, or who falsely brands any package or affixes any stamp on any package denoting a less amount of tax than that required by law, "may be fined for each *offense* not more than $1,000, and be imprisoned not more than two years." § 6. Every manufacturer of oleomargarine who neglects to affix the required label to a package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any label so affixed may be "fined $50 for each package in respect to which such *offense* is committed." § 7. Every officer of customs who permits imported oleomargarine "to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a *misdemeanor* and shall be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months nor more than two years." § 10. Any person who wilfully neglects or refuses, when emptying a stamped package containing oleomargarine, to utterly destroy such stamps, "shall for each *offense* be fined not exceeding $50 and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such *offense* be fined not exceeding $100 and be imprisoned not more than one year." § 13. Any person who wilfully removes or defaces the stamps, marks or brands on packages containing oleomargarine taxed as provided, is guilty "of a *misdemeanor*, and shall be punished by a fine of not less than one hundred dollars, nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months." § 15. Whenever any person engaged in carrying on the business of manufacturing oleomargarine who defrauds, or attempts to defraud,

the United States of the tax on the oleomargarine produced by him, or any part thereof, forfeits the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and "shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years." § 17.

These sections are to be looked at in connection with section 11, on which this prosecution is based. That section provides "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of fifty dollars for each such *offense*."

It is true that the word "penalty" is used in several sections of this act. But it is not to be conclusively inferred therefrom that the offense described was not a crime, within the strictest meaning of that word. Referring to the words "penalty," "liability," and "forfeiture," this court has said: "These words have been used by the great masters of Crown law and the elementary writers as synonymous with 'punishment,' in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties,' and repeatedly refers to laws that inflict the 'penalty of death.'" *United States* v. *Reisinger*, 128 U. S. 398, 402. So, in *Huntington* v. *Attrill*, 146 U. S. 657, 667, after quoting the maxim of international law in *The Antelope*, 10 Wh. 66, 123, that "the courts of no country execute the penal laws of another," and observ-

ing that there was great danger, when interpreting that maxim, of being misled by the different shades of meaning allowed to the word "penal" in our language, this court said: "In the municipal law of England and America the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws. . . . Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon." Besides the act throughout uses the words "fine," and "fined" —words which, in their primary sense, import the punishment of a person convicted of crime.

I cannot doubt, after a scrutiny of the entire act, that every offense prescribed by it and for which a fine is imposed, was intended to be made and is a criminal offense—a crime against the United States—to be punished as such. Certainly the offenses prescribed in sections four, six, seven, ten, thirteen, fifteen and seventeen are crimes against the United States. If that be so, surely the offense prescribed in section 11 is a crime and not a mere penalty recoverable only by some form of proceeding of a civil nature. This view is substantially conceded by the Solicitor General when he says that "in view of the word 'offense' in section 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor." If the United States could have proceeded in some form of civil action to recover the fine imposed by that section, it has not done so. It chose to proceed by criminal information, and the accused pleaded not guilty of the crime charged.

II. So far it has been my object only to show that the offense charged was a *crime* against the United States. I now inquire as to the mode in which it may be legally ascertained whether an accused, pleading *not guilty*, has committed the

crime charged against him. Has the law designated any particular tribunal or prescribed any special mode for trying the issue of his guilt? The words of the Constitution upon this subject are clear and explicit. They leave no room for interpretation. Its express mandate is that "the *trial* of *all* crimes, except in cases of impeachment, *shall be* by jury." Const. Art. 3. When the Constitution was placed before the people for adoption or rejection many deemed those words, explicit as they were, inadequate to secure all the benefits of a jury trial as it existed at common law.

It is suggested that if any conflict exists between the absolute requirement in the original Constitution, (Art. 3, § 2,) that the "trial of all crimes, except in cases of impeachment, *shall* be by jury," and the provision in the Sixth Amendment, that the accused, in every criminal prosecution, "shall *enjoy the right* to a speedy and public trial, by an impartial jury," etc., the latter, having been last adopted, must control. But there is no such conflict. Those who opposed the acceptance of the Constitution said, among other things, that the words of that instrument, strictly construed, (Art. 3, § 2,) admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the Government, or of one taking place in a State or district other than that in which the crime was committed. The framers of the Constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible ground of uneasiness on the subject, the Sixth Amendment was adopted, in which the essential features of the trial required by section 2 of Article 3 are set forth. In other words, the trial required by that section is the trial referred to in the Sixth Amendment. And the jury referred to in both the original Constitution and in the Amendments was, the authorities all agree, the historical jury of the common law, consisting of twelve persons, no more and no less, whose unanimous verdict was necessary to conviction. *Thompson* v. *Utah*, 170 U. S. 343, 349; 2 Hale's P. C. 161; 1 Chitty's Cr.

Law, 505; 2 Blackstone, 719; Coke, Elizabeth, 654. Mr. Justice Story said: "The Constitution of the United States has exhibited great solicitude on the subject of the trial of crimes, and has declared that the trial of all crimes, except in cases of impeachment, shall be by jury; and has in some cases prescribed and in others required Congress to prescribe, the place of trial. And certain amendments of the Constitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury." *United States* v. *Gibert*, 2 Sumner, 19, 38. See also *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Natal* v. *Louisiana*, 139 U. S. 621, 624; 4 Black. Com. 280; 1 Stephens' History of the Criminal Law, 123.

The contention in the present prosecutions is that although the positive constitutional injunction that the trial of all crimes shall be by jury furnishes an inflexible rule that may not be ignored in cases of felony, that rule, even where the accused pleads not guilty, may be disregarded altogether in a trial for a misdemeanor, provided he consents to be tried by the court without a jury. Plainly, such an exception is unauthorized by the Constitution if its words be interpreted according to their ordinary meaning. Nor, in my opinion, is it consistent with the fundamental rules of criminal procedure, as established and enforced at common law. In determining the meaning and scope of the words "due process of law," as used in the Constitution, the established rule is that "we must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 277. So, in ascertaining whether under any circumstances a criminal case may be *tried* in a Federal court

without a jury—*the accused pleading not guilty*—we must inquire whether the Constitution forbids such an exercise of authority by the court, without a jury. If it does, that is the end of the matter; if it does not, then, and then only, may we look to such usages and modes of proceeding as existed at the common law for the trial of crimes before the adoption of the Constitution.

Proceeding on that basis, we have seen that the Constitution expressly requires that the trial of all crimes, except impeachment, shall be by jury; and I assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described in adjudged cases and by elementary authorities as minor or petty offenses involved in the internal police of the State, and those could be tried summarily by some court or officer without the intervention of a jury *only* when thereunto authorized by an act of Parliament. Except in cases of contempt, the common law, Blackstone says, was a stranger to the summary proceedings authorized by acts of Parliament. Bk. 4, c 20, 280. I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta* and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, *unless the authority to do so was expressly conferred by an act of Parliament.* The exceptions to the rule at common law that all crimes must be tried by a jury were in the mind of this court when in *Callan* v. *Wilson*, 127 U. S. 540, 557, it said: "Except in that class or grade of offenses, called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal *legally constituted for that purpose*, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in what-

ever court, he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void."

If, in analogy to the powers exercised by the Parliament of England prior to the adoption of our Constitution, it should be held that Congress could treat the particular crime here in question as a petty offense triable by the court, without a jury, or with a jury of less than twelve persons, it is sufficient to say that Congress has not legislated to that effect in respect of the offense charged against these defendants, or of any other offense defined in the acts relating to oleomargarine. If it has the power to do so, Congress has not assumed, directly or indirectly, to withdraw such offenses from the operation of the constitutional provision that the trial of all crimes, except in cases of impeachment, *shall* be by jury. And the question is whether in the face of that explicit provision, and in the absence of any statute authorizing it to be done, the court, a jury being waived, had *jurisdiction* to try the accused for the crime charged.

In this connection we are confronted with the broad statement, found in some adjudged cases as well as in elementary treatises, to the effect that a person is entitled to waive *any* constitutional right, of whatever nature, that he possesses, and thereby preclude himself from invoking the authority of the Constitution for the protection or enforcement of that right. It is suggested that even when charged with murder he may plead guilty, and that the court thereupon without the intervention of a jury may pronounce such judgment as the law permits or authorizes. And it is confidently asked by those who make that suggestion, why may not one charged with a misdemeanor, and pleading not guilty, waive a jury altogether and consent to be tried by the court? This argument will not stand the test of reason. It proceeds upon the ground that jurisdiction to try a criminal case may be given by consent of the accused and the prosecutor. But such consent could have no legal efficacy. Undoubtedly one accused of

murder may plead guilty. But in doing so he renders a trial unnecessary. The Constitution does not prohibit an accused from pleading guilty. His right to do so was recognized long before the adoption of that instrument; and it was never supposed that such a plea impaired the force of the requirement that a trial for crime, under a plea of not guilty, shall be by jury. It is not to be assumed that the Constitution intended, when preserving the right of trial by jury, to change any essential rule of criminal practice established at the common law, before the adoption of that instrument. When the accused pleads guilty before a lawful tribunal he admits every material fact well averred in the indictment or information, and there is no issue to be tried; no facts are to be found; no trial occurs. After such a plea nothing remains to be done except that the court shall pronounce judgment upon the facts voluntarily confessed by the accused. What the Constitution requires is that the *trial* of a crime shall be by jury. If the accused pleads not guilty, there must, of necessity, be a trial; for by that plea he puts "himself on his country, which country the jury are;" he contests, by that plea, every fact necessary to establish his guilt; he is presumed to be innocent; nothing is confessed; and the facts necessary to show guilt must be judicially ascertained, in the mode prescribed by law, before any judgment can be rendered. But the vital inquiry is, in what way, when the defendant pleads not guilty, are the facts to be ascertained and the plea of not guilty overcome? Under the express words of the Constitution the answer must be: By trial before a jury of twelve persons organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial and render a judgment in accordance with the verdict of the jury as to the facts. The court and the jury, not separately but *together*, constitute the appointed tribunal which alone, under the law, can *try* the question of crime, the commission of which by the accused is put in issue by a plea of not guilty.

There are some things so vital in their character that they

may not be legally done or legally omitted in a criminal prosecution, even with the consent of the accused. This is abundantly established by authority. The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases. Certain it is, that felonies and misdemeanors are equally crimes within the meaning of the constitutional provision that the trial of all crimes shall be by jury, and there is no warrant to construe that provision as if it read, "the trial of all crimes, except in cases of impeachment *and in misdemeanors*, shall be by jury."

Let us look at some of the authorities in cases both of felonies and misdemeanors, and ascertain whether the consent, express or implied, of the accused can have the effect to dispense with the mode of trial appointed by law for criminal cases. As the question here presented has never been decided by this court, and is of importance, a somewhat extended reference to authorities is justified.

The first case to which I call attention is *Hopt* v. *Utah*, 110 U. S. 574, 579. That was a case of murder, arising in Utah while a Territory. It appeared that the trial, by triers appointed by the court, of challenges of proposed jurors was not had in the presence of the accused. It was there argued that his presence at the trial of such an issue was a privilege which he was entitled to waive, and that the entire proceedings against him should not fail because he chose not to exercise that privilege. This court, however, held that the trial of challenges could not legally take place except in the actual presence of the accused. In dealing with the suggestion that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence, it was said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial.

The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. *That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused,* much less by his mere failure, when on trial and in custody, to object to unauthorized methods." 4 Bl. Com. 11.

In *Thompson* v. *Utah,* 170 U. S. 343, 353, which was a case of grand larceny charged to have been committed while Utah was a Territory, (the trial occurring after Utah became a State,) one of the questions was whether the trial by a jury composed of eight jurors, as authorized by the statutes of the State, was a legal trial for a crime committed when Utah was a Territory under the exclusive jurisdiction of the United States. It was contended that as the accused did not object, until after verdict, to a trial by a jury of eight persons, he should not be heard to say that the trial was in violation of his constitutional rights. This court overruled that contention, saying: "It is sufficient to say that it was not in the power of one accused of felony, *by consent expressly given* or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit *any* tribunal to deprive him of his liberty, except one constituted of *a court and a jury of twelve persons.*" After referring to *Hopt* v. *Utah,* above cited, the court proceeded: "If one under trial for a felony

the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by *a tribunal not authorized by law to determine his guilt.*"

"The infirmity," say Cooley, "in case of a trial by a jury of less than twelve, by consent, would be that the *tribunal would be one unknown to the law, created by mere voluntary act of the parties;* and it would be in effect an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the State." Const. Lim. 319.

A leading case is that of *Cancemi* v. *People*, 18 N. Y. 128, 137. Its doctrines have been widely accepted as based upon a sound interpretation of constitutional provisions relating to criminal prosecutions. The Court of Appeals of New York said: "These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals *or the mode of proceeding prescribed by the constitution and the laws.* Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to various matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed

to be a sufficient safeguard to the public interests. *But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.* Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

Upon the general question whether the consent or silence of the defendant can excuse the failure of the court at the trial to enforce such essential rules as are here prescribed by law for the trial of criminal cases, the case of *Hill* v. *People*, 16 Michigan, 351, 356, 357, 358, is instructive. That was a case of murder. The defendant was found guilty, and after the trial it was discovered that one of the jurors was disqualified under the statutes of Michigan. But that fact was unknown to the accused and his counsel until after the rendition of the verdict. It was contended by the State that by neglecting to challenge that juror, the accused lost the right to avail himself of the objection; and was to be deemed to have thereby waived all objections to the juror or to a trial by eleven qualified jurors. It should be here observed that the Constitution of Michigan preserved the

right, in all criminal prosecutions, to "a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record." Looking at the case as one in which the trial had been by eleven competent jurors only, the court considered the general question of waiver as applicable to criminal cases. Speaking by Judge Christiancy, and observing that under the state constitution there could be no reasonable doubt of the competency of parties in civil cases to waive such an objection, or to stipulate for a trial by a jury of less than twelve, the court said: "But a criminal prosecution, in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding *in invitum*, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney (representing the State) to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position, to hold that he might be bound by contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary. The true theory, we think, is that the people, in their political or sovereign capacity, *assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such;* and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the constitution, which secures his rights."

The court added some general observations which may well

be heeded by every one charged with the administration of the criminal laws. It said: "But independent of all theories, and as a practical question, we think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can see the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially fritted away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

In *State* v. *Carman*, 63 Iowa, 130, 131, which was the case of an assault with an attempt to commit murder, the Supreme Court of Iowa said: "In our Code of Civil Practice it is provided that 'issues of fact in an action in an ordinary proceeding must be tried by a jury, unless the same is waived.' § 2740. In our Code of Criminal Procedure there is no provision for the waiver of a jury. On the other hand, it is provided that 'an issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.' § 4350. *We regard this provision as excluding the jurisdiction of the court, without a jury, to try such issue.* The question presented is not as to the waiver of

a mere statutory privilege, but an imperative provision based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea. If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion."

In *State* v. *Mansfield*, 41 Missouri, 470, 476, which involved the question of the right of the accused in capital crimes and felonies to waive his right to a jury of twelve persons, after referring to *Cancemi* v. *People*, 18 N. Y. 128, the Supreme Court of Missouri, speaking by Judge Wagner, conceded that in cases of misdemeanor, *created by statute*, the *Legislature*, under the laws of that State, might provide for their prosecution in a summary way, without the formality of an indictment, and that the accused could waive a jury or agree on a certain number. But there was no such statute in Missouri, and the court, in respect of the general question of the waiver of a jury, said: "Another good and sufficient reason, it occurs to us, is, that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is *a positive requirement of the law*. He can unquestionably waive many of his legal rights or privileges. He may agree to certain facts and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; *but he has no power to consent to the creation of a new tribunal unknown to the law to try his offense*. The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and *a defendant*,

when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards, and should be clear, definite and uniform, and absolute. If one juror can be withdrawn, there is no reason why six or eight may not be, and thus the accused through persuasion or other causes may have his life put in jeopardy, or be deprived of his liberty, through a body constituted in a manner unknown to the law. Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him."

In *Wilson* v. *State*, 16 Arkansas, 601, 608, which was a case of larceny, the Supreme Court of Arkansas said: "Hence there would seem to be no other mode for the trial of a criminal issue, than that by jury. The difficulty is not obviated by any *waiver* of this mode of trial, *because the Legislature has provided no other mode, in lieu of it, in such an event, as it has in civil cases. Nothing short of a confession of the facts, or the finding of them by the verdict of the jury, can regularly authorize the judgment of the court.* If the accused would not only waive his right to a trial by jury, but go further, and withdraw his plea, and then confess the facts charged against him in the indictment, the court would be authorized to render a judgment against him; but *so long as his plea of not guilty is in, there is no mode by which the court can dispose of it, although the accused may waive a trial by jury, with all its attendant privileges, and desire ever so much that the issue may be disposed of by a reference of it to the judge,* or any other referee or arbitrator, and the prosecuting attorney may desire the same, and act in concert with the accused; for the simple reason that the law makes no provision for any such referee or arbitrator in criminal cases. The only provision is for a confession of the facts, or a trial by jury to determine them."

A leading case upon the subject of trial by jury is that of

Work v. *State of Ohio*, 2 Ohio St. 296, 302, 305. That was an information charging the defendant with assault and battery. The trial took place under an act of the Ohio legislature which permitted a trial in such a case by a jury of six men, notwithstanding the Constitution of Ohio provided that the right of trial by jury should be inviolate. The defendant pleaded not guilty, but was found guilty and sentenced to pay a fine of $100 and costs. In discussing the history of trial by jury, the court, speaking by Judge Ranney, said: "In what does the privilege of this great bulwark of personal liberty consist? The constitution furnishes no answer, nor was it necessary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the *habeas corpus* stand as representatives of ideas as certain and definite as any other in the whole range of legal learning. The institution of the jury, referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect, as that recognized in the great charter, and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property: The same, brought to this continent by our forefathers, and perseveringly claimed as their birthright, in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence. . . . We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the constitution of this State intended to perpetuate, and make the safeguard of innocence, by securing its benefits to every person accused of crime, in any of its courts. There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law, *no person had ever been convicted of crime, by less than the*

concurring assent of twelve of his peers; and no law had ever attempted to authorize it to be done. If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. *The same constitutional provision that secures the right in a charge involving the life of the accused, secures it also in every other criminal case.* It is no answer to say that this would not likely be done. If it had been deemed safe to leave it to the discretion of the General Assembly, no constitutional provision was needed; but, whether needed or not, it has been ordained by a power which both the General Assembly and this court are bound to obey." Again: "But, without pursuing these considerations further, our opinion is, that the essential and distinguishing features of the trial by jury as known at the common law, and generally, if not universally, adopted in this country, were intended to be preserved, and its benefits secured to the accused in all criminal cases, by the constitutional provision referred to. That it is beyond the power of the General Assembly to impair the right, or materially change its character; that the number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void."

In *United States* v. *Taylor*, 11 Fed. Rep. 470, which was a criminal prosecution by information for the offense of carrying on the business of a retail dealer in liquors without having paid the special taxes required by law, the main question was as to the authority of the court to direct a verdict of guilty under the evidence. It was held by Judge McCrary that no such power existed in the court. In the course of his opinion he said that the constitutional guaranty of a jury in a criminal case was a right that *could not be waived, and that such a trial before the court by the prisoner's consent was erroneous.* It appears from the report of that case that Mr.

Justice Miller was consulted by Judge McCrary and concurred in the latter's views.

Among the cases cited by Judge McCrary was *State* v. *Maine*, 27 Connecticut, 281, which was a criminal information for placing a nuisance in a highway. The defendant pleaded not guilty. The case, *by agreement of the parties*, was tried by the court, which found the facts, and reserved the questions of law arising thereon for the advice of the Supreme Court of Errors. The judges of the latter court unanimously held that, "*as no statute conferred on the superior court the power to try this or any other criminal charge, excepting through the intervention of a jury*, the court below could not legally try the case in the manner in which it had done, and would not be able to render a legal judgment on the facts, if the advice of this court was given upon them. They therefore refused to entertain the case."

In *Neales* v. *The State*, 10 Missouri, 498, which is an indictment for unlawfully carrying on the business of a dram-shop keeper without having a license therefor, it appears that the defendant pleaded not guilty, and *neither party requiring a jury*, the case was submitted to the court, who found him guilty and assessed a fine of $30 against him. The Supreme Court of Missouri, in which State there was a constitutional provision providing that the right of trial by jury should remain inviolate, said: "Another objection, equally fatal to the judgment, was the trial of the cause by the court, on the plea of not guilty. It has heretofore been virtually decided by this court, in two cases, that unless the defendant pleads guilty to the charge contained in the indictment, the court cannot try the issue and assess a fine against him. 6 Missouri, 457; 9 Missouri, 696. It is exclusively the province of a jury to *try the issue of not guilty*, and *the consent of the defendant for the court to try the same, cannot confer such power upon the court.*"

A case directly in point is that of *State* v. *Stewart*, 89 N. Car. 563, 564. That was an indictment for an assault and battery.

The defendant pleaded not guilty. A jury trial was *waived*, the court found the facts and adjudged the accused guilty. The judgment was arrested and the State appealed. The Supreme Court of North Carolina said: "It is a fundamental principle of the common law, declared in '*Magna Charta*,' and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' Art. I, § 13. The only exception to this is *where the Legislature may provide other means of trial for petty misdemeanors* with the right of appeal—Proviso in same section. *This is not one of the petty misdemeanors embraced in the proviso;* and if it was, *no such means of trial as that adopted in this case has been provided by the legislature. The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner.*"

Later, in *State* v. *Holt*, 90 N. Car. 749, 754—which was an indictment for cruelty to animals—the same court, after observing that it was the province and duty of the judiciary to watch over and protect the fundamental rights, in all matters that come before them, said: "There was not the remotest purpose in this case, we are sure, to infringe the right of trial by jury in a criminal action, but for convenience sake and to save time (because the facts were not disputed) the facts of the case were agreed upon by the State and the defendant, and submitted to the judge, instead of letting a jury hear the evidence, and render a verdict upon the issue, or find a special verdict. In our judgment, this was not only irregular, but wholly without the sanction of law. *There is no statute that authorizes such procedure*, and the constitution forbids it. 'No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' No jury was empaneled to try the issue; there was no verdict of a jury; there was no conviction. The judgment of the court had nothing to warrant it, and there was nothing upon

which it could properly rest. *The defendant could not consent to a conviction by the court. It had no authority to try the issue of fact raised by the pleadings.* The defendant did not plead guilty; he did not enter the plea of *nolo contendere,* or submit; he pleaded *autrefois convict,* and a jury must try the issue raised by that plea. *State* v. *Stewart,* 89 N. Car. 563; *State* v. *Moss,* 2 Jones, 66; 1 Bish Cr. Pl. § 759, and cases there cited; *Cancemi* v. *People,* 18 N. Y. 128. *The legislature has not provided a means for the trial of cases like this, different from the ordinary method provided by law.* The court erred in passing upon the facts agreed upon and submitted to it without the finding of a jury, and for such error the judgment must be reversed and the court proceed to dispose of the case according to law."

Running through the adjudged cases is the thought that the facts necessary to be proved in order to sustain the charge of crime, where the plea is not guilty, must be ascertained in the mode ordained by law for such purpose. "When, therefore," says Blackstone, "a prisoner on his arraignment pleads not guilty, and for his trial hath put himself on his country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto.*" Bk. 4, c. 27, *350. Now, all will agree that when the crime charged is a felony, a trial in a Circuit or District Court of the United States, even with the consent of the accused, without a jury composed of twelve persons, would be unauthorized and unavailing for any legal purpose. Why? Because, and only because, the law, the supreme law of the land, has declared that the trial of all crimes shall be by jury. And, perhaps, all will agree that the constitutional injunction applies with like force to such misdemeanors as by statute are punishable with imprisonment, and that a Circuit or District Court of the United States is without jurisdiction, under a plea of not guilty, no jury being impaneled, to try any crime against the United States involving *life* or *liberty.* The consent of the accused in such a case certainly cannot confer upon the court

authority to try the crime in a mode inconsistent with the one prescribed by the law.

In my judgment, the same principle must apply in the present case, although a fine only can be imposed. The case is embraced by the very words of the Constitution; for the offense charged is a crime—none the less a crime because only a fine is involved—and the constitutional mandate is that the trial of all crimes, except impeachment, shall be by jury. By what authority can a Federal court except from the operation of the constitutional mandate a crime punishable by fine? It is said that only the property of the accused can be affected, and, therefore, to his consent in this criminal case should be accorded the same effect as is given to his consent in a purely civil case to which he might be a party, and which involved no element of crime. In this view I cannot occur. Something more than property is involved in a criminal case, although the penalty imposed may be simply a fine. Whether the accused has violated the laws of his country, and whether he shall be branded by the judgment of a court as a criminal, are things of more consequence to the public than property the value of which is to be measured in money. What shall constitute a crime, how that crime shall be tried, and in what way the guilt of the accused shall be manifested, when he pleads not guilty, are exclusively for the Government to declare and regulate, and it is not for the accused, and the prosecutor, by the device of an agreement between them, to evade the requirements of the Constitution and provide a tribunal for the determination of the issue of crime or no crime different from that designated by the law. Crime or no crime, if the plea be not guilty, can be established in a court of the United States only by the verdict of a jury.

Undoubtedly, as already indicated, there were petty or minor crimes which, at common law, could be tried without a jury, and it may be assumed for the purposes of this case, that the constitutional provision that all crimes except im-

peachment shall be tried by jury is to be interpreted in the light of that fact. But, it may be repeated, that the trial, even of such cases, without a jury, was contrary to the genius of the common law, and was allowed by the courts *only in obedience to acts of Parliament*, which was not bound by a written constitution, and whose authority in matters of legislation was omnipotent, and, therefore, not to be disputed by an English court. An enumeration of all the crimes against the United States which may be reasonably declared to belong to the class known at the common law as petty offenses, punishable *under legislative sanction* without the intervention of a jury, need not here be attempted. Nor is it necessary to express any final judgment upon the question whether the particular crime here involved might, *by statute*, be placed in that class and tried without a jury. It is enough to say that even if Congress could place it in that class, and authorize its trial by summary proceedings, without a jury, or with a jury of less than twelve, it has not done so. The case, therefore, is controlled by the express constitutional injunction that all crimes, except in case of impeachment, shall *be* tried by a jury. The agreement of the accused and the prosecutor cannot confer jurisdiction, much less have the effect to displace the mode of trial established by the fundamental law and substitute for it one inconsistent with the principles of the common law as unmodified by any valid statute.

It is said that the nature of the offense and the amount of punishment prescribed must determine whether it is to be classed among serious or petty offenses. This, I take it, means that it is for the court, in the exercise of its inherent powers, to determine whether the offense is a serious one to be tried alone by a jury, or a petty one which may be tried without a jury. But the judiciary had no such function at common law. No court at common law assumed, without a jury, to try any offense, however trivial or petty, except under the authority of a statute conferring authority to that end. If the offense is punishable only by a fine of fifty dol-

lars—as is the case here—is it to be deemed a petty offense, and yet is one punishable by a fine of five hundred dollars to be deemed a serious one? Must there not be some fixed rule or limit on the subject? In my judgment, the Constitution establishes a rule which must be respected by every branch of the Government. Yet, under the principles now announced, an offense punishable by a fine of five or ten thousand dollars may be regarded—if the court so wills—as a petty offense, triable without a jury. I cannot understand where the judiciary derives its authority to prescribe any rule on the subject, in face of the absolute constitutional requirement that all crimes, except in cases of impeachment, shall be tried by a jury, and in face of the further significant fact that no court at common law ever assumed to regard *any* crime, however trivial, as triable without a jury, except under express legislative sanction.

Again, it is said that in the original draft of the Constitution, the words were "the trial of all criminal offenses . . . shall be by jury," and that these words were changed in the Convention so as to read "the trial of all crimes." Strangely enough, it is supposed that this change of words justifies the conclusion that the framers of the Constitution intended to dispense with a jury in such criminal offenses as the courts, uncontrolled by statute, deemed petty as contrasted with those that they deemed serious. To say that "crimes" means something different from "criminal offenses" is something that I cannot comprehend. A crime is a criminal offense and a criminal offense is a crime. But the contention of the prosecution, even if sound, does not answer the suggestion that, at common law, it was never the province of a court, by any inherent power it possessed, to prescribe what criminal offenses or crimes were triable, and what need not be tried, by jury. My point is that no criminal offense or crime against the United States can be tried except by jury, if the plea be not guilty, unless it be a petty offense or crime, *and* unless the legislative department declares that it may be so

tried. If the offense or crime be, in reality, in its essence, a petty one, then Congress may authorize it to be tried without a jury. But Congress has not so declared in respect of the offense or crime charged against the present defendant. The trial by jury is not one of form, but of the very substance of the mode prescribed for the trial of crimes. It may not be waived merely by the consent of the accused and the prosecutor. In the present case the court, as I think, entrenches upon the domain of the legislative department of the Government. It assumes, without authority, to prescribe a rule of criminal procedure which Congress has not, in its wisdom, undertaken to prescribe. It has made, not declared, law. There is no tendency, in these latter days, more dangerous than the assumption by one department of the Government of powers that belong to another department.

It is contended that this mode of trial, at least in misdemeanors involving only a fine, ought to be sanctioned—indeed, encouraged—as convenient both for the Government and the accused. What was said by Blackstone when referring to summary proceedings authorized by acts of Parliament in particular cases may well be repeated, at this day, whenever it is proposed, upon grounds of convenience, to dispense with juries in criminal prosecutions, and thereby introduce a new mode for the trial of crimes. He said: "And, however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." Bk. 4, c. 27, 350.

I insist that as the offense charged in each of these cases

was a crime against the United States; as the Constitution expressly declares, without qualification, that the trial of all crimes, except impeachment, shall be by jury; as Congress has not assumed to declare that this case and like ones may be tried without a jury, the parties assenting; and as the trial of these cases by the court alone, without a jury, has no other sanction than the consent of the accused and the District Attorney, the judgment in each case should be reversed, and each case remanded with directions to set aside the judgment, grant a new trial, and take such further proceedings as may be in conformity with law.

KEPNER *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 244. Argued April 22, 1904.—Decided May 31, 1904.

The expressed declarations of the President in Military Order, No. 58, of April 23, 1900, and in the act of July 1, 1902, establishing a civil government in the Philippine Islands, both adopting with little alteration the provisions of the Bill of Rights, show that it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom; and those expressions were used in the sense which has been placed upon them in construing the instrument from which they were taken.

It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body.

It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling.

Although a right of appeal was given to the Government by Military Order, No. 58, in criminal cases in the Philippine Islands, § 5 of the act of July 1, 1902, establishing a civil government in the Islands, specifically provided that no person should be put twice in jeopardy for the same offense, thereby repealing the provision in the military order and nothing in § 9 of the act of 1902 can be construed as intending to prevail over the specific guaranty contained in § 5.

In ascertaining the meaning of a phrase in the Constitution taken from the Bill of Rights, it must be construed with reference to the common law from which it was taken.

PROPERTY OF UNITED STATES SENATE

At common law protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense; and it is the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The second jeopardy is not against the peril of second judgment, but against being again tried for the same offense.

THE facts, which involved the application of the constitutional immunity provision of the Constitution of the United States to the Philippine Islands, are stated in the opinion of the court.

Mr. Charles H. Aldrich for plaintiff in error:[1]

The result of *De Lima* v. *Bidwell* and the *Fourteen Diamond Rings Case* made these islands territory of the United States. They ceased to be foreign in any sense. Hence tariff laws were not applicable until Congress had made them so.

That the term "United States" in the Uniformity Clause had a restricted meaning and that these possessions were not within that clause of the Constitution, was the judgment of a majority of this court.

The status of the Philippine Archipelago is fixed as territory of the United States. *Fourteen Diamond Rings Case*, 183 U. S. 176, 179.

The question whether any particular provision is applicable depends upon whether Congress has extended that provision to such territory.

Considered in connection with the *Hawaiian* case, even the application of the bill of rights, so called, becomes a question of relation.

If we assume that enough has been done in the Philippines to incorporate them into the United States as required by one section of this court, or to extend the Constitution thereto as demanded by another view here expressed, then clearly the plaintiff in error must succeed.

[1] *Dorr* v. *United States*, No. 584, *post*, 138, and *Mendezona* v. *United States*, No. 583, *post*, 158, were argued simultaneously with this case.

Again, if every agency of the Government is bound by these limitations upon the powers of Congress upon the establishment of civil government in the Philippines in dealing with persons not in the military service of the United States, the plaintiff in error must be sustained. See *Hawaii* v. *Mankichi*, 190 U. S. 197, 217; White, J., in same, p. 221; Harlan, J., in same, p. 237; *Downes* v. *Bidwell*, White, J., concurring opinion, 182 U. S. 244, 288, citing McLean, J., in *Dred Scott* v. *Sanford*, 19 How. 393, 542; Curtis, J., in same, p. 614.

The Territory being territory of the United States can only be governed by agencies of the United States, and as these agents are limited in their powers by the Constitution, it follows that without action by Congress, that is, in the absence of any action by Congress, unconstitutional acts may not be lawfully done in the Philippines.

It has been repeatedly stated by this court that while municipal law in force under the former sovereign remained in force as governing private persons and property, until changed by Congress, those laws which were in conflict with our Constitution and the spirit of our institutions were by the fact of acquisition abrogated. *Dred Scott* v. *Sanford*, 19 How. 398, 450; *Fong Yue Ting* v. *United States*, 149 U. S. 716, 738; *Pollard* v. *Hagan*, 3 How. 212, 225; *Leitensdorfer* v. *Webb*, 20 How. 176; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Chicago, R. I. & P.* v. *McGlinn*, 114 U. S. 542, 546; *Downes* v. *Bidwell*, White, J., 182 U. S. 244, 291.

Why appeal to the spirit of our institutions, when we have the spirit embodied in these amendments constituting a bill of rights, a *Magna Charta*, as they were frequently called in the debates upon the adoption of the Constitution?

Such a course is to make uncertain the liberties of the people. They rest not in the letter of the Constitution, but in judicial interpretation, and the recent cases show that the members of our highest courts are unable to agree as to what they are or when they are available to the protection of the people.

Why make a difference between these prohibitions upon the

power of Congress by stating that some protect natural rights and some only methods of procedure?

They are all in the Constitution of equal dignity, if we look to that instrument alone. See *Reynolds* v. *United States*, 98 U. S. 145, 154, 162; *Callan* v. *Wilson*, 127 U. S. 540, 549; *Springville* v. *Thomas*, 166 U. S. 707; *Publishing Co.* v. *Fisher*, 166 U. S. 464; *Bauman* v. *Ross*, 167 U. S. 548; *Thompson* v. *Utah*, 170 U. S. 343; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 5, 45; *Black* v. *Jackson*, 177 U. S. 349, 363.

The cases relating to the Territories and those relating to the District of Columbia are treated by this court as resting upon the same principle. It is evident that this is so, there being no distinction to be drawn between the power to make rules and regulations respecting the territory of the United States, and the power to exercise exclusive legislation, in all cases whatsoever, in the District; none, at least, which would tend to give less effect to the constitutional prohibitions in the former case than in the latter. The decisions in all these cases have been unanimous on the point to which we cite them. Every member of the bench, as it is now constituted, has participated in one or more of them, and the same is true, with, we believe, a single exception, of every one of its distinguished occupants since 1878.

See also *Wong Wing* v. *United States*, 163 U. S. 228, citing on p. 238, *Yick Wo* v. *Hopkins*, 118 U. S. 300, to effect that the provisions of the Fourteenth Amendment to secure life, liberty and property, "are universal in their application to all persons within the territorial jurisdiction." And see *Webster* v. *Reid*, 11 How. 437, 460.

And see the question again considered in *Dred Scott* v. *Sanford*, 19 How. 393, as to the validity of the Missouri Compromise Act, which prohibited slavery in that part of the Louisiana Purchase lying north of 36°, 30′, north latitude and not included in the limits of the State of Missouri.

See especially dissenting opinions of McLean, J., and Curtis, J., as to when does territory become so far incorporated,

to use the language of the concurring opinion in the *Hawaiian* case, as to make these provisions of the Constitution applicable. It was conceded by all that the act of April 30, 1900, was effectual for that purpose.

Tried by this test, the acts of the President, of the Commission, and of Congress of July 1, 1902, prevented double jeopardy and tried by any of the tests proposed by any of the variant opinions in the cases cited, the contention of the plaintiff in error must be sustained.

And see also the Spooner Resolution of March 2, 1901, which constituted full authority to the President to extend the Constitution, and perhaps such portions of it as he might deem advisable, to the Philippine Islands; and, as we have seen, he did extend the provision forbidding that a person should be twice put in jeopardy for the same offense. The conclusion follows that when the Congress has given a broad letter of attorney to the President, making him the judge of what is necessary to govern the Philippines, and he extends the Constitution in whole or in part, it is the act of his principal.

All of the acts relating to criminal trial were prior to the commission of the offense for which the plaintiff in error was submitted to a double jeopardy, except the act of Congress and that act was prior to his second trial.

Have not all these provisions extended this prohibition of the Constitution to the Philippine Islands? If they have not, what would be effective for that purpose?

The court will note that the right of appeal by the United States is predicated wholly upon General Orders No. 58, issued by the military commander under date April 23, 1900. It is submitted that this cannot override an order of the President taking effect at a later date and looking to the restoration of the ordinary civil and criminal jurisdiction of the courts of this country, and that the language used by the President and Congress must be held to have been used with its accepted meaning in this country. It seems certain, that as against the liberty of the citizen, this court is not authorized

to deny to the language thus used by the executive and legislative branches of the Government its ordinary acceptation.

Two trials in a criminal case are not consistent with the prohibition against double jeopardy in the Federal Constitution. *United States* v. *Sanges*, 144 U. S. 310; *Sparf* v. *United States*, 156 U. S. 51, 87, 175; *United States* v. *Ball*, 163 U. S. 662, 669, 671; *Ex parte Lange*, 18 Wall. 163; *Berkowitz* v. *United States*, 93 Fed. Rep. 452, and other cases cited by the Government, distinguished. And see also *In re Belt*, 159 U. S. 95, 98; *Ex parte Mason*, 105 U. S. 696, 699; *Murphy* v. *Massachusetts*, 177 U. S. 155; *Kohlheimer* v. *State*, 39 Mississippi, 548; *State* v. *Ward*, 48 Arkansas, 36; *Black* v. *State*, 36 Georgia, 447; *Hilands* v. *Commonwealth*, 111 Pa. St. 1; *State* v. *McKee*, 1 Bailey Law, 651; *S. C.*, 21 Am. Dec. 499, with notes; *Commonwealth* v. *Fitzpatrick*, 121 Pa. St. 109; *McDonald* v. *State*, 79 Wisconsin, 651; *O'Brian* v. *Commonwealth*, 9 Bush, 333; *Durham* v. *State*, 4 Scam. 172; *People* v. *Miner*, 144 Illinois, 308.

These cases show that while there is not a unanimity of decision as to the precise moment when jeopardy attaches, there is substantial unanimity that where the indictment or information is sufficient, and the defendant is acquitted in a court having jurisdiction, he cannot be called upon to again answer for the same offense.

Mr. Lebbeus R. Wilfley, Attorney General for the Philippine Islands, for the United States in this case and in Nos. 583 and 584.

Plaintiff in error, a member of the Manila bar, was tried by the court of first instance of the city of Manila in November, 1901, on the charge of *estafa* (embezzlement of the funds of a client) and acquitted.

Under the law now in force in the Philippine Islands, which gives the Government as well as the accused the right of appeal from final judgments of the courts of first instance in criminal cases, the Government appealed the case and the

Supreme Court reversed the judgment of the lower court, sentencing the plaintiff in error to one year, eight months and twenty-one days' imprisonment, together with suspension from the office of attorney at law.

The plaintiff in error contends that the right to trial by jury is in the Philippine Islands. The court has held in the *Insular* cases and in the case of *Hawaii* v. *Mankichi* that the Constitution does not of its own force attach to newly acquired territory immediately upon the date of acquisition; that power to extend the provisions of the Constitution to the Territories rests in Congress; that notwithstanding the fact that there are certain prohibitions contained in the Constitution relating to fundamental rights which go to the very root of the power of Congress to act, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to such matters as methods of procedure and forms of judicial trials, which do not restrict Congress in the exercise of its power to create local governments and make needful rules and regulations for the Territories of the United States.

The power of Congress to provide such modes of trial and methods of procedure as in its judgment are best adapted to the needs of the people of the Territory is clearly recognized in the foregoing cases.

The sole question raised in this case, in our opinion, is whether the provision of the Code of Criminal Procedure now in force in the Philippine Islands, which gives the Government, as well as the accused, the right of appeal from judgments of the trial court in criminal cases, is repealed by the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," which provides that no person "for the same offence shall be twice put in jeopardy of punishment."

General Order No. 58 is not repealed by said act of Congress because the clause giving the Government the right of

trial in government cases does not violate the provision against double jeopardy contained in said act. The principle of law against double jeopardy exists in the Spanish as it does in the common law countries. The proceeding before the court of the first instance and the Supreme Court of the Philippine Islands are but parts of a single continuous trial. Congress in enacting this piece of special legislation, must be supposed to have had in view the conditions and circumstances existing in the Philippine Islands and the laws in force there on the subject of criminal procedure, and to have legislated with special reference thereto.

The system of trial by jury has been withheld from the Philippines by Congress.

Hence Congress cannot be presumed, by the use of general terms, to have engrafted on the Roman law system of trial by judges an application of the treaty against double jeopardy which is connected inseparably with the common law system of trial by jury. This could only be done by express, specific provision repealing unmistakably the law of procedure in force in the islands at the date of the passage of the act.

The adoption by Congress of the Spanish law application of the principle against double jeopardy is not in derogation of any fundamental right guaranteed by the Constitution of the United States, does not violate any principle of natural justice, and is not inconsistent with the universal principle of jurisprudence which enforces the conclusiveness of a final and valid judgment.

All rules of statutory construction support the interpretation herein contended for.

Mr. Solicitor General Hoyt for the United States in this case and in Nos. 583 and 584:

The first question here is whether the express limitations respecting trial by jury apply of their own force in the Philippines as a vital and inherent principle of our free government everywhere, or whether they constitute simply a remedial

right and a particular method of procedure peculiar to our Anglo-Saxon jurisprudence, but not essential to the protection of individual liberty.

This question was answered in the *Mankichi Case*, 190 U. S. 197. From that decision it seems clear that while most of the privileges and immunities of the bill of rights apply to Territories from the moment of acquisition, trial by jury does not. That institution is not a necessary and fundamental right, but concerns procedure mainly, and the guarantee does not apply to newly acquired territory. Trial by jury was entirely unknown to the civil law in general and as administered in the Philippines, and the civil law method of trial has always been in vogue there, is familiar to the people and is perfectly adequate to all the demands of justice.

The respect which we are bound to feel for the institutions of the civil law, and the idea that the rights of new people coming under our sovereignty should not be unnecessarily interfered with in respect to their historical institutions and jurisprudence, have been expressed by the court in opinions of great ability and force. *Hurtado* v. *California*, 110 U. S. 516; *Holden* v. *Hardy*, 169 U. S. 366.

Previous cases involving the question as to the right of trial by jury establish these propositions: that the first eight amendments to the Constitution do not operate upon the States; that accordingly, while jury trial is a necessary rule in courts of the United States, including the District of Columbia and the organized Territories, nevertheless the State may provide for other modes of accusation and trial consistently with due process of law and the principles of free government. *Webster* v. *Reid*, 11 How. 437; *Hurtado* v. *California*, 110 U. S. 516; *In re Ross*, 140 U. S. 473; *American Pub. Co.* v. *Fisher*, 166 U. S. 46; *Thompson* v. *Utah*, 170 U. S. 343; *Bolln* v. *Nebraska*, 176 U. S. 83; *Maxwell* v. *Dow*, 176 U. S. 584; *Downes* v. *Bidwell*, 182 U. S. 244. The *Mankichi* case and the present cases add to this rule Territories not organized.

The power of Congress here is plenary. Congress has exer-

cised it by maintaining all the guarantees vital and necessary to free government which our war power had imposed upon itself at the outset. Congress has not only not extended the Constitution and laws in general of the United States, but has affirmatively withheld them, and intentionally has not included trial by jury in the bill of rights conferred. Under these circumstances, and under the decisions as interpreted and applied by the *Insular* cases, the logic is certain and inevitable that the right of trial by jury does not apply to the Philippine Islands.

What does the provision as to jeopardy in the Philippine civil government act mean as applied to Philippine conditions? What was the intention of Congress? The principle is ancient and inherent in all just laws, and in some sense is a fundamental limitation on our Government everywhere. It is evident, however, that the scope and effect of our rules are essentially dependent upon the peculiar function and conclusive authority of a jury. The finality of a verdict against the prosecution rules the whole subject.

Under the system we found in the Philippines all serious crimes were necessarily reviewed by the audiencia, whether acquittal or conviction resulted below, and the case was not final, the trial ended and the jeopardy complete until the audiencia had pronounced judgment. The American legislation has made no substantial changes in these proceedings. Under the present system there is not more than one trial; the original trial is a unitary and continuous thing and is not complete until the appellate court has pronounced judgment.

Congress has manifested a clear intention to approve and sustain the established scheme as modified and enlarged under our authority; the Philippine situation was studied with particular care and great deliberation, and Congress acted upon full information. It is incredible that Congress meant to impose the peculiar conception and effect of the rule on jeopardy which is imbedded in our law simply because of its relation to trial by jury. If that view were sustained, such

mischiefs and confusion would follow as those which would be consequent upon the immediate introduction of grand and petit juries. It was never intended, by the insertion of the jeopardy clause to wipe out by mere remote implication the entire established course of state appeals in criminal cases. If Congress had desired to give to our Government in the Philippines the authority to strike down appeals by the prosecution in criminal cases, they would have done so in clear and unmistakable language.

There is due process of law in the Philippines within our own fundamental guarantees and by our own tests. The system is sufficient for the full demands of distributive justice. The law is equal and operates upon all alike. It is as right for this Government to preserve the essential character of the structure as a possession and cherished institution of the inhabitants, as it is for a State to adopt just such institutions upon the desires and demands of its people. See *Missouri* v. *Lewis*, 101 U. S. 22, 31.

The Philippine laws respecting criminal trials and appeals are entirely harmonious with the necessary principles of free government, and all the proceedings taken herein were due and legal and were not forbidden by the Constitution and laws of the United States.

Mr. Justice Day delivered the opinion of the court.

Thomas E. Kepner, a practicing lawyer in the city of Manila, Philippine Islands, was charged with a violation of the law in the embezzlement of the funds of his client (*estafa*). Upon trial, in November, 1901, in the court of first instance, without a jury, he was acquitted, it being the judgment of the court that he was not guilty of the offense charged. Upon appellate proceedings by the United States to the Supreme Court of the Philippine Islands the judgment of the court of first instance, finding the accused not guilty, was reversed, and Kepner was found guilty and sentenced to a term of imprisonment of one

year, eight months and twenty-one days, suspended from any public office or place of trust and deprived of the right of suffrage.

Error was assigned in the appellate court upon the ground that the accused had been put in jeopardy a second time by the appellate proceedings, in violation of the law against putting a person twice in jeopardy for the same offense, and contrary to the Constitution of the United States.

The appeal was taken by the United States on December 20, 1901. A motion to dismiss the appeal was made on January 1, 1902. The motion was finally overruled on October 11, 1902; the final decision in the case, finding the accused guilty and imposing the sentence, was rendered on December 3, 1902.

A proper consideration of the question herein made renders it necessary to notice some of the steps by which the jurisdiction of the courts in which the accused was tried was established.

The United States acquired the Philippine Islands by cession under the treaty of peace executed at Paris, between the United States and Spain, on December 10, 1898, the final ratifications being exchanged April 11, 1899.

The islands after American occupation had been under military rule prior to the creation of the Philippine Commission.

Under the control of the military government, orders had been issued, among others, military order number 58, dated April 23, 1900, which order was in part as follows:

"General Orders, No. 58.

"Manila, P. I., April 23, 1900.

"In the interests of justice and to safeguard the civil liberties of the inhabitants of these islands, the criminal code of procedure now in force therein is hereby amended in certain of its important provisions as indicated in the following enumerated sections:

* * * * * * * *

"SEC. 3. All public offences triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.

* * * * * * * *

Rights of accused at the trial.

"SEC. 15. In all criminal prosecutions the defendant shall be entitled:

"1. To appear and defend in person and by counsel at every stage of the proceedings.

"2. To be informed of the nature and cause of the accusation.

"3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice or be used against him.

"4. To be exempt from testifying against himself.

"5. To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answers in the presence of the accused or his counsel, the defence having had an opportunity to cross-examine the witness, the deposition of the latter may be read, upon satisfactory proof to the court that he is dead or insane, or cannot with due diligence be found in the islands.

"6. To have compulsory process issue for obtaining witnesses in his own favor.

"7. To have a speedy and public trial.

"8. To have the right of appeal in all cases.

* * * * * * * *

"SEC. 43. From all final judgments of the courts of first instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts an appeal may be taken to the Supreme Court as hereinafter prescribed. . . .

"SEC. 44. Either party may appeal from a final judgment

or from an order made after judgment affecting the substantial rights of the appellant or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information.

* * * * * * * *

"SEC. 50. It shall not be necessary to forward to the Supreme Court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos, exclusive of costs, unless such case shall have been duly appealed. But such sentences shall be executed upon the order of the court in which the trial was had. The record in cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding 250 pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the Supreme Court within twenty days, but not earlier than fifteen days after the rendition of the sentence. All cases involving sentence of death, or of imprisonment exceeding six years, or of fine exceeding 1250 pesos, or in which an appeal shall have been taken, shall be submitted to the criminal branch of the Supreme Court, and shall thereafter take the same course as is now provided by law. Cases forwarded to the Supreme Court involving sentences less serious than those hereinbefore last mentioned, and not appealed, shall be referred by the clerk to the ministerio fiscal for consideration, and if the latter return the same concurring in the sentence imposed, the record shall immediately be returned to the trial court for execution of sentence. If the ministerio fiscal shall not concur in the sentence the case shall be submitted to the criminal branch of the Supreme Court, and shall thereafter take the same course as is now provided by law when that officer shall recommend a sentence in any respect more severe than that imposed by the trial judge, and for the consideration of the

court, without the necessity of a further defence or hearing, when that officer recommends a lighter sentence."

This order was amended by an act of the commission (No. 194), passed August 10, 1901, and is as follows:

"(G) No. 194. An act conferring jurisdiction on justices of the peace, &c.

"SEC. 1. Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the judges of courts of first instance. . . .

"SEC. 4. So much of section fifty of said general order number fifty-eight as requires courts of first instance, or clerks thereof, to forward to the Supreme Court or the ministerio fiscal the record of all criminal cases for revision or consideration, except where the death penalty is imposed as the judgment or part of the judgment of such court of first instance, is hereby repealed, and it shall not be necessary to forward to the Supreme Court or the ministerio fiscal the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed, as provided in such order. The records of all cases in which the death penalty shall have been imposed by any court of first instance, whether the defendant shall have appealed or not, shall be forwarded to the Supreme Court for investigation and judgment, as law and justice shall dictate."

Courts were established for the islands under an act passed by the commission June 11, 1901:

"SEC. 2. The judicial power of the government of the Philippine Islands shall be vested in a Supreme Court, courts of first instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts, and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record.

* * * * * * * *

"SEC. 16. The jurisdiction of the Supreme Court shall be of two kinds:

"1. Original; and

"2. Appellate.

"SEC. 17. The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, *habeas corpus* and *quo warranto* in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law.

"SEC. 18. The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from courts of first instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court.

"SEC. 19. The Supreme Court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction.

* * * * * * * *

"SEC. 39. The existing audiencia or Supreme Court is hereby abolished, and the Supreme Court provided by this act is substituted in place thereof.

* * * * * * * *

"SEC. 55. The jurisdiction of courts of first instance shall be of two kinds:

"1. Original; and

"2. Appellate.

"SEC. 56. Courts of first instance shall have original jurisdiction. . . . 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * * * * *

"SEC. 65. The existing courts of first instance are hereby abolished, and the courts of first instance provided by this act are substituted in place thereof.

"SEC. 66. There shall be courts of justice of the peace as in this section provided:

"1. The existing courts of justices of the peace, established by military orders since the thirteenth day of August, eighteen hundred and ninety-eight, are hereby recognized and continued, and the justices of such courts shall continue to hold office during the pleasure of the commission.

"2. In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justice of the peace shall be established in every municipality thereof which shall be organized under the municipal code, or which has been organized and is being conducted as a municipality when this act shall take effect, under and by virtue of the municipal code.

* * * * * * * *

"SEC. 68. A justice of the peace shall have original jurisdiction for the trial of all misdemeanors and offences arising within the municipality of which he is a justice, in all cases where the sentence might not by law exceed six months' imprisonment or a fine of one hundred dollars; . . ."

On July 1, 1902, Congress passed an act, 32 Stat. 691:

"An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the action of the President of the United States in creating the Philippine Commission and authorizing said commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the executive

order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands as set forth in the act of the Philippine Commission, entitled 'An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction,' enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: 'By authority of the United States be it enacted by the Philippine Commission.' The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

"Future appointments of civil governor, vice-governor, members of said commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

* * * * * * * *

"SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws.

"That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offence without due process of law; and no person for the same offence shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

"That all persons shall before conviction be bailable by sufficient sureties, except for capital offences.

"That no law impairing the obligation of contracts shall be enacted.

"That no person shall be imprisoned for debt.

"That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, insurrection or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist.

"That no *ex post facto* law or bill of attainder shall be enacted.

"That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of the Congress of the United States, accept any present, emolument, office or title of any kind whatever from any king, queen, prince or foreign State.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"That the right to be secure against unreasonable searches and seizures shall not be violated.

"That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

"That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

"That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.

"That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

"That the rule of taxation in said islands shall be uniform.

"That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

"That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only.

* * * * * * * *

"SEC. 9. That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said Government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the Supreme Court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided,* That the admiralty jurisdiction of the Supreme Court and courts of first instance shall not be changed except by act of Congress.

"SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved, or in causes in

which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States."

The act just quoted became a law before the final conviction of the accused in the Supreme Court of the islands.

It is contended by the Government that that part of the law under immediate consideration, which provides that no person, for the same offense, shall be twice put in jeopardy, must be construed in view of the system of laws prevailing in the islands before the same were ceded to the United States, and that the purpose of Congress was to make effectual the jurisprudence of the islands as known and established before American occupation, and that the provision against double jeopardy must be read in the light of the understanding of that expression in the civil law, or rather the Spanish law as it was then in force.

The citations in the brief of the learned counsel for the Government seem to establish that under the Spanish law, as theretofore administered, one who had been convicted by a judgment of the court of last resort could not again be prosecuted for the same offense. We notice some of these provisions:

In Spanish law the doctrine found expression in the Fuero Real (A. D. 1255) and the Siete Partidas (A. D. 1263).

"After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offence (except in certain specified cases). Fuero Real, lib. iv, tit. xxi, 1, 13.

"If a man is acquitted by a valid judgment of any offence of which he has been accused, no other person can afterwards accuse him of the offence (except in certain cases). Siete Partidas, Part VII, tit. i, l. xii."

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola in 1848, it is said, in considering the persons who may be accused of crime:

"It is another of the general exceptions that a person cannot be accused who has formerly been accused and adjudged of the same crime, since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law. Tomo I, pag. 511."

Under that system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the audiencia, or Supreme Court, whose judgment was subject to review in the Supreme Court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in due form of law. The change introduced under military order No. 58, as amended by act 194 of the commission, made the judgment of the court of first instance final, in cases other than capital, whether the accused be convicted or acquitted, unless an appeal was prosecuted by the Government or the accused in the manner pointed out.

In order to determine what Congress meant in the language used in the act under consideration, "No person for the same offence shall be twice put in jeopardy of punishment," we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed. A consideration of the events preceding this regulation makes evident the intention of Congress to

carry some at least of the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people, newly subject to our jurisdiction.

That it was the intention of the President in the instructions to the Philippine Commission to adopt a well-known part of the fundamental law of the United States, and to give much of the beneficent protection of the bill of rights to the people of the Philippine Islands, is not left to inference, for in his instructions, dated April 7, 1900, (see Public Laws and Resolutions of Philippine Com. 6–9,) he says:

"In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government;"

But he was careful to add:

"At the same time the commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most

enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offence or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainer or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the Thirteenth Amendment against slavery or involuntary servi-

tude except as a punishment for crime, and that of Art. 1, § 9, to the passage of bills of attainder and *ex post facto* laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.

When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?

It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *The Abbotsford,* 98 U. S. 440.

It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without Congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court and is no longer open to question. *American Ins. Co.* v. *Canter,* 1

Pet. 511; *Murphy* v. *Ramsey*, 114 U. S. 15; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197. This case does not call for a discussion of the limitations of such power, nor require determination of the question whether the jeopardy clause became the law of the islands after the ratification of the treaty without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted.

It is argued that in the act of July 1, 1902, Congress recognized the jurisdiction of the Philippine courts in section 9 as follows:

"SEC. 9. That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure."

The argument is, that Congress intended to leave the right of appeal as provided by military order, No. 58, as amended by the commission, in full force.

But Congress, in section 5, had already specifically provided that no person should be put twice in jeopardy of punishment for the same offense. While section 9 recognizes the established jurisdiction of the courts of the islands, it was not intended to repeal the specific guaranty of section 5, which is direct legislation pertaining to the particular subject. It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. *In re Rouse, Hazard & Co.*, 91 Fed. Rep. 96, 100, and cases therein cited; *Townsend* v. *Little*, 109 U. S. 504, 512.

In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken. 1 Kent, Com. 336. *United*

States v. *Wong Kim Ark*, 169 U. S. 649, in which this court said:

"In this, as in other respects, it [a constitutional provision] must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 144 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 624 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent's Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274."

At the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense. The rule is thus stated by Hawkins in his Pleas of the Crown, quoted by Mr. Justice Story in *United States* v. *Gibert et al.*, 2 Sumner, 19, 39:

"The plea (says he) of *autre fois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court, which hath jurisdiction of the cause, he may by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime."

In this court it was said by Mr. Justice Miller, in *Ex parte Lange*, 18 Wall. 163:

"The common law not only prohibited a second punishment for the same offence, but went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

And in as late a case as *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378, it was held that a conviction before a court of competent

jurisdiction, even without a jury, was a bar to a second prosecution.

In that case the appellant had been summarily convicted before a magistrate for negligently and by wilful misconduct driving a carriage against a horse ridden by the respondent, and was afterwards convicted on the same facts for unlawful assault. It was held that the first conviction was a bar to the second. In the course of the opinion it was said by Blackburn, J.:

"I think the fact that the appellant had been convicted by justices under one act of Parliament for what amounted to an assault is a bar to a conviction under another act of Parliament for the same assault. The defence does not arise on a plea of *autre fois convict*, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatum*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence. The only point raised is whether a defence in the nature of a plea of *autre fois convict* would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury."

In the same case it was said by Lush, J.: "I am also of opinion that the second conviction should be quashed, upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offence for which the appellant might be punished under either of two

statutes. The appellant was prosecuted for the assault and convicted under one of the statutes, 3 and 4, Wm. IV, c. 50, § 78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute."

It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal. *Coleman* v. *Tennessee*, 97 U. S. 509. Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. *People* v. *Miner*, 144 Illinois, 308; *State* v. *Bowen*, 45 Minnesota, 145; *State* v. *Layne*, 96 Tennessee, 668.

In *United States* v. *Sanges*, 144 U. S. 310, it was held that a writ of error did not lie in favor of the United States in a criminal case, Mr. Justice Gray said:

"From the time of Lord Hale to that of Chadwick's case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, § 12; c. 50, §§ 10 *et seq.;* Bac. Ab. Trial, L. 9; Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 199.

"But whatever may have been, or may be, the law of

England upon that question, it is settled by an overwhelming weight of American authority that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

In the course of the opinion Justice Gray cites, among other cases, *Com.* v. *Commings* and *Same* v. *McGinnis*, opinion by Chief Justice Shaw, 3 Cush. 212. In Archbold Cr. Pl. & Pr. Pomeroy's ed. 199, it was said: "There is no instance of error being brought upon a judgment for a defendant after an acquittal."

That the learned justice could not have intended to intimate that a second prosecution could be allowed by statute after an acquittal of the offense is shown by the subsequent decision of this court in *United States* v. *Ball*, 163 U. S. 662, in which Mr. Justice Gray also delivered the opinion of the court. In that case an attempt was made to prosecute for the second time one Millard F. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others jointly indicted with Millard F. Ball, who had been convicted at the trial. The court below held Ball's plea of former jeopardy to be bad. But this court reversed the judgment, and in the course of the opinion it was said:

"The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth* v. *Peters*, 12 Met. 387; 2 Hawk. P. C.

c. 35, § 3; 1 Bishop's Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. *Ex parte Parks*, 93 U. S. 18. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. *United States* v. *Sanges*, 144 U. S. 310. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case. . . . *As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.* However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States* v. *Sanges*, 144 U. S. 310; *Commonwealth* v. *Tuck*, 20 Pick. 356, 365; *West* v. *State*, 2 Zabriskie [22 N. J. Law], 212, 231; 1 Lead. Crim. Cas. 532."

It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense.

We are not here dealing with those statutes which give to the Government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy

has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused. *People* v. *Webb*, 38 California, 467. Mr. Bishop, in his work upon Criminal Law, sums up the scope and authority of such statutes as follows:

"A legislative provision for the rehearing of criminal causes cannot be interpreted—or, at least, it cannot have force—to violate the constitutional rule under consideration, whatever be the words in which the provision is expressed. When, therefore, a defendant has been once in jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. Such a statute will be interpreted with the Constitution, and be held to apply only to cases where it constitutionally may. And if it undertakes to give to the State the right of appeal, to retry the party charged, after acquittal, it is invalid. And so the writ of error, or the like, allowed to the State, can authorize the State to procure the reversal of erroneous proceedings and commence anew, only in those cases in which the first proceeding did not create legal jeopardy." 1 Bishop Criminal Law (5th ed.), § 1026.

The author's conclusion has support in the case of *People* v. *Miner*, 144 Illinois, 308, *supra*, wherein a statute giving an appeal when the accused had been acquitted before a competent tribunal, was held in violation of section 10, article 2, of the constitution of that State, providing that no person shall be put twice in jeopardy for the same offense. So in the case of *People* v. *Webb*, 38 California, 467, a statute undertaking to give the right of appeal to the people in criminal cases was held to be limited to the cases in which errors in the proceedings may occur before legal jeopardy has attached. In the course of a well-considered opinion it was said:

"The question thus presented is of most grave importance, and, so far as we are advised, has never been directly passed upon by this court; hence we have given it a most patient consideration, and after a careful examination of the authorities

as to the construction of similar provisions in the constitutions of other States, and the Constitution of the United States, we are entirely satisfied that this court has no authority in criminal cases, under our State constitution, to order a new trial of a defendant at the instance of the prosecution for mere errors in the ruling of the court during the progress of the trial after the jury have been charged with the case and have rendered a verdict of not guilty. No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had once been put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury and acquitted by the verdict of such jury; but we find a vast number of adjudications of the highest judicial tribunals of the different States and many of the Federal courts to the effect that no such retrial is authorized by the common law, and is directly interdicted by the Constitution of the United States, and also of most of the several States. The universal maxim of the common law of England, as Sir William Blackstone expresses it, '*that no man is to be brought into jeopardy of his life more than once for the same offence,*' is embraced in article V of amendments to the Constitution of the United States, and in the constitutions of several States, in the following language: '*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;*' and in many other States the same principle is incorporated in the organic law, in language substantially the same as hereinbefore quoted from the constitution of this State. While the constitutions of some few States are destitute of this or any similar provision, other state constitutions, such as of New Hampshire, Rhode Island, New Jersey and Iowa, merely interdict a second trial for the same offence after acquittal."

The case of *State* v. *Lee*, 65 Connecticut, 265, in the reasoning of the court seems opposed to this view. But no reference

is made in the course of the opinion to any constitutional requirement in Connecticut as to double jeopardy. An examination of the constitution of that State and amendments as published in General Statutes of Connecticut Revision of 1902, discloses no provision upon the subject of jeopardy, and we conclude there is none.

The exceptional character of the decision in *State* v. *Lee* is stated by the learned editor of American State Reports in a note to the case as reported in 48 Am. St. Rep. 202, in the following language:

"This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy."

And further:

"The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it." *People* v. *Corning*, 2 N. Y. 9; 49 Am. Dec. 364, and note; 48 Am. St. Rep. 213, 214.

The *Ball* case, 163 U. S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well settled sense as declared and settled by the decisions of this court.

It follows that military order No. 58, as amended by act of the Philippine Commission, No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, was

repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offense.

This conclusion renders it unnecessary to consider, if the question was presented in this case, whether the accused was entitled to the right of a trial by jury.

Judgment reversed and prisoner discharged.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, dissenting.

I regret that I am unable to agree with the decision of the majority of the court. The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument. If, as is possible, the constitutional prohibition should be extended to misdemeanors, *Ex parte Lange*, 18 Wall. 163, 173, we shall have fastened upon the country a doctrine covering the whole criminal law, which, it seems to me, will have serious and evil consequences. At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny. But I do not stop to consider or to state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt. It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury

disagree, *United States* v. *Perez*, 9 Wheat. 579; see *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263; *Thompson* v. *United States*, 155 U. S. 271, or notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. *Hopt* v. *People*, 104 U. S. 631, 635; 110 U. S. 574; 114 U. S. 488, 492; 120 U. S. 430, 442; *United States* v. *Ball*, 163 U. S. 662, 672. He even may be tried on a new indictment if the judgment on the first is arrested upon motion. *Ex parte Lange*, 18 Wall. 163, 174; 1 Bish. Crim. Law (5th ed.), § 998. I may refer further to the opinions of Kent and Curtis in *People* v. *Olcott*, 2 Johns. Cas. 301; *S. C.*, 2 Day, 507, n.; *United States* v. *Morris*, 1 Curtis, 23, and to the well-reasoned decision in *State* v. *Lee*, 65 Connecticut, 265.

If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt* v. *People*, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson* v. *Utah*, 170 U. S. 343, 353, 354. Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it and can be retried only for the less offense, so that the jeopardy only is con-

tinued to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is what shall be done with the prisoner. Since at that moment he no longer is in jeopardy from the first verdict, if a second trial in the same case is a second jeopardy even as to the less offense, he has a right to go free. In view of these difficulties it has been argued that on principle he has that right if a mistake of law is committed at the first trial. 1 Bish. Crim. Law (5th ed.), §§ 999, 1047. But even Mr. Bishop admits that the decisions are otherwise, and the point is settled in this court by the cases cited above. That fetish happily being destroyed, the necessary alternative is that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record, as when he is tried on a defective indictment, if judgment is not arrested. *United States* v. *Ball*, 163 U. S. 662. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I submit, is that there can be but one jeopardy in one case. I have seen no other, except the suggestion of waiver, and that I think cannot stand.

If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the Government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. The latter is every day practice, yet there is no doubt that the prisoner is in jeopardy at the trial before the magistrate, and that a conviction or acquittal not appealed from would be a bar to a second prosecution. That is what was decided, and it is all that was decided or intimated, relevant to this case, in *Wemyss*

v. *Hopkins*, L. R. 10 Q. B. 378. For the reasons which I have stated already, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below.

MR. JUSTICE BROWN dissenting.

Under our Anglo-Saxon system of jurisprudence I have always supposed that a verdict of acquittal upon a valid indictment terminated the jeopardy, that no further proceedings for a review could be taken either in the same or in an appellate court, and that it was extremely doubtful whether even Congress could constitutionally authorize such review.

Conceding all this, however, I think that in applying the principle to the Philippine Islands, Congress intended to use the words in the sense in which they had theretofore been understood in those Islands. By that law, in which trial by jury was unknown, the jeopardy did not terminate, if appeal were taken to the audiencia or Supreme Court, until that body had acted upon the case. The proceedings before the court of first instance were in all important cases reviewable by the Supreme Court upon appeal, which acted finally upon the case and terminated the jeopardy. This was evidently the view of the military commander in General Order, No. 58, and of the Philippine Commission in the act of August 10, 1901, (No. 194,) in both of which an appeal to the Supreme Court was contemplated, even after a judgment of acquittal. I think this also must have been the intention of Congress, particularly in view of sec. 9 of the Philippine act of July 1, 1902, which provided that "the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction *as heretofore provided* . . . subject to the power of said government to change the practice and method of procedure." It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals.

DORR *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 583. Argued April 22, 1904.—Decided May 31, 1904.

While it is settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government, it is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effective terms of peace and for that purpose has the powers of other sovereign nations.

Congress has the right to make laws for the government of Territories, without being subject to all the restrictions which are imposed upon it when passing laws for the United States considered as a political body of States in union and, until territory ceded by treaty has been incorporated into the United States, it is to be governed under Congress subject only to such constitutional restrictions upon its powers as are applicable to the situation.

It is evident, from Article IX of the treaty with Spain ceding the Philippine Islands, that the intention of the framers of the treaty was to reserve to Congress, so far as it could constitutionally be done, a free hand in dealing with the territory ceded by the treaty.

Congress has not up to the present time incorporated the Philippine Islands into the United States, and by an express provision of the act of July 1, 1902, § 1891, Rev. Stat., by which force and effect is given to the Constitution and laws of the United States in the Territories, does not apply to the Philippine Islands.

The power to govern territory implied in the right to acquire it, and given to Congress in Article IV, § 3 of the Constitution, to whatever other limitations it may be subject, does not require Congress to exact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Under §§ 7 and 8 of the libel law enacted by the Philippine Commission, permitting a fair and true report of judicial, legislative and public official proceedings as privileged communications but excluding libelous remarks or comments from the privilege, the headlines "Traitor, Seducer, Perjurer—Wife would have killed him," over the report of a trial, although in quotation marks, are not within the privilege given by the act, and, if proved to be without basis, are libelous.

The power of Congress to authorize the temporary government, such as

that established under the Spooner Resolution of March 2, 1901, for the Philippine Islands, has been frequently exercised and is not now open to question, and the Philippine Commission established under that act had power to enact the libel law involved in this case.

THE facts, which involved the question whether in the absence of a statute of Congress expressly conferring the right of trial by jury, when demanded by the accused, is a necessary incident of judicial procedure in the Philippine Islands, are stated in the opinion of the court.

No brief filed for plaintiff in error.

Mr. L. R. Wilfley, Attorney General for the Philippine Islands and *Mr. Solicitor General Hoyt*, for the United States.[1]

MR. JUSTICE DAY delivered the opinion of the court.

This case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands.

The recent consideration by this court and the full discussion had in the opinions delivered in the so-called "*Insular* cases," renders superfluous any attempt to reconsider the constitutional relation of the powers of the government to territory acquired by a treaty cession to the United States. *De Lima* v. *Bidwell*, 182 U. S. 1; *Downes* v. *Bidwell*, 182 U. S. 244. The opinions rendered in those cases cover every phase of the question, either legal or historical, and it would be useless to undertake to add to the elaborate consideration of the subject had therein. In the still more recent case of *Hawaii* v. *Mankichi*, 190 U. S. 197, the right to a jury trial in outlying

[1] This case was argued simulatenously with *Kepner* v. *United States*. For abstracts of arguments, see *ante*, p. 100.

territory of the United States was under consideration. For the present purpose it is only necessary to state certain conclusions which are deemed to be established by prior adjudications, and are decisive of this case.

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government. "The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument." *Downes* v. *Bidwell*, 182 U. S. 244, 288, and cases cited. It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations. This principle has been recognized by this court from its earliest decisions. The convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument, in article IV, section 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As early as the February term, 1810, of this court, in the case of *Seré and Laralde* v. *Pitot and others*, 6 Cranch, 332, Chief Justice Marshall, delivering the opinion of the court, said:

"The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has

given them a legislative, an executive and a judiciary, with such powers as it has been their will to assign to those departments respectively."

And later, the same eminent judge, delivering the opinion of the court in the leading case upon the subject, *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542, says:

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the word is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories, which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

While these cases, and others which are cited in the late case of *Downes* v. *Bidwell, supra,* sustain the right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott* v. *Sandford,* 19 How. 393, 614, said:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That

the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes* v. *Bidwell*, *supra*.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case, the practical question is, must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without Congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government, 32 Stat. 691, there is express provision that section eighteen hundred and ninety-one of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every

territory thereafter organized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article III, section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the States where such crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

And in article six of the amendments to the Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime 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; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

It was said in the *Mankichi* case, *supra*, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. Opinion of Mr. Justice White, p. 220, citing *Hurtado* v. *California*, 110 U. S. 516; *In re Ross*, 140 U. S. 453, 473; *Bolln* v. *Nebraska*, 176 U. S. 83, and cases cited on page 86; *Maxwell* v. *Dow*, 176 U. S. 581, 584; *Downes* v. *Bidwell*, 182 U. S. 244.

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method

of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being."

As we have had occasion to see in the case of *Kepner* v. *United States*, decided, *ante*, p. 100, the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new government the guarantees of the Bill of Rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry and whose judgments were not final until passed in review before the audiencia or Supreme Court, with right of final review and power to grant a new trial for errors of law in the Supreme Court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President and sanctioned by act of Congress, act of July 1, 1902, 32 Stat. 691, has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the *Kepner* case, *supra*, the accused is given the right of appeal from the judgment of the court of first instance to the Supreme Court, and, in capital cases, the case goes to the latter court without appeal.

It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings, which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories?

The cases cited have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized people, additional territory. The framers of the Constitution, recognizing the possibility of future extension by acquiring territory outside the States, did not leave to implication alone the power to govern and control territory owned or to be acquired, but in the article quoted expressly conferred the needful powers to make regulations. Regulations in this sense must mean laws, for, as well as States, territories must be governed by laws. The limitations of this power were suggested by Mr. Justice Curtis in the *Dred Scott* case, above quoted, and Mr. Justice Bradley, in the *Mormon Church Case*, 136 U. S. 1, said:

"Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

This language was quoted with approbation by Mr. Justice Brown in *Downes* v. *Bidwell*, *supra*, and in the same case Mr. Justice White said:

"Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

In treating of article 4, section 3, Judge Cooley, in his work on Constitutional Law, says:

"The peculiar wording of the provision [section 3, article 4] has led some persons to suppose that it was intended Congress should exercise, in respect to the territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older States, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the Government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; and

whether the jurisdiction over the district has been acquired by grant from the States, or by treaty with a foreign power, Congress has unquestionably full power to govern it, and the people, except as Congress shall provide for, are not of right entitled to participate in political authority, until the Territory becomes a State. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined." Cooley, Principles of Constitutional Law, 164.

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to Statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Other assignments of error bring further questions before the court which we will proceed to notice. The case was a prosecution for libel brought at the instance of Don Benito Legarda, a member of the Philippine Commission, against the plaintiffs in error, Dorr and O'Brien, who were proprietors and editors of a newspaper published in the city of Manila, known as the "Manila Freedom." It appears that Legarda was the prosecuting witness against one Valdez, editor of a certain Spanish newspaper called the "Miau." At the time of the trial of Valdez, under the Spanish law then in force in the islands, the truth could not be given in defence in a prosecution for criminal libel. Notwithstanding this fact, counsel for Valdez, in the form of an offer of proof, read a paper in court, making certain statements with reference to the libel charged tending to show the truth thereof. In what purported to be a report of the proceeding, the Manila Freedom printed an article containing the matter set forth in the offer to prove, with headlines in large type, as follows:

"TRAITOR, SEDUCER, AND PERJURER.
SENSATIONAL ALLEGATIONS AGAINST COMMISSIONER LEGARDA.
MADE OF RECORD AND READ IN ENGLISH—SPANISH READING WAIVED.
WIFE WOULD HAVE KILLED HIM.
LEGARDA PALE AND NERVOUS."

The prosecution of the plaintiffs in error was based upon the

publication of these headlines, which were charged to be a false and malicious libel printed in the English language of and concerning Don Benito Legarda. At the time Valdez was tried, in which case the occurrence undertaken to be reported took place, the Spanish law was in force, denying the right to put in evidence the truth of the alleged libelous matter. At the time of the trial of the plaintiffs in error the Philippine Commission had passed Act No. 277, known as the libel law:

[No. 277.]

"AN ACT defining the law of libel and threats to publish a libel, making libel and threats to publish libel misdemeanors, giving a right of civil action therefor, and making obscene or indecent publications misdemeanors.

"*By authority of the President of the United States, be it enacted by the United States Philippine Commission that:* SEC. 1. A libel is a malicious defamation, expressed either in writing, printing or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead or to impeach the honesty, virtue or reputation or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt or ridicule.

* * * * * * * *

"SEC. 4. In all criminal prosecutions for libel the truth may be given in evidence to the court, and if it appears to the court that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; otherwise he shall be convicted; but to establish this defence, not only must the truth of the matter so charged be proven, but also that it was published with good motives and for justifiable ends.

* * * * * * * *

"SEC. 6. Every author, editor or proprietor of any book, newspaper or serial publication is chargeable with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same.

"SEC. 7. No reporter, editor or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

"SEC. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected.

* * * * * * * *

"Enacted October 24, 1901."

The contention is that the publication is privileged under sections 7 and 8, the claim being that the publication was a fair and truthful report of judicial proceedings. Testimony was introduced in the court below tending to show malice, and there was no proof to support the truth of the charges in the alleged libel, which were found to be without basis and wanton, and as the findings of the two lower courts in a cause brought in review here are not ordinarily disturbed, the case upon this branch might rest upon that proposition. It is evident, however, that the publication in question did not stop with a simple report of the judicial proceedings. Indeed, the paper offered in evidence could not have been received under the law then in force—a fact concerning which no comment was made in the report of the proceedings. Furthermore, section 8 of the law, while permitting as privileged a fair and truthful report of judicial proceedings, except upon express proof of malice, does not make privileged libelous remarks or comments in connection with the privileged matter. The draftsman of the law evidently had in mind the law of criminal libel in newspaper publications as it exists in this country. The privilege extends to a full and correct report of judicial proceedings without prejudicial comment. The rule is nowhere better stated than by Judge Cooley in his work on Constitutional Limitations, 7th ed. p. 637:

"It seems to be settled that a fair and impartial account of judicial proceedings, which have not been *ex parte*, but in the hearing of both parties, is generally speaking, a justifiable publication. But it is said that if a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. A plea that the supposed libel was, in substance, a true account and report of a trial has been held bad; and a statement of the circumstances of a trial as from counsel in the case has been held not privileged. The report must also be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever, in addition to what forms strictly and properly the legal proceedings."

Many cases are cited by the learned author in support of this conclusion. In *Hayes* v. *Press Co., Limited*, 127 Pa. St. 642, headlines stating "Hotel Proprietors Embarrassed," in giving an account of a judgment rendered in the suit of a bank against the proprietors of a certain hotel, was held not privileged. In Newell on Defamation, Libel and Slander, § 163, the author says:

"The publisher must add nothing of his own. He must not state his opinion of the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground—that they are fair and *bona fide* criticism on a matter of public interest, and are therefore not libelous. But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. Lord Campbell said: 'If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things—report and comment—should be kept

separate.' And all sensational headings to reports should be avoided." *Thomas* v. *Croswell*, 7 Johns. N. Y. 264.

These headlines were not privileged matter at the common law, and were libelous remarks or comments if the matter could be deemed otherwise privileged, within the meaning of § 8 of the Philippine libel law. An inspection of them would seem to be sufficient to demonstrate this fact. The complainant was held up to the public where the paper circulated in striking headlines as "Traitor, Seducer, Perjurer," and while these words were quoted as well as the phrase "Wife would have killed him," their publication in this manner was certainly the equivalent to a remark or comment unnecessary to a fair and truthful report of judicial proceedings, and likely to raise inferences highly detrimental to the character and standing of the one concerning whom they were printed and published.

Further error is assigned in that Act No. 277 of the laws of the Philippine Commission was not passed by competent legal authority. The act was one of the laws of the Philippine Commission, passed by that body by virtue of the authority given the President under the so-called Spooner resolution of March 2, 1901. The right of Congress to authorize a temporary government of this character is not open to question at this day. The power has been frequently exercised and is too well settled to require further discussion. *De Lima* v. *Bidwell*, 182 U. S. 1, 196.

Judgment affirmed.

MR. JUSTICE PECKHAM, concurring.

I concur in the result of the opinion of the court in this case, which upholds the conviction of the plaintiffs in error on a trial at Manila, Philippine Islands, for a criminal offense, without a jury. I do so simply because of the decision in *Hawaii* v. *Mankichi*, 190 U. S. 197. That case was decided by the concurring views of a majority of this court, and although

I did not and do not concur in those views, yet the case in my opinion is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands. But, while concurring in this judgment, I do not wish to be understood as assenting to the view that *Downes* v. *Bidwell*, 182 U. S. 244, is to be regarded as authority for the decision herein. That case is authority only for the proposition that the plaintiff therein was not entitled to recover the amount of duties he had paid under protest upon the importation into the city of New York of certain oranges from the port of San Juan, in the Island of Porto Rico, in November, 1900, after the passage of the act known as the Foraker act. The various reasons advanced by the judges in reaching this conclusion, which were not concurred in by a majority of the court, are plainly not binding. The *Mankichi* case is, however, directly in point, and calls for an affirmance of this judgment.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE BREWER agree in this concurring opinion.

MR. JUSTICE HARLAN, dissenting:

I do not believe now any more than I did when *Hawaii* v. *Mankichi*, 190 U. S. 197, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure and are not fundamental in their nature. In my opinion, guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.

The Constitution declares that *no* person, except in the land

or naval forces, shall be held to answer for a capital or otherwise infamous crime, except on the presentment or indictment of a grand jury; and forbids the conviction, in a criminal prosecution, of any person, for any crime, except on the unanimous verdict of a petit jury composed of twelve persons. Necessarily, that mandate was addressed to every one committing crime punishable by the United States. This court, however, holds that these provisions are not fundamental and may be disregarded in any territory acquired in the manner the Philippine Islands were acquired, although, as heretofore decided by this court, they could not be disregarded in what are commonly called the organized territories of the United States. *Thompson* v. *Utah*, 170 U. S. 343. I cannot assent to this interpretation of the Constitution. It is, I submit, so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution declares that it "shall be the supreme law of the land." But the court in effect adjudges that the Philippine Islands are not part of the "land," within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction—as much so as are the people in the District of Columbia or in the several States of the Union. No power exists in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States. As a Filipino committing the crime of murder in the Philippine Islands may be hung by the sovereign authority of the United States, and as the Philippine Islands are under a

civil, not military, government, the suggestion that he may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of the power that the Government may exercise at any time or at any place, is utterly revolting to my mind, and can never receive my sanction. The Constitution, without excepting from its provisions any persons over whom the United States may exercise jurisdiction, declares expressly that "the trial of all crimes, except in cases of impeachment, shall be by jury." It is now adjudged that that provision is not fundamental in respect of a part of the people over whom the United States may exercise full legislative, judicial and executive power. Indeed, it is adjudged, in effect, that the above clause, in its application to this case, is to be construed as if it read: "The trial of all crimes, except in cases of impeachment, *and except where Filipinos are concerned,* shall be by jury." Such a mode of constitutional interpretation plays havoc with the old-fashioned ideas of the fathers, who took care to say that the Constitution was the supreme law—supreme everywhere, at all times, and over all persons who are subject to the authority of the United States. According to the principles of the opinion just rendered, neither the Governor nor any American civil officer in the Philippines, although citizens of the United States, although under an oath to support the Constitution, and although in those distant possessions for the purpose of enforcing the authority of the United States, can claim, of right, the benefit of the jury provisions of the Constitution, if tried for crime committed on those Islands. There are many thousands of American soldiers in the Philippines. Besides, they are there by command of the United States to enforce its authority. They carry the flag of the United States, and have not lost their American citizenship. Yet, if charged in the Philippines with having committed a crime against the United States of which a civil tribunal may take cognizance, they cannot, under the present decision, claim of right a trial by jury. So that, if an

American soldier, in discharge of his duty to his country, goes into what some call our "outlying dependencies," he is, it seems, "outside of the Constitution," in respect of a right which this court has said was justly "dear to the American people," and has "always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy;" a right which, Mr. Justice Story said, was from very early times insisted on by our ancestors in the parent country "as the great bulwark of their civil and political liberties." *Parsons* v. *Bedford*, 3 Pet. 433, 446; 2 Story's Const. § 1779. Referring to the declaration by a French writer, that Rome, Sparta and Carthage having lost their liberties, those of England must in time perish, Blackstone observed that the writer "should have recollected that Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury." 2 Bl. Comm. 379.

In a former case I had occasion to say, and I still think, that "neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States;" that "the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction."

My views as to the scope and meaning of the provisions of the Constitution which relate to grand and petit juries, and as to the relations of the United States to our newly acquired possessions, have been more fully stated in cases heretofore decided in this court,[1] and I have therefore not deemed it

[1] *Hurtado* v. *California*, 110 U. S. 516, 538; *Thompson* v. *Utah*, 170 U. S. 343; *Maxwell* v. *Dow*, 176 U. S. 581, 605; *Downes* v. *Bidwell*, 182 U. S. 244, 375; *Hawaii* v. *Mankichi*, 190 U. S. 197, 221, 226.

necessary in the present case to enter upon a review of the authorities.

I dissent from the opinion and judgment of the court.

SECUNDINO MENDEZONA y MENDEZONA *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 584. Argued April 22, 1904.—Decided May 31, 1904.

Decided on authority of *Kepner* v. *United States, ante,* p. 100.

No brief filed for plaintiff in error.

Mr. L. R. Wilfley, Attorney General for the Philippine Islands and *Mr. Solicitor General Hoyt,* for the United States.

Mr. Justice Day delivered the opinion of the court.

This case involves the question just decided in *Kepner* v. *United States, ante,* p. 100. The plaintiff in error was acquitted in the court of first instance and convicted in the Supreme Court of the Philippine Islands.

For the reasons stated in the *Kepner* case, the judgment herein is reversed, and the prisoner discharged.

Dissenting: Mr. Justice Brown, Mr. Justice White, Mr. Justice McKenna and Mr. Justice Holmes.

CLIFF v. UNITED STATES.

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

No. 19. Argued December 2, 1903.—Decided October 24, 1904.

In enumerating the ingredients of oleomargarine in section 2 of the act of 1886 as amended in 1902, Congress included not only those substances which, entering into its composition make it suitable for food and form its body but also other ingredients used only for coloring, the purpose being to prevent excluding from the operation of the statute anything in its nature oleomargarine by reason of the addition of a substance not really an ingredient, but serving substantially only for coloring the product yellow.

Under sections 2 and 8 of the act as amended, oleomargarine colored yellow by a small amount of palm oil serving no purpose other than coloration is artificially colored and is subject to the tax of ten cents a pound and does not come within the proviso to section 8 making the tax a quarter of a cent a pound when the oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow.

One claiming that his oleomargarine is not subject to the higher tax prescribed by section 8 of the oleomargarine act must make it clear that his product is clearly within the scope of the exception stated in the proviso.

The finding of a court upon a question of fact is as conclusive as the verdict of a jury and when supported by testimony admitted without objection will not be disturbed by this court.

THE facts are stated in the opinion of the court.

Mr. William D. Guthrie and *Mr. Miller Outcalt*, with whom *Mr. Charles E. Prior*, *Mr. Francis J. Kearful*, *Mr. Delavan B. Cole*, *Mr. Charles C. Carnahan* and *Mr. John Maynard Harlan* were on the brief, for plaintiff in error.

Mr. Solicitor General Hoyt for the United States.[1]

MR. JUSTICE BREWER delivered the opinion of the court.

August Cliff was convicted in the District Court of the

[1] For abstract of arguments see *McCray* v. *United States* argued simultaneously with this case, *ante*, p. 30.

United States for the Northern District of Illinois of a violation of section 11 of the act of August 2, 1886, 24 Stat. 209, amended May 9, 1902, 32 Stat. 193. A judgment for fifty dollars, as prescribed by the section, was entered with an order for collection by execution. That judgment was brought directly to this court by writ of error. The constitutionality of the oleomargarine legislation and the right to waive a trial by jury in petty criminal offenses were affirmed in *McCray* v. *United States*, *ante*, p. 27, and *Schick* v. *United States*, *ante*, p. 65. Nothing need be added to the opinions in those cases on these questions.

There is in this case a further question. Section 2 reads:

"SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

In section 8 is this provision:

"SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound."

By section 14 the Commissioner of Internal Revenue "is authorized to decide what substances, extracts, mixtures or

compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Defendant was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law—that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley."

It was shown that the tax of ten cents per pound had not been paid, that the package contained ten pounds, that its ingredients and their proportions were: Three pounds of oleo oil; one pound and twelve ounces of neutral lard; two pounds of cotton-seed oil; one pound and fourteen and a half ounces of milk; one pound and four ounces of salt; one and one half ounces of palm oil. In other words, out of one hundred and sixty ounces, only one and one half ounces were palm oil. There was introduced in evidence a ruling of the Commissioner of Internal Revenue as follows:

"This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine,

and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of ten cents per pound."

Now the contention is that Congress having by section 2 named the possible ingredients of oleomargarine, the coloring given to a compound of some or all by the use of one of the named ingredients is a natural coloring, and not an artificial coloration subjecting to a tax of ten cents per pound. In order that the precise contention may be understood we quote the following from one of the briefs filed for plaintiff in error:

"By parity of reasoning, when one is speaking of oleomargarine, natural coloration means a coloration due to a natural ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the nature of oleomargarine. If the color-giving ingredient be a natural, that is, a statutory ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is 'artificial coloration' merely because the quantity of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color? Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a statutory, or, so to speak, a natural ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as for instance, cottonseed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when, by reason of his arbitrary classification, based upon the quantity of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a sub-

stantial part of the finished product, it is conceded that the tax would be only one-fourth of a cent per pound?"

We do not undervalue the force of this argument, but, as applied to this case, hold that it cannot prevail. It is true that under the last clause of section 2 oleomargarine includes "all mixtures and compounds" of the substances named, "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, "and other coloring matter." The purpose in so including "coloring matter" is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this it is rightfully styled an artificial coloration. Otherwise the proviso practically nullifies the body of the section. For "other coloring matter" includes all coloring matter, at least all of the nature of those named; and hence the addition of any coloring matter would produce only a natural and not an artificial coloration, and thus relieve the product from the ten cent tax. It will be noted that the regular tax imposed upon oleomargarine by section 8 is ten cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it clear that his oleomargarine is within its scope. That exception is "when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow." Bearing in mind also that one of the purposes of this legisla-

tion was to prevent the sale of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to "look like butter of any shade of yellow," it is an artificial coloration.

Whether the Commissioner of Internal Revenue has all the authority which is in terms committed to him by section 14 need not be determined. The letter containing his ruling was admitted in evidence without objection. Irrespective of such ruling, and upon the other testimony, the judge who tried the case, and whose decision must be considered as equivalent to the verdict of a jury, could rightfully have found that this package of oleomargarine was artificially colored by the small amount of palm oil used in its manufacture. A witness testified that he called at the place of business of the defendant, "and found this ten-pound package of oleomargarine, which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax paid stamp of one-quarter of a cent a pound." Other witnesses testified to the exact per cent of palm oil used in the preparation of the package. One said that "the article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the 'Daisy grade,' the lower grade. It is a substitute for butter." Another testified that "a very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such that it may be used to make oleomargarine or white substances to look like butter." Further, the defendant offered quite an amount of testimony, which was received by the court and afterwards on motion stricken out as irrelevant and immaterial. Included in this was that of the secretary of the manufacturer, who testified that "before July 1, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since

that date we have used the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten cent tax."

The verdict of a jury is conclusive upon a question of fact unless plainly against the evidence. The same weight, as we have said, must be given to the finding of a court, and upon the testimony received without objection a finding that this palm oil served substantially only to color the product cannot be disturbed. Indeed the fact was made certain by the testimony offered by the defendant, although that testimony was afterwards stricken out by the court as immaterial.

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

Affirmed.

The CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM dissented.

STEVENSON *v.* FAIN.

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

No. 8. Argued October 18, 19, 1904.—Decided November 7, 1904.

The Circuit Courts do not possess original jurisdiction over controversies between citizens of different States claiming lands under grants of different States by reason of the subject matter, and the decree of a Circuit Court of Appeals in such a case is final and an appeal to this court does not lie.

THIS was a bill filed by Stevenson and others, citizens and residents of New York and Rhode Island, against Fain and others, citizens and residents of North Carolina and Georgia, in the Circuit Court of the United States for the Eastern District of Tennessee, to remove a cloud upon the title to a

body of wild lands lying adjacent to the boundary between Tennessee and North Carolina.

Complainants claimed title under grants from the State of Tennessee, and alleged that the lands lay wholly in Monroe County, Tennessee. Defendants alleged that the lands lay wholly within the county of Cherokee, in the State of North Carolina, and that they were lawfully granted to their ancestor by that State.

The issue involved the true boundary line between North Carolina and Tennessee. The Circuit Court held that the lands lay in the State of North Carolina, and that the title was in defendants, and dismissed the bill.

Thereupon an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and, on hearing, the decree of the Circuit Court was affirmed. 116 Fed. Rep. 147.

From the decree of the Circuit Court of Appeals this appeal was prosecuted.

Mr. T. S. Webb, with whom *Mr. Charles Seymour*, *Mr. Hu. L. McClung* and *Mr. L. M. G. Baker* were on the brief, for appellants.

Submitted by *Mr. Samuel G. Shields* and *Mr. John W. Green* for appellees.

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

If the jurisdiction of the Circuit Court was dependent entirely on diversity of citizenship, the decree of the Circuit Court of Appeals was final, and this appeal cannot be maintained. The contention of appellants is that it was not so dependent because jurisdiction also existed in that the parties claimed under grants from different States, to which it is replied that under the Constitution and laws the Circuit Courts are not vested with jurisdiction on that ground except when the parties are citizens of the same State.

By section 1 of article III of the Constitution it is provided

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." And by section 2 that: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The Supreme Court alone "possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it," *United States* v. *Hudson*, 7 Cranch, 32, but the jurisdiction of the Circuit Courts depends upon some act of Congress. *Turner* v. *Bank*, 4 Dall. 8, 10; *McIntire* v. *Wood*, 7 Cranch, 504, 506.

The use of the word "controversies" as in contradistinction to the word "cases," and the omission of the word "all" in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done.

By the eleventh section of the Judiciary Act of September 24, 1789, it was provided that the Circuit Courts of the United States should "have original cognizance, concurrent with the

courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State."

In *Bank* v. *Deveaux*, 5 Cranch, 61, 85, Mr. Chief Justice Marshall said:

"The judicial power of the United States, as defined in the Constitution, is dependent, 1st, On the nature of the case; and 2d, On the character of the parties. By the judicial act, the jurisdiction of the Circuit Court is extended to cases where the constitutional right to plead and be impleaded, in the courts of the Union, depends on the character of the parties; but where that right depends on the nature of the case, the Circuit Courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State, claiming lands under grants from different States."

And that jurisdiction was conferred by the twelfth section of the act, which provided that "if in any action commenced in a State court, the title of land is concerned, and the parties are citizens of the same State," either party might remove the cause to the Circuit Court on the fact being made to appear that the parties claimed under grants of different States. This section was carried forward as section 647 of the Revised Statutes and reappears in substance in section 3 of the act of March 3, 1875. 18 Stat. 470, c. 137.

By the first section of the latter act original jurisdiction was given to the Circuit Courts of cases, among others, "arising under the Constitution or laws of the United States, or treaties," or in which there was "a controversy between citizens of the same State claiming lands under grants of different States."

The acts of March 3, 1887, 24 Stat. 552, c. 373, and of August 13, 1888, 25 Stat. 433, c. 866, are to the same purport.

Two cases arising under the Judiciary Act of 1789 are cited,

Town of Pawlet v. *Clark et al.*, 9 Cranch, 292, decided March 10, 1815, and *Colson et al.* v. *Lewis*, 2 Wheat. 377, decided March 14, 1817.

In *Pawlet* v. *Clark*, it appeared that the parties were citizens of Vermont and that the cases were pending in the Circuit Court of the District of Vermont, but the reporter's statement does not show that the case was commenced in the state court. The record on file in this court, however, discloses that such was the fact, and that the cause was removed into the Circuit Court under the twelfth section.

Colson et al. v. *Lewis* is not well reported. It was a bill in equity in which Lewis and others were complainants and Rawleigh Colson was the sole defendant. It came here on certificate, and the title was Lewis and others against Colson, and not as given in the report. The case stated shows that the case was removed from the state court into the Circuit Court of Kentucky, and that the complainants were citizens of Virginia, but the citizenship of defendant was not disclosed. The headnote asserts that the parties were citizens of Kentucky. But the certificate of the clerk, as appears from our files, sets forth "that it is stated in the bill that the defendant Rawleigh Colson is a citizen of the State of Virginia."

In both cases the parties were citizens of the same State and the cases were originally commenced in the state courts, and the Circuit Courts acquired jurisdiction by removal. The Judiciary Act of 1789 vested the Circuit Courts with original jurisdiction on the ground of diversity of citizenship, but not where title was claimed under grants of different States. Congress manifestly accepted the letter of the Constitution and as the judicial power extended to controversies where citizens of the same State claimed title under grants of different States, assumed that cases presenting such controversies would be commenced in the state courts, and provided that those cases might be removed when that fact was made to appear. The particular constitutional provision was treated as not open to a construction which would make it embrace

citizens of different States. Naturally enough, as the reason for the extension of the Federal judicial power to controversies between citizens of different States, and to controversies between citizens of the same State claiming lands under grants of different States, was in substance the same. 2 Story Const. § 1696.

And when the act of 1875 enlarged the original jurisdiction, no view to the contrary was indicated.

Ayres v. *Polsdorfer*, 187 U. S. 585, was an action of ejectment brought in the Circuit Court by citizens of one State against those of another, and the case, having gone to judgment, was carried to the Circuit Court of Appeals, and the judgment affirmed. A writ of error from this court was then sought to be sustained because, as was contended, the evidence disclosed, though the pleadings did not, that the parties claimed under grants of different States. But we held that if the emergence of such a question might have justified taking the case directly to this court, having gone to the Court of Appeals, it could not after judgment then be brought here.

As Congress has not conferred jurisdiction on the Circuit Courts over controversies between citizens of different States because, apart from diversity of citizenship, they may have claimed title by grants from different States, even if it had power to do so, which is not conceded, the result is that the appeal must be

Dismissed.

SCHWEER *v.* BROWN.

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

No. 162. Submitted October 31, 1904.—Decided November 7, 1904.

Where the question is whether a District Court sitting in bankruptcy could proceed in a summary way in the particular instance, the jurisdiction of the United States court as such is not in question and section 5 of the judiciary act of March 3, 1891, has no application.

Mueller v. *Nugent*, 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, 184 U. S. 18, approved on the point that the bankruptcy court has jurisdiction to determine in the first instance whether a summary proceeding can be maintained. If it errs in so proceeding the remedy is under section 24*b* of the bankruptcy law.

THE facts are stated in the opinion.

Mr. Daniel W. Jones for appellants.

Mr. Robert E. Wiley for appellee.

THE CHIEF JUSTICE: This was a summary proceeding in the District Court of the United States for the Eastern District of Arkansas, in bankruptcy, requiring the payment to the trustee in bankruptcy of the sum of two thousand dollars as part of the assets of the bankrupt's estate. In return to a rule, one of the respondents alleged that he had paid the money over to the other and denied the jurisdiction of the court. The other, Mrs. Schweer, denied that she had or ever had had any money belonging or due to the estate, and denied jurisdiction. The matter was heard before a referee, who made findings of fact and conclusions of law, and ordered the return of the money. It was then carried to the District Court and there heard *de novo*. The District Court sustained the referee and entered decree for the payment of the money to the trustee. Thereupon an appeal was taken directly to this court on the

ground that the case fell within the first of the classes of cases enumerated in section five of the judiciary act of March 3, 1891. But that class only includes cases where the question is as to the jurisdiction of courts of the United States as such, and the question has to be certified. That was not the question raised here, and none such was certified. And it is settled that the District Court had jurisdiction to determine whether any adverse claim to the money was asserted at the time the petition was filed. *Mueller* v. *Nugent*, 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, 184 U. S. 18.

If the court erred in retaining jurisdiction on the merits, the remedy was by petition to the Circuit Court of Appeals under § 24*b* of the bankruptcy law. *Holden* v. *Stratton*, 191 U. S. 115.

Appeal dismissed.

AMADO *v.* UNITED STATES.

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

No. 33. Submitted October 25, 1904.—Decided November 7, 1904.

The review of the final judgment of the District Court of the United States for Porto Rico by this court is not restricted to cases in which the Constitution or a treaty of the United States or an act of Congress is brought in question and the right claimed under it is denied. There may be cases, certainly civil cases, which if determined in a Supreme Court of one of the Territories of the United States could be reviewed although not involving any right of a distinctly Federal nature.

But a criminal case like this arising under § 3082 Rev. Stat., could not be reviewed by this court in virtue of the words, in § 35 of the Porto Rico act of April 12, 1900, "in the same cases as from the Supreme Courts of the Territories of the United States."

Nor will the words in the same act, "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," authorize this court to review a judgment of conviction in a criminal case in the court below under § 3082 Rev. Stat., when the only claim at the trial was that the

indictment did not charge "an offense under the statutes of the United States." Such an objection was too indefinite.

Unless a judgment in the United States District Court for Porto Rico can be reviewed here, then it is final; for no case determined in that court can be carried to a Circuit Court of Appeals.

THE facts are stated in the opinion.

Submitted on the record for plaintiff in error.

Mr. Assistant Attorney General Purdy for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

THE Revised Statutes of the United States provide that "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both." § 3082.

The act of April 12, 1900, temporarily providing revenues and a civil government for Porto Rico, declares, among other things, that on and after its passage "the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries;" also, that "the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico." 31 Stat. 77, 80, c. 191, §§ 2, 14.

These statutes being in force, the plaintiff in error, Amado, was indicted in the District Court of the United States for Porto Rico, upon the charge of having, on May 28, 1901, unlawfully received, concealed and facilitated the transportation, concealment and sale of certain specified quantities of Holland gin, vermouth, brandy and Danish beer, theretofore, as the accused well knew, fraudulently imported into Porto Rico, contrary to law, without the payment to the United States of the duties imposed upon such articles.

The accused was duly arraigned, and found guilty by a jury. A motion in arrest of judgment having been overruled, he was sentenced to confinement in the penitentiary of Porto Rico for one year and one day, and to pay a fine of five hundred dollars. A new trial was denied, and the accused sued out the present writ of error.

In allowing the writ the Judge of the District Court expressed some doubt whether error would lie, but he resolved the doubt in favor of the defendant.

The Government insists that the writ of error should be dismissed for want of jurisdiction in this court to review the judgment below; otherwise, that the judgment should be affirmed.

It is provided by the above act of April 12, 1900, that the District Court of the United States for Porto Rico "shall have, 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 therein in the same manner as a Circuit Court." 31 Stat. 77, 84, c. 191, § 34.

The act also provides 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 this court "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 appeal shall be allowed in all cases where

the Constitution of the United States, or treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; . . . ." *Ibid.* § 35.

A review of the final judgment of the District Court of the United States for Porto Rico is not restricted to those cases in which the Constitution or a treaty of the United States or an act of Congress is brought in question and the right claimed under it denied. This construction is too narrow and technical. There may be cases—certainly civil cases—in the United States District Court for Porto Rico that do not involve any question arising under the Constitution, or a treaty, or an act of Congress; and yet if the case be one which, if determined in a Supreme Court of one of the Territories of the United States, could be brought here for reëxamination, the final judgment could be reviewed by this court, although no right of a distinctly Federal nature was involved. *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 160; *Hijo* v. *United States*, 194 U. S. 315, 320. See *Crowley* v. *United States*, 194 U. S. 461. But even this test, if applied here, will not avail the accused; for the statutes regulating the appellate jurisdiction of this court do not authorize a review of the final judgment in a Supreme Court of one of the Territories of the United States in a criminal case like this one.

Can our jurisdiction be sustained by reference to the words, in the Porto Rico act, "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?" We must answer this question in the negative. The nearest approach to a claim of specific right under the Constitution or a treaty of the United States or under an act of Congress, was when the accused, in his written motion to arrest the judgment or sentence, insisted that the indictment did not set forth "an offense under the statutes of the United States." But that language amounted to nothing more, in legal effect, than a plea of not guilty, or a demurrer upon the general ground that the indictment did not state enough to

show an offense. It was not the assertion of any particular right under the Constitution, or under any treaty, or under an act of Congress, which would be denied to him, if the prosecution was sustained. His contention was only that he was not subject to criminal prosecution by reason of anything set forth in the indictment. The indictment was plainly sufficient under the statute prescribing the offense charged, and the objections to it were too indefinite to meet the requirements of the act of 1900, and make the case one which, by that act, could be brought to this court for review. Unless the case was one in which the judgment could be reviewed here, then such judgment would be final and not subject to review; for no case determined in the United States court for Porto Rico can be carried to a Circuit Court of Appeals. We said, in *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 160, that "Congress did not intend that any connection should exist between the United States court for Porto Rico and any Circuit Court of Appeals established under the act of 1891."

The writ of error must be dismissed for want of jurisdiction in this court, and

It is so ordered.

CRAWFORD *v.* BURKE.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 22. Argued April 25, 26, 1904.—Decided November 7, 1904.

A plea *puis darrien continuance* waives all prior pleas and amounts to an admission of the plaintiff's cause of action.

A commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him and this rule applies to a broker carrying stocks on margin who sells the same and does not pay over the proceeds to his principal.

A change in phraseology of a statute reënacted creates a presumption of

change of intent of the legislative body from that expressed in the former statute.

While punctuation may shed some light on the construction of statutes, so little is it a part thereof that courts will read the statutes with such stops as will give effect to the whole.

The language of paragraph 4 of section 17 of the bankruptcy act of 1898 is different from that of section 33 of the act of 1867 and the words "fiduciary capacity" extend back to and qualify the words "fraud, embezzlement and misappropriation," and an unliquidated claim of a principal against his broker for fraudulently selling stocks carried on margin is not within the exception of section 17 but is a provable debt and is barred by the discharge in bankruptcy.

A debt, originating or founded upon an open account or upon a contract express or implied, is provable against the bankrupt's estate, though the creditor may have elected to bring his action in trover as for a fraudulent conversion instead of in assumpsit upon an open account.

THIS was an action in trover instituted September 10, 1897, in the Circuit Court of Cook County, Illinois, by Burke against Crawford & Valentine, plaintiffs in error, to recover damages for the willful and fraudulent conversion of certain reversionary interests of the plaintiff in 550 shares of Metropolitan Traction stock.

There were ten counts in the declaration. In each of the first five counts it was alleged that the defendant firm of Crawford & Valentine were stock brokers and dealers in investment securities; that plaintiff employed the defendants as his brokers and agents to buy, hold and carry stocks for him subject to his order; that defendants had in their possession, or under their control, certain shares of the capital stock of the Metropolitan Traction Company, which they were holding as a pledge and security for the amount due them from the plaintiff on said stock; that defendants wrongfully, willfully and fraudulently, and without his knowledge or consent, sold said shares of stock, and willfully and fraudulently, and with intent to cheat and defraud the plaintiff, converted plaintiff's reversionary interest in said stock to their use, whereby it was wholly lost.

In each of the last five counts it was alleged that after defendants had wrongfully and fraudulently, and without plain-

tiff's knowledge or consent, sold the plaintiff's stock and converted the proceeds of such sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand and were carrying it for him; that their correspondents in Philadelphia, where the stock had been bought, were calling upon them for further demands or margins, and that it therefore became necessary to call upon the plaintiff to make further payments on the stock in order to comply with their correspondents' demands and to be secured against loss. It was averred in each of said counts that such representations were false and fraudulent, and by means thereof defendants obtained from the plaintiff the aggregate sum of $10,800.

To this declaration defendants pleaded not guilty, upon which issue was joined January 4, 1900, and on May 12, 1900, a jury trial was waived in writing. The case rested without action until January 3, 1901, when defendants filed their separate pleas of *puis darrein continuance*, setting up that on April 5, 1900, the defendants had received their discharge in bankruptcy, in the District Court for the Northern District of Illinois, and that plaintiff's claims were provable and not excepted from the operation of such discharge. The plaintiff replied denying that his claim was provable, and averred that the same was excepted from such operation.

Notwithstanding the plea of *puis darrein continuance*, the plaintiff introduced evidence and proved the allegations in his declaration and the amount of damages he had sustained. Defendants were found guilty upon all the counts and judgment entered against them.

The case was taken to the appellate court, where it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree upon the case, the judgment of the Circuit Court was affirmed. The judgment of the appellate court was also affirmed by the Supreme Court of Illinois, 201 Illinois, 581, to review which judgment this writ of error was sued out.

Mr. Charles E. Vroman and *Mr. George Packard*, with whom *Mr. Harrison Musgrave* was on the brief, for plaintiff in error:

The claim of defendant in error is a provable debt in bankruptcy under the bankruptcy act of 1898. Bankruptcy Act, 1898, sec. 17; sec. 1 (11); sec. 63; *In re Hirschman*, 104 Fed. Rep. 69; *T. W. & W. Ry. Co.* v. *Clews*, 67 Illinois, 383; *Elliott* v. *Jackson*, 3 Wisconsin, 649; *Sloat* v. *Evans*, 35 Illinois, 455; *Western Assurance Co.* v. *Towle*, 28 N. W. Rep. 106 (Wis.); *Dashaney* v. *Rogers*, 21 Pac. Rep. 342 (Cal.); *In re Filer*, 125 Fed Rep. 261; *In re Silverman*, 101 Fed. Rep. 219; Collier on Bankruptcy, 338, 344; *Beers* v. *Hamlin*, 99 Fed. Rep. 695; *In re Hilton*, 104 Fed. Rep. 981; *In re Graff*, 117 Fed. Rep. 343.

Being a provable debt, the claim is of such a character that it is barred by the discharge in bankruptcy of plaintiffs in error, it not being within any of the exceptions of section 17 of the bankruptcy act. (1.) As stock-brokers, or factors, plaintiffs in error were not "acting in a fiduciary capacity." *Chapman* v. *Forsyth*, 2 How. 202; *Neal* v. *Scroggs*, 95 U. S. 704; *Keine* v. *Graff*, 14 Fed. Cases, No. 7650; *Hennequin* v. *Clews*, 111 U. S. 565; *Grover & Baker Co.* v. *Clinton*, 11 Fed. Cases, No. 5845; *Noble* v. *Hammond*, 129 U. S. 68; *Upshur* v. *Briscoe*, 138 U. S. 375; *Anstill* v. *Crawford*, 7 Alabama, 340; *Woolsey* v. *Cach*, 54 Alabama, 383; *Sanders* v. *Sanders*, 56 Arkansas, 588; *Chipley* v. *Frierson*, 17 Florida, 642; *Georgia R. Co.* v. *Cubbedge*, 75 Georgia, 323; *Dupont* v. *Beck*, 81 Indiana, 274; *Phillips* v. *Russell*, 42 Maine, 361; *Hyman* v. *Powl*, 7 Met. 330; *Halpin* v. *May*, 100 Massachusetts, 499; *Cronan* v. *Cotting*, 104 Massachusetts, 245; *Woodward* v. *Towne*, 127 Massachusetts, 42; *Green* v. *Chilton*, 57 Mississippi, 599; *Gibson* v. *Gorman*, 44 N. J. L. 327; *Palmer* v. *Hussy*, 87 N. Y. 308; *Lawrence* v. *Harrington*, 122 N. Y. 408; *Mulock* v. *Byrns*, 129 N. Y. 25; *Bissell* v. *Couchine*, 15 Ohio, 64; *Curtis* v. *Waring*, 92 Pa. St. 109; *Scott* v. *Porter*, 93 Pa. St. 40; *Pankey* v. *Nolan*, 6 Humph. 155; *Hammond* v. *Noble*, 57 Vermont, 200; *Slayton* v. *Wells*, 66 Vermont, 63; *Wilson* v. *Kirby*, 88 Illinois, 570; *Straw* v. *Jurgens*, 144 Illinois, 507; *Shepherd* v. *Furness*, 153 Illinois,

590; *Pierce* v. *Shippee*, 90 Illinois, 376; Am. & Eng. Ency. of Law, vol. 16, p. 781 (2d ed.); *In re Basch*, 97 Fed. Rep. 761; *Bracken* v. *Milner*, 104 Fed. Rep. 522.

The clause "fraud," etc., used in subdivision four of section 17, is limited and restricted by the qualifying clause "while acting in a fiduciary capacity." There being no fiduciary relation between the parties, the debt is not within the exception, and hence is barred. *In re Rhutassel*, 96 Fed. Rep. 599; *In re Hirschman*, 104 Fed. Rep. 69; *In re Lewinsohn*, 99 Fed. Rep. 74; *Hargadine-McKitrick Co.* v. *Hudson*, 111 Fed. Rep. 361; *Gee* v. *Gee*, 87 N. W. Rep. 1116; *In re Bullis*, 73 N. Y. Supp. 1048; *Allen* v. *Ferguson*, 85 U. S. 1.

"Fraud," as used in the act, means positive fraud, involving moral turpitude—not constructive fraud, or fraud in law. Conversion by one in lawful possession of property is not "fraud" within the meaning of the bankruptcy act. Hence the claim of defendant in error does not fall within the meaning of the term "fraud" as there used. And on this point the entire evidence is properly before the court on the plea *puis* and the replication thereto. Chitty on Pleadings, 246; *Clough* v. *Shepherd*, 31 N. H. 490; *Teel* v. *Fonda*, 4 Johns. 304; *Neal* v. *Scroggs*, 95 U. S. 704; *Hennequin* v. *Clews*, 111 U. S. 565; *Noble* v. *Hammond*, 129 U. S. 68; *Upshur* v. *Briscoe*, 138 U. S. 138; *Keime* v. *Graff*, 14 Fed. Cas. No. 7650; *Bracken* v. *Milner*, 104 Fed. Rep. 522; *Burnham* v. *Pidcock*, 68 N. Y. Supp. 1009; *In re Benedict*, 75 N. Y. Supp. 165; *In re Gaylord*, 113 Fed. Rep. 131, 135; *Scott* v. *Porter*, 39 Am. Rep. 726; *Watertown Carriage Co.* v. *Hall*, 72 N. Y. Supp. 466; *Crosby* v. *Miller*, 25 R. I. 172 (55 Atl. Rep. 328); *Western, etc., Co.* v. *Hunt*, 116 Fed. Rep. 442.

The case made by defendant in error shows that there was no fraudulent intent or positive fraud on the part of plaintiffs in error, and that the relations between the parties were purely contractual and therefore not responsive to the counts either for conversion or deceit. *Markham* v. *Jourdain*, 41 N. Y. 239; *Wood* v. *Hayes*, 15 Gray, 375; *In re Swift*, 105 Fed. Rep. 493;

Coville v. *Loud*, 135 Massachusetts, 41; *Weston* v. *Jordan*, 168 Massachusetts, 501; *Corbett* v. *Underwood*, 83 Illinois, 324.

The evidence shows that the transactions out of which the claim of defendant in error arises were of a gambling character and illegal and void at common law and under the statute. The court may, at any stage, when it appears that the matter involved is forbidden by public policy, or is against public morality, decline to consider a claim so founded, regardless of the pleadings. *Lyon* v. *Culbertson*, 83 Illinois, 38; *Soby* v. *People*, 31 Ill. App. 242; *Cothran* v. *Ellis*, 125 Illinois, 506; *Schneider* v. *Turner*, 130 Illinois, 39; *Jameson* v. *Wallace*, 167 Illinois, 396; *Oscanyon* v. *Arms Co.*, 103 U. S. 261; *Martin Emerich Outfitting Co.* v. *Siegel, Cooper & Co.*, 108 Ill. App. 364.

Mr. John E. Burke in person for defendant in error:

The claims of defendant in error were claims for unliquidated damages arising out of torts; they were claims for damages occasioned by positive fraud; they were not provable in bankruptcy, and therefore were not barred by the discharge of plaintiffs in error.

As to the proof of debts under the provisions of the act of 1898, paragraph *a* of § 63 classifies all claims or "debts which may be proved," while paragraph *b* provides for the precedent liquidation of such unliquidated claims only as come within the provisions of paragraph *a*, and, thereafter, for the proof and allowance of such claims.

Claims for unliquidated damages arising out of tort do not come within any of the provisions of paragraph *a*, and hence are not provable. Collier on Bankruptcy, 1900, 385; Lowell on Bankruptcy, 487; *In re Yates*, 114 Fed. Rep. 365; *In re Big Meadows Co.*, 7 Am. Bank. Rep. 697; *Old Colony Boot & Shoe Co.* v. *Parker*, 183 Massachusetts, 557, 561; *Watertown Carriage Co.* v. *Hall*, 77 N. Y. Supp. 1028.

The claims of the defendant in error were for unliquidated damages arising out of tort, and did not come within any of

the provisions of paragraph *a*. Under *Dunbar* v. *Dunbar*, 190 U. S. 340, such claims cannot be liquidated or proved under the provisions of paragraph *b*.

As to waiving the tort and effect in bankruptcy, see *Bixby* v. *United States*, 188 U. S. 405; *Williamson* v. *Dickens*, 27 N. Car. 259; *Hughes* v. *Oliver*, 8 Pa. St. 426; *Graham* v. *C. M. & St. P. Ry. Co.*, 10 N. W. Rep. 609; *Bradner* v. *Strang*, 89 N. Y. 299, 306.

A claim which could not be liquidated and proved under the act of 1867 certainly cannot be liquidated and proved under the act of 1898. Defendant in error did not file any claim with the receiver or receive any dividend.

While the record does not show that the state Supreme Court passed upon the question as to whether the claims of plaintiff in error were provable, yet, the question appears of record, and was raised and argued in each of the courts below, and calls into exercise the jurisdiction of this court. The question is involved in the main question: Was the discharge in bankruptcy of plaintiffs in error a bar to the claims in controversy? If the claims were not provable, the discharge was not a bar, and the judgment should be affirmed. *Collier* v. *Stanbrough*, 6 How. 21; *Dewey* v. *Des Moines*, 173 U. S. 197, 198; *Murdock* v. *Memphis*, 20 Wall. 590, 636.

The qualifying clause in subdivision 4 of § 17 of the act of 1898, "while acting as an officer or in any fiduciary capacity," refers, both grammatically and logically, to its next antecedent only, which is the term "defalcation," and does not apply to or restrict the terms "fraud" or "embezzlement."

As to grammatical construction and effect of punctuation, see *City Safe Dep. Co.* v. *Lee*, 107 Ill. App. 263; *S. C.*, 204 Ill. Sup. Ct. 69; Endlich on Interpretation, § 2; 26 Am. & Eng. Ency. of Law (2d ed.), 613; *Cushing* v. *Worrick*, 9 Gray, 382, 385; *State* v. *Jernigan*, 3 Murphey, 12, 18; *Dearborn* v. *Inhabitants of Brookline*, 97 Massachusetts, 466, 469; *Wetmore* v. *Wetmore*, 17 Pa. County Rep. 11; *Quinn* v. *Lowell Electric Light Co.*, 140 Massachusetts, 106; *Price* v. *Price*, 10 Ohio St.

316; *Hamilton* v. *Steamboat, etc.*, 16 Ohio St. 428; *Zimmerman* v. *Willard*, 114 Illinois, 364; 45 Cent. Law J. 229, 236; *Albright* v. *Payne*, 1 N. E. Rep. 20; *Joy* v. *St. Louis*, 138 U. S. 1, 32.

It cannot be held that the clause applies to some classes of debts created by positive fraud, but not to all. It has no other or different meaning or application in the act of 1898 than it had in the acts of 1841 and 1867. Under the act of 1867 it was never held that "while acting in any fiduciary character" applied to or restricted the term "fraud."

Neither does it restrict the term "embezzlement," which is a specific term and imports the violation of a trust. *Moore* v. *United States*, 160 U. S. 268; *Grin* v. *Shine*, 187 U. S. 181, 196; *Central Nat. Bank* v. *Conn. Mut. Life Ins. Co.*, 104 U. S. 54. As to definition of "defalcation," see 9 Am. & Eng. Ency. of Law, 2d ed., 166; see Black's Law Dictionary; *Madison Twp.* v. *Dunkle*, 114 Indiana, 262; *Chapman* v. *Forsyth*, 2 How. 202, 208; *Frey* v. *Torrey*, 75 N. Y. Supp., 40. Nothing in the statute can be regarded as superfluous but full effect must be given to every part of it. Endlich on Interpretation, §§ 23, 265; *Montclair* v. *Ramsdell*, 107 U. S. 152; Bishop on Stat. Crime, 3d ed., § 82; *Opinion of Justices*, 22 Pick. 571, 575; *Commonwealth* v. *McCaughey*, 9 Gray, 296; *Wilmot* v. *Mudge*, 106 U. S. 217.

Section 33 of the act of 1867, was substantially a reënactment of the act of 1841, in that regard, with the additional provision that no debt created by fraud or embezzlement shall be discharged. See *Noble* v. *Hammond*, 129 U. S. 65, 69.

As to the construction to be given to § 33 of the act of 1867, with reference to the release of a bankrupt from debts or claims created by his positive fraud, see *Strang* v. *Bradner*, 114 U. S. 555; *Ames* v. *Moir*, 138 U. S. 306; *Forsyth* v. *Vehmeyer*, 177 U. S. 177, holding that a discharge in bankruptcy did not release a bankrupt from debts or claims which were created by his positive fraud involving moral turpitude or intentional wrong, while not acting as an officer or in any fiduciary capacity at the time he committed the fraud.

Subd. 4 of § 17 of the act of 1898, is substantially a re-enactment of a corresponding provision in the act of 1867, with the addition of the word "misappropriation." Loveland on Bankruptcy, § 293, 295; Lowell on Bankruptcy, 395; *In re Basch*, 97 Fed. Rep. 761; Collier on Bankruptcy, 3d ed. 198; *Frey* v. *Torrey*, 73 N. Y. Supp. 201; *S. C.*, 75 N. Y. Supp. 40.

When an act, or part of an act, which has received a judicial construction, is reënacted in substantially the same terms, that construction must be considered to have the sanction of the legislature, unless the contrary appears. Mere change in the phraseology works no change in the established interpretation thereof, unless it clearly appears that such was the intention of the legislature. Black on Interpretation, 161; *Bradley* v. *State*, 69 Alabama, 318; *Huddleston* v. *Askey*, 56 Alabama, 218; *Posey* v. *Pressly*, 60 Alabama, 243, 249; *McDonald* v. *Hovey*, 110 U. S. 619, 628; Potter's Dwarris, 181, note 2; *Yates's Case*, 4 Johns. 318, 358; *Dominick* v. *Michael*, 4 Sandf. (13 N. Y.) 374, 409; *The Devonshire*, 13 Fed. Rep. 39; *Reiche* v. *Smythe*, 13 Wall. 162; *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 307; *Commonwealth* v. *Hartnett*, 3 Gray, 450; *State* v. *Cornell*, 75 Fed. Rep. 25.

A discharge in bankruptcy, under the act of 1898, does not release a bankrupt from debts created by his positive fraud involving moral turpitude or intentional wrong. *In re Wollock*, 120 Fed. Rep. 912; *In re Blumberg*, 1 Am. Bk. Rep. 633; *In re Black*, 97 Fed. Rep. 493; *In re Thomas*, 92 Fed. Rep. 912; *In re Basch*, 97 Fed. Rep. 761; *In re Lewensohn*, 99 Fed. Rep. 73; *In re Steed*, 107 Fed. Rep. 682; Loveland on Bankruptcy, §§ 293, 295; Lowell on Bankruptcy, § 433, p. 488; Collier on Bankruptcy, 3d ed. 200; *Bracken* v. *Milner*, 104 Fed. Rep. 522; *In re Cole*, 106 Fed. Rep. 837; *Frey* v. *Torrey*, *supra*; *Stevens* v. *Meyers*, 76 N. Y. Supp. 332; *Predmore* v. *Torrey*, 77 N. Y. Supp. 86.

The cases cited by plaintiffs in error can be distinguished.

The history of bankruptcy legislation shows that no such law was ever enacted, either in this country or in England.

It has been repeatedly declared by the highest courts of both countries that bankrupt laws are enacted with the object and intention of relieving *honest* men, but not *rascals*, from the burden of their debts. *In re Silverman*, 22 Fed. Cas. 139; Cong. Rec. June 28, 1898; *Re Dow's Estate*, 105 Fed. Rep. 889; *In re Becker*, 106 Fed. Rep. 54; *Turner* v. *Turner*, 108 Fed. Rep. 785; *Lubke* v. *Thomas*, 116 U. S. 606; *In re Scott*, 126 Fed. Rep. 981; *McDonald* v. *Brown*, 10 Am. Bank. Rep. 58; *Dister* v. *McCauley*, 71 N. Y. Supp. 949; *Tinker* v. *Colwell*, 193 U. S. 473.

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

A year after this case was put at issue, and upon the opening of the trial, defendants filed their separate pleas *puis darrein continuance*, setting up their discharge in bankruptcy, and averring that plaintiff's claim was a provable debt, and the discharge a complete defense.

It is a well-settled principle of law, and was so held by the Supreme Court of Illinois in this case, that a plea *puis darrein continuance* waives all prior pleas, and amounts to an admission of the cause of the action set up in the plaintiff's declaration. *Mount* v. *Scholes*, 120 Illinois, 394; *East St. Louis* v. *Renshaw*, 153 Illinois, 491; *Angus* v. *Trust & Savings Bank*, 170 Illinois, 298; *Kimball* v. *Huntington*, 10 Wendell, 675.

But notwithstanding this, plaintiff was permitted to introduce evidence in proof of the fraud alleged in his declaration; and upon the conclusion of the trial the court found there had been a conversion of plaintiff's reversionary interest in the stock, for which he "had a right to recover in trover," and that it was not such a debt as was barred by the bankruptcy act. Upon appeal to the Supreme Court it was held that it was not necessary to the judgment to decide whether the allegations of the declaration were admitted by the pleadings, as they were established by the proof which had been adduced

by plaintiff, "and the propositions held as law on that branch of the case being correct, judgment for plaintiff necessarily follows." That court also held that the case, being one of fraud, was not covered by the defendants' discharge in bankruptcy.

The only Federal question involved in the case is whether the Supreme Court of Illinois gave the proper effect to the discharge pleaded by the defendants. If plaintiff's claim was not a provable debt, or was expressly excepted from the operation of the discharge, the decision of that court was right, but if it was covered by the discharge such discharge was a complete defense.

Section 17 of the bankruptcy act of 1898 contains, among other things, the following provisions:

"SEC. 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether that debt was "provable" under the bankruptcy act, that is, susceptible of being proved; second, whether it was or was not created by defendants' fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

1. Provable debts are defined by section 63, a copy of which appears in the margin.[1] Paragraph *a* of this section includes

[1] SEC. 63. DEBTS WHICH MAY BE PROVED.—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that

debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph *b*, two constructions are possible: It may relate to all unliquidated demands or only to such as may arise upon such contracts, express or implied, as are covered by paragraph *a*.

Certainly paragraph *b* does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated. *Dunbar* v. *Dunbar*, 190 U. S. 340, 350. Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation but is not literally embraced by paragraph *a*, to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provision of paragraph *a*, as one "founded upon an open account, or upon a contract, express or implied," and might have been proved under section 63*a* had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate. He did not elect to do this, however, but brought an action of trover, setting up a fraudulent conversion of his property by defendants. In the first five counts of his declaration he charges a fraudulent conversion of his interest in the stock, and in the last five counts that the defendants had induced him to make further payments on such stock in the way of margins, by false and fraudulent representations.

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date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt, who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) *founded upon an open account, or upon a contract express or implied;* and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

(*b*.) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

The question whether the claim thus set forth is barred by the discharge depends upon the proper construction of section 17, which declares that the discharge in bankruptcy relieves the bankrupt from all of his "provable debts" except such as ". . . (2) are judgments in actions for frauds, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Do these words apply to all debts created by the fraud, embezzlement, misappropriation of the bankrupt, or only to such as were created while he was acting as an officer or in some fiduciary capacity? The fact that the second subdivision of section 17 excepted from the discharge "all *judgments* in actions for frauds, or of obtaining property by false pretences, or false representations," indicates quite clearly that as to frauds in general it was the intention of Congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision, of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity. Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements, as well as misappropriations or defalcations, it results that the exception in subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subdivision 4, whether judgment had been obtained or not.

This conclusion is fortified by reference to corresponding sections of the former bankrupt acts. Thus, by the first section of the act or 1841, 5 Stat. 440, the benefits of that act were extended to all persons owing debts "which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." It is entirely clear

that under this section a discharge was not denied to the bankrupt by reason of debts fraudulently contracted, but only to such as were created by his defalcation as an officer, or while acting in a fiduciary capacity.

We may remark here in passing that ever since the case of *Chapman* v. *Forsyth*, 2 How. 202, this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts. *Neal* v. *Clark*, 95 U. S. 704, 708; *Hennequin* v. *Clews*, 111 U. S. 676, 679; *Noble* v. *Hammond*, 129 U. S. 65, 68; *Upshur* v. *Briscoe*, 138 U. S. 365, 375, as well as in cases in the state courts too numerous for citation.

Under the bankruptcy act of 1867 the list of debts excluded from the operation of the discharge was considerably larger. In section 33, Revised Statutes, 5117, it was declared that:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in a fiduciary character, and that this character relates only to his defalcation. But under the act of 1898 there is no such severance, in the fourth paragraph as would authorize us to say that the term "fiduciary capacity" did not extend back to the words "fraud, embezzlement and misappropriation." It was the opinion of the Supreme Court of Illinois that "a mere change in phraseology, apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents es-

tablished by previous bankruptcy legislation and judicial decisions, as to provide that debts created by fraud or embezzlement of the bankrupt should be released by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer, or in a fiduciary capacity."

Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language in section 17 from that used in section 33 of the act of 1867, without thereby intending a change of meaning. The view generally taken by the bankruptcy courts has been that the terms "officer" and "fiduciary capacity" extend to all the claims mentioned in paragraph 4, and are not confined to cases of defalcation. *In re Rhutassel*, 96 Fed. Rep. 597; *In re Lewensohn*, 99 Fed. Rep. 73; *In re Hirschman*, 104 Fed. Rep. 69; *In re Cole*, 106 Fed. Rep. 837; *In re Freche*, 109 Fed. Rep. 620; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson*, 111 Fed. Rep. 361. This is the natural and grammatical reading of the clause.

The cases in the state courts are almost uniformly to the same effect. Thus in *Smith & Wallace Co.* v. *Lambert*, 69 N. J. Law, 487, the defendant pleaded to an action on a book account his discharge in bankruptcy, to which the plaintiff replied that the cause of action was created by the fraud of the defendant. The Supreme Court of New Jersey held the replication to be insufficient. "We think," said the court, "that under section 17 of the bankrupt law, to which reference has been made, there is no provision that would except from the discharge the debt upon which the present suit is brought."

In *Morse* v. *Kauffman*, 100 Virginia, 218, it was pleaded against the discharge that the goods were procured by false pretenses. After holding that the case had not fallen within subdivision 2 of section 17, as there was no judgment for fraud, the Supreme Court of Virginia observed:

"It would seem to be equally clear that the demand of plaintiffs in error is not within the exception of subdivision 4

of section 17. It is not pretended that the claim was created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity."

"The contention that 'fraud' should be segregated from the qualifying language 'while acting as an officer or in any fiduciary capacity' is without merit. Such interpretation would not only destroy the grammatical construction of the sentences and contravene its plain meaning, but it would likewise be inconsistent with paragraph 2 of the same section—that a creditor should have obtained judgment in an action for fraud in order to override a discharge in bankruptcy."

A like construction was given to subdivision 4 by the Supreme Court of Missouri in *Goodman* v. *Herman*, 172 Missouri, 344, by the Supreme Court of Minnesota in *Gee* v. *Gee*, 84 Minnesota 384, by that of Rhode Island in *Crosby* v. *Miller*, 25 R. I. 172, and by the Supreme Court of New York, fourth department, in *In re Bullis*, 73 N. Y. Supp. 1047. In this case the question was discussed at considerable length, the court saying:

"If *any* debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute, then there is no necessity for subdivision 2, making a judgment essential to prevent the granting of the discharge under the statute."

We have not overlooked the fact that the New York Supreme Court of the first department reached a different conclusion in *Frey* v. *Torrey*, 70 App. Div. 166, affirmed by the Court of Appeals in a *per curiam* opinion, 175 N. Y. 501, but so far as we know this is the only case that supports the construction given to section 17 by the Supreme Court of Illinois.

Why an ordinary claim for fraud should be released by the discharge, while a judgment for fraud is not released, is not altogether clear, although this distinction may have been created to avoid the necessity of going into conflicting evidence upon the subject of fraud; while in cases of judgments for

frauds the judgment itself would be evidence of the fraudulent character of the claim. If a creditor has a claim against a debtor for goods sold which would ordinarily be covered by a discharge in bankruptcy, he is strongly tempted to allege, and if possible to prove, that the goods were purchased under a misrepresentation of the assets of the buyer, and thus to make out a claim for fraud which would not be discharged in bankruptcy. It was probably this contingency which induced Congress to enact that an alleged fraud of this kind should be reduced to judgment before it could be set up in bar of a discharge.

The intent of Congress in changing the language of the act of 1867 seems to have been to restore the act of 1841, which, as already observed, extended the benefits of the law to every debtor who had not been guilty of defalcation as a public officer or in a fiduciary capacity, the act of 1898 adding, however, to the excepted class those against whom a judgment for fraud had been obtained.

Some stress is laid by the Supreme Court of Illinois upon the punctuation of subdivision 4, section 17, presumably upon the insertion of a comma after the word "misappropriation," thereby indicating a severance of that which precedes from that which follows. While we do not deny that punctuation may shed some light upon the construction of a statute, *Joy* v. *St. Louis*, 138 U. S. 1, 32, we do not think it is entitled to weight in this case. In the enumeration of persons or things in acts of Congress it has been the custom for many years to insert a comma before the final "and" or "or" which precedes the last thing enumerated, apparently for greater precision, but without special significance. So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole. *Doe* v. *Martin*, 4 J. R. 65; *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84; *United States* v. *Lacher*, 134 U. S. 624, 628; *United States* v. *Isham*, 17 Wall. 496.

2. But it is strenuously insisted by the plaintiff that a claim

for the conversion of personal property is not within the scope of section 17; because it is not a "provable debt" within the definition of section 63*a*. Did the latter section stand alone, there would be some ground for saying that a claim, though "founded upon an open account, or upon a contract, express or implied," would not be a provable debt, if plaintiff elected to treat the conversion as fraudulent and sue in trover, though he might have chosen to waive the tort and bring an action for a balance due on account. An early English case, *Parker* v. *Crole*, 5 Bingham, 63, is cited to the effect that the operation of the discharge is determined by the election of the creditor to sue in assumpsit or case. A like ruling was made in certain cases under the bankruptcy acts of 1841 and 1867. *Williamson* v. *Dickens*, 27 N. Car. 259; *Oliver* v. *Hughes*, 8 Pa. St. 426; *Bradner* v. *Strang*, 89 N. Y. 299, 307.

But we think that section 63*a*, defining provable debts, must be read in connection with section 17, limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity. If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of a discharge? We are, therefore, of opinion that if a debt originates or is "founded upon an open account or upon a contract, express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63*a*. It results from the construction we have given the latter section that all debts originating upon an open account or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud.

In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

AIKENS *v.* WISCONSIN.

HUEGIN *v.* WISCONSIN.

HOYT *v.* WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Nos. 3, 4, 5. Argued November 7, 1903.—Reargued October 17, 1904.—Decided November 7, 1904.

Malicious mischief is a familiar and proper subject for legislative repression as are also combinations for the purpose of inflicting it, and liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, is not among the rights which the Fourteenth Amendment was intended to protect.

Section 4466*a*, Wisconsin Statutes of 1898, prohibiting combinations for the purpose of willfully or maliciously injuring another in his reputation,

trade, business or profession, is not in conflict with the Fourteenth Amendment so far as the section applies to such a combination made from solely malevolent motives.

THE facts, which involved the constitutionality of § 4466*a* of the statutes of Wisconsin, 1898, are stated in the opinion of the court.

Mr. W. H. Timlin and *Mr. Goerge D. Van Dyke* for plaintiffs in error in Nos. 3 and 4:

Section 1 of the Fourteenth Amendment of the Federal Constitution contains an express restriction against the State, through any of its governmental agencies, executive, legislative or judicial, depriving any person of liberty or property without due process of law. The words "liberty or property" not having been defined in the Constitution it is for the court to determine their scope and meaning according to the usual rules of construction, including of course the meaning which has been given to these words or either of them in judicial decisions, or juristic writings.

The constitutionality of § 4466*a* must be determined in this court upon the construction given to it by the Supreme Court of Wisconsin, *Machine Co.* v. *Gage*, 100 U. S. 676, that it prohibits intentional joint action of any kind intended to cause loss of trade to another. This includes coöperation in trade competition. Thus construed the statute is unconstitutional.

If the state court had limited "injury" in this penal statute to mean, "an infraction of some legal right," *Penna. R. R. Co.* v. *Marchant*, 119 Pa. St. 541, or had excepted the acts of cooperation in trade competition, different questions might arise. It did not do so. It treated loss of customers as an "injury." Because this is the only injury claimed. A criminal statute cannot be used as a drag net to ensnare the guilty and the innocent, leaving the latter to extricate themselves as they can. *Trade Mark Cases*, 100 U. S. 82; *Montana Co.* v. *St. Louis Co.*, 152 U. S. 170, citing *Stuart* v. *Palmer*, 74 N. Y. 183; *In re Ah Jow*, 29 Fed. Rep. 181.

The statute, as construed, subjects to criminal prosecution those who enter into an ordinary partnership to compete in trade and win away customers from another, at least provided a jury find their intentions in doing so to be malicious, and it makes criminal many agreements in trade competition approved and found to be a lawful exercise of the right of liberty to contract by many other eminent courts such as the agreements held valid in *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816; *State* v. *Julow*, 29 L. R. A. 257 (Missouri); *People* v. *Gilson*, 109 N. Y. 389; *Steamship Co.* v. *McGregor*, 21 Q. B. D. 544; *S. C.*, 23 Q. B. D. 598; *S. C.*, [1892] App. Cas. 25; *Orr* v. *Ins. Co.*, 12 La. Ann. 255; *Hunt* v. *Simonds*, 19 Missouri, 583, 591; *Anderson* v. *United States*, 171 U. S. 604; *Doctor* v. *Riedel*, 96 Wisconsin, 158; *Bowen* v. *Matheson*, 14 Allen, 499; *Transportation Co.* v. *Oil Co.*, 50 W. Va. 611; *S. C.*, 40 S. E. Rep. 591; *Watch Case Co.* v. *Watch & Clock Co.*, 66 Fed. Rep. 637; *In re Grice*, 79 Fed. Rep. 627; but see 169 U. S. 284; *Adler* v. *Fenton*, 24 How. 407–413; *McCauley* v. *Tierney*, 37 L. R. A. 455; *Bohn Mfg. Co.* v. *Lumbermen's Assn.*, 21 L. R. A. 337.

Even this court is able to say from the information alone (without here considering the plea) as the state court said in the *habeas corpus* case, that there could be no competitive purpose served by the acts charged against the accused. The accused cannot by law be deprived of their liberty to contract, collectively or individually, with whom, at what rates and upon what terms they choose, including terms which prohibit their customer from dealing with their competitor. *Coffeyville &c. Co.* v. *Perry*, 76 Pac. Rep. (Kan.) 848; *State ex rel.* v. *Kreutzberg*, 114 Wisconsin, 530; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Carew* v. *Rutherford*, 106 Massachusetts, 1; *Allen* v. *Flood*, [1898] A. C. 1; *Doremus* v. *Hennessey*, 176 Illinois, 608; *Wallace* v. *Georgia &c. R. R. Co.*, 94 Georgia, 732; *State* v. *Julow*, 129 Missouri, 163; *People* v. *Warren*, 34 N. Y. Supp. 942; *Chicago* v. *Hurlbert*, 68 N. E. Rep. 786, 792; *Commonwealth* v. *Perry*, 155 Massachusetts, 117; Cooley on Torts, 278.

A strike or boycott becomes an unlawful conspiracy, not by

reason of the refusal of the interested parties to assume or continue contractual relations with the persons to be coerced, which is a legal right, but by reason of the strikers or boycotters going beyond this and preventing, even in some cases by persuasion, others with whom the strikers or boycotters neither have nor intend to have contract relations, from entering into contract relations with the person to be coerced. *Erdmann* v. *Mitchell*, 207 Pa. St. 79; *S. C.*, 56 Atl. Rep. 327; *Gray* v. *Building Trades Council*, (Minn.) 97 N. W. Rep. 663; *Arthur* v. *Oakes*, 11 C. C. A. 209; *S. C.*, 63 Fed. Rep. 310; *Martell* v. *White*, 69 N. E. Rep. (Mass.) 1085; *Van Horn* v. *Van Horn*, 52 N. J. Law, 284; *Vegelahn* v. *Gunter*, 167 Massachusetts, 92; *Plant* v. *Woods*, 176 Massachusetts, 492; *Perkins* v. *Pendleton*, 90 Maine, 196; *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 912; *Bohn Mfg. Co.* v. *Hollis*, 54 Minnesota, 223; *Knudsen* v. *Benn*, 123 Fed. Rep. 636; *Underhill* v. *Murphy*, 78 S. W. Rep. (Ky.) 482; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101; *Park* v. *Druggists' Assn.*, 175 N. Y. 1; *Delz* v. *Winfree*, 80 Tex. Sup. 400; *Walker* v. *Cronin*, 107 Massachusetts, 555; *Beck* v. *Railway &c. Union*, 118 Michigan, 497; *National Assn.* v. *Cummings*, 170 N. Y. 315.

No one can be held answerable in law for the exercise of a legal right on the ground that it was exercised with malevolent intent. *Doctor* v. *Riedel*, 96 Wisconsin, 158; *Raycroft* v. *Tayntor*, 68 Vermont, 219; *Walker* v. *Cronin*, 107 Massachusetts, 555; *Frazier* v. *Brown*, 12 Ohio St. 294; *Chatfield* v. *Wilson*, 28 Vermont, 49; *Mahan* v. *Brown*, 13 Wendell, 261; *Chipley* v. *Atkinson*, 23 Florida, 206; *South Royalton Bank* v. *Suffolk Bank*, 27 Vermont, 505; *Harwood* v. *Benton*, 32 Vermont, 724; *Phelps* v. *Nowlen*, 72 N. Y. 39; Am. Bar Assn., vol. 21, for 1898, 335, address of L. C. Krauthoff on Malice as an Ingredient of Civil Cause of Action; *Auburn &c. Road Co.* v. *Douglass*, 9 N. Y. 444, 450; but see 8 Harv. Law Rev. 511; *Glencoe &c. Co.* v. *Hudson &c. Co.*, 138 Missouri, 439; but see *Boyson* v. *Thorne*, 98 California, 578; *Baker* v. *Sun Ins. Co.*, 64 S. W. Rep. (Ky.) 967; *Chambers* v. *Baldwin*, 91 Kentucky, 122; *Boulier* v.

McCauley, 91 Kentucky, 135; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Adler* v. *Fenton*, 24 How. 407; *Kiff* v. *Youmans*, 86 N. Y. 324; *O'Callaghan* v. *Cronan*, 121 Massachusetts, 114; *Continental Ins. Co.* v. *Underwriters*, 67 Fed. Rep. 310; *Huttley* v. *Simmons*, [1898] 1 Q. B. 181; *Ajello* v. *Worsley*, [1898] 1 Ch. Div. 274; article in 18 Cent. L. J. 424, citing a great number of cases; *Kelly* v. *Railway Co.*, 93 Iowa, 436; *Passaic Print Works* v. *Ely & W. Dry Goods Co.*, 44 C. C. A. 426; *Quinn* v. *Leathem*, [1901] A. C. 495; *Robinson* v. *Texas Pine Lands Assn.*, 40 S. W. Rep. 843.

The act of combining can never be considered a wrong or a crime when done in the exercise of a legal right or attempted exercise of a legal right which requires for its exercise combination or coöperation notwithstanding a malevolent purpose is admitted in some of the cases by demurrer. Many of the cases cited *supra* and *Kearney* v. *Lloyd*, 26 L. R. (Irish) 268; *Boyer* v. *West. Union Telegraph Co. et al.*, 124 Fed. Rep. 246.

The statute is unconstitutional as depriving one of his liberty to make contracts and it is not a police regulation. *State* v. *Julow*, 129 Missouri, 163, and cases cited; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Block* v. *Schwartz*, 76 Pac. Rep. (Utah) 22; *Street* v. *Varney Electric &c. Co.*, 160 Indiana, 338.

For examples of statutes held unconstitutional as interfering with the liberty of contract by imposing penalties for coöperation in matters of trade and contract, see *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816; *Greenwich Dist. Co.* v. *Carroll*, 125 Fed. Rep, 121; *State* v. *Dalton*, 22 R. I. 77; *S. C.*, 46 Atl. Rep. 234; *State* v. *Dodge*, 56 Atl. Rep. 983.

The state law denies the equal protection of the laws. *Cote* v. *Murphy*, 159 Pa. St. 420; *Matthews* v. *Illinois*, 202 Illinois, 389; *Louisville* v. *Louisville &c.*, 14 L. R. A. 579, and note.

Mr. S. S. Gregory, with whom *Mr. Conrad H. Poppenhusen*

and *Mr. Joseph L. McNab* were on the brief, for plaintiff in error, in No. 5:

There was nothing illegal at common law in the arrangement made by plaintiff in error. 1 Chitty Cr. Law, 1138; *Quinn* v. *Leathem*, [1901] A. C. 495; *Jones* v. *Randall*, Lofft's Rep. 383; *Read* v. *Friendly Society &c.*, [1902] A. C. 593; *Scottish Cooperative &c.* v. *Glasgow Fleshers' &c. Assn.*, 35 Scottish Law Rep. 645; *Heywood* v. *Tillson*, 75 Maine, 225; *Macauley* v. *Tierney*, 19 R. I. 255; *Huttley* v. *Simmons*, 1 Q. B. 1898, 181; *Guethler* v. *Altman*, 26 Ind. App. 587; *Railroad Co.* v. *Schaffer*, 65 Ohio St. 414; *Buchanan* v. *Kerr*, 159 Pa. St. 433; *Commonwealth* v. *Hunt*, 4 Metcalf, 111; *Vegelahn* v. *Guntner*, 167 Massachusetts, 92, distinguished, and see dissenting opinion; *Plant* v. *Woods*, 176 Massachusetts, 492; *People* v. *Wilzig*, 4 N. Y. Co. Rep. 403; *Nat. Protective Assn.* v. *Cumming*, 170 N. Y. 315.

There is no common law offense of conspiracy against the United States, and by statute it is limited to certain indicated acts. *Pettibone* v. *United States*, 148 U. S. 197; *United States* v. *Britton*, 108 U. S. 109. See as to railroad strike cases, *Arthur* v. *Oakes*, 63 Fed. Rep. 310, 329.

The statute is an unwarranted interference with constitutional rights and cannot be justified as being within the police power. *State* v. *Goodwill*, 33 W. Va. 179; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Goodcharles* v. *Wigeman*, 113 Pa. St. 431; *Commonwealth* v. *Vrooman*, 164 Pa. St. 306; *Leep* v. *Railway Co.*, 58 Arkansas, 407; *Thomas* v. *City of Hot Springs*, 34 Arkansas, 553; *State* v. *Scougal*, 3 S. Dak. 55, and cases cited on p. 72; *Wallace* v. *Georgia &c. Ry. Co.*, 94 Georgia, 72; *In re Ah Jow*, 29 Fed. Rep. 181; *In re Grice*, 79 Fed. Rep. 627; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; *Gillespie* v. *People*, 188 Illinois, 176; *Ritchie* v. *People*, 155 Illinois, 98; *Bailey* v. *People*, 190 Illinois, 28; *Harding* v. *Glucose Co.*, 182 Illinois, 551, 621; *Booth* v. *People*, 186 Illinois, 43; see also the anti-trust law cases decided by this court.

Mr. James G. Flanders, with whom *Mr. LaFayette M. Sturdevant*, Attorney General of the State of Wisconsin, was on the brief, for defendant in error in Nos. 3, 4. Submitted by *Mr. Sturdevant*, for defendant in error in No. 5:

As construed by the state court the statute is merely declaratory of the common law. Hawkins's Pleas of the Crown, ch. 27, § 2; *Rex* v. *Eccles*, 1 Leach, 274; Chitty Cr. Law, 1139; Archibold Criminal Practice and Pleading, 1829; *Queen* v. *Kendrick*, 5 Q. B. D. 49. Authorities in this country to the same effect might be multiplied indefinitely. For example, see *Crump* v. *Commonwealth*, 84 Virginia, 927; *State* v. *Stewart*, 59 Vermont, 273; *State* v. *Donnelson*, 32 N. J. L. 151, 156; *State* v. *Glidden*, 55 Connecticut, 46; *People* v. *Petheram*, 64 Michigan, 252; *State* v. *Burnham*, 15 N. H. 403; *Commonwealth* v. *Carlisle*, Brightly, 36; *State* v. *Buchanan*, 5 Harris & Johnson, 317; *Farmers' L. & T. Co.* v. *Nor. Pac. R. R. Co.*, 60 Fed. Rep. 803, 817; *Arthur* v. *Oakes*, 63 Fed. Rep. 310.

It was not necessary, even at common law, to make a combination formed for the purpose of injuring the business of another illegal that such purpose should be the sole or ultimate object of the combination. It was sufficient if there were a direct and immediate purpose to injure others, even though the ultimate object were to benefit the parties to the combination. *Doremus* v. *Henney*, 176 Illinois, 608; *Barr* v. *Trades Councils*, (N. J. Chan.) 30 Atl. Rep. 881; *Hilton* v. *Eckersley*, 6 El. & Bl. 47, 74; *Steamship Co.* v. *McKenna*, 30 Fed. Rep. 48; *Casey* v. *Typographical Union*, 45 Fed. Rep. 138; *Callan* v. *Wilson*, 127 U. S. 547; *Mogul S. S. Co.* v. *McGregor*, 23 Q. B. D. 598; A. C. 25; *Continental Ins. Co.* v. *Board of Underwriters*, 67 Fed. Rep. 319; *Temperton* v. *Russell*, 1 Q. B. D. 715; *Walker* v. *Cronin*, 107 Massachusetts, 555; *Graham* v. *St. Charles Str. Ry. Co.*, 27 R. L. A. 416; *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 918; *Quinn* v. *Leathem*, L. R. App. Cas. (1901), 515, overruling *Allen* v. *Flood*, H. L. Appeal Cases (1898), 1.

Motive or intent with which an act is done is not an element

of the cause of action, is not generally applicable to civil actions of conspiracy, and is not applicable at all to conspiracy in its criminal aspects any more than to any other criminal offense. 6 Am. & Eng. Ency. of Law, 2d ed. 872; Bishop on Non-Contract Law, § 592; *Clifford* v. *Brandon*, 2 Campbell, 358; *Boutwell* v. *Marr*, 71 Vermont, 6.

Of the many cases that might be cited illustrative of the limitations upon the scope of the Federal Constitution to abridge the powers of the State to regulate its internal affairs affecting the peace, order and general welfare of the community, see *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Munn* v. *Illinois*, 94 U. S. 113, 124; *Slaughter-House Cases*, 16 Wall. 62; *Barbier* v. *Conway*, 113 U. S. 31; *Soon Hing* v. *Crowley*, 113 U. S. 709. See also Wisconsin General Statutes, § 1747*c*, and for other statutes, see § 168, Penal Code, New York; *People* v. *Sheldon*, 139 N. Y. 251; *Matter of Davies*, 168 N. Y. 89, 101; Rev. Stat. Illinois, § 130; Burns's Statutes of Indiana, § 2302; Iowa General Statutes, § 5059; Minnesota Statutes of 1894, § 6423; New Hampshire Pub. Stat. of 1891, ch. 266, § 12; Rhode Island General Laws, 1896, ch. 279, § 45.

Mr. Justice Holmes delivered the opinion of the court.

These are three writs of error to the Supreme Court of Wisconsin, brought to set aside convictions and sentences of the plaintiffs in error, the defendants below, upon informations filed by the District Attorney. 113 Wisconsin, 419. The ground of the writs is that the proceedings violated the rights of the plaintiffs in error under the Fourteenth Amendment of the Constitution of the United States. The informations were brought under the Wisconsin statutes of 1898, § 4466*a*, which impose imprisonment or fine on "any two or more persons who shall combine . . . for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever," etc. The plaintiffs in error were severally charged with unlawfully combining to-

gether with the intent of willfully and maliciously injuring The Journal Company, a corporation, and certain persons named, stockholders and officers of the company, in their trade and business. It was alleged that the company was publisher of a newspaper in Milwaukee and had notified an increase of about twenty-five per cent in its charges for advertising, and that thereupon the plaintiffs in error, who were managers of other newspapers in the same place, in pursuance of their combination and with the intent of willfully, maliciously and unlawfully injuring The Journal Company and the others named, agreed as follows: If any person should agree to pay the increased rate to The Journal Company, then he should not be permitted to advertise in any of the other three newspapers except at a corresponding increase of rate; but if he should refuse to pay The Journal Company the increased rate, then he should be allowed to advertise in any of the other three papers at the rate previously charged. It was alleged that this conspiracy was carried out and that much damage to the business of The Journal Company ensued.

The defendant Hoyt demurred to this information, setting up the Fourteenth Amendment. Aikens and Huegin filed pleas which admitted the combination and intent of injuring The Journal Company and the resulting damage but alleged that the combination was entered into in trade competition and that the parties had the right to make it under the Fourteenth Amendment. The State demurred to the pleas. The demurrer of Hoyt was overruled; those of the State were sustained. The defendants were sentenced and the judgment of the trial court was affirmed by the Supreme Court of the State on the authority of an earlier decision between the same parties, reported in 110 Wisconsin, 189.

The statute, it will be observed, punishes combining for the purpose of willfully or maliciously injuring another in his business. If it should be construed literally, the word "willfully" would embrace all injuries intended to follow from the parties' acts, although they were intended only as the necessary means

to ulterior gain for the parties themselves. Taken in that way the word would hit making a new partnership, if it was intended thereby to hurt some one else's business by competition. We shall not consider whether that branch of the statute, so construed, could be sustained and express no opinion about it. The Supreme Court of Wisconsin has intimated that a narrower interpretation will be adopted, and in the present case we have to deal only with the other branch, depending on the word "maliciously," as we shall explain in a moment. The last quoted word we must take as intended to add something to the word "willfully," and we can do so only by taking it in its true sense. We interpret "maliciously injuring" to import doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired. Otherwise the phrase would be tautologous, since a willful injury is malicious in the sense familiar to declarations and indictments, where indeed the word means no more than foreseen, or even less than that. A death is caused of malice aforethought if, under the circumstances known to the actor, the probability of its ensuing from the act done is great and manifest according to common experience. *Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178; 1 East P. C. 262. See also *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 613.

The informations alleged a combination for the purpose of willfully and maliciously injuring others, and therefore brought the case within the latter branch of the statute, if there are two and if "or" in the act is not taken to mean "and." It is true that the plan is set forth, and some argument was spent on whether that plan might or might not be an instrument of ultimate gain. But while that question may have been open when the state court was discussing the evidence warranting a commitment, in 110 Wisconsin, 189, none such is open here. The malevolent purpose is alleged, it is admitted by the demurrer, it is not sufficiently denied by the pleas, whatever we may conjecture would have been done if counsel had had this

decision before them. A purely malevolent act may be done even in trade competition.

We come then to the question whether there is any constitutional objection to so much of the act as applies to this case. It has been thought by other courts as well as the Supreme Court of Wisconsin that such a combination followed by damage would be actionable even at common law. It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 613; *S. C.*, [1892] A. C. 25. If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, at common law, those affecting the use of land, are absolute, *Bradford* v. *Pickens*, [1895] A. C. 587, others may depend upon the end for which the act is done. *Moran* v. *Dunphy*, 177 Massachusetts, 485, 487; *Plant* v. *Woods*, 176 Massachusetts, 492; *Squires* v. *Wason Manuf. Co.*, 182 Massachusetts, 137, 140, 141. See cases cited in 62 L. R. A. 673. It is no sufficient answer to this line of thought that motives are not actionable and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen. *Quinn* v. *Leathem*, [1901] A. C. 495, 524.

Whether, at common law, combinations would make conduct actionable which would be lawful in a single person it is unnecessary to consider. *Quinn* v. *Leathem*, [1901] A. C. 495. We are aware too that a prevailing opinion in England makes motives immaterial, although it is probable that in *Allen* v. *Flood*, [1898] A. C. 1, 94, the jury were instructed, as in *Temperton* v. *Russell*, [1893] 1 Q. B. 715, 719, in such a way that their finding of malice meant no more than that the defendant had acted with foresight of the harm which he would inflict,

as a means to an end. *Quinn* v. *Leathem*, [1901] A. C. 495, 514. However these things may be, we have said enough to show that there is no anomaly in a statute, at least, which punishes a combination such as is charged here. It has been held that even the free use of land by a single owner for purely malevolent purposes may be restricted constitutionally, although the only immediate injury is to a neighboring land owner. *Rideout* v. *Knox*, 148 Massachusetts, 368. Whether this decision was right or not, when it comes to the freedom of the individual, malicious mischief is a familiar and proper subject for legislative repression. *Commonwealth* v. *Walden*, 3 Cush. 558. Still more are combinations for the purpose of inflicting it. It would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the Fourteenth Amendment was intended to preserve. The statute was assumed to be constitutional in *Arthur* v. *Oakes*, 63 Fed. Rep. 310, 325, 326.

But if all these general considerations be admitted, it is urged nevertheless that the means intended to be used by this particular combination were simply the abstinence from making contracts, that a man's right so to abstain cannot be infringed on the ground of motives, and further, that it carries with it the right to communicate that intent to abstain to others and to abstain in common with them. It is said that if the statute extends to such a case it must be unconstitutional. The fallacy of this argument lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts. "The very plot is an act in itself." *Mulcahy* v. *The Queen*, L. R. 3 H. L. 306, 317. But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such

acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

It was urged farther that to make a right depend upon motives is to make it depend upon the whim of a jury and to deny the right. But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved. The power of the legislature to make the fact of malice material we think sufficiently appears from what we already have said.

Finally it is argued that the Supreme Court of Wisconsin would hold that the statute extends to acts of which the motives were mixed and which were done partly from disinterested malevolence and partly from a hope of gain. If so, it is said, the statute would be open to all the objections at which we have hinted in dealing with the word "willfully." The Supreme Court did use some language which looked that way, but we consider it to have decided that the statute would be confined to combinations with intent to do wrongful harm. 110 Wisconsin, 193, 260. Thus limited, on whatever ground, the statute would punish only combinations of a kind for which no justification could be offered and those which were taken out of the justification by the motive with which they were made. We see no sufficient reason to believe that the court will go farther or construe the act in such a way as to raise questions which we need not go into here. Therefore it is unnecessary to consider whether, on a more literal construction, the portion dealing with malicious intent could be separated from that which deals with the purpose of merely willful injury, and saved, even if the latter were held to go too

far. Probably the two phrases will be read together and the statute made unquestionable as a whole.

Judgment affirmed.

MR. JUSTICE WHITE dissenting.

Not being able to concur in the conclusion of the court that the opinion of the Supreme Court of Wisconsin has affixed to the statute of that State a much narrower meaning than the text of the statute imports, and thinking, on the contrary, that not only such text but the construction of the statute adopted by the Supreme Court of Wisconsin operates to deprive the citizen of a lawful right to contract protected by the Fourteenth Amendment, I dissent.

THOMAS *v.* BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY.

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

No. 43. Argued March 3, 1904.—Decided November 14, 1904.

Jurisdiction of a Circuit Court of the United States must appear affirmatively from distinct allegations, or facts clearly proven, and is not to be established argumentatively or by mere inference and when jurisdiction depends upon diverse citizenship, absence of sufficient averments, or of facts in the record, showing such diversity is fatal and the defect cannot be waived by the parties, nor can consent confer jurisdiction.

For the purpose of suing and being sued in the Circuit Court of the United States the members of a local corporation are conclusively presumed to be citizens of the State by whose law it was created and in which alone the corporate body has a legal existence.

While this court is not conclusively bound by the judgment of the highest court of a State as to what is and is not a corporation of that State within

the jurisdictional rule, it will accept such judgment unless a contrary view is demanded by most cogent reasons.

An averment that a Board of Trustees of a state institution was created by and exists under the laws of a State, other than that of complainant, and is a citizen of that State, without alleging that it is a corporation of the State, or that each individual member of the Board is a citizen of that State, and where the highest court of the State has decided that the Board although possessing some of the attributes of a corporation is not a corporation of such State, and *held*, insufficient to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship.

Where a Board of Trustees of an institution can by the legislative act creating it, sue and be sued collectively and is bound by the judgment, a citizen of another State can sue it as such Board collectively, without bringing in all the members thereof, in a Circuit Court of the United States provided it affirmatively appears that each member of the Board is a citizen of a State other than that of complainant.

THE facts are stated in the opinion of the court.

Mr. Lawrence Maxwell, Jr., with whom *Mr. Joseph Olds* was on the brief, for the Ohio State University.

Submitted by *Mr. J. E. Sater* and *Mr. L. F. Sater* for Thomas *et al.*

MR. JUSTICE HARLAN delivered the opinion of the court.

This case is before us upon certified questions relating to the jurisdiction of the Circuit Court.

The suit is in equity, and the plaintiff is a citizen of Michigan. The defendants are George Folsom, a citizen of California, and the Board of Trustees of the Ohio State University.

The object of the bill was to effect the partition of certain lands claimed by the plaintiff and the defendant Folsom as tenants in common, but held adversely by the defendant Board of Trustees. The plaintiff sought to have the title determined as preliminary to partition.

The Board of Trustees appeared and demurred to the bill as not making a case entitling the plaintiff to any relief against

The demurrer was sustained, and the bill dismissed—the decree reciting that neither the plaintiff nor the defendant Folsom had any title or interest in the lands described in the bill, or in the rents or profits thereof, but that the same belonged to the Board of Trustees of the Ohio State University. Folsom entered his appearance in the Circuit Court, but made no defense, nor was any decree taken by default against him.

From that decree the plaintiff and the defendant Folsom prayed and perfected an appeal.

It is certified that the jurisdiction of the Circuit Court was wholly dependent upon diversity of citizenship, and that neither defendant objected in the Circuit Court that the case was not of equitable cognizance or that the court, as a Federal court, was without jurisdiction to determine it. But in the Circuit Court of Appeals Folsom insisted, among other things, that the Circuit Court "had no cognizance of the cause because the requisite diversity of citizenship does not exist, the Board of Trustees of the Ohio State University not being a *corporation* of Ohio within the jurisdictional rule imputing to the members of that board citizenship of the State under whose law it is organized."

The Circuit Court of Appeals propound the following questions:

1. Does the bill sufficiently aver that the Board of Trustees of Ohio State University is a corporation of the State of Ohio, or does it aver facts which in legal intendment constitute said body a corporation of the State of Ohio, within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purpose of the litigation, to be one by or against citizens of the State creating the corporation?

2. If the said Board of Trustees be not such a corporation as is required by the jurisdictional rule referred to, may this suit be maintained against it as "The Board of Trustees of the Ohio State University" without bringing the persons constituting the board before the court as defendants?

3. If the said Board may sue or be sued in a Federal court by the name of "The Board of Trustees of the Ohio State University," although not constituting a corporation of the State of Ohio, within the jurisdictional rule referred to in the first question, do the facts stated on the face of the bill sufficiently show that the persons composing said Board of Trustees are citizens of Ohio, or should the court take notice of the law creating said Board of Trustees, and of other laws of Ohio defining the qualification of such trustees, and by legal intendments find that the persons constituting said board when this bill was filed were in fact citizens of Ohio and that the requisite diversity of citizenship existed to give jurisdiction to the Circuit Court?

That the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which in legal intendment it rests, must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively; and that, for the purpose of suing and being sued in a Circuit Court of the United States, the members of a local "corporation" are conclusively presumed to be citizens of the State by whose laws it was created, and in which alone the corporate body has a legal existence; are propositions so firmly established that further discussion of them would be both useless and inappropriate. *Brown* v. *Keene*, 8 Pet. 112, 115; *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 How. 497; *Marshall* v. *Baltimore & Ohio R. R. Co.*, 16 How. 314; *Lafayette Insurance Co.* v. *French*, 18 How. 404, 405; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *Ohio & Mississippi R. R. Co.* v. *Wheeler*, 1 Black, 286, 296; *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Robertson* v. *Cease*, 97 U. S. 646, 648; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 120;

King Bridge Co. v. *Otoe County*, 120 U. S. 225; *Parker* v. *Ormsby*, 141 U. S. 81; *Continental Nat. Bank* v. *Buford*, 191 U. S. 120.

It is equally well established that when jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Mansfield, C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379; *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 689; *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92, 98. As late as in *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 63, we said, both parties insisting upon the jurisdiction of the Circuit Court: "Consent of the 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."

So that the fact stated in the certificate that neither party in the Circuit Court objected to its jurisdiction is of no consequence.

Two other cases illustrating the above rules may be specially referred to.

In *Chapman* v. *Barney*, 129 U. S. 677, 682, which was a suit, in the Circuit Court for the Northern District of Illinois, by the United States Express Company against a citizen of Illinois, the declaration alleged that the company was organized under and by virtue of the laws of New York and was a citizen of that State. The court said: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint-stock company organized under a law of the State of New York, and is a citizen of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the com-

pany was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company —that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court. The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company."

In *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 456, 457, the bill alleged that the plaintiffs Jones and others were members of a limited partnership association, doing business, by their firm name, under the authority of a Pennsylvania statute, and that such association was a citizen of that State. Although the constitution of Pennsylvania provided that the term corporation, as used in a certain article of that instrument, should be construed as including all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships, and although the Supreme Court of Pennsylvania had held that it would not be improper to call a limited partnership, created under its statutes, a *quasi* corporation having some of the characteristics of a corporation, this court, without considering the merits of the case, said: "When the question relates to the jurisdiction of a Circuit Court of the United States as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association. . . . That a limited partnership association created under the Pennsylvania statute may be described as a '*quasi* corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule

heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations. . . . We therefore adjudge that as the bill does not make a case arising under the Constitution and laws of the United States, it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit." The judgment was reversed, upon the ground that the jurisdiction of the Circuit Court did not affirmatively appear from the record. Upon the return of the cause to the court of original jurisdiction the bill was amended, and it was alleged that each member of the partnership was a citizen of Pennsylvania. The case was then heard upon its merits and was again brought here and determined. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 532.

In the light of these decisions we come to the question whether the jurisdiction of the Circuit Court affirmatively appears in this case. If it does not, it must be held that that court had no authority to take cognizance of it.

The bill alleges that the defendant, the Board of Trustees of the Ohio State University, "was created by and exists under and by virtue of a law duly passed and enacted by the Legislature of said State of Ohio, on March 22, 1870, and now known and designated as sections 4105–9 and following, of the Revised Statutes of said State of Ohio, and the subsequent acts amendatory of and supplementary thereto;" that said board, "under and by virtue of the aforesaid laws and enactments, and at all times since its creation and establishment, is fully authorized and empowered to sue and be sued, to contract and be contracted with, to make and use a common seal, and to alter the same at its pleasure, and to adopt by-laws, rules and regulations for the government of said college, and to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest, moneys, lands and other properties for its benefit and for the benefit of those under its charge, subject,

however, to the provisions, exceptions, and restrictions contained in section twenty and five thousand nine hundred and fifteen of the Revised Statutes of the State of Ohio;" and is "a citizen of and domiciled in the State of Ohio." 67 O. L. 20; 75 O. L. 126; R. S. Ohio, § 4105 *et seq.*

Do those averments, taken in connection with the statutes of Ohio relating to the defendant Board—of the provisions of which statutes judicial notice may be taken, *Hanley* v. *Donoghue*, 116 U. S. 1, 6—sufficiently show that the Circuit Court was entitled to take cognizance of this case?

If the defendant Board had been specifically averred to be and was in fact a corporation created by and existing under the laws of Ohio, then within the meaning of the adjudged cases the controversy would have been one between citizens of different States, and consequently within the jurisdiction of the Circuit Court; for, in that case, the legal presumption would be that the Trustees were citizens of the State by which the corporation was brought into existence, and no averment or evidence to the contrary would be admissible for the purpose of withdrawing the suit from the jurisdiction of the Circuit Court. *Ohio & Miss. R. R. Co.* v. *Wheeler*, 1 Black, 286, 296. Here the averment is only that the defendant Board of Trustees is a citizen of and domiciled in Ohio; not that the Trustees themselves are citizens of that State. That averment alone is not sufficient. In *Lafayette Ins. Co.* v. *French*, 18 How. 404, 405, which was a suit brought in the Circuit Court of the United States for the District of Indiana, the declaration alleged that the plaintiffs were citizens of Ohio, and that the defendant, the Lafayette Insurance Company, was a citizen of Indiana. This court, speaking by Justice Curtis, said: "This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what State it was created. The averment that the company is a citizen of the State of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of

persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution." It is vital that the corporate character of the collective body should be averred or shown.

The fundamental inquiry therefore is whether the defendant Board of Trustees is a "corporation" within the jurisdictional rule that admits of a corporation being regarded, for purposes of suing and being sued in the courts of the United States, as a citizen of the State under and by the laws of which it was created. The pleadings, we have seen, do not in terms aver the Board to be a corporation; only that it is a citizen of and domiciled in Ohio, and to have been created as a collective body by the laws of that State, with power to sue and be sued by the name of the Board of Trustees of the Ohio State University. Those laws must therefore be examined in order to ascertain whether, for purposes of suit in the Circuit Court of the United States, the Board may be deemed a corporation of Ohio within the meaning of the above cases.

In determining this question we are confronted with the fact that the statute creating the defendant Board was clearly a special, as distinguished from a general act, and that the Constitution of Ohio forbade the passage of any special act conferring *corporate* powers. Const. Ohio, Art. XIII, § 1. So that the Board of Trustees cannot be held to have been made a corporation or endowed with corporate powers without holding that the act by which it was created was invalid under the Constitution of Ohio; whereas, the Supreme Court of Ohio have adjudicated that the act was valid as not conferring, and as not intended to confer, corporate powers on the Board.

This question was presented in *Neill* v. *Board of Trustees of the Ohio Agricultural and Mechanical College*, 31 Ohio St. 15, 21, (1876) which was the original name of the Ohio State University. The validity of the act creating the Board was there brought in question as having, to all intents and purposes, created a corporation and clothed it with corporate powers and privileges. But the Supreme Court of Ohio said:

"We are not able to yield our assent to this construction of the statute. The act is entitled 'An act to establish and maintain an agricultural and mechanical college in Ohio.' It creates a board of trustees to be appointed by the Governor by and with the advice and consent of the Senate; and commits to such board the government, control and general management of the affairs of the institution; and while the statute authorizes the board to make contracts for the benefit of the college, and to maintain actions, if necessary, to enforce them, and to exercise other powers similar to those conferred on bodies corporate, it does not assume to, nor does it in fact, create or constitute such board of trustees a corporation; and hence does not clothe it with corporate functions or powers. *The State ex rel. The Attorney General* v. *Davis*, 23 Ohio St. 434. The college is a state institution, designed and well calculated to promote public educational interests established for the people of the whole State, to be managed and controlled by such agencies as the legislature in its wisdom may provide. Similar powers, but perhaps less extensive, because less required, are conferred on the trustees of the various hospitals for the insane (73 O. L. 80), and on the board of managers of the Ohio Soldiers' and Sailors' Orphans' Homes (67 O. L. 53), and other institutions of the State. The powers thus conferred are essentially necessary to accomplish the objects for which these institutions were established. The power to establish them is found clearly granted in the seventh article of the Constitution." The article here referred to gave the legislature power to establish benevolent and other state institutions.

Thus, upon an issue distinctly made, the Supreme Court of Ohio has adjudged that the defendant Board is not, and was not intended to be made, a corporation of the State, but only an agency to manage and control a state institution as the State may direct or provide. And the interpretation of the state constitution upon which that judgment rests has never been modified by that court.

While the state court may not conclusively determine for

this court what is and what is not a corporation within the meaning of the jurisdictional rule that a corporation, for purposes of suing and being sued in the courts of the United States, is, under the Constitution and laws of the United States, to be deemed a citizen of the State by whose laws it is created, nevertheless, this court should accept the judgment of the highest court of a State upon the question whether a particular body created by its laws is or is not a corporation, by virtue of those laws, unless a contrary view is demanded by most cogent reasons involving or affecting the constitutional and statutory jurisdiction of the Federal courts. No such reasons exist in this case; and accepting the above decision of the Supreme Court of Ohio as correctly interpreting the constitution and laws of that State, we hold that while the defendant Board is clothed with some, it is not clothed with all, of the functions belonging to technical corporations, and is not such a corporation as may sue and be sued in a Circuit Court of the United States as a citizen of Ohio. A contrary ruling would, we apprehend, produce confusion and embarrassment in litigation relating to those public state institutions or agencies in Ohio which, according to the decision of its highest court, were not endowed, nor intended to be endowed, with corporate powers.

It is contended, however, that the bill sufficiently shows that the persons constituting the Board of Trustees of the Ohio State University were in fact citizens of Ohio, and therefore, as the Board had power to sue and be sued, and to contract and be contracted with, in its collective name, the requisite diversity of citizenship sufficiently appeared from the pleadings. This contention is not warranted by any distinct averments in the bill. The bill contains no such averment. As already stated, it alleges that the Board is a citizen of Ohio, not that the trustees are citizens of that State. As already stated, the bill does not in terms even allege that the Board is a corporation, although it shows that it possesses some of the characteristics of corporations. The constitution of Ohio pro-

vides that no person shall be elected or appointed to any office in the State, unless he possesses the qualifications of an elector; and an elector must be a citizen of the State, Const. Art. XV, § 4, Art. V, § 1; therefore it must be taken not only that each Trustee of the Ohio State University holds an office within the meaning of the state constitution, but is in fact a citizen of that State; and the allegation that the Board was created by and existed as an organized body under the laws of Ohio was equivalent to an allegation that the trustees are each and all citizens of Ohio. Such is the process of reasoning by which it is attempted to support the jurisdiction of the Circuit Court in the present case. But it is settled that the jurisdiction of a court of the United States must appear from distinct allegations or from facts clearly proven, and is not to be established argumentatively or by mere inference. The presumption is that a cause is without the jurisdiction of a Circuit Court of the United States, unless the contrary affirmatively and distinctly appears. *Brown* v. *Keene*, 8 Pet. 112, 115, and other cases above cited.

For the reasons stated the first question must be answered in the negative. To the second question our answer is that as the Board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the Board before the court as defendants, provided the bill had contained the additional allegation that each individual Trustee was a citizen of Ohio. Each branch of the third question must be answered in the negative. These answers will be certified to the Circuit Court of Appeals with liberty to that court to authorize such amendment of the bill in the Circuit Court as will show jurisdiction.

It is so ordered.

WRIGHT *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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

No. 20. Argued October 25, 1904.—Decided November 14, 1904.

The constitution and laws of Georgia do not exempt from taxation shares of stock of a railroad corporation of another State held by a Georgia railroad corporation.

THE facts are stated in the opinion.

Mr. Boykin Wright and *Mr. John C. Hart,* Attorney General of the State of Georgia, for petitioner.

Mr. Alexander C. King and *Mr. Joseph B. Cumming* for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here on certiorari to the Circuit Court of Appeals, that court having affirmed, *per curiam,* a decree of the Circuit Court enjoining the Comptroller General of Georgia from collecting a tax for the year 1900. 116 Fed. Rep. 669; 117 Fed. Rep. 1007. In view of the conclusion to which we have been driven, it is enough to say that the question presented is whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad and Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia, under its constitution and statutes. The respondents, the plaintiffs below, are lessees of the Georgia corporation and are bound to reimburse the latter for the tax, if it has to be paid. Taking into account the decision in *Kidd* v. *Alabama,* 188 U. S. 730,

the power of the State to tax the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present constitution and laws.

The constitution of Georgia provides that "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Code of 1895, § 5883. The words "within the territorial limits" plainly qualify "subject to be taxed." The constitution further makes void all laws exempting property from taxation, other than the property therein enumerated, which does not include this stock. § 5886. Following these requirements the General Tax Act for 1899 and 1900, Laws of 1898, No. 150, §§ 1, 2, p. 22, authorizes a tax on all of the taxable property of the State.

The natural inference from the foregoing language is that the Comptroller General was bound to collect this tax. It is true that it was said, in a case decided before the date of the present constitution, that stock in railroads outside the State was not taxable in Georgia, the reason offered being that such stock is really but so many shares of the railroad's property, and that that property is real estate, for the most part at least, and taxable by the State in which the road lies. *Wright* v. *Southwestern Railroad*, 64 Georgia, 783, 799. This reason is shown by later decisions to be an insufficient ground for a claim of constitutional right, and the language of the case probably does not represent adequately the present opinion of the Supreme Court, although the passages are cited in the later of the two following cases. *Georgia State Building and Loan Association* v. *Savannah*, 109 Georgia, 63, 69; *Peoples' National Bank* v. *Cleveland*, 117 Georgia, 908, 913, 915.

If we look to the construction adopted by the Legislature there is no doubt as to that. The Code, after defining personalty as property movable in its nature, continues "stocks representing shares in an incorporated company holding lands,

or a franchise in or over lands, are personalty." § 3070. The act of 1884–1885, touching returns of property for taxation, No. 457, § 2, p. 30, enacted in terms "that personal property shall be construed, for purposes of taxation, to include . . . all stocks and securities, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt," etc. It is argued on one side and denied on the other that this section was repealed by the Code, but whether it was or not, it equally may be invoked for the purpose of interpretation at least. We do not understand and cannot believe that the Supreme Court of the State would deny the power of the Legislature under the present Constitution to tax stock.

The argument against the tax is that the constitution of Georgia is satisfied if all the lands and goods in the State are taxed once, and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes. It is admitted that no such double taxation is enforced with regard to corporations, of which the property is taxed, within the State, and it hardly would be contended that this wise moderation is unconstitutional. It even has been thought that a similar constitution forbade taxation of both capital and stock. *Burke* v. *Badlam*, 57 California, 594, 601. But, from the point of view of the taxpayer, it does not matter whether all of his double taxation is done in one State or half in one and half in another. He suffers the same injustice. And as manifestly the clearest right to tax belongs to the State where the railroad has its tracks, every principle of justice and patriotism would require the same abstinence from taxing stocks of the railroads of neighboring States that is practiced with regard to those of the taxing State—in this case Georgia—itself.

The difficulty with this argument is that the Georgia constitution requires the taxation of all property subject to be taxed in Georgia. And while it may be that the constitutional requirement is sufficiently complied with when the land and

chattels which give value to the stock pay a tax, without another tax on the stock, there is much more difficulty in saying that the words are satisfied if stock is left untaxed when the land and chattels cannot be reached. Probably the constitution does not go further than to require one tax on all attainable sources of value, even if it permits more. *Burke* v. *Badlam*, 57 California, 594, 601. But it certainly seems intended to tax once at least all property which can be come at in any way. *San Francisco* v. *Fry*, 63 California, 470. A tax in another State is no tax for the purposes of the State of Georgia. *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Dwight* v. *Boston*, 12 Allen, 316; *Seward* v. *Rising Sun*, 79 Indiana, 351; *Dyer* v. *Osborne*, 11 R. I. 321; *McKeen* v. *Northampton*, 49 Pa. St. 519.

Putting the case at the lowest, the above cited section of the constitution was adopted in the interest of the State as a tax-collector, and authorizes, if it does not require, a tax on the stock. In pursuance of the constitution, the law of 1898, under which this tax is demanded, contains the following: "In addition to the questions now propounded to tax-payers by the tax-receivers, questions shall be framed by the Comptroller-General to reach all property upon which a tax is imposed by this Act, and especially the following questions: . . . Thirtieth—How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State? Thirty-first—What was the gross nominal value thereof? Thirty-second—What was the fair market value thereof?" Laws of 1898, No. 150, § 16, p. 36. This plainly contemplates that the mandate of the constitution shall be carried out, and in view of §§ 1, 2, of the same act, referred to above, and of the facts that legislation could not make the requirement to tax more explicit, and that the constitution seems to be regarded by the Supreme Court of the State as self-executing, *Georgia State Building & Loan Association* v. *Savannah*, 109 Georgia, 63, we think it impossible to escape from the words. The distinction in-

tended between stock in corporations of which the property is taxed by the State and that in corporations otherwise untaxed is emphasized by the thirty-third question: "How many shares of stocks did you own, . . . issued by corporations within this State, the capital stock of which or the property of which is not returned by such corporation for taxation?" We think the distinction consistent with the Constitution, if not required by it as held in *Burke* v. *Badlam*, cited above.

Decree reversed.

DOBBINS *v.* LOS ANGELES.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 107. Argued October 11, 12, 1904.—Decided November 14, 1904.

While every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health, municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with constitutional rights to carry on a lawful business, make contracts, or use and enjoy property.

While the right to exercise the police power is a continuing one and a business lawful today may in the future become a menace to the public welfare and be required to yield to the public good, the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.

Although an ordinance may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of a community for no lawful reason, such exercise of power will be invalidated by the courts. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

A municipal ordinance was adopted in September fixing the limits within which gasworks might be erected. Thereafter a permit was granted for the erection of a plant; in November another ordinance was adopted amending the September ordinance and by which ordinance the territory on which the works were in course of erection and purchased in reliance upon the September ordinance was excluded. There had been

no change in the neighborhood or conditions. *Held* to be void as against the holder of the permit as an arbitrary and discriminatory exercise of the police power which amounted to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment.

Where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.

THIS is a writ of error to the Supreme Court of the State of California seeking a reversal of the judgment of that court, affirming the judgment of the Superior Court dismissing the complaint of the plaintiff in error against the city of Los Angeles. 139 California, 179.

Plaintiff in error filed a bill of complaint against the city of Los Angeles, seeking an injunction to restrain the enforcement of certain ordinances prohibiting the erection or maintenance of gasworks except within prescribed limits in said city.

The case was decided upon demurrer to the bill. The complaint sets forth in substance: That on August 26, 1901, the city council of Los Angeles adopted an ordinance making it unlawful to erect and maintain gasworks outside of a certain district described in the ordinance and fixing penalties for the violation thereof. While this ordinance was in force the plaintiff in error made a contract with the Valley Gas and Fuel Company for the erection of certain gasworks upon territory to be thereafter designated by her, and on September 28, 1901, purchased lands within the limits of the privileged district as fixed by the ordinance. That on November 22, 1901, upon application to the board of fire commissioners of the city of Los Angeles, that body granted to the plaintiff in error the privilege to erect the gasworks upon the territory aforesaid. Thereupon the plaintiff in error directed the Valley Gas and Fuel Company to proceed with the erection of the works upon the premises so purchased. That the foundations were constructed at a cost of upwards of $2,500. After the foundations had been nearly completed the city council, on November 25,

1901, passed a second ordinance, amending the first ordinance, and thereby so limiting the boundaries of the territory within which the erection of gasworks was permitted in said city as to include the premises of the plaintiff in error within the prohibited territory. The work of constructing the works was continuously prosecuted until the latter part of February, 1902, when the plaintiff in error alleges that the city of Los Angeles, combining and confederating with one James R. C. Burton and other persons unknown, caused certain employés of the company engaged in the erection of said works to be arrested, charged with the violation of the said city ordinance. Other arrests were made on the first and third of March, 1902. On March 3, 1902, the city council passed a third ordinance, amending the ordinance of November 25, 1901, in respect to the description of the district within which gasworks could be erected. On March 6, 1902, the city caused the arrest of certain persons employed by the company in charge of the erection of the works, charged with the violation of the amended city ordinance.

It is averred that the adoption by the city council of the ordinances aforesaid and the attempted enforcement thereof were instigated by officers and agents of the Los Angeles Lighting Company, a corporation engaged in manufacturing and supplying gas in said city, and having a monopoly of said business therein. It is further averred that the action of the municipal authorities complained of was taken for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of its monopoly. It is also claimed that the territory surrounding the premises of the plaintiff in error, and within which, under the ordinance of August 26, in force when the complainant made her purchase and located and begun the erection of the gasworks it was lawful so to do, and which by the amending ordinances was added to the prohibited territory, was and is a district devoted almost exclusively to manufacturing enterprises. Within its boundaries there is a large amount of vacant and unoccupied land, which is and

will continue to be useless except for the erection of manufacturing establishments; within which were located at that time a soap factory, a wool pulling factory, three wineries, numerous oil wells in operation, iron foundry, brass foundry, oil refinery; immediately east of said tract railroads and an extensive tannery; immediately north the oil tanks and refinery of the Standard Oil Company. That the works being constructed for the plaintiff in error are to be built upon concrete foundations with a superstructure of non-combustible material, so that there can be no danger from explosion, bursting or leaking. The machinery is to be of the most approved pattern and that there can be no leakage or escape of odors or any interference with the health, comfort or safety of the inhabitants of the city.

The plaintiff in error, relying upon the protection of the Fourteenth Amendment to the Constitution of the United States, prays that the permit granted by the board of fire commissioners be declared to be a valid and subsisting contract between the city of Los Angeles and herself, and that all ordinances passed by the city council in contravention thereof be declared void; that the defendant be enjoined from enforcing said ordinances against the plaintiff, from delaying or interfering with the action of the plaintiff in erecting the said works, from interfering with the maintenance and operation of the same, and for general relief.

Mr. Lynn Helm and *Mr. Edward C. Bailey,* with whom *Mr. Henry T. Lee, Mr. J. R. Scott* and *Mr. Charles W. Chase* were on the brief, for plaintiff in error:

In passing upon a municipal ordinance, it is necessary to its validity that its provisions should be determined to be reasonable. *Oxanna* v. *Allen,* 90 Alabama, 468; *Tugman* v. *Chicago,* 78 Illinois, 405; *Chicago* v. *Rumpf,* 45 Illinois, 90; *Toledo Railroad* v. *Jacksonville,* 67 Illinois, 37; *Lake View* v. *Tate,* 130 Illinois, 247.

The determination by the legislative body of what is a

proper exercise of the police power is not final nor conclusive, but is subject to the supervision of the courts, and what is a reasonable ordinance is a judicial, and not a legislative, question. *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Lawton* v. *Steel*, 152 U. S. 153; *Holden* v. *Hardy*, 169 U. S. 366; *In re Smith*, 77 Pac. Rep. 180; *Ex parte Whitwell*, 98 California, 73; *Ex parte Sing Lee*, 96 Colorado, 354; 1 Tiedeman on State and Federal Control, 238; *Jew Ho* v. *Williamson*, 103 Fed. Rep. 10, 17–20; *Weill* v. *Ricord*, 24 N. J. Eq. 169; *Yates* v. *Milwaukee*, 10 Wall. 497; *People* v. *Budd*, 117 N. Y. 1. See *contra*, *Dobbins* v. *Los Angeles*, 139 California, 179, and *Munn* v. *Illinois*, 94 U. S. 113, distinguished. In *Maxwell* v. *Fulton*, 119 Indiana, 23; *Whittington* v. *Pope*, 1 Har. & J. 236; Cooley's Const. Lim. 6th ed. 247, *et seq.*, distinguished.

The legislature is distinguished from a municipal council in enacting its police provisions and is not subject to review by the courts merely because its laws may be unreasonable.

In determining the validity of an ordinance the objects and purposes sought to be accomplished are always scrutinized by the courts, and in so doing they are not limited to those matters which appear upon the face of the ordinance or of which they may take judicial notice, but may consider all the circumstances in the light of existing conditions. Cases cited under first point and see *Ex parte Patterson*, (Tex.) 58 S. W. Rep. 1011; *People* v. *Armstrong*, 73 Michigan, 288; *Wreford* v. *People*, 14 Michigan, 41, 46; *Cleveland Ry. Co.* v. *City of Connersville*, 147 Indiana, 277; *State* v. *Boardman*, 93 Maine, 73; *Corregan* v. *Gage*, 68 Missouri, 571; *Pieri* v. *The Mayor*, 42 Mississippi, 493; *Town of Kosciusko* v. *Slomberg*, 68 Mississippi, 469; *Crowley* v. *West*, 52 La. Ann. 526.

The motives which actuate a municipal council in the adoption of ordinances are material as showing the objects and purposes for which the ordinances are adopted. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Ho Ah Kow*, Fed. Case No. 6546; *C. B. & Q. Railroad* v. *Chicago*, 116 U. S. 234; Dillon on Mun.

Corp. 4th ed. § 311; *State* v. *Cincinnati Gas Light Coke Co.*, 8 Ohio St. 262.

The ordinance of Los Angeles involved is invalid and not binding upon the plaintiff in error as against her right to conduct a lawful business of erecting gasworks and manufacturing gas for the following reasons: It is in violation of the rights, privileges and immunities of a citizen of carrying on a lawful occupation within that city. The business of erecting or maintaining a gasworks is a lawful occupation. Constitution of the State of California, Art. XI, § 19; *Ex parte Johnson*, 137 California, 115; *People* v. *Stevens*, 62 California, 209.

A municipality has not the power or right to impose additional burdens or terms or conditions to the exercise of rights created by the sovereign authority of the State in its constitution. Restrictions in the exercise of these rights are not regulations and at least impair if they do not deny the exercise of the right. *Summit* v. *N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123; *Atlanta* v. *Gate City Gaslight Co.*, 71 Georgia, 106; *Michigan Tel. Co.* v. *Benton Harbor*, 121 Michigan, 512; *Wisconsin Tel. Co.* v. *Oshkosh*, 62 Wisconsin, 32; *Appeal of Pittsburg*, 115 Pa. St. 4; *Millvale* v. *Evergreen Railway Co.*, 131 Pa. St. 1; *Harrisburg City Pass. R. R. Co.* v. *Harrisburg*, 149 Pa. St. 465; *State* v. *Flad*, 23 Mo. App. 185; *Hodges* v. *Telegraph Co.*, 72 Mississippi, 910.

This ordinance is void in that it is unreasonable because it does not describe the district to which gasworks shall be confined by any geographical or natural boundary or by any reasonable designation.

This ordinance is invalid because it is an attempt on the part of the city council to define and make that a nuisance which is not a nuisance *per se*. Gasworks are neither in their erection nor maintenance a nuisance *per se* and it is not within the power of the city council to pass an ordinance making that a nuisance which is not a nuisance *per se*, nor could such a declaration make it a nuisance unless it in fact had that

character. *Yates* v. *Milwaukee*, 10 Wall. 497; *C. R. I. & P. R. R.* v. *Joliet*, 79 Illinois, 39; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Ex parte Sing Lee*, 96 California, 354; *Los Angeles* v. *Hollywood Cemetery Assn.*, 124 California, 344; *Grossman* v. *Oakland*, 30 Oregon, 478; *Stockton Laundry Case*, 31 Fed. Rep. 680; *In re Hong Wah*, 82 Fed. Rep. 623, 624, 626; *Ex parte Whitall*, 98 California, 73; Wood on Nuisances, § 744.

The power granted in the city charter to *abate* nuisances does not give power to *prevent* except in those cases of nuisances *per se*, and those things which only become nuisances because of the method of their operation cannot be prevented and stopped under the power to abate until it has been demonstrated they are nuisances. *Lakeview* v. *Letz*, 44 Illinois, 81, 83.

The ordinance of November 25, 1901, was repealed by the ordinance of March 3, 1902. The ordinances are on the same subject matter. The latter ordinance covers the whole subject matter of the earlier and will repeal the former. 23 Am. & Eng. Ency. of Law, 485.

The later ordinance is invalid for the reason that it is in violation of the vested rights acquired by Mrs. Dobbins, by virtue of her purchase of land within the limits of the district within which it was lawful to erect gasworks by the terms of the earlier ordinance and by virtue of the permit granted to her by the fire commissioners under the existing building and fire ordinances.

The rights acquired by said plaintiff in error were vested rights. *Calder* v. *Bull*, 3 Dall. 394; *Farrington* v. *Tennessee*, 95 U. S. 679; *Steamship Co.* v. *Jolliff*, 2 Wall. 457; *Worth* v. *Cransen*, 98 U. S. 118; *Classen* v. *Chesapeake Guano Co.*, 81 Maryland, 258; *Roberts* v. *Brooks*, 71 Fed. Rep. 914; *Baltimore Trust Co.* v. *Baltimore*, 64 Fed. Rep. 153; *Levis* v. *Newton*, 75 Fed. Rep. 884; *Cleveland City Railroad Co.* v. *Cleveland*, 94 Fed. Rep. 385; *City Railway Company* v. *Citizens' Street Railway Co.*, 166 U. S. 562.

The ordinance of March 3, 1902, is void as depriving the said plaintiff in error of property without due process of law.

Chicago v. *Netcher*, 183 Illinois, 104; *C. B. & Q. R. R.* v. *Chicago*, 166 U. S. 234; *Frorer* v. *People*, 141 Illinois, 171; *Ramsey* v. *People*, 142 Illinois, 380; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; Cooley's Const. Lim. 393. Nor is the ordinance within the police power, nor is it a proper police regulation.

The police power has reference to those things which affect the public health, the public safety, the public comfort, or the public morals. *Noel* v. *People*, 187 Illinois, 587; *State* v. *Donaldson*, 41 Minnesota, 74; *Indianapolis* v. *Consumers' Gas Trust Co.*, 140 Indiana, 107; *Barthet* v. *New Orleans*, 24 Fed. Rep. 564; *Buffalo* v. *Chadeayne*, 134 N. Y. 163; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Walla Walla* v. *Walla Walla Co.*, 172 U. S. 115.

Distinguished: *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Stone* v. *Mississippi*, 101 U. S. 814; *Slaughter House Cases*, 16 Wall. 36; *Butchers' Union Co.* v. *Crescent City Live Stock Co.*, 111 U. S. 746; *Ex parte Lacey*, 108 California, 326; *Barbier* v. *Connolly*, 113 U. S. 27; *Knoxville* v. *Bird*, 12 Lea, 121; *Davenport* v. *Richmond*, 81 Virginia, 636.

The provisions of sec. 11 of art. XI of the constitution of California is not a grant of the police power. It is simply an extension to counties, cities and towns of the right to exercise powers that are inherent in the legislature as the representative of the people; but it is in no sense an enlargement of that power. *Ex parte Campbell*, 74 California, 20; *Ex parte Roach*, 104 California, 272; *Los Angeles* v. *Hollywood Cemetery Assn.*, 124 California, 344.

A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such criminal prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right. *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207; *Central Trust Co.* v. *Citizens' St. Ry. Co.* 80 Fed. Rep. 225; *S. C.*, 82 Fed. Rep. 1; *Reagan* v. *Trust Co.*,

154 U. S. 326; *Southern Express Co.* v. *Mayor,* 116 Fed. Rep. 756; *Lottery Co.* v. *Fitzpatrick,* 3 Woods, 222; *S. C.,* Fed. Cases No. 8541; *Springhead Spinning Co.* v. *Riley,* L. R. 6 Eq. 588; *Osborn* v. *United States Bank,* 3 Wheat. 738; *Wood* v. *Brooklyn,* 14 Barb. 425; *Manhattan Iron Works* v. *French,* 12 Abbott's N. C. 446; *Rushville* v. *Rushville Natural Gas Co.,* 132 Indiana, 575; *Davis* v. *Fasig,* 128 Indiana, 271; *Platte & D. Canal & Milling Co.* v. *Lee, Mayor,* (Colo.) 29 Pac. Rep. 1036; *Smith* v. *Bangs,* 15 Illinois, 399; *Baltimore* v. *Radecke,* 49 Maryland, 218; *Cape May & L. R. Co.* v. *Cape May,* 35 N. J. Eq. 409; *Los Angeles City Water Co.* v. *Los Angeles,* 103 Fed. Rep. 711; *Atlanta* v. *Gate City Gaslight Co.,* 71 Georgia, 196; *Austin* v. *Austin City Cemetery Assn.,* 87 Texas, 330; *Port Mobile* v. *Louisville & N. Railway Co.,* 84 Alabama, 115; *Smyth* v. *Ames,* 169 U. S. 466, 517; *Detroit* v. *Detroit Citizens' Railway Co.,* 184 U. S. 368, 378.

The plaintiff in error, Caroline W. Dobbins, has no remedy against the defendant in error for damages for the wrongful arrest of her employés or for the destruction of her business and property rights. *Steadman* v. *San Francisco,* 63 California, 193; *Chope* v. *Eureka,* 78 California, 508; *Doeg* v. *Cook,* 126 California, 213.

It is not enough that the plaintiff has a remedy at law. It must be as efficient and as prompt in its administration as the remedy in equity. *Boyce* v. *Grundy,* 3 Peters, 377; *Walla Walla City* v. *Walla Walla Water Co.,* 172 U. S. 1, 12; *Insurance Co.* v. *Bailey,* 13 Wall. 616, 621; *Kilbourne* v. *Sunderland,* 130 U. S. 505, 514; *Tyler* v. *Savage,* 143 U. S. 79, 95; 2 Story's Eq. § 928.

Where a law under which a prisoner is held has been declared unconstitutional and where the unreasonableness and oppression of the ordinance is not apparent upon the face thereof, evidence in such cases will be admitted by a court of general jurisdiction upon *habeas corpus* showing existing conditions and for the purpose of determining whether a public offense has been committed. *Ex parte Smith,* 77 Pac.

Rep. 180; *Ex parte Neilson*, 131 U. S. 176; *Ex parte Lang*, 85 U. S. 163; *Ex parte Siebold*, 100 U. S. 176; *In re Coy*, 127 U. S. 731, 758; *Ex parte Mayfield*, 141 U. S. 107; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Mr. W. B. Mathews, with whom *Mr. Herbert J. Goudge* was on the brief, for defendants in error:

The enactment of the ordinance drawn in question was fully within the police powers of the city. Constitution of California, § 11, Art. XI; Statutes of California, 1869–1870, 815; and 1889, 458; Charter of Los Angeles, §§ 2, 25, 27, 40; *Munn* v. *Illinois*, 94 U. S. 113; *Westfield G. & M. Co.* v. *Mendenhall*, 142 Indiana, 538; *New Orleans Gas Co.* v. *Louisiana L. Co.*, 115 U. S. 650; 2 Tiedeman on Police Powers, 740; *Jamieson* v. *Indiana Natural G. & Oil Co.*, 28 N. E. Rep. 76; *Lanigan* v. *N. Y. Gas & L. Co.*, 71 N. Y. 29; *Ex parte Lacy*, 108 California, 326; *Crowley* v. *Christensen*, 137 U. S. 86.

The allegations of the complaint as to the unreasonableness of this ordinance are not sufficient to sustain a decision against its validity. *Slack* v. *Jacob*, 8 W. Va. 612; *Harmon* v. *Lewiston*, 46 Am. St. Rep. 893; *Darnelly* v. *Cabanns*, 52 Georgia, 212; *Wells* v. *Mayor*, 43 Georgia, 67; *State* v. *Schlenker*, 51 L. R. A. 351; *People* v. *Cipperly*, 4 N. E. Rep. (N. Y.) 108; *In re Wilshire*, 103 Fed. Rep. 620; *Barbier* v. *Connolly*, 113 U. S. 27.

All rights in contracts and property are held subject to such regulations as may be made from time to time by the State for the protection of public health, comfort and saftey. Cooley Const. Lim. 6th ed. 707; *Mugler* v. *Kansas*, 123 U. S. 669; *Corporation of Knoxville* v. *Bird*, 12 B. J. Lea, 121; *City of Salem* v. *Maynes*, 123 Massachusetts, 372; *Barbier* v. *Connolly*, 113 U. S. 27; *City of New Orleans* v. *Stafford*, 21 Am. Rep. 563; 2 Story Const. Lim. § 1954; *Jamieson* v. *Ind. Natural G. & Oil Co.*, 28 N. E. Rep. 76.

A municipality cannot in any manner barter away, part with or abridge its right to exercise the police powers delegated to it by the State. Cooley Const. Lim. 6th ed. 341;

Russell on Police Powers, 88; *Davenport* v. *Richmond*, 81 Virginia, 636; *Newson* v. *Galveston*, 13 S. W. Rep. 368; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659.

The ordinance complained of is not violative of the commerce clause of the Constitution of the United States. *Sherlock* v. *Alling, Admr.*, 93 U. S. 99; *United States* v. *E. C. Knight*, 156 U. S. 1; *Railroad Co.* v. *Husen*, 95 U. S. 465.

The question, whether the state court erred in refusing to consider or decide the claim of plaintiff in error that she was entitled to an injunction against the enforcement of the ordinance complained of by criminal prosecution, does not arise on this appeal.

The motives of a legislative body in enacting a law cannot be inquired into by the courts. *Fletcher* v. *Peck*, 6 Cranch, 87; *Dodge* v. *Wolsey*, 18 How. 371; *United States* v. *Des Moines R. R. Co.*, 142 U. S. 545; *Hing* v. *Crowley*, 113 U. S. 703.

In reviewing a judgment upon a petition for writ of *habeas corpus* discharging the writ and remanding the petitioner, the only question reviewable by this court is the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws or treaties of the United States. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Wright*, 29 Hun, 361; *Ex parte Sternes*, 77 California, 156; *Ex parte McCullough*, 25 California, 97; *Ex parte Grannis*, 51 California, 375; *Powell* v. *Pennsylvania*, 127 U. S. 678; Cooley Const. Lim. 6th ed. 425; *In re Coy*, 127 U. S. 732; *Ex parte Lennon*, 166 U. S. 548; *Andrews* v. *Swartz*, 156 U. S. 272; *Ex parte Belt*, 159 U. S. 95.

A bill in equity will not lie to restrain the enforcement of a municipal ordinance by criminal prosecution upon the mere ground of its alleged invalidity. *In re Sawyer*, 124 U. S. 200; *Fitts* v. *McGhee*, 172 U. S. 528; *Davis and Farnum Mfg. Co.* v. *Los Angeles*, 115 Fed. Rep. 537; *S. C.*, 189 U. S. 207; *Hemsley* v. *Myers*, 45 Fed. Rep. 283; *Wagner* v. *Drake*, 31 Fed. Rep. 849; *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed. Rep. 272.

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

As this case was decided upon demurrer to the complaint, the allegations thereof must be taken as true. The question presented involves the right of the plaintiff in error to invoke the protection of the Fourteenth Amendment against alleged infraction of her rights by the action of the city council in passing and enforcing the ordinances which prevent the carrying on of the business of making and selling gas to the people of the city.

Before entering upon a consideration of the case it is essential to examine briefly the extent to which constitutional and legislative control have been exercised by authority of the State of California in reference to the erection and maintenance of gas-works in cities. The constitution of the State, section 19, article XI, provides that "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." By the act of the state legislature of April 4, 1870, Stats. of 1869-1870, 815, it was provided that cities may control the location and construction of works so that they may be erected in suitable localities to give the least discomfiture or annoyance to the public. By the constitution

of the State of California it is provided, art. XII, sec. 11, that any county, city, town or township may make and enforce within its limits all such local, police, sanitary or other regulations as are not in conflict with the general laws. In these provisions may be found a grant of power to the city of Los Angeles to control the location and erection of gasworks within the city limits. In the grant of such control the fact is recognized that while the erection and maintenance of such works is a lawful business pursuit and one essential to the welfare and comfort of the community, its prosecution requires the use of materials of such a character, and such construction and maintenance of the works as not to be dangerous or offensive when carried on within thickly populated parts of the city, and such rights are consequently justly subject to regulation in such manner as to protect the public health and safety. The Supreme Court of California, as may be gathered from its opinion in this case, based its decision upon the proposition that as the exercise of the right to control the location and construction of gasworks is within the power conferred by the legislature upon the city, the act of the municipality in question cannot be reviewed, because so to do would be a substitution of the judgment of the court for that of the council upon a matter left within the exclusive control of the legislative body. To support this conclusion a citation is made from the opinion of this court in the case of *Munn* v. *Illinois*, 94 U. S. 113, to the effect that the legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power. The observations of Mr. Chief Justice Waite in that connection had reference to the facts of the particular case and were certainly not intended to declare the right of either the legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution under the guise of exercising the police powers reserved to the States. It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and

safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton* v. *Steele*, 152 U. S. 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

And, again, in *Holden* v. *Hardy*, 169 U. S. 366, 398, the same justice, again speaking for the court, said:

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

And in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558, Mr. Justice Harlan, delivering the opinion of the court, said:

"The question of constitutional law to which we have referred [the equal protection of the laws] cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Ry.* v. *Haber*, 169 U. S. 613, 626."

This principle was recognized and applied in the Supreme Court of California in a case decided later than the one under consideration. *In re Smith*, decided May 31, 1904, 77 Pac. Rep. 180, in which it was held that a county ordinance making it a misdemeanor to maintain a gasworks within a sparsely settled district was unreasonable and void. In that case the court, after again quoting from *Munn* v. *Illinois*, to the effect that the courts will not interfere with laws which are within the scope of legislative power, well said:

"But, running current with this principle, and to be read with it, is one of equal importance, namely, that when the

police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only where it is clear that the ordinance or law declared void passes the limits of the police powers, and infringes upon rights guaranteed by the constitution."

Applying the principles settled by these decisions to the allegations of the bill, admitted by the demurrer, we think a case is made which called for the protection of the courts against arbitrary interference with the rights of the plaintiff in error. Complying with the terms of the ordinance which was in force when the plaintiff in error was about to begin the erection of the gasworks in controversy, a tract of land was purchased within the district wherein the erection of such works was permitted, a contract was entered into for the construction of the works, a considerable sum of money was expended. It may be admitted as being a correct statement of the law as held by the California Supreme Court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good. *Fertilizing Co.* v. *Hyde*

Park, 97 U. S. 659; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672. But the exercise of the police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactment. It was averred that the works would be so constructed so as not to interfere with the health or safety of the people. No reasonable explanation for the arbitrary exercise of power in the case is suggested. The narrowing of the limits within which the plaintiff in error, in compliance with the ordinance of the city and the permit of the board of fire commissioners, was proceeding to erect the gasworks, to the smaller and more limited section, was not demanded by the public welfare, and, taking the facts as alleged in the bill, seems rather to have been actuated by a purpose to exclude the plaintiff in error from further prosecution of the enterprise. The limits of the privileged district were fixed late in August. In September the complainant began the construction of the works. In November, without changed conditions or adequate reason, the council by an amended ordinance drew a line embracing a part of the district including the complainant's property, and declared that, too, shall be prohibited territory. This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public but the destruction of the plaintiff's rights and the building up of another company still within the privileged district after the passage of the amendment. Being the owner of the land and having partially erected the works the plaintiff in error had acquired property rights and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law. It is averred in the bill of complaint that the district within which the works were being erected was one given over to manufacturing enterprises, some of which were fully as obnoxious as gasworks possibly could be; that it contained large spaces of unoccupied lands, worthless except for manufacturing purposes, and by clear inference that there was

nothing in the situation which rendered it necessary, in order to protect the city from a noisome and unhealthy business, to decrease the area within which gasworks could lawfully be erected.

It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance is not a question necessary to be determined in this case, but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court, in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts.

In some of the States, perhaps in most, the right to build and maintain gasworks is derived from the State, but subject to municipal control as to the use of the streets and the prices to be charged to consumers. In Ohio this price is regulated for stated periods. Could it be successfully maintained that after the erection of the works and the fixing of prices for a term of ten years, at the expiration thereof and exercising the right to fix prices for a new term, the council could arbitrarily, and with a view of compelling the sale of the works to the municipality or a rival company, fix the rate at a price below the cost of gas to the producer and at such a rate as to be ruinous to the business? In *State ex rel. The Attorney General* v. *The Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262, it was

held to be the legislative intention, in empowering city councils to regulate the price of gas, to limit such companies to fair and reasonable prices, and if in the colorable exercise of this power a majority of the members of the council, for a fraudulent purpose, combine to pass an ordinance fixing the price of gas at a rate at which they well know it cannot be manufactured and sold without loss, such an ordinance would impose no obligation on the company. This case was cited with apparent approval by Mr. Justice Matthews in delivering the opinion of this court in *Yick Wo* v. *Hopkins, supra,* and see Dillon Mun. Corp. 4th ed. § 311.

In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution.

It is also urged by the defendants in error that a court of equity will not enjoin prosecution of a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights which by the enforcement of the ordinances in question would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 218, and cases therein cited.

Upon the whole case, we are of opinion that the demurrer

should have been overruled and the city of Los Angeles put upon its answer.

For the reasons herein stated, the judgment of the Supreme Court of California is reversed and the cause remanded to that court for further proceedings not in conflict with this opinion.

DALY *v.* ELTON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 108. Argued October 11, 12, 1904.—Decided November 14, 1904.

Decided on authority of *Dobbins* v. *Los Angeles*, *ante*, p. 223.

THE facts are stated in the opinion.

Mr. Lynn Helm and *Mr. Edward C. Bailey*, with whom *Mr. Henry T. Lee*, *Mr. J. R. Scott* and *Mr. Charles W. Chase* were on the brief, for plaintiff in error.

Mr. W. B. Mathews, with whom *Mr. Herbert J. Goudge* was on the brief, for defendant in error.[1]

MR. JUSTICE DAY delivered the opinion of the court.

This case is practically determined by views expressed in *Dobbins* v. *The City of Los Angeles*, just decided. It was a petition for a writ of *habeas corpus* to discharge Daly from custody, in a prosecution under the ordinance under consideration in the *Dobbins* case. The prayer of the petition was denied and the writ discharged. *In re Daly*, 139 California,

[1] This case was argued simultaneously with the preceding case and for abstracts of arguments, see *ante*, p. 226.

216. Under the California practice, in the absence of issue joined the allegations of the petition are taken as true and the facts alleged therein are taken as admitted. *In re Smith*, 77 Pac. Rep. 180. The petition made allegations attacking the ordinance which, if true, would render it invalid for the reasons stated in the *Dobbins* case, *supra*, and the petitioner upon the record made should have been discharged from custody.

It is therefore ordered that the judgment of the Supreme Court of California be reversed and the cause remanded for further proceedings not inconsistent with the views announced in the Dobbins case, supra.

BRADFORD *v.* SOUTHERN RAILWAY COMPANY.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 151. Submitted October 19, 1904.—Decided November 28, 1904.

The act of July 20, 1892, providing when a plaintiff may sue as a poor person, does not apply to appellate proceedings.

Federal appellate courts have no power to permit prosecutions *in forma pauperis* in the absence of a statute.

THIS case is brought here on the following certificate:

"This was an action of tort. The plaintiff was a citizen of Tennessee, and the defendant a corporation organized under the laws of Virginia. The jurisdiction of the court below was wholly dependent upon diversity of citizenship. There was a jury and verdict against the plaintiff in error and a judgment accordingly.

"The plaintiff in error sued out this writ of error, and has lodged with the clerk of this court, within the time required by law, a full transcript of the record in the court below. The

clerk refusing to docket same unless the plaintiff would deposit with him the sum of thirty-five dollars, as security for taxable costs as required by rule 16 of this court, the plaintiff has filed her petition, duly verified, praying to be allowed to prosecute her writ *in forma pauperis*, and that the clerk be required to docket said transcript and that the rule requiring a deposit to cover costs be dispensed with. The petition shows a state of facts which entitle the plaintiff to prosecute her writ of error as a poor person, provided the act of July 20, 1892, 27 Statutes at Large, 252, applies to appellate proceedings.

"Because this court has doubts as to whether the act of Congress above mentioned applies to appellate proceedings, it is ordered that the foregoing statement be certified to the Supreme Court and the instruction of that court be requested for the proper decision of the following questions which arise upon the petition and motion of the plaintiff in error.

"1. Does the act of July 20, 1892, 27 Statutes at Large, 252, providing when a plaintiff may sue as a poor person, apply to the prosecution of a writ of error from this court?

"2. If that act of Congress does not apply to appellate proceedings, has this court any authority to permit the prosecution of a writ of error *in forma pauperis?*"

The act of July 20, 1892, above referred to, reads:

"An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks

by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"SEC. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"SEC. 3. That the officers of the court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"SEC. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"SEC. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided*, That the United States shall not be liable for any of the costs thus incurred."

Mr. James Gallagher and *Mr. Frederic D. McKenney* for Bradford:

As the case was removed to the Circuit Court, it is to be considered, for all purposes, as having originated in said court, thus distinguishing it from *Galloway* v. *Bank*, 186 U. S. 177, which arose in a state court. The former case is within the equity of the act of Congress. *Fuller* v. *Montague*, 53 Fed. Rep. 206, but see *The Presto*, 93 Fed. Rep. 522.

Although the Tennessee statute authorizing the commencement of this case *in forma pauperis* in the state court is narrower and more restricted in scope than the act of Congress upon the same subject, it has been construed to extend to the prosecution of appellate proceedings. *Phillips* v. *Rudle*,

1 Yerger, 121; *Brinkley* v. *Hayworth*, 3 Yerger, 421; *Mosley* v. *Davenport*, 6 Lea, 80, and see 2 Heiskell, 634.

The trial judge having granted the writ of error *in forma pauperis*, and the Circuit Court of Appeals having certified the statement and questions to this court for instructions, a *prima facie* meritorious case is shown, at least within the equity of the act of Congress, if not within its letter.

Independent of any statute, the Circuit Court of Appeals possesses inherent power to allow the prosecution of a writ of error *in forma pauperis* in any case wherein there might otherwise be a failure of justice. *Bland* v. *Lamb*, 2 Jac. & W. 402, cited in 95 Fed. Rep. 345.

If the act of Congress of July 20, 1892, does not apply to appellate proceedings, it is nevertheless within the discretionary power of the Circuit Court of Appeals to allow plaintiff in error, for cause shown, to prosecute her writ of error *in forma pauperis*.

Mr. Frank P. Poston and *Mr. W. A. Henderson* for Southern Railway Company.

An appeal or writ of error is a statutory proceeding, and not a common law right. The mere fact that the appellant is a pauper does not, of itself, relieve him of the necessity of giving an appeal bond; the general rule is that express statutory authority must be had for an appeal *in forma pauperis*. *The Presto*, 93 Fed. Rep. 524; *McLain* v. *Williams*, 43 L. R. A. 287; *Sullivan* v. *Haug*, 10 L. R. A. 263; *Bailey* v. *Kincaid*, 57 Hun, 516; *Butler* v. *Jarvis*, 117 N. Y. 115; *Halloran* v. *Railroad Co.*, 40 Texas, 465; *Fite* v. *Black*, 85 Georgia, 413; *Sage* v. *Central Railroad Co.*, 96 U. S. 714; *Ex parte Parks*, 93 U. S. 21; *Woods* v. *Davidson*, 57 Mississippi, 206; *Galloway* v. *Bank*, 186 U. S. 177.

The fact of poverty, itself, does not relieve appellant from the necessity of giving bond, but there must be express statutory authority for an appeal *in forma pauperis*. Practically every State in the United States has enacted such a statute.

The plaintiff has had the benefit of a day in court, has had a fair trial, and was denied a judgment. If she desires to prosecute the case further, she should be required to give a bond for the costs, unless she can show clear legislative authority for granting this writ of error on the pauper's oath.

It is well known that the courts are crowded with damage suits of every imaginable description against railroads and other corporations and that more than 90 per cent of these cases are brought on the pauper's oath. Even if the defendant is successful in its defense of these cases, it is required, as a matter of law, to pay a proportion of the costs, that is, such costs as are incurred in its behalf.

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

1. After the passage of the act of July 20, 1892, many applications were made to this court for leave to prosecute writs of error or appeals *in forma pauperis*, and were uniformly denied, as we were of opinion that the act had no relation to proceedings in this court. And we so stated in *Gallaway* v. *Fort Worth Bank*, 186 U. S. 177, where leave was asked to prosecute a writ of error to a state court without giving security as required by section 1000 of the Revised Statutes. The ruling would have been the same if the review of the judgment or decree of a court of the United States had been sought, because in our view the statute refers only to the court of original jurisdiction. And the same ruling must necessarily obtain in the Circuit Courts of Appeals.

The act consists of five sections. Of these, sections 3 and 4 obviously relate to the trial or hearing. By section 5 "judgment may be rendered for costs at the conclusion of the suit as in other cases," which we take to mean judgment at the close of the trial or hearing, and not judgment then and also judgment in appellate proceedings, or in case of such proceedings no judgment for costs below until judgment rendered above.

The first section relates to the commencement and carrying forward of a suit or action without plaintiff being required to prepay fees or costs or to give security therefor, whether the fees or costs accrue at the beginning or during the progress of the suit or action. The application is to be made at the outset, and the order, if granted, covers the fees or costs, accruing when or after the suit or action is commenced. And this result is secured by the words "and its prosecution to conclusion." That conclusion is the termination of the suit or action in the court where it is commenced. The second section provides for a similar application after the suit or action has been brought.

The words "suit or action" are used in both sections, and the applicant is required to set forth "his alleged cause of action," and by section 4 the case may be dismissed "if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."

Lord Coke defined "action" to be "a legal demand of one's right," and cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse, *Railway Company* v. *Dixon*, 179 U. S. 131, 139. The words "action" and "cause of action" are not ordinarily applicable to writs of error, and, in our opinion, were obviously not so applicable here, but used *diverso intuitu*. And this is so whether a writ of error be considered a new proceeding or a continuation of the original proceeding as it is usually regarded in the Federal courts. *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Nations* v. *Johnson*, 24 How. 195, 205; *In re Chetwood*, 165 U. S. 443, 461.

A leading case on the subject is *Moore* v. *Cooley*, 2 Hill, 412. The statute of New York under consideration in that case was as follows (2 Rev. Stat. N. Y. 2d ed. 1836, p. 362):

"Every poor person, not being of ability to sue, who shall have a cause of action against any other, may petition the

court in which such action is depending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have counsel and attorneys assigned to conduct his suit."

After quoting the statute Judge Cowen said:

"Strictly speaking, an error on which a writ lies is not a cause of action; for, as Lord Coke says, there is a distinction between writs and actions; and under this distinction he instances actions and writs of error. (2 Inst. 39, 40.) And yet, a release of all actions extends to writs of error, when anything may be recovered or taken by way of restitution under or in consequence of the writ of error. (Co. Litt. 288, b. Bac. Abr. Release, [1] 2.) This, however, I take it, proceeds rather upon an equitable, and therefore extended construction of the words in the release beyond their strict meaning; for they generally reach the original matter out of which the error arose, that being the direct subject of an action if the matter be thrown open by the writ of error. The original matter being released therefore, the words are very properly construed as reaching indirectly and in liberal construction to the writ of error itself, because that depends upon the original matter. Yet, in strictness, no book holds the word *action*, or words *cause of action*, to be identical with a writ of error or cause of a writ of error.

"There can be little doubt that the statute under which this motion is made, should be construed strictly; for the pauper comes to litigate entirely at the expense of others. He is neither to pay his own attorneys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby, in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex than unable to sue. (Hist. of Hen. 7.)"

Lord Bacon was referring to the statute 11 Hen. VII, c. 12, and his language is elsewhere translated or explained to mean "that the charity of the legislature thought it better that the

poor man should be able to vex than that he should not be able to sue." 6 Bacon's Works, 161.

So in *Bristol* v. *United States*, 129 Fed. Rep. 87, where the Circuit Court of Appeals for the Seventh Circuit held that the act of Congress of July 20, 1892, did not entitle a defendant in a criminal case to prosecute a writ of error out of the Circuit Court of Appeals *in forma pauperis*, Jenkins, J., delivering the opinion, said:

"We do not think that it can properly be said that a writ of error is a suit or action within the statute so far as respects a writ of error in a criminal case. Were it not for the words 'prosecute to conclusion,' we doubt if any court would hold that the act applied to an appeal or writ of error in a civil cause. The applicant by the statute must declare the nature of his cause of action. Surely an erroneous ruling by the trial court cannot be held to furnish 'a cause of action,' as that phrase is commonly understood. The statute, by that term, in our judgment, refers to a legal demand by one against another, not to the rulings of a trial court. Under a somewhat similar statute of the state of New York, its Supreme Court, speaking through Judge Cowen, held that the provisions of the statute do not extend to writs of error. *Moore* v. *Cooley*, 2 Hill, 412."

We adhere to the view that the act, on its face, does not apply to appellate proceedings, and that it does not is sustained by other considerations.

The act of July 20, 1892, does not purport to grant the right to prosecute a writ of error or an appeal, and that right depends on statute and not on the common law. *United States* v. *More*, 3 Cranch, 159, 171. Errors can be reviewed only in the cases in which those processes are given by statute. *Ex parte Parks*, 93 U. S. 18, 21.

Section 11 of the judiciary act of March 3, 1891, creating the Circuit Courts of Appeals, provides:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of

error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

There are several such provisions, and, among others, section 1000 of the Revised Statutes reads:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Clearly an act giving the right to prosecute *in forma pauperis* cannot be extended by implication beyond its terms in conflict with existing provisions in relation to writs of error and appeals.

The result is that the first question must be answered in the negative.

2. The second question is, whether, if the act of July 20, 1892, does not apply to appellate proceedings, the Court of Appeals has "any authority to permit the prosecution of a writ of error *in forma pauperis*."

We answer that that court has no such power unless derived from statute, and we find no statute authorizing any order to that effect.

Costs are the creatures of statute, and it is settled that authority to permit prosecution *in forma pauperis* must be given by statute.

By section 2 of the judiciary act of March 3, 1891, the costs and fees in the Supreme Court are made the costs and fees in the Circuit Courts of Appeals, and the latter courts are empowered to establish all rules and regulations for the conduct of the business of the court.

And it appears that on November 21, 1898, Rule 16 of the Circuit Court of Appeals for the Sixth Circuit was so amended as to read that "at the time of filing the record the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed *in forma pauperis*."

But the exception must be assumed to have been framed on a construction of the act of July 20, 1892, which we have been constrained to hold it does not bear, and the exception falls in the absence of a statute authorizing such an order.

We need not advert to the distinction between costs and fees, but it should be noted that the power of the Circuit Courts of Appeals, in respect of the distribution of costs or in dealing with its officers in respect of their fees, under special circumstances, is not here involved.

Both questions answered in the negative.

NEW *v.* OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 226. Argued October 14, 17, 1904—Decided November 28, 1904.

Writs of error from this court to the Supreme Court of Oklahoma in capital cases do not lie.

THE facts are stated in the opinion.

Mr. Hugh T. Taggart for plaintiff in error:

The Supreme Court of Oklahoma is a court of the United

States within § 6, act of February 6, 1889, 25 Stat. 655. See Organic Act of Oklahoma, May 2, 1890, § 2; *Moss* v. *United States*, 32 Wash. Law Rep. 342; *McAllister* v. *United States*, 141 U. S. 174; *Cross* v. *United States*, 145 U. S. 571. Jurisdiction of this court does not necessarily depend on the act of 1889. See §§ 9, 13, 28, Organic Act, *supra*, and §§ 4, 15, Judiciary Act of March 3, 1891; and assignments in 139 U. S. 707. This court entertained jurisdiction in *Queenan* v. *Oklahoma*, 190 U. S. 548.

Mr. P. C. Simons, Attorney General of the Territory of Oklahoma, for defendant in error.

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

John T. New was tried on an indictment for murder in the District Court of Washita County, Oklahoma Territory, found guilty, and his punishment fixed by the jury at imprisonment for life.

The Crimes Act of Oklahoma provided that every person convicted of murder should "suffer death or imprisonment at hard labor in the Territorial penitentiary for life, at the discretion of the jury." Stat. Okla. 1893, p. 456, c. 25, § 13; Stat. Okla. 1890, c. 25, Art, 17, § 13.

Judgment was entered on the verdict and New was sentenced accordingly. He carried the case to the Supreme Court of the Territory and the judgment was affirmed. This writ of error was then allowed, and the objection is made that this court has no jurisdiction to review the judgments of the Supreme Court of Oklahoma in criminal cases for want of statutory provision to that effect.

By the "Act to provide a temporary government for the Territory of Oklahoma," approved May 2, 1890, 26 Stat. 81, c. 182, "the legislative power and authority of said Territory" was vested in the governor and legislative assembly, and the power extended "to all rightful subjects of legislation not

inconsistent with the Constitution and laws of the United States."

Section 28 provided: "That the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States; and all acts and parts of acts in conflict with the provisions of this act are as to their effect in said Territory of Oklahoma hereby repealed;" and by a proviso section 1850 of the Revised Statutes, requiring the submission of territorial laws to Congress, was made inapplicable to Oklahoma.

By section 11 certain enumerated "chapters and provisions of the Compiled Laws of the State of Nebraska, in force November first, eighteen hundred and eighty-nine, in so far as they are locally applicable, and not in conflict with the laws of the United States or with this act, are hereby extended to and put in force in the Territory of Oklahoma until after the adjournment of the first session of the legislative assembly of said Territory, namely: . . . and of part three thereof, entitled 'Criminal Code.'"

This temporary provision was supplanted some months subsequently by laws passed by the Oklahoma legislative assembly. Statutes, Oklahoma, 1890. These statutes were elaborate and comprehensive, and embraced a crimes act, with due provision for procedure.

Section 9 of the organic act reads as follows:

"SEC. 9. That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. . . .

" . . . and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property. . . . Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said district courts to the

supreme court under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness shall exceed five thousand dollars; . . ."

So far as review by this court is concerned, this is the usual provision, and is limited to civil cases. We are then brought to inquire whether any other statute may be invoked to sustain our jurisdiction.

Section 5 of the judiciary act of March 3, 1891, 26 Stat. 827, c. 517, provided that appeals or writs of error might be taken from the District and Circuit Courts directly to this court in certain enumerated classes of cases, among which were "cases of conviction of a capital or otherwise infamous crime." By amendment the words "or otherwise infamous" were stricken out, and it was declared that cases of convictions for an infamous crime not capital might be carried to the Circuit Courts of Appeals. 29 Stat. 492, c. 68.

By section 6, the judgments of the Circuit Courts of Appeals are made final in cases arising under the criminal laws.

And section 15 provides: "That the Circuit Court of Appeals in cases in which the judgments of the Circuit Courts of Appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

But the case before us is a capital case and not included in

the criminal cases to which the jurisdiction of the Circuit Courts of Appeals extends. It is suggested that, as it follows that if this court has no jurisdiction, convictions for crimes not capital are reviewable on a second appeal, while convictions for a capital crime are not, this involves an absurdity, hardship or injustice, presumably not intended. We held, however, in *Folsom* v. *United States*, 160 U. S. 121, that the intention was plain and that the statute must be taken as it read.

There remains the act of February 6, 1889, 25 Stat. 655, c. 113, by the sixth section of which it was provided that "in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reëxamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error." As to this, however, it was ruled in *Cross* v. *United States*, 145 U. S. 571, that, in view of the terms of the whole section, the allowance of a writ of error to any appellate tribunal was not contemplated, but merely to review the judgment of the trial court.

It is thus seen that there is no statute giving appellate jurisdiction to this court over the judgments of the Supreme Court of Oklahoma in capital cases.

Reference is made to *Queenan* v. *Oklahoma*, 190 U. S. 548, in which we entertained jurisdiction in the absence of any suggestion as to the want of it. *United States* v. *Simms*, 1 Cranch, 252, is an instance of similar inadvertance, and when cited in *United States* v. *More*, 3 Cranch, 159, 172, Chief Justice Marshall disposed of it in these words: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case."

Writ of error dismissed.

NATIONAL EXCHANGE BANK OF TIFFIN *v.* WILEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 53. Argued November 7, 1904.—Decided November 28, 1904.

A warrant of attorney executed by the maker of a note and authorizing, in case of nonpayment, an attorney to appear, waive process, confess judgment, waive error and right of appeal in favor of the "holder" of the note must be construed strictly in favor of the maker, and does not, in the absence of express terms, authorize the confession of judgment in favor of the original payee after it ceases to be the owner of the note even though he may have the note in his possession. A judgment so entered would be a personal judgment without service of process or appearance, and the court would have no authority or jurisdiction to enter it, and the proceedings would be wanting in due process of law. Such a judgment can be attacked collaterally without violating the full faith and credit clause of the Federal Constitution in an action thereon in a State, other than that in which it was entered, on the ground that the party in whose favor it was rendered was not in fact the holder because not the owner of the note and that, therefore, the court entering the judgment was without jurisdiction.

THE facts are stated in the opinion.

Mr. John J. Boucher, with whom *Mr. Constantine J. Smyth* and *Mr. Thomas D. Crane* were on the brief, for plaintiff in error:

The answer does not state a defense to the petition but confesses same; it admits delivery of the note and warrant of attorney authorizing any attorney to appear without process and confess judgment and that the judgment was so confessed in a court of general jurisdiction. The judgment of a court of general jurisdiction in any State is equally conclusive upon the parties in any other State. *Tell* v. *Yost*, 128 N. Y. 387; *Shumway* v. *Stillman*, 6 Wend. 453. In any view of the case there is no evidence in support of the defendant's contention that the bank was not the holder of the note in the Ohio court.

Under the full faith and credit clause of the Constitution the Ohio judgment is conclusive that plaintiff was the holder of the note. *Richtmeyer* v. *Remsen*, 38 N. Y. 206; *Reed* v. *Spoon*, 66 N. Car. 415; *Fisher* v. *Williams*, 57 Vermont, 586. Whether or not the plaintiff was the holder of the note is not a jurisdictional, but a *quasi*-jurisdictional question and the judgment of the Ohio court is conclusive and cannot be controverted in collateral proceedings. 12 Ency. Pl. & Pr. 211; *Reinach* v. *Atlantic &c. R. Co.*, 58 Fed. Rep. 43; *Betts* v. *Bagley*, 12 Pick. (Mass.) 572; *Holcomb* v. *Phelps*, 16 Connecticut, 132; *Wright* v. *Douglas*, 10 Barb. 97; *Ex parte Stearnes*, 77 California, 156; *Bostwick* v. *Skinner*, 80 Illinois, 153; *Wing* v. *Dodge*, 80 Illinois, 564; *Young* v. *Lorain*, 11 Illinois, 624; *Simmons* v. *Saul*, 138 U. S. 439; *Comstock* v. *Crawford*, 3 Wall. 396, 403; *Lafayette Ins. Co.* v. *French*, 18 How. 404. This judgment has the same force and effect as a judgment in adversary proceedings. *Snyder* v. *Critchfield*, 44 Nebraska, 66. The defendant waived any defect of parties. If there was any such defect it appeared on the face of the petition and should have been demurred to. 6 Ency. Pl. & Pr. 375; *Beeler* v. *Larned*, 34 Nebraska, 348; *Castile* v. *Ford*, 53 Nebraska, 507.

Mr. James H. McIntosh for defendant in error:

The answer is a sufficient defense. Plaintiff was not the holder of the note and the attorney was not the agent for the maker of the note. Notwithstanding the full faith and credit clause of the Constitution it can always be ascertained in collateral proceedings if the court entering the judgment had jurisdiction to enter it. *Thompson* v. *Whitman*, 18 Wall. 457; *Knowles* v. *Gas Light Co.*, 19 Wall. 58; *Hall* v. *Lanning*, 91 U. S. 160; *Pennoyer* v. *Neff*, 95 U. S. 714; *Cole* v. *Cunningham*, 133 U. S. 107; *Simmons* v. *Saul*, 138 U. S. 439; *Thormann* v. *Frame*, 176 U. S. 356; *Bell* v. *Bell*, 181 U. S. 175.

The warrant of attorney was confined to entering the judgment in favor of the holder of this instrument. Such a war-

rant must be strictly construed. *Spence* v. *Emerine*, 46 Ohio, 433, and cases cited; *Cahn* v. *Lessor*, 72 N. W. Rep. 739; *Morris* v. *Bank*, 67 Texas, 602; *Bank* v. *St. John's*, 5 Hill, 497. As to who is the holder of a note, see 1 Randolph on Com'l Paper, § 14 and note.

As to what are jurisdictional questions, see *Pennoyer* v. *Neff*, 95 U. S. 714; *Griffith* v. *Frazier*, 8 Cranch, 9; *Wise* v. *Withers*, 3 Cranch, 331; *Rose* v. *Himely*, 4 Cranch, 214; *Galbin* v. *Pays*, 18 Wall. 350; *Clark* v. *Clark*, 178 U. S. 186; as to what are *quasi*-jurisdictional questions, see *Des Moines* v. *Iowa*, 123 U. S. 552; *Mickel* v. *Post*, 21 Wall. 398; *Comstock* v. *Crawford*, 3 Wall. 398; *Thompson* v. *Tolme*, 2 Peters, 157; *Reinach* v. *Atl. &c. R. Co.*, 43 Fed. Rep. 83; *Betts* v. *Bagley*, 12 Pick. 572; *Holcombe* v. *Phelps*, 16 Connecticut, 132; *Wright* v. *Douglas*, 10 Barb. 97; *Simmons* v. *Saul*, 138 U. S. 439.

Even if the court erred in its instructions the error was without prejudice; for if the plaintiff's judgment was valid, it was a joint judgment against Wiley and Wiley Construction Company and suit could not be maintained against Wiley alone. A joint judgment cannot be made the basis of a separate suit against one of the judgment debtors. *First National Bank* v. *Hamor*, 63 Fed. Rep. 36; *Watson* v. *Steineu*, 33 Atl. Rep. 4 (R. I.); *Knapp* v. *Abell*, 10 Allen, 485; *Mann* v. *Edward*, 138 Illinois, 19; *Smith* v. *Smith*, 17 Illinois, 481; *Donnelly* v. *Graham*, 77 Pa. St. 274; *Holbrook* v. *Murray*, 5 Wend. 161; *Dark* v. *Goss*, 24 Michigan, 265; *Sheehan* v. *Sims*, 28 Mo. App. 64; *Lawrence* v. *Willoughby*, 1 Minnesota, 65.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action upon a judgment rendered in one of the courts of Ohio, and the question to be considered is whether the final judgment under review gave to the proceedings in the Ohio court such faith and credit as are required by the Constitution and laws of the United States.

The Constitution, Art. IV, § 1, provides that "Full faith

and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The statute enacted in execution of that power, Rev. Stat. § 905, provides for the authentication of the records and judicial proceedings of the several States and Territories and any country subject to the jurisdiction of the United States, and declares that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The Wiley Construction Company, a Massachusetts corporation, and Wiley, the defendant in error, executed and delivered to the National Exchange Bank, the plaintiff in error, a written instrument—being a note with warrant of attorney annexed—dated Tiffin, Ohio, April 26, 1884, in which for value received they jointly and severally promised to pay to that bank, or order, on the first day of October, 1884, at its office in that city, ten thousand dollars with eight per cent interest after maturity. The instrument authorized N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after such obligation became due, waive the issuing and service of process, and confess judgment against the obligors or either of them "in favor of the *holder*" for the amount then appearing to be due, together with the cost of suit; and thereupon to release all errors and writs of errors, and in behalf of the obligors or either of them waive all right to appeal and stay of execution.

On the thirty-first day of July, 1899, nearly fifteen years after the maturity of the note, the National Exchange Bank instituted suit against both obligors in the court of Common Pleas of Seneca County, Ohio—a court of general jurisdiction in that State—to recover the balance due on that obligation, which was alleged to be $5,772.70, with interest from May 9,

1887, at eight per cent. Upon it was credited a payment of $6,311.75 as of May 9, 1887.

It may be here stated that there was no endorsement on the note showing that it had ever been assigned or transferred by the original payee.

With the petition in that suit were filed copies of the paper constituting the note and warrant of attorney. With it was also filed an answer, in which an attorney, assuming, by virtue of the above warrant and not otherwise, to be the attorney of the construction company and of Wiley, confessed judgment against them for the full amount claimed by the bank.

On the very day of the bringing of that suit judgment was entered against the defendants therein for $11,419.68, being the amount of the obligation with interest at eight per cent from May 9, 1887,—the judgment reciting that the attorney who acted under the warrant of attorney, naming him in person, by virtue of that warrant, entered the appearance of the defendants, waived the issuing and service of process, confessed judgment, and released and waived all exceptions, errors and right of appeal.

The present action was by the National Exchange Bank against Wiley on the judgment rendered in the Ohio suit. The defendant disputed the plaintiff's right to recover upon several grounds, one of which was that prior to the institution of the Ohio suit and more than twelve years before the commencement of the present action, the note had been fully discharged, so far as he was concerned, pursuant to an agreement between him and the holder. But on this writ of error we are concerned only with the part of the defense which distinctly raises a Federal question.

The defendant alleged that the warrant of attorney annexed to the note of April 26, 1884, did not authorize a confession of judgment against the obligors except in favor of the "holder;" that so far from the National Exchange Bank being such holder when it brought the Ohio suit, the Tiffin National Bank, as early as March 2, 1885, purchased, received and

became the holder of the obligation, and thereafter remained and still was the holder; that, therefore, the attorney professing to act in behalf of the defendants in the Ohio suit had no authority, in virtue of such warrant of attorney, to represent them in that suit, or to confess judgment in favor of the National Exchange Bank; that the defendant was neither served with process in the Ohio suit nor had any notice thereof; that the Ohio court was entirely without authority or jurisdiction to render judgment against him in favor of the plaintiff bank; and that its authority or jurisdiction could not be upheld consistently with the Fourteenth Amendment of the Constitution of the United States.

The plaintiff insisted that it was the holder of the note when put in suit; further, that the court in Ohio had full power and jurisdiction to render the judgment in question, and that neither personal service of process on nor notice to the obligors was necessary in order to give that court jurisdiction of the parties and subject-matter.

Both at the trial and in the Supreme Court of Nebraska the bank contended that full faith and credit, as required by the Constitution and laws of the United States, would not be given to the proceedings in the Ohio suit if the judgment in its favor was held not to be conclusive in respect of the authority of the Ohio court to render such judgment.

It is unnecessary to set out all the instructions. It is sufficient to say that the jury were, in substance, instructed that the warrant of attorney authorized a confession of judgment in favor of the holder of the note; that it was to be presumed upon the showing made by the record of the Ohio court that it had jurisdiction to render the judgment sued on; and that such presumption continued throughout this case, unless the defendant, by a preponderance of evidence, proved that the plaintiff bank was not, in fact, the holder of the note when put in suit in Ohio. The jury were also instructed that if the plaintiff was found not to be such holder, the verdict should be for the defendant.

The jury's verdict was for the defendant and the judgment thereon was affirmed. Upon the issue as to the ownership of the note at the time it was sued on in Ohio there was, as the Supreme Court of Nebraska held, proof both ways.

Did the Ohio court have jurisdiction to render the judgment in question? It is a settled doctrine, Chief Justice Marshall said in *Rose* v. *Himely*, 4 Cr. 241, 269, that the effect of every judgment must depend upon the power of the court to render that judgment. In determining whether the Ohio court had authority to render the judgment against the obligors in the note, we must look first into the decisions of the highest court of that State.

In *Osborn* v. *Hawley*, 19 Ohio, 130 (1850), the plaintiff declared as endorsee of a promissory note, to which was attached a power of attorney to confess judgment. The report of that case is very meager, but in the course of the opinion the court said: "The power of attorney is not negotiable, and when the legal title to the note is transferred the power of attorney becomes invalid, and no power whatever can be exercised under it, for the benefit of the endorsee; and he holds the note as if no such power had ever been attached to it."

In *Marsden* v. *Soper*, 11 Ohio St. 503 (1860), the plaintiff declared on a note to which was attached a warrant of attorney authorizing a confession of judgment "in favor of any holder." A suit was brought on the note in one of the courts of Ohio by the endorsee thereof, and judgment was confessed under a warrant of attorney annexed to the note. The question was whether the court had jurisdiction of the persons of the defendants so as to authorize a judgment affecting their rights. The Supreme Court of Ohio said: "It will be noticed that the plaintiff in this judgment is not the payee of the note on which judgment is taken, but an endorsee; and that the warrant of attorney under which judgment was confessed purports to authorize such confession 'in favor of any holder of this obligation,' after the same becomes due. But, it was held, in broad and general terms, in the case of *Osborn* v. *Hawley*, 19 Ohio

Rep. 130, that a warrant of attorney to confess judgment, attached to a note, and forming a part of the same instrument, is not negotiable, and when the note is transferred becomes invalid and inoperative. It is true, the report of that case does not inform us whether the warrant of attorney in that case purported to authorize the confession of a judgment in favor of the payee of the note alone, or whether its terms extended, as in this case, to any holder of the note after due. But, however this may have been in that case, we suppose that, if this judgment rested upon the confession under the warrant of attorney alone, it would be very questionable whether the Court of Common Pleas had any rightful jurisdiction of the defendants in the judgment."

In *Cushman* v. *Welsh*, 19 Ohio St. 536, 539, the warrant of attorney authorized a confession of judgment "in favor of the legal holder." The note there in question was payable to order and had not been regularly endorsed to the party who in fact purchased and owned it and in whose name suit was brought. The question in the case was whether the confession under the warrant of attorney authorized judgment in favor of the purchaser. The court said: "Though he might, as the owner of the note in equity, have brought an action thereon, under the provisions of the code, in his own name, against the makers of the note, it does not follow that he could obtain judgment by confession on their warrant of attorney attached to the note. That depends on the extent of the power conferred by the warrant. The attorney can do nothing more than execute the power conferred by his warrant; moreover, 'all authorities of this sort must be strictly pursued.' *Cowie* v. *Allaway*, 8 Durnf. & East, 257. 'Indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.' Story on Agency, sec. 68. Now, the power conferred by the terms of the instrument in this case was, to confess judgment

only 'in favor of the *legal* holder' of the note. The plaintiff below was not the 'legal' holder of the note, for the note had not been endorsed to him. He could become the 'legal holder' of the note only 'by endorsement thereon,' as authorized by the statute. S. & C. Stat. 862; *Avery* v. *Latimer*, 14 Ohio, 542. The waiving of the process and confession of judgment in favor of the *plaintiff* below was not, then, within the authority conferred by the power of attorney. Under the rule of interpretation applicable to such instruments, we must conclude that the jurisdiction of the defendants below, obtained through the warrant of attorney only, and the confession of judgment by means thereof, exceeded the authority conferred by the defendants in their power of attorney, and that the court, therefore, erred in overruling their motion to set aside the judgment, irregularly obtained against them."

In *Watson* v. *Paine*, 25 Ohio St. 340, which was an action upon a judgment based on a warrant of attorney attached to a promissory note, and which authorized any attorney at law to confess judgment in favor of the holder of the note, the point was made that the warrant of attorney did not authorize the waiving of process or an appearance for the defendants in an action brought by an endorsee. The members of the Supreme Court of Ohio were divided in opinion on that point, and it was left undecided. The case went off upon another ground, but McIlvaine, C. J., delivering the judgment of the court, expressed his individual opinion that a power to confess judgment in favor of any holder of the note may be exerted as well in favor of an endorsee as of the payee.

But in *Clements* v. *Hull*, 35 Ohio St. 141, 143, it was held that, under the Code of Civil Procedure, a warrant of attorney authorizing judgment to be confessed in favor of the holder of a note could be executed in favor of the equitable owner and holder, being the real party in interest. The court said: "The scope of the power is not limited in this case as it was in the case of *Cushman* v. *Welsh*, 19 Ohio St. 536, in favor of the *legal* holder only. The authority here given is 'to confess

judgment in favor of the holder of said note,' and we think these words were intended, and should be construed, to embrace any holder who might lawfully prosecute an action on said note, in his own name and for his own use."

The latest case in the Supreme Court of Ohio is *Spence* v. *Emerine*, 46 Ohio St. 433, 439, 440, 441. There the note was payable to a named person or bearer, and the warrant of attorney authorized any attorney to appear for the obligor in any court of record in Ohio, and confess judgment for the amount then due, and to release all errors and the right of appeal. The confession was in favor of one to whom the note had been transferred by delivery merely. The question was as to the power of the court to render the judgment. The Supreme Court of Ohio, after referring to its prior adjudications, said: "Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. But it is an established principle that an authority given by warrant of attorney to confess a judgment against the maker of the note must be clear and explicit and strictly pursued, and we cannot supply any supposed omissions of the parties. *Cushman* v. *Welsh*, 19 Ohio St. 536; *Cowie* v. *Allaway*, 8 T. R. 257; *Henshall* v. *Matthew*, 1 Dowling's Pr. Cas. 217; *Foster* v. *Claggett*, 6 Dowling's Pr. Cas. 524; *The Manufacturers' & Mechanics' Bank of Philadelphia* v. *St. John*, 5 Hill. 497. . . . The power of attorney attached to the note in controversy does not, in express language, authorize a confession of judgment in favor of any one, not even of the payee; but if such authority might be implied as to the payee, we cannot, under the rule of a strict interpretation, extend that implication in favor of the defendant in error to whom the note was transferred by delivery. . . . It will thus be seen that where it has been adjudged by the court that a power of attorney to confess a judgment may be executed in favor of a party other than the payee, it has been in cases where authority was expressly conferred to confess a judgment in favor of a *legal*

holder or *holder* of the note. The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction. In accordance with the views which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on did not authorize a confession of judgment in favor of defendant in error, and there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the Court of Common Pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him."

Looking at the face of the note, the National Exchange Bank insists that, being payee, it was also the holder within the meaning of the warrant of attorney, however strictly construed; that nothing else appearing than the note and warrant a confession of judgment in its favor was in conformity with law and usage in Ohio, as declared by the highest court of that State. We incline to think that that position is justified by the above cases, when carefully considered; and assuming such to be the law as administered in Ohio—which is the view most favorable to the plaintiff in error—the question still remains whether the judgment, when sued on in another State, may be collaterally attacked upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner, of the note? This question must, we think, be answered in the affirmative. It can be so answered without doing violence to the Constitution or the laws of the United States. While the words of the warrant of attorney might be held to embrace any holder, even the equitable owner, who might rightfully prosecute an action on the note in his own name and for his own use, *Clements* v. *Hull*, 35 Ohio St. 141, above cited, yet if it was true, as alleged, that in 1885 the Tiffin National Bank purchased, received and became the owner of the note, then the National Exchange Bank could not thereafter rightfully sue on it in

its name and for its own use. Here, the confession of judgment was in behalf of the payee bank, which was not entitled to sue for its own use or to receive the proceeds, if it sold the note in 1885, and never afterwards became the owner. The words, in the warrant of attorney, "in favor of the holder of this instrument," ought not, as between the National Exchange Bank and the obligors, to be construed as embracing the former after it ceased to be the owner of the note, but, at most, as only authorizing a confession of judgment in favor of the party who had become its real owner. It should not be supposed that the obligors intended, or that the payee bank ever understood them as intending, to authorize a confession of judgment in favor of one who was not entitled, of right, to demand payment from the obligors. That view accords with justice, and, not being inconsistent with the words in the warrant of attorney, it should be adopted.

Byles on Bills says that "*holder* is a general word, applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it." Sharswood's Ed. 66. So in 1 Parsons' Bills and Notes it is said that "by the holder of negotiable paper is meant, in law, the owner of it; for if it be in his possession without title or interest he is, in general, considered only as the agent of the owner." p. 253. So that proof that the payee bank was not the owner of the note when it brought suit in Ohio tended to show that it was not in law the "holder" of the instrument within what must be regarded as the true meaning of the warrant of attorney, and, therefore, that the court was without authority to enter judgment by confession in its favor against the obligor. In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not in any just sense—if his appearance was entered and judgment confessed by one who had, in fact, at the time, no authority to do either; and, consequently, that the court was without jurisdiction to proceed except on legal notice to him or without his appearance in

person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then, such law and usage would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law.

This whole subject was carefully considered in *Thompson* v. *Whitman*, 18 Wall. 457, 463, 469. That was an action of trespass, brought in the Circuit Court of the United States for the Southern District of New York, for taking and carrying away a certain sloop. The defendant, a New Jersey sheriff, had seized the vessel, pursuant, as he claimed, to a statute of New Jersey relating to the raking of clams, and proceeded against it before two justices of Monmouth County, New Jersey, by whom it was condemned and ordered to be sold. Those justices had no jurisdiction, under the statute, to act in the premises, unless the seizure and the offense *both* occurred in that county. The record of the case recited that the offense was committed *and the seizure* made in Monmouth County, and the contention was that the record was conclusive, both as to the jurisdiction of the court and the merits of the case. In that case it was held to be competent for the complaining party to prove collaterally that the vessel was not seized in Monmouth County, and, therefore, that the facts necessary to the exercise of jurisdiction by the New Jersey justices did not exist, although their existence was recited or affirmed in the official record made by them. Speaking by Mr. Justice Bradley, this court adjudged, in the language of Story, that the Constitution "'did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them, as evidence;'" and, upon an elaborate review of previous cases, that "the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral

proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and law of 1790 [Rev. Stat. § 905 *et seq.*], and notwithstanding the averments contained in the record of the judgment itself." There has been no departure in the decisions of this court from the doctrines announced in *Thompson* v. *Whitman*, whether the question related to courts of general or to courts of limited or special jurisdiction. It has been repeatedly affirmed. *Knowles* v. *Gaslight & Coke Co.*, 19 Wall. 58, 61; *Hall* v. *Lanning*, 91 U. S. 160, 165; *Pennoyer* v. *Neff*, 95 U. S. 714, 732; *Cole* v. *Cunningham*, 133 U. S. 107, 112; *Grover & Baker Machine Co.* v. *Radcliffe*, 137 U. S. 287, 295; *Thormann* v. *Frame*, 176 U. S. 350, 356; *Bell* v. *Bell*, 181 U. S. 175, 178; *Andrews* v. *Andrews*, 188 U. S. 14, 34. The general jurisdiction of the Ohio court undoubtedly embraced such a cause of action as was set forth in the suit on the note. But we are of opinion that that court had no authority or jurisdiction to render judgment against the obligors, if the National Exchange Bank had in fact sold the note and ceased before the commencement of that suit to own it or to be entitled to receive the proceeds to its own use. It was, in such case, in legal effect, a personal judgment without service of process upon the defendants and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot he held to have authorized such a confession.

Perceiving no error of law in the record the judgment must be affirmed.

It is so ordered.

KAUFMAN v. TREDWAY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 17. Argued October 24, 1904.—Decided November 28, 1904.

In an action by a trustee in bankruptcy to recover a preferential payment the insolvency of the bankrupt at the time of payment and whether the payee had reasonable cause to believe that a preference was intended are questions of fact determined by the verdict of the jury.

The commencement of an action by a trustee in bankruptcy to recover a preferential payment is a demand and he is entitled to interest from that time.

One who after receiving a preferential payment from the bankrupt, loans him money in good faith without security and which actually passes into the bankrupt's possession, is entitled to have the amount loaned set off from the amount recoverable by the trustee.

On August 20, 1898, Gustave Kaufman filed his petition in bankruptcy and was subsequently adjudged and decreed a bankrupt. W. T. Tredway was appointed trustee of his estate. On July 24, 1899, the trustee commenced suit in the Court of Common Pleas, No. 3, of Allegheny County, Pennsylvania, to recover from Joseph S. Kaufman the sum of $4,086.64, charged to have been given, on August 4, 1898, by the bankrupt to the defendant as a preference. The trial resulted in a judgment in favor of the trustee for $1,086.64 and interest. This judgment was affirmed on appeal by the Superior Court. An application for a further appeal to the Supreme Court of the State was denied, and thereupon this writ of error was sued out to review the judgment of the Superior Court. Section 60 of the bankrupt act is as follows:

"Sec. 60. *a*. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the

enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"*b.* If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

"*c.* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." 30 Stat. 544, 562, c. 541, July 1, 1898.

Mr. Joseph A. Langfitt and *Mr. William Kaufman* for plaintiff in error:

The payment of $1,086.64 made August 4, 1898, was not a voidable preference within § 60 of the bankrupt act.

As to the terms "insolvent" and "reasonable cause to believe" and proof necessary to establish same, see *Perry* v. *Booth*, 80 N. Y. Supp. 706; *S. C.*, 67 App. Div. 235; *Sirrine* v. *Stover-Marshall Co.*, 64 S. Car. 457, and cases cited; *Harmon* v. *Feldheim*, 131 Michigan, 470; *Congleton* v. *Schreihofer*, 54 Atl. Rep. (N. J.) 144; *Netter* v. *Refowich*, 12 Dist. Rep. (Pa.) 196.

If the payment of $1,086.64 was a voidable preference, then plaintiff is entitled to a set-off of $767 returned by him to the bankrupt four days afterwards. No interest should have been allowed. Collier on Bankruptcy, 3d ed., 369.

Mr. H. L. Castle, with whom *Mr. William A. Stone* was on the brief, for defendant in error.

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

Whether the bankrupt was insolvent on August 4, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court. *Hedrick* v. *A., T. & S. F. R. R. Co.*, 167 U. S. 673, 677; *Bement* v. *National Harrow Company*, 186 U. S. 70, 83; *Jenkins* v. *Neff*, 186 U. S. 230, and cases cited in opinions. It is suggested that the trial court erred in admitting testimony of transactions between the brothers some six or seven months prior to the payment by the bankrupt to the defendant; that such transactions were too remote from the time of the preference to throw light on the question of knowledge. We think that the testimony, whether of much or little value, was competent, and that it was not error for the court to admit it. *Clune* v. *United States*, 159 U. S. 590, 592.

We see no reason to doubt the propriety of allowing interest on the claim from the commencement of the action. Such commencement is itself a demand.

The principal contention, however, is that the state court erred in ruling that the sum of $767, loaned by the defendant to the bankrupt on August 8, could not be considered as a set-off. It appeared that four days after he had received the money paid to him in preference the defendant handed to the bankrupt $767, on the latter's request for money to pay his employés. There was no testimony tending to show what became of this money, whether it was used in paying employés, or whether the payments, if made, were for wages earned within three months before the date of the commencement of proceedings in bankruptcy. All that appeared was the fact of the loan and the expressed purpose thereof. Under these circumstances the court instructed the jury that the defendant had not established his claim to a set-off, as author-

ized by paragraph "*c*" of section 60. This presents a distinct question of law.

The trial court, and its views were approved by the Superior Court, held that the statute required not merely that the creditor in good faith gave the debtor credit without security and that the money or property in fact passed to the debtor and became a part of his estate, but also that it remained such until the time of the bankruptcy and was transferred to the trustee, or at least that it was used in payment of preferred debts. In its opinion, on a motion for a new trial, it said:

"Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee. The most that defendant can ask—and this we would probably hold—is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off."

It will be noticed that the words used in paragraph "*c*" are not "the bankrupt's estate," but "the debtor's estate." "Debtor" is also found in the preceding clause as descriptive of the one to whom the credit is given. While the same person is both debtor and bankrupt, first debtor and then bankrupt, the use of the former term is suggestive of the time of the transaction as well as the status of the recipient of the credit. The paragraph further provides that "the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set-off." It is the non-payment and not the fact that the property remains still a part of the debtor's estate which entitles to a set-off. It would seem that if Congress intended that which the trial court held to be the meaning of the statute it would have said "which becomes a part of the bankrupt's estate" or "which becomes and remains a part of the debtor's estate until the adjudication in bankruptcy."

Further, Congress provided that the creditor act in good faith. Thus it excluded any arrangement by which the cred-

itor, seeking to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with some other wrongful purpose. It meant that the creditor should not act in such a way as to intentionally defeat the bankrupt act, but should let the debtor have the money or property for some honest purpose. Requiring that it should become a part of the debtor's estate excluded cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instructions to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property.

Still again, to require that the creditor should not only in good faith have extended the credit and that the money or property should have passed into and become a part of the debtor's estate, but that he should also show the actual disposition thereof made by the debtor would in many cases practically deny the creditor the benefit of a credit which he had extended in good faith. Suppose three months and a half before bankruptcy the creditor, in good faith, sells and delivers a bill of goods to the debtor, a merchant, how difficult it would be to show what had become of each particular article on that bill, or what was done with the money received for those that had been sold; and the same when, as in this case, money was delivered to the debtor. If Congress had intended to require such proof it would seem that it would have used language more definite and certain. If the creditor has acted in good faith, extended credit without security, and the money or property has actually passed into the debtor's possession, why should anything more be required? Has the creditor not been already sufficiently punished when, having received money or property in payment of a just debt, he is compelled to refund that to the trustee because he believed, or had reason to believe, that the debtor, in paying that debt, preferred him?

Why should he be punished in addition by the loss of the benefit of a credit given in good faith?

We are of opinion that the state court erred in its construction of the statute and in peremptorily denying to the creditor the benefit of the credit. For these reasons the judgment of the Superior Court is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

FAYERWEATHER *v.* RITCH.

REYNOLDS *v.* RITCH.

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

Nos. 157, 158. Argued October 12, 13, 1904.—Decided November 28, 1904.

Where the appellant's contention is that the Circuit Court, by giving unwarranted effect to a judgment of a state court and accepting that judgment, which contained no finding of one of the fundamental facts as a conclusive determination of that fact, deprived him of his property without due process of law, and that contention is made in good faith, and under the circumstances, upon reasonable grounds, the application of the Constitution is involved and this court has jurisdiction of a direct appeal from the Circuit Court.

Where it appears that a question was distinctly put in issue and the parties presented, or had an opportunity to present, their evidence, and the question was decided by a court of competent jurisdiction, private right and public welfare both demand that the question so adjudicated shall, except in direct proceedings for review be considered as finally settled and conclusive upon the parties.

The ordinary rule in cases tried by the court without a jury is that a judgment entered without any special findings is, like a general verdict in a jury case, tantamount to a finding in favor of the successful party of all the facts necessary to sustain the judgment.

While in some cases on a plea of *res judicata* evidence *aliunde* the record is proper to show what particular questions were tried and determined

in the former case, it is not competent to introduce the testimony of the trial judge as to the matters then considered and passed on by him.

Where in an action in a court of competent jurisdiction the validity of certain releases is put in issue by the pleadings and no judgment can properly be rendered without determining that question, and judgment is rendered against the parties executing the releases and who were before the trial court, the judgment in effect determines that the releases are valid and the question of their validity is *res judicata* notwithstanding no special findings in regard thereto were made by the trial judge.

THE controlling question in these cases arises on pleas of *res judicata*. The essential facts are as follows:

On October 6, 1884, Daniel B. Fayerweather, a citizen and resident of the State of New York, made a will, by the ninth article of which he gave to twenty colleges bequests amounting in the aggregate to $2,100,000. By the tenth article he gave the residuary estate to his executors, as trustees, directing them to divide it equally among the twenty colleges named in the ninth article. On the same day he signed the following statement:

"This certifies that I have executed my will of this date, having been advised by my counsel of the provision and restrictions of the law of this State relative to benevolent corporations. I trust my heirs will permit the provision of this my will to be carried into effect."

At that time by chap. 360, Laws of 1860 of the State of New York, a testator having husband, wife, child or parent was forbidden to give to literary or benevolent institutions more than one-half of his estate. On December 13, 1884, the testator made a first codicil to his will, by which he revoked the tenth article and gave the residuary of his estate absolutely to his executors. In other respects the will was ratified. At or about the same time a paper, bearing date December 11, 1884, headed "Private Memorandum," was signed by him, which reads as follows:

"I have made Messrs. Bulkley and Ritch my residuary legatees in the confidence that thereby my intentions as expressed in my will shall be carried into effect, and without

litigations on the part of any person or persons interested. In case of my death I trust that they will take such steps, by will or otherwise, as will protect my estate against the contingency of the death of either before my estate is settled and distributed."

By subsequent codicils minor changes were made, and Henry B. Vaughan was added as executor. The testator died on November 15, 1890, leaving a widow and three nieces, his only heirs at law and next of kin. On the day of his death he executed a codicil, which was mainly a confirmation of the provisions of the will and prior codicils.

Mr. Fayerweather's estate amounted at the date of the will to about three millions of dollars, and at the time of his death to from five to six millions of dollars, mainly in personal property.

While by articles in the will, prior to the ninth, he had made provision for his widow and also bequests to his three nieces, yet obviously his purpose was to give the bulk of his estate to the several colleges named, and to avoid the restraining effect of the New York statute. After the death of Mr. Fayerweather the will and codicils were propounded for probate, to which the widow and nieces filed objections. A hearing was had before the Surrogate, and on February 25, 1891, he entered an order admitting the will to probate, and leaving the contest of the codicils to continue. On February 24, 1891, the three executors, residuary legatees, made a deed of gift, which reads:

"Know all men by these presents, That we, Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, residuary devisees and legatees under the will, meaning thereby the original will and the subsequent codicils of Daniel B. Fayerweather, late of the city of New York, deceased, prompted by our determination that we will not retain for our own use any part of the residuary estate left to us by his will, and by the desire to make such disposition of his said residuary estate as in our judgment will best honor his memory, do dispose of so much

of the same as shall remain after the payment of all lawful fees, expenses and charges as follows:

"First, We reserve the power to make, and we retain the right to assent to any enlargement of the fifteen thousand dollars a year by the will left to Mrs. Fayerweather, which she may desire.

"Second, We reserve the power to make, and we retain the right to assent to any enlargement of the provisions made by the will for Mrs. Mary W. Achter and Mrs. Emma S. Drury, in case we shall be satisfied that such enlargement would not be against the wishes of Mr. Fayerweather.

"Third, We give to Lucy J. Beardsley, wife of Morris B. Beardsley, $100,000.

"We do this because of Mr. Fayerweather's letter written to Mr. Vaughan and Mr. F. B. Myrick. If accepted, this gift is in discharge of any claim under that letter."

Then, after making gifts of several sums to individuals, hospitals and colleges (some being those named in the will of Mr. Fayerweather, and others not so mentioned), the deed closes with these words:

"We execute this instrument, recognizing that there is pending a contest in proceedings for the probate of Mr. Fayerweather's will, and recognizing further that if such contest shall not prevail, a question may be made about our legal rights as devisees and legatees. . . . Our object is each for himself to give away whatever may come to us as residuary devisees and legatees under Mr. Fayerweather's will."

Subsequently, and on March 5, the executors, as residuary legatees, entered into an agreement with the contestants by which the amounts coming to them were increased, and thereupon the contestants executed the following paper:

"In consideration of the instrument of even date herewith executed by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, residuary devisees and legatees under the will, meaning thereby the original will and subsequent codicils of Daniel B. Fayerweather, . . . we, the undersigned, being

the widow and all of the next of kin of the said Daniel B. Fayerweather, do hereby severally agree for ourselves, our, and each of our heirs, executors and administrators, as follows:

"1. All objections to the probate of the will and four codicils of the late Daniel B. Fayerweather, offered for probate to the Surrogate of the county of New York, are hereby withdrawn, and we consent to the probate of the same.

"2. No suit shall hereafter be brought for the construction of the said will and codicils or either of them, or to set aside the will and codicils or either of them, and we further agree not to make any claim upon the said Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan or either of them, or against their heirs or personal representatives, or either against them, the said Bulkley, Ritch and Vaughan, as executors, or as residuary legatees, other than for amounts left to us by the will and codicils aforesaid, and the deed of gift executed by the said Bulkley, Ritch and Vaughan on the 24th day of February, 1891, and the instrument dated on the 5th day of March, 1891.

"3. Upon the payment to the undersigned, respectively, of the several amounts mentioned in said deed of gift and said instrument, we will severally execute a general release of all claims, except those arising under the will and codicils, both to the executors and to the donees mentioned in the deed of gift, dated on the 24th day of February, 1891, and to the said Bulkley, Ritch and Vaughan individually."

On March 24, 1891, the codicils were admitted to probate on written consent signed by the attorneys for the parties to the contest. On June 12, 1891, the widow executed the following release:

"Know ye, that I, Lucy Fayerweather, widow of Daniel B. Fayerweather, of the City of New York, for and in consideration of the sum of two hundred and twenty-five thousand dollars, lawful money of the United States, to me in hand paid

by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors and trustees under the last will and testament of Daniel B. Fayerweather, deceased, and individually, and as the representatives of the persons or corporations hereinafter named, forming a class known as donees, under the deed of gift executed by the said Bulkley, Ritch and Vaughan, on February 24th, 1891, which sum is in compromise and full settlement of any and all contests on my part of the will of said Daniel B. Fayerweather, deceased, or concerning his estate, have remised, released and forever discharged, and by these presents do, for myself and for my heirs, administrators and executors, remise, release and discharge, the said Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors and trustees aforesaid, as individuals and as representatives of the said donees constituting a class, and also the said donees, to wit, the persons and corporations mentioned in a certain deed of gift duly delivered, made by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan on the 24th day of February, 1891, which deed of gift was introduced in evidence in the probate proceedings of the last will and testament of Daniel B. Fayerweather, deceased, and marked 'Exhibit No. 7, contestants,' and which said deed of gift is hereby made a part of this release, in order that the persons constituting said class of donees and to whom this release runs may be more fully known, and also the legal successors, assigns, heirs, executors and administrators of all the aforesaid persons and corporations, of and from and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever in law or in equity, which against the said persons or corporations, or any of them, I ever had or now have, or which I or my heirs, executors or administrators hereafter shall, can or may have for, upon, or by reason of any matter, cause or thing whatsoever, except my claim for the annuity given me by the will and codicils thereto of said Daniel B. Fayerweather, deceased, and also my claim for the increased annuity men-

tioned in the agreement dated March 5th, 1891, and made pursuant to the deed of gift above referred to."

Releases similar in form were executed by the other three contestants, the nieces and next of kin.

In January, 1893, five of the colleges named in article 9 of the will brought suit in the Supreme Court of the State of New York against the executors of Mr. Fayerweather's will, the executors of the will of Mrs. Fayerweather (who had died since the release), the nieces, the donees in the deed of gift, and all the colleges not joined as plaintiffs. The contention of the plaintiffs was that the codicil which gave the residue of the estate to the three executors absolutely was made in pursuance of an agreement that they should take that residue in trust for the colleges mentioned in the will and distribute it among them. The complaint set forth the will and codicils, their admission to probate and the issue of letters testamentary, and averred that the value of the estate left by the testator was upwards of $6,000,000 and the residuary estate more than $3,000,000. It alleged that the intention of the testator was to devote the principal part of his estate to the several institutions mentioned, and that the proceedings taken by him were under the advice of counsel and for the purpose of carrying into effect that intention, and upon a promise and assurance from the executors that they would dispose of the residuary estate accordingly; it averred also the fact of a contest in respect to the probate of the will and codicils, a settlement with the contestants in consideration of the payment of $310,000 and the execution of releases by them. The prayer was that it be adjudged and decreed that the residuary estate was devised by the testator and received by the executors in trust for the purposes set forth, that they be required to apply that estate to those purposes, and, also, "that the ultimate rights of the plaintiffs as between them and each of them and every of the other defendants herein be determined by the judgment in this action in accordance with the allegations of this complaint and the prayer hereinbefore contained."

The donees in the deed of gift answered, asserting the validity of that deed, and praying that its provisions be carried out.

The widow's executors and the nieces also appeared and filed an answer and counterclaim, in which they alleged that the agreement which the suit was brought to enforce was a secret trust to evade the New York statute by giving more than half to the several institutions, that the releases were obtained from them by concealment and fraud, and therefore of no obligation; and prayed for judgment, among other things—

"3d. That it be adjudged that the said settlements and releases made with or obtained from the said Lucy Fayerweather, Mary W. Achter and Emma S. Fayerweather, respectively, were and are each fraudulent and void, and that the same be set aside, upon such terms as may be just and equitable, and that the sums paid for the same to said releasors or their attorneys, respectively, with the interest thereon, including the increased payments to said Lucy Fayerweather on her annuity, be charged against or allowed upon the sums payable to them respectively under the judgment herein, or be otherwise provided or accounted for as may be according to equity.

"4th. That it be adjudged that the said deed of gift, dated February 24th, 1890 (Exhibit F), was and is fraudulent and void, and that the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan be enjoined and restrained from further disturbing the said residuary estate, or any part thereof, under the same, except to continue the payment of the said annuity to said Anner Amelia Reynolds, as aforesaid.

"5th. That the said defendants Ritch, Bulkley and Vaughan may be required to account for the moneys and property received by them from the estate of the said Daniel B. Fayerweather under said last will and testament and codicils or otherwise, and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties to this action according to their several and re-

spective rights thereto, as the same may be adjudged in this action.

"6th. That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief therein.

"7th. That these defendants may have such other and further relief herein as may be just and equitable, with their costs herein, to be paid as the court may direct."

The decree of the Supreme Court at special term, entered on December 28, 1894, adjudged and decreed that the residuary estate passed to the executors in trust for the colleges named in the ninth paragraph of the will; that the executors and trustees be restrained and enjoined from distributing the residuary estate, or any part thereof under the deed of gift, and that the plaintiffs and certain of the defendants (including therein the executors of the will of Mrs. Fayerweather and two of the nieces) recover from the trustees their costs, together with extra allowances to be paid out of the trust funds. There was no formal finding of facts and no mention made in the decree of the specific claim of the executors of Mrs. Fayerweather's will and the nieces that the releases were fraudulently obtained. An appeal was taken by the defendants to the general term of the Supreme Court, which on December 18, 1895, affirmed the judgment. 91 Hun, 509. A further appeal was taken to the Court of Appeals, which on January 19, 1897, affirmed the judgment of the general term. 151 N. Y. 282. On January 28, 1897, a motion was made in the Court of Appeals to amend the remittitur so as to direct the Justice of the Supreme Court, before whom the action was tried at special term, to consider the evidence given before him at the trial concerning the releases and to determine whether the said releases were valid and binding or invalid and void, which motion was on March 9, 1897, denied.

After these proceedings in the state court two of the nieces

and next of kin, being citizens of the State of Iowa, instituted this suit in the Circuit Court of the United States, making defendants substantially all the parties to the suit in the state court, the one or two omissions in no way affecting the question before us. Subsequently the remaining executor, one having resigned, of the will of Mrs. Fayerweather filed a cross bill, the allegations and the relief asked being similar to those in the original bill.

These bills—in addition to setting forth the will and codicils executed by Mr. Fayerweather, the probate proceedings and the releases by the widow and nieces, and alleging that these letters were fraudulently obtained and not binding—averred the bringing of the suit hereinbefore referred to in the Supreme Court of the State by the five colleges, annexing copies of the pleadings, and alleged that "thereupon the issues so joined, as well as others duly raised by the answers of the several defendants, came on to be tried before said court, and these complainants gave evidence tending to prove the allegations in their said answer and all of said allegations, and thereupon it became and was the duty of said court to adjudge and determine whether the releases therein described were invalid, and whether these complainants were entitled to the affirmative relief prayed in respect thereto;" and further, that the defendants—

"Confederating and combining together and between themselves to prevent the entry of any judgment upon an actual determination of the invalidity of said releases so in issue, requested and induced the court to hold and decide that the right of the respective parties to said property and residuary estate did not require any consideration or decision of said issues, and said court thereupon made and rendered its decision without considering, passing upon or including in judgment the said issues, and omitted to decide upon these complainants' right to the affirmative relief by said answer prayed in respect to said releases.

"And thereupon there was filed and entered in said action

a decision and judgment, a copy of which is hereto annexed, which complainants pray may be referred to and taken as part of this bill as if the same were herein set forth at length.

"Thereupon by appeals taken from said judgment, in which appeals these complainants were respondents as well as appellants, said judgment was reviewed by the general term of said Supreme Court, sitting as a court for the correction of errors, and not exercising any original jurisdiction, and thereupon said court held and determined that the right of the respective parties to said property and residuary estate did require the consideration and decision of said issues, and thereupon, being duly informed by the record that said issues had not been in fact considered, passed upon or included in said judgment, it became and was the duty of said court, pursuant to due process of law, the law of the land and the provisions of the Constitutions of the State of New York and of the United States, to require and order that said issues should be in fact considered, passed upon and included in judgment by the trial court, and until that should be done said court could not duly adjudge or determine whether any error had been committed in such determination upon said issues.

"Nevertheless said court at said general term did not so require or order, but by various fictions of law imputed to said trial term and court below that it had determined said issues and had decided in favor of the plaintiffs in said action upon such determination, contrary to the truth and fact, and thereupon pretended to adjudge and determine, as such court for the correction of errors, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases to render such imputed determination of said trial court erroneous as matter of law, but that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding.

"It was not competent for said general term to have exercised an original jurisdiction and to have adjudged said issues,

and thereupon to have modified said judgment so as to include the actual determination thereof; and said general term did not exercise such power, but confined its action wholly to the consideration of errors in the record.

"Thereupon said judgment was by appeals taken from the judgment of affirmance so rendered, in which appeals these complainants were respondents as well as appellants, and reviewed by the Court of Appeals of the State of New York.

"Said court determined that these complainants had no standing to be heard or to have their rights determined by said Court of Appeals, because the limitations imposed by statute upon the jurisdiction of said court precluded any inquiry into the facts, the proof of the merits of the said issues, but that said court was bound by the formal record procured as aforesaid, and by the fictions thereby adjudged as aforesaid, and had no power to review the same.

"During the pendency of the appeals aforesaid the control of the several courts below over said action and the trial thereof and the correction of any injustice arising as aforesaid was suspended, and upon the affirmance of said judgment of affirmance, by the statutes of the State of New York, any correction of the injustice arising as aforesaid was placed beyond the power of any court of said State, except as the Court of Appeals should, by its remittitur, confer power upon said subordinate courts to entertain and try the said issues.

"Thereupon these complainants duly made application to said Court of Appeals so to frame its said remittitur as to permit said subordinate courts to entertain and try the said issues, which application said court denied."

To these bills the defendants filed pleas of *res judicata*, claiming that the controversy between the parties was finally settled by the decision of the state court. These pleas were accompanied by an answer denying the allegations of fraud. The Circuit Court sustained the pleas and dismissed the bill and cross bill on the ground that the cause of action set forth

in them was barred by the prior judgment of the state court. From this decree of dismissal the plaintiffs appealed directly to this court.

Mr. Roger M. Sherman for appellant in No. 157 and *Mr. William Blaikie* for appellant in No. 158. *Mr. Charles Andrews* submitted a brief for appellants in Nos. 157 and 158.

This court has juridsiction on direct appeal. The appellants have not had due process of law. *United States* v. *Throckmorton*, 98 U. S. 61; *Hovey* v. *Elliott*, 167 U. S. 446. The question of whether the releases were fraudulent was never considered by the trial judge in the state court. A question not considered is not settled by the decision. *Hagar* v. *Reclamation District*, 111 U. S. 708; *State* v. *Rusk*, 23 Wisconsin, 643; *Starr* v. *Stark*, 2 Sawyer, 641.

Fundamental rights cannot be taken away without due process of law. *Barney* v. *New York*, distinguished, and see *Holden* v. *Hardy*, 169 U. S. 389; *Logan* v. *United States*, 144 U. S. 288; *Caldwell* v. *Texas*, 137 U. S. 697; *Hurtado* v. *California*, 110 U. S. 535; *Campbell* v. *Evans*, 45 N. Y. 358; *Taylor* v. *Porter*, 4 Hill, 140; *Wynehawer* v. *People*, 31 Connecticut, 328; *People* v. *O'Brien et al.*, 111 N. Y. 38; *Dash* v. *Van Vleeck*, 7 Johns. 427; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 325; *Boyd* v. *United States*, 116 U. S. 635; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 695; *Walker* v. *Sauvinet*, 92 U. S. 92; *Allen* v. *Georgia*, 166 U. S. 140; *Mo. Pac. Ry.* v. *Nebraska*, 164 U. S. 417; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 231; *Scott* v. *McNeal*, 154 U. S. 34; *Davidson* v. *New Orleans*, 96 U. S. 97.

There are private rights beyond the control of the State in every free government. *Loan Assn.* v. *Topeka*, 20 Wall. 603. A State has control of the procedure in its courts but cannot deprive citizens of fundamental rights. *Brown* v. *New Jersey*, 175 U. S. 175; *Bertholf* v. *O'Reilly*, 74 N. Y. 515; *West* v. *Louisiana*, 194 U. S. 258. The cases must be disposed of

according to law. The Circuit Court was free to decide this case upon the merits according to its own convictions. Comity deserves respect but it is not law. *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 489. The interlocutory decision of the Circuit Court of Appeals reversing the injunction order was not final and has not the weight of a decision of the case and is not *res judicata* or controlling at final judgment. *Keystone Iron Co.* v. *Martin*, 132 U. S. 93; 1 Freeman on Judgments, 4th ed., § 251; Pothier on Obligations, Pt. 4, c. 3, § 3, art. 1; *Webb* v. *Buckalew*, 82 N. Y. 559; *Snow* v. *Sargent*, 106 Fed. Rep. 232; High on Injunctions, 3d ed., § 5; *Andred* v. *Redfield*, 12 Blatchf. 425; *California Fig Syrup Co.* v. *Putnam*, 66 Fed. Rep. 754; *McLure* v. *Sherman*, 70 Fed. Rep. 90.

The Circuit Court of Appeals has never passed on the questions of *res judicata* and due process of law now before this court. The decision in *Trustees of Amherst College* v. *Ritch* is not *res judicata*. The record shows that Judge Truax who tried the case in the first instance did not consider the question of the validity of the releases, but decided that the releasors had nothing to release. The question here is the validity of the releases—hence the state court decision is not *res judicata*. Casparsz on Estoppel, 342; *Fifield* v. *Edwards*, 39 Michigan, 264; *State* v. *Rusk*, 23 Wisconsin, 643; *Russell* v. *Place*, 94 U. S. 608; *Packing Co.* v. *Sickles*, 5 Wall. 580; *Lantern* v. *Meyrose*, 27 Fed. Rep. 213; *Hooker* v. *Hubbard*, 102 Massachusetts, 245; *Aiken* v. *Peck*, 22 Vermont, 260.

As the state court judgment was not responsive to the issues of the complaint it is upon that ground not a bar. *Arnold* v. *Angell*, 62 N. Y. 511; *Romeyn* v. *Sickles*, 108 N. Y. 652; *Day* v. *New Lots*, 107 N. Y. 148; *Southwick* v. *Bank*, 61 How. Pr. 170; *Neudecker* v. *Kohlberg*, 81 N. Y. 301; *Stevens* v. *Mayor*, 84 N. Y. 305; *Bradley* v. *Aldrich*, 40 N. Y. 504; *Graham* v. *Read*, 57 N. Y. 683; *Reynolds* v. *Stockton*, 140 U. S. 254; *Crockett* v. *Lee*, 7 Wheat. 525.

The short form decision of Judge Truax had the same effect as a general verdict, as such it is not conclusive as to facts not proved or considered. *Bomeisler* v. *Forster*, 154 N. Y. 236; *Dickenson* v. *Hayes*, 31 Connecticut, 423; *Hungerford's Appeal*, 41 Connecticut, 327; *Sawyer* v. *Woodbury*, 7 Gray, 499; *Hooker* v. *Hubbard*, 102 Massachusetts, 245; *Foster* v. *The Richard Busteed*, 100 Massachusetts, 411; *Young* v. *Pritchard*, 75 Maine, 518; *Ward* v. *Boyce*, 152 N. Y. 203; *Hibshman* v. *Dubleban*, 4 Watts, 190; *Forcey's Appeal*, 106 Pa. St. 515; *Woodgate* v. *Fleet*, 44 N. Y. 13; *People* v. *Johnson*, 38 N. Y. 63.

The success of the colleges in excluding all consideration of the releases by Judge Truax estops them now from asserting that the question of the releases is *res judicata*. *Hovey* v. *Elliott*, 167 U. S. 414, 443. This is estoppel by conduct. Bigelow, 5th ed., 54; *Davis* v. *Wakelee*, 156 U. S. 389; *Davis* v. *Cromwell*, 68 Fed. Rep. 525. The issue as to the releases was decided only by the General Term or Appellate Division upon exceptions to a general decision. This is by a court unknown to the Constitution for the trial of causes. See the powers of the Appellate Division, *Benedict* v. *Arnoux*, 154 N. Y. 726; *Snyder* v. *Seaman*, 157 N. Y. 452; Story on Const. § 1761; Elliott's App. Pro. §§ 16, 17. This makes the plea of *res judicata* bad on its face. 2 Dan. Ch. Pr. 103; *Emmott* v. *Mitchell*, 14 Sim. 432.

The decision of Judge Truax did not show that this issue was decided. *Bomeisler* v. *Forster*, 154 N. Y. 237; *Galle* v. *Tode*, 148 N. Y. 277.

The issue must be same or the question is not *res judicata*. So in will cases. *Gaines* v. *Hennen*, 24 How. 553; *Burt* v. *Steinburger*, 4 Cowen, 563. No power exists in the appellate courts to find facts not found by the trial court. A judgment affirmed on facts not found by the trial court is not due process of law. *Truesdale* v. *Burke*, 145 N. Y. 616, 617; *Smith* v. *Platt*, 96 N. Y. 637; *Rodgers* v. *Clement*, 162 N. Y. 427; *Iselin* v. *Starin*, 144 N. Y. 460; *Thomas* v. *N. Y. Life Ins. Co.*, 99 N. Y. 250; *Ehrichs* v. *De Mill*, 75 N. Y. 370; *Whitehead* v.

Kennedy, 69 N. Y. 462; *Foot* v. *Ætna Life Ins. Co.*, 61 N. Y. 578; *Griffin* v. *Maynard*, 17 N. Y. 28.

Mr. Elihu Root, with whom *Mr. James L. Bishop*, *Mr. William Forse Scott*, *Mr. William Ford Upson*, *Mr. John McL. Nash*, *Mr. C. N. Bovee*, *Mr. Thomas H. Hubbard*, *Mr. Stewart L. Woodford*, *Mr. Horace Russell*, *Mr. Henry L. Stimson*, *Mr. Alfred W. Kiddle*, *Mr. Seth Sprague Terry*, *Mr. George G. Reynolds*, *Mr. Henry B. Twombly*, *Mr. Haley Fiske* and *Mr. Henry Stoddard* were on the brief, for various colleges, appellees.

Mr. John E. Parsons for appellees, Bulkley and Vaughan, and *Mr. C. N. Bovee* for appellees, Ritch and Marietta College, submitted a separate brief.

Mr. Thomas H. Hubbard submitted a separate brief for appellee, President and Trustees of Bowdoin College.

This court is without jurisdiction on direct appeal. 26 Stat. 826.

The jurisdiction of the court below was not in issue or if it was it was decided in appellants' favor. *United States* v. *Jahn*, 155 U. S. 109; *Anglo-Am. Prov. Co.* v. *Davis Provision Co.*, 191 U. S. 376. No question of jurisdiction was certified to this court. *Filhiol* v. *Torney*, 194 U. S. 356.

The jurisdiction of the Circuit Court as to its Federal jurisdiction was not in issue, but the question was merely one as to the equity powers of the court. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523; *Blythe* v. *Hinckley*, 173 U. S. 501, 506; *Huntington* v. *Laidley*, 176 U. S. 668, 679. And see *Chappell* v. *United States*, 160 U. S. 499; *Van Wagenen* v. *Sewell*, 160 U. S. 369, as necessity for certification of question.

The jurisdiction of the Circuit Court was not in issue in the court below. The decision of the court did not rest upon the ground that the Circuit Court as a Federal court did not have

jurisdiction to hear and determine the cause; on the contrary, the court assumed jurisdiction in giving effect to the judgment of the state court in *Amherst* v. *Ritch*. The Judiciary Act of March 3, 1891, 26 U. S. Stat. c. 826; *Mex. Cent. Railway Co.* v. *Eckman*, 187 U. S. 429; *O'Niel* v. *United States*, 190 U. S. 36; *Blythe* v. *Hinckley*, 173 U. S. 501; *Bache* v. *Hunt*, 193 U. S. 523; *United States* v. *Rider*, 163 U. S. 132; *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Blythe*, 172 U. S. 644; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Huntington* v. *Laidley*, 176 U. S. 668; *Arkansas* v. *Schlierholz*, 179 U. S. 598; *Shields* v. *Coleman*, 157 U. S. 177; *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460; *Robinson* v. *Caldwell*, 165 U. S. 359; *Filhiol* v. *Torney*, 194 U. S. 356; *Barney* v. *New York*, 193 U. S. 430; *West* v. *Louisiana*, 194 U. S. 258. See *Chappell* v. *United States*, 160 U. S. 499; *Van Waggenen* v. *Sewell*, 160 U. S. 369, as to necessity for certificate.

This suit is not one which involves the construction or application of the Constitution of the United States, within the meaning of the Judiciary Act of March 3, 1891, authorizing the taking of appeals or writs of error in such cases from District or Circuit Courts of the United States direct to the Supreme Court. *Cosmopolitan Mining Company* v. *Walsh*, 193 U. S. 460; *Treat Mfg. Co.* v. *Standard S. & I. Co.*, 157 U. S. 674; *Sloan* v. *United States*, 193 U. S. 614, 620; *Lambert* v. *Barett*, 157 U. S. 697; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Weber* v. *Rogan*, 188 U. S. 10; *Wilson* v. *North Carolina*, 169 U. S. 586; *Carey* v. *Houston & Tex. Cent. R. R. Co.*, 150 U. S. 170; *N. O. Water Works Co.* v. *Louisiana*, 185 U. S. 336; *Forsyth* v. *Vehemeyer*, 177 U. S. 177; *Iowa Cent. R. R. Co.* v. *Iowa*, 160 U. S. 389.

The mere assertion by plaintiffs of constitutional questions, or that they have been deprived of their property without due process of law, does not establish jurisdiction. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576, and cases cited; *Maynard* v. *Hecht*, 151 U. S. 324; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336; *St. Joseph & G. I. R. R.*

Co. v. *Steele*, 167 U. S. 659; *West. Un. Tel. Co.* v. *Ann Arbor R. Co.*, 178 U. S. 239; *Lampasas* v. *Bell*, 180 U. S. 276.

The United States Circuit Court has no jurisdiction to set aside a will admitted to probate and establish another and a different will as a testamentary act. *Broderick's Will*, 21 Wall. 503; *Simmons* v. *Saul*, 138 U. S. 439, 459; *Fouvergne* v. *City of New Orleans*, 18 How. 470; *Langdon* v. *Goddard*, 2 Story, 267; *Wahl* v. *Franz*, 100 Fed. Rep. 680; *Tarver* v. *Tarver*, 9 Peters, 174; *Re Aspinwall Estate*, 83 Fed. Rep. 851; *Reed* v. *Reed*, 31 Fed. Rep. 49; *Copeland* v. *Bruning*, 72 Fed. Rep. 5; *In re Cilley*, 58 Fed. Rep. 977; *Oakley* v. *Taylor*, 64 Fed. Rep. 245; *In re Frazer*, Fed. Cas. 5068, vol. 9; *Ellis* v. *Davis*, 109 U. S. 485; *Carrou* v. *O'Callagan*, 125 Fed. Rep. 657; *Richardson* v. *Green*, 61 Fed. Rep. 423; *Cilley* v. *Patton*, 62 Fed. Rep. 498; *Kirby* v. *C. & N. W. R. Co.*, 106 Fed. Rep. 551; *Byers* v. *Macauley*, 149 U. S. 608; *In re Foley*, 80 Fed. Rep. 949; *The Hammburg*, 119 U. S. 199.

If the jurisdiction of the Federal Court to probate a will is dependent upon the jurisdiction of the Supreme Court of the State of New York to grant such relief, such jurisdiction does not exist in the state courts. *Anderson* v. *Anderson*, 112 N. Y. 104; *Delabarre* v. *McAlpin*, 71 App. Div. 591; *Post* v. *Mason*, 91 N. Y. 539.

The right, title and interest of the appellants are *res adjudicata* in respect to the fund constituting the residuary estate, by virtue of the proceedings and decree in the suit of the trustees of *Amherst College* v. *Ritch et al.*

The decree in that case is an estoppel of record on the appellants to bring the present actions, and is conclusive not only as to the matters litigated, but also upon those which *might* have been litigated in that action. This concludes any question which might be raised by the appellants as to a will of 1878, or a will of 1880, or any testamentary papers of Fayerweather, other than the will and codicils of 1884, which were the subject of adjudication in that case.

That case was properly adjudicated. There is no lack of

due process of law in the appellate courts supplying a finding not made by the trial court where the evidence warrants it and is submitted on bill and exceptions as was done. N. Y. Code Civ. Pro. § 1022; Laws, 1894, ch. 688; Laws, 1895, ch. 946; *First National Bank* v. *Chalmers*, 144 N. Y. 432; *Osborn* v. *Green*, 161 N. Y. 353; *Ogden* v. *Alexander*, 140 N. Y. 356; *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538, 547; *Newman* v. *Frost*, 52 N. Y. 422; *Hays* v. *Miller*, 70 N. Y. 112; *Meyer* v. *Lathrop*, 73 N. Y. 315, 321; *Sheldon* v. *Sherman*, 42 N. Y. 484, 489; *Grant* v. *Morse*, 22 N. Y. 323; *Rider* v. *Powell*, 28 N. Y. 310; *Oberlander* v. *Spies*, 45 N. Y. 175; *Page* v. *Met. El. R.*, 10 Misc. 134; *Milleneaux* v. *Terwilliger*, 50 Hun, 526; *Harding* v. *Elliott*, 91 Hun, 502; *Benedict* v. *Arnoux*, 7 App. Div. 1; *Ross* v. *Caywood*, 16 App. Div. 591; *Edson* v. *Bartow*, 154 N. Y. 199. While the General Term could not reverse and render absolute judgment for appellant it can affirm on a case and exceptions upon facts not specifically stated in a general concise decision. *Johnstone* v. *O'Connor*, 21 App. Div. 77; aff'd 162 N. Y. 639; *Keegan* v. *Smith*, 60 App. Div. 168; *Gardner* v. *N. Y. Mutual Sav. & L. Assn.*, 67 App. Div. 141; *Multz* v. *Price*, 91 App. Div. 116; *Bomeisler* v. *Forster*, 154 N. Y. 229, 236; *People* v. *Barker*, 152 N. Y. 431; *Health Dept.* v. *Weeks*, 22 App. Div. 110; *Viele* v. *R. R. Co.*, 20 N. Y. 184; *Smith* v. *Coe*, 29 N. Y. 666.

The Court of Appeals having declared that the General Term had jurisdiction to affirm a judgment upon the facts appearing in the evidence which had not been passed upon by the Court at Special Term, the Federal courts are conclusively bound by the law thus settled and announced. *Sioux City T. B. W. Co.* v. *Trust Co. of N. A.*, 173 U. S. 99; *M., K. & T. R. Co.* v. *McCann*, 174 U. S. 580; *Morley* v. *L. S. & M. S. Ry. Co.*, 146 U. S. 162.

A general finding is as conclusive upon all matters of fact as the verdict of a jury. *Martinton* v. *Fairbanks*, 112 U. S. 670; *Lehnen* v. *Dickson*, 48 U. S. 71; *McDoyle* v. *McCormick*, 121 Fed. Rep. 61; *Hughes* v. *Livingston*, 104 Fed. Rep. 306;

Paul v. *D., L. & W. R. Co.*, 130 Fed. Rep. 951; *Corliss* v. *Pulaski Co.*, 116 Fed. Rep. 289.

The due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court shall be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted and an opportunity afforded to defend against it. *Simon* v. *Craft*, 182 U. S. 427; *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230; *Re Robert W. Parsons*, 191 U. S. 45; *Missouri* v. *Lewis*, 101 U. S. 22; *New Orleans W. Co.* v. *Louisiana*, 185 U. S. 336, 350; *Kennard* v. *Morgan*, 92 U. S. 480; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Loeb* v. *Columbia County*, 179 U. S. 492.

An appeal is a privilege given and regulated by the State. If a party has been afforded due process of law by a trial he cannot say that he was denied due process because he has no appeal or the appeal is regulated by state laws. *McKane* v. *Durston*, 153 U. S. 684, 687; *Andrews* v. *Swartz*, 156 U. S. 272; *Holden* v. *Hardy*, 169 U. S. 366; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Walker* v. *Sauvinet*, 92 U. S. 90; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 26; *Morley* v. *L. S. & M. S. R. Co.*, 146 U. S. 162, 171; *Bergemann* v. *Backer*, 157 U. S. 655; *Fielden* v. *Illinois*, 143 U. S. 452; *West* v. *Louisiana*, 194 U. S. 258.

A correct decision will not be reversed on appeal because founded upon a wrong reason. *Ward* v. *Hasbrouck*, 169 N. Y. 407, 420; *Marvin* v. *Univ. Life Ins. Co.*, 85 N. Y. 278, 284; *Allard* v. *Graesert*, 61 N. Y. 1; *Ferguson* v. *Gill*, 74 Hun, 566.

Federal courts of equity have no power to disaffirm or disregard judgments of the state courts by reason of error or irregularity other than want of jurisdiction or fraud. *Milne* v. *Deen*, 121 U. S. 525; *Barrow* v. *Hunton*, 99 U. S, 80; *Graham* v. *Railroad Co.*, 118 U. S. 161; *Arrowsmith* v. *Gleason*, 129 U. S. 99; *Marshall* v. *Holmes*, 141 U. S. 589, 600; *K., Ft. S. & M. R. Co.* v. *Morgan*, 21 C. C. A. 468; *In re Converse*, 137 U. S. 624, 631; *Caldwell* v. *Texas*, 137 U. S. 692; *Iowa Central*

v. *Iowa*, 160 U. S. 389; *People* v. *Supervisors*, 70 N. Y. 228, 234; *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Gallup* v. *Schmidt*, 183 U. S. 300; *French* v. *Barber Asphalt Co.*, 181 U. S. 324.

The rights of each of the parties were conclusively determined by the judgment in the *Amherst College case* and the question is *res judicata*. *Fayerweather* v. *Ritch*, 91 Fed. Rep. 721; *Landon* v. *Bulkley*, 95 Fed. Rep. 344; *Manhattan Trust Co.* v. *Trust Co. of North America* (C. C. A. 8th Circuit), 107 Fed. Rep. 328; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Cromwell* v. *County of Sac*, 94 U. S. 352; *United States* v. *Calif. & Oregon Land Co.*, 192 U. S. 355; *Dowell* v. *Applegate*, 152 U. S. 327, 343; *Wilson's Exr.* v. *Deen*, 121 U. S. 525; *Stout* v. *Lye*, 103 U. S. 66; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Mitchell* v. *First Nat. Bank of Chicago*, 180 U. S. 471; *Manson* v. *Duncanson*, 166 U. S. 533; *United States* v. *Throckmorton*, 98 U. S. 65; *Smith* v. *Nelson*, 62 N. Y. 288, 289; *Sanders* v. *Soutter*, 126 N. Y. 199; *Herring* v. *N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340; *Pray* v. *Hegeman*, 98 N. Y. 358; *Thorn* v. *De Breteuil*, 179 N. Y. 64, 79; *Leavitt* v. *Wolcott*, 95 N. Y. 212; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683.

The validity of the releases was determined by the state court decision. The appellate courts had power to examine the whole record even in the absence of a special finding by the trial judge. *Ward* v. *Hasbrouck*, 169 N. Y. 407; *Keegan* v. *Smith*, 60 App. Div. 168; *Thomas* v. *N. Y. Life Ins. Co.*, 99 N. Y. 250; *Bank* v. *Chalmers*, 144 N. Y. 432; *Lantern Co.* v. *Styles & Parker*, 135 N. Y. 209.

It is not competent to impeach a judgment by calling judges to the witness stand to testify as to the mental processes by which they reached the conclusion on which the judgment is based. Such a course is contrary to the settled rules of law, and if permitted would inaugurate a most pernicious practice. *The People* v. *Columbia Common Pleas*, 1 Wend. 297; *Sargent* v. *Anonymous*, 5 Cowen, 106; *Dana* v. *Tucker*, 4 Johns. 487; *Welling* v. *Swasey*, 3 Gil. & Johns. 473.

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

Our jurisdiction of this direct appeal from the decision of the Circuit Court is invoked on the ground that the case involves the application of the Constitution of the United States.

The contention is that by Article V of the amendments to the Federal Constitution no person can "be deprived of life, liberty, or property, without due process of law;" that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of the state courts; that this action of the Circuit Court is not to be considered a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure. In *Chicago, Burlington &c. Railroad* v. *Chicago,* 166 U. S. 226, we held that a judgment of a state court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (p. 234):

"But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans,* 96 U. S. 97, 102. The

same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment."

And again (pp. 236, 237):

"The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

If a judgment of a state court can be reviewed by this court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to) a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in the view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the State was the validity of those releases; that notwithstanding this that court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question, and rendered their judgments upon that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate, without any finding of the vital fact which alone could destroy their right. The

contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S. *supra*. Giving effect in the Circuit Court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits and does not determine the matter of jurisdiction. That depends upon whether there is presented a *bona fide* and reasonable question of the wrongful character of the proceedings in the state courts and the necessary result therefrom. We are of opinion that the jurisdiction of this court must be sustained.

We pass, therefore, to consider the merits of the case. Private right and public welfare unite in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties. *Interest reipublicæ ut sit finis litium.* But in order to make this finality rightful it should appear that the question was distinctly put in issue; that the parties presented their evidence, or at least had an opportunity to present it, and that the question was decided. Cases of an alleged prior adjudication have frequently been presented in this court and the scope of a plea thereof fully determined. In the leading

case of *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, we said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

See also *Wilson's Executor* v. *Deen*, 121 U. S. 525; *Hefner* v. *Northwestern Life Ins. Co.*, 123 U. S. 747; *Wiggins Ferry Co.* v. *O. & M. Ry. Co.*, 142 U. S. 396; *Nesbit* v. *Riverside Independent*

District, 144 U. S. 610; *Johnson Company* v. *Wharton*, 152 U. S. 252; *Dowell* v. *Applegate*, 152 U. S. 327; *Last Chance Mining Company* v. *Tyler Mining Company*, 157 U. S. 683; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1; *Bryar* v. *Campbell*, 177 U. S. 649; *United States* v. *California & Oregon Land Company*, 192 U. S. 355, 358.

The state court was one of competent jurisdiction, and the present contestants were before that court, taking part in the litigation. The validity of the releases was put in issue by the pleadings, and no judgment could properly have been rendered without a determination of that question. The colleges sought to enforce a secret trust, but the property covered by the trust, together with that passing under the ninth article of the will, was the bulk of the estate—far more than half. Such a disposition of the testator's property was in contravention of the laws of New York. They who would take the estate in case of intestacy had a right to object to the enforcement of the trust. Only on condition that they waived their objections and released could it be sustained. The judgment enforced it. It therefore practically determined that the releases were valid, and decided against the contention of these plaintiffs that they were fraudulent and void. All this is evident from a perusal of the pleadings. The appellants concede this and rest their claim in the Federal court partly upon that basis. Thus, in their brief it is said:

"The issues so joined came on to be tried in the state Supreme Court; these complainants gave evidence tending to prove their allegations, and thereupon it became the duty of the court to adjudge whether the releases which they assailed were invalid and whether they were entitled to the affirmative relief prayed. The issues so tendered were necessary to be determined before any valid judgment upon those issues could be given pursuant to due process of law, the law of the land and the provisions of the Constitution of the United States."

The case was tried by the court without a jury. No special

findings of fact were made. According to testimony given on the trial of this case in the Circuit Court the omission to make special findings was with the acquiescence (if not at the instance) of all the counsel appearing in the state court. The decree adjudged that the residuary estate was held in trust for the colleges named in the ninth article of the will, enjoined the residuary legatees from distributing any portion of that estate under the deed of gift, and directed that it be paid over to the respective colleges. The ordinary rule in respect to a judgment without any special findings is that it, like a general verdict of a jury, is tantamount to a finding in favor of the successful party of all the facts necessary to sustain the judgment. In the general term, on the appeal taken to it, two opinions were filed. One by Judge Follett, in which Judge Parker concurred, and one by the presiding judge, Van Brunt. Judge Follett, after stating that the executors of the testator's widow and two of his heirs at law and next of kin sought to have the residuary clause declared invalid, under chap. 360 of the Laws of 1860, said:

"The difficulty with their contention is that the widow and heirs released all of their interest in the estate, for valuable considerations paid to them. . . . It is urged that these releases were procured by fraud and undue influences. There is no evidence in the record justifying this contention. The terms of settlement were agreed on during the controversy in the surrogate's court over the probate of the will and codicils, and the widow and heirs were represented in that controversy, and in the settlement, by distinguished counsel and acted under their advice. . . . If the person entitled to contest a will, or some one or more of its provisions, voluntarily and for a valuable consideration, received after the testator's death, with full knowledge of the invalidity of the will, divests himself of all interest in the property attempted to be disposed of by it, he cannot impeach its validity."

Presiding Judge Van Brunt thus stated his conclusions:

"The testator left him surviving a widow, who was the only

person who could call into operation for her protection the statute which we have quoted. The widow, however, has released to the executors all claims to the estate, which release cannot be successfully attacked or set aside. There is consequently no person for whose benefit the statute can operate.

"No rights of heirs and next of kin have been infringed upon, because the trust does not contravene any statute for their benefit, and is not the subject of attack by them. If it were, they have also executed a release of their interest in the estate in the same manner as the widow.

"We have therefore the case of a trust established, which would be valid as against all the world but for the statute in favor of the widow, and the widow, having released all her rights in the estate, how can her representatives claim the invalidity of a trust as to property in which she had no interest?"

The opinion in the Court of Appeals was delivered by Judge Vann, and concurred in by all of the judges except Chief Judge Andrews. In it it is said:

"Although the decision by the special term and the affirmance by the general term were general in form, necessarily some facts were found by those courts, even if they are not specified in the record. Otherwise the burden of deciding questions of fact would be cast upon this court, which has jurisdiction to decide only questions of law. We think that the effect of a decision by the trial court without expressing the facts found is the same as if there had been a general verdict rendered by a jury, and that the same presumptions arise in its support.

* * * * * * * *

"We are of the opinion, therefore, that where the decision of the special term does not state the facts found, and the judgment entered thereon has been affirmed by the general term, upon an appeal to this court, all the facts, warranted by the evidence and necessary to support the judgments below, are presumed to have been found. Hence, upon such an appeal, we have no more control over the facts than we have

when specific findings are made by the special term and affirmed by the general term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference there was no fraud. A question of fact was thus presented which is beyond our power of review."

Thus the Court of Appeals held in accord with the ordinary ruling as to the effect of a judgment without findings. So it has frequently decided. In *Bartlett* v. *Goodrich*, 153 N. Y. 421, 424, it said:

"The learned trial judge held that the plaintiff was entitled to recover, and the general term has affirmed the judgment. There were no findings made as the result of the trial, but simply a brief statement of the ground of the decision. In this condition of the record we must presume that all facts warranted by the evidence, and necessary to support the judgment, have been found. (*Amherst College* v. *Ritch*, 151 N. Y. 282.) The appeal, therefore, cannot prevail unless it appears, as matter of law, that the learned trial judge was not warranted, upon any fair view of the evidence, in finding as he did, that the deceased was, at the time of his death, the equitable owner of the policies."

See also *N. Y. Security & Trust Co.* v. *Lipman*, 157 N. Y. 551, 556; *Garvey* v. *Long Island R. R. Co.*, 159 N. Y. 323, 328; *Reed* v. *McCord*, 160 N. Y. 330, 334; *Solomon* v. *Continental Fire Insurance Company*, 160 N. Y. 595, 598; *Rodgers* v. *Clement*, 162 N. Y. 422, 427; *National Harrow Company* v. *Bement & Sons*, 163 N. Y. 505, 510; *City of Niagara Falls* v. *N. Y. C. & H. R. R. R.*, 168 N. Y. 610; *Critten* v. *Chemical National Bank*, 171 N. Y. 219, 231; *Hutton* v. *Smith*, 175 N. Y. 375, 378.

After the filing of its opinion an application made to the Court of Appeals, as shown in the statement of facts, to amend the remittitur so as to direct the trial court to find specifically whether the releases were valid or not, was denied.

We have thus the case of a hearing in the trial court upon issues which required a determination of the validity of these releases as a condition of a judgment adverse to these plaintiffs; a judgment against them; an affirmance of the judgment by the general term of the Supreme Court, with an opinion declaring that there was in the record no evidence justifying the claim that these releases were fraudulently obtained and void; and a further affirmance by the Court of Appeals, accompanied by an opinion declaring that upon the state of the record it was to be presumed that the validity of the releases had been affirmatively found, and also that there was sufficient evidence to sustain such a finding, followed by a refusal to send the question of the validity of the releases back to the trial court for consideration. Notwithstanding all this, apparent upon the face of the record, the plaintiffs insist that the validity of the releases was never determined by any of the state courts, and that the final judgment of affirmance by the Court of Appeals was based upon the presumption of a determination which was never in fact made.

Upon what is this contention based? First, the silence of the judgment, which contains no findings to indicate upon what it is based; second, a memorandum of decision filed by the trial judge, in which he states that "the grounds upon which the issues have been decided are" a promise of the executors that if made residuary legatees they would distribute the residuary estate among the colleges named in the ninth article, and that the testator made them residuary legatees in reliance thereupon; third, the opinion of the trial judge, in which he discusses at some length and with citation of authorities the validity of the secret trust and the testimony by which it was established, and then, without in terms passing upon the contention respecting the releases, states "the

view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather;" and finally the testimony of the trial judge, given on the hearing in this case some six years after his decision in the state court, to the effect that in deciding the case he did not consider the question of the validity of the releases.

It is undoubtedly true that in some cases evidence may be introduced outside the record to show what particular question was tried and determined in the former suit. *Washington, Alexandria & Georgetown Steam-Packet Company* v. *Sickles*, 24 How. 333, 344; *Packet Co.* v. *Sickles*, 5 Wall. 580, 592; *Russell* v. *Place*, 94 U. S. 606, 608. But it does not follow that testimony of every kind is admissible for that purpose. In *Packet Company* v. *Sickles*, *supra*, although it was held that "in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact," yet it appearing that some of the jurors on the former trial were permitted to testify as to the particular ground upon which they found their verdict, it was said (p. 593):

"But it is proper to say that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it.

"The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict."

See also *Wood* v. *Jackson*, 8 Wend. 9, 36; *Lawrence* v. *Hunt*, 10 Wend. 80, 85.

Tested by the rule thus laid down the testimony of the trial

judge, given six years after the case had been disposed of, in respect to the matters he considered and passed upon, was obviously incompetent. True, the reasoning of the court for the rule is not wholly applicable, for as the case was tried before a single judge there were not two or more minds coming by different processes to the same result. Nevertheless no testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision. Undoubtedly, when the pleadings are general, as in a case of the common counts, evidence may be given of the testimony which was introduced on the trial, for that may disclose what must have been considered and determined. And where the evidence is that testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail.

Putting one side the oral testimony of the trial judge, there is nothing in the other matters specified to disturb the conclusion which follows from an examination of the record that the validity of the releases was actually determined. Of course, the omission of special findings means nothing, for the judgment implies a finding of all necessary facts. The memorandum of decision naturally states the grounds for arriving at a conclusion concerning the respective claims of the colleges named in the ninth clause and the beneficiaries of the deed of gift, for that was the controversy between those parties and indeed the primary controversy presented by the pleadings. The declaration in the opinion, that the conclusion reached upon the matters discussed rendered it unnecessary to consider the questions of law propounded by the counsel for these plaintiffs, must be read in the light of the

prior statement therein that the widow and next of kin were demanding that the releases executed by them be set aside and they be given the residuary estate, and the further fact that whether the releases were fraudulently obtained and void was a question of fact rather than of law. Evidently the opinion proceeded and the conclusion was reached on the assumption that there was no sufficient testimony to invalidate the releases.

Further, the entire record of the case was taken on appeal to the general term. That court had before it for consideration all the evidence which was presented to the trial court; and, as we have seen, declared in its opinion that there was no evidence justifying the contention that the releases were procured by fraud and undue influence. While this was not stated in the form of a special finding it discloses the conclusion of the court from the evidence. We cannot hold that it was not authorized to pass upon this question, for its conclusion was sustained by the Court of Appeals, which in its opinion also referred to the question. Finally, by the motion to amend its remittitur, the attention of the Court of Appeals was specifically called to these very matters which are now urged as showing a failure on the part of the lower courts to determine the question of the validity of the releases, and it refused to make any order which would permit a further consideration. Nothing can be clearer from this record than that the question of the validity of the releases was not only before the state courts, but was considered and determined by them, and the regularity of the procedure was sustained by the highest court of the State. The question was, as affirmed by counsel for these appellants, put in issue by the pleadings, and its determination was a necessary prerequisite to an adverse judgment. It was referred to by all the courts in their opinions, was affirmatively decided by the general term, its decision sustained by the Court of Appeals and reaffirmed by that court, by a refusal to amend its remittitur.

Under these circumstances the pleas of *res judicata* were

properly sustained, and the decree of the Circuit Court dismissing the bill and cross bill is

Affirmed.

The CHIEF JUSTICE did not hear the argument and took no part in the decision of these cases.

PATTERSON *v.* HEWITT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 23. Argued October 25, 26, 1904.—Decided November 28, 1904.

The owners of a mining claim in New Mexico transferred their interests to one of their number as trustee, who was to retransfer to each one contributing his share of development expenses for a year, a one-eighth interest. Plaintiff, one of the parties, contributed his share and demanded a deed which the trustee refused to give. Plaintiff made no further demand and did not contribute any more to the expenses, but the trustee and some of the other owners continued to develop the claim, and finally succeeded in finding a valuable body of ore. Eight years after the former demand plaintiff commenced an action in equity to enforce the original trust. There is a statute in New Mexico to the effect that no action for the recovery of lands shall be commenced after a lapse of ten years, etc. *Held:*

That persons having claims to mining property in the course of development are bound to the utmost diligence in enforcing them, and in such cases the doctrine of laches is relentlessly enforced.

That while in actions at law, courts are bound by the literalism of statutes, in equity the question of unreasonable delay within the statutory limitation is still open, and that even where a statute of limitations exists and has been made applicable in general terms to suits in equity, defendant may avail of the laches of complainant, notwithstanding the time fixed by the statute has not expired.

That the refusal by a trustee of a demand to execute a deed in alleged pursuance of a trust agreement is a repudiation of the trust and opens the door to the defense of laches.

That a delay of eight years during which large sums of money have been spent in developing a mining property is inexcusable laches.

APPELLANTS C. Ewing Patterson, a resident of New Jersey, and Henry J. Patterson, a resident of New Mexico, on April 29,

1903, filed their bill of complaint in the District Court for Lincoln County, Territory of New Mexico, against John Y. Hewitt, William Watson, Mathew Hoyle, and Harvey B. Fergusson, residents of New Mexico, and the Old Abe Company, a corporation of the same Territory, to enforce a trust which is alleged to have existed between the appellants and the defendant Hewitt, and by virtue of which they sought to recover a one-fourth interest in two mining locations made in the name of John Y. Hewitt on the second day of May, 1884. The bill prayed for an accounting of proceeds of ores taken from the mines, and a lien on the property, for an injunction and the appointment of a receiver.

The facts in the case as found by the District Court and adopted by the Supreme Court are substantially as follows:

In 1881 the property in controversy was claimed by the appellants and by Watson, one of the defendants, under locations previously made by them. Between 1881 and 1883, appellants, in conjunction with the defendant Watson, did a large amount of work upon the claims, and were asserting their rights under the mining laws of the United States. During this time the same ground was also claimed by other parties, among whom was the defendant Hewitt. In August, 1883, a dispute arose in regard to this property between appellants and the defendant Watson on one side, and the other parties upon the other side.

The parties interested held a meeting in August or September, 1883, for the purpose of adjusting the differences then existing between them, and to endeavor, if possible, to arrive at an agreement whereby the interests of all would be protected. The two appellants, the defendant Watson and the defendant Hewitt, with several others who were interested, attended this meeting. The result was an agreement between them that all the old locations then existing, whether made by the appellants or any of the defendants, or conflicting claimants, should be from that date abandoned, surrendered and given up by all of the parties, and that the ground should be

put in possession of Hewitt as trustee, to hold in his own name for the benefit of all the parties then interested. It was also agreed that Hewitt, as such trustee, should make a deed to such of the said parties holding interests therein as should contribute their part to the work, labor and expenses necessary to obtain a patent to the land; but there was no agreement as to what should become of the interests of any one who failed to contribute his share of the expenses. It was also agreed that each of the appellants contributing his share of the expenses should receive a one-eighth interest in the location, and that the said Watson and Hewitt should each receive a one-eighth interest, part on account of their services and part on account of their interests in the ground, and that the remaining shares should go to other parties who were interested therein.

In pursuance of this agreement Hewitt took charge of the property, and together with the defendant Watson, and one of the appellants, Patterson, superintended and directed the work upon said mine during the year 1883 and part of the year 1884. In order to raise money for the working of the mine it was agreed that a one-sixth interest should be sold to H. B. Fergusson for five hundred dollars.

During 1884 and 1885 a sufficient amount of work was done upon the property to obtain a patent, and to discover mineral thereon. The appellants contributed their share of the work, which enabled the trustee to obtain a patent, and so far carried out their part of the agreement as to entitle them to a deed from the trustee for their one-eighth interest each, according to said agreement.

In April, 1885, the appellant Henry J. Patterson, in person and by his agent, demanded a deed from Hewitt, trustee, of the one-eighth interest to which he claimed to be entitled; but the defendant Hewitt at that time refused to make the said deed, and has ever since refused to execute the same, and has disputed his right thereto.

No demand for a deed appears to have been made by C.

Ewing Patterson until just before the commencement of this suit, when it was also refused.

In 1883, the complainant C. Ewing Patterson left New Mexico, and, up to the time of the bringing of this suit, had never returned there. The appellant Henry J. Patterson left in 1885, and from that time until the fall of 1892 was a non-resident of New Mexico.

From 1885 to 1890 the defendants performed a large amount of work, and expended a good deal of money on the mine in addition to the annual assessment required by the Government of the United States thereon; but neither of the appellants ever contributed or offered to contribute any part of the expenses of said work, or perform any labor.

In November, 1890, the defendants discovered a large body of rich ore in the mine, and since that date have taken out therefrom gold amounting to several hundred thousand dollars. In 1892, a corporation, known as the Old Abe Mining Co., was organized by the defendants Hewitt, Fergusson, Watson and others, and the ground in controversy, known as the Old Abe ground, including the interests claimed by the appellants, was turned over to the new corporation by the trustee Hewitt, and this corporation is now holding title thereto.

The appellant Henry J. Patterson, through his agent, Henry Burgess, had knowledge from April, 1885, that Hewitt had refused to carry out said agreement, and execute the deed to him and his co-complainant, and both of the appellants were again informed after April, 1885, that Hewitt had refused to make the said deeds or to carry out the trust agreement.

Upon this state of facts the District Court dismissed the bill upon the ground of laches. The Supreme Court of the Territory affirmed its action, 66 Pac. Rep. 552, and complainants appealed to this court.

Mr. W. B. Childers, with whom *Mr. F. W. Clancy* was on the brief, for appellants:

The agreement of 1883 created a mining partnership be-

tween all the parties thereto, with one of them, Hewitt, as trustee to hold the legal title for the benefit of the others. *Manville* v. *Parks*, 7 Colorado, 128; *Hirbour* v. *Reeding*, 3 Montana, 15; *Skillman* v. *Lachman*, 23 California, 203; *Settembre* v. *Putnam*, 30 California, 490. Such an agreement is not within the statute of frauds. *Munley* v. *Ennis*, 2 Colorado, 300; *Meylette* v. *Brennan*, 20 Colorado, 242; *Hirbour* v. *Reeding*, 3 Montana, 15; *Raymond* v. *Johnson*, 17 Washington, 232; *Moritz* v. *Lavelle*, 77 California, 10. But if it were, complete performance by complainants, as found by the courts below, would be sufficient to avoid the effect of the statute.

Even if the bill does not pray the dissolution of the partnership, it contains a prayer for general relief under which any relief consistent with the case stated in the bill can be given, although not specifically prayed for. *Texas* v. *Hardenberg*, 10 Wall. 85; *Tayloe* v. *Ins. Co.*, 9 How. 406; *Jones* v. *Van Doren*, 130 U. S. 692; *Hall* v. *Lonkey*, 57 California, 80.

Complainants were under no obligation to contribute to development expenses. *Turner* v. *Sawyer*, 150 U. S. 583.

The doctrine of laches does not apply to this case. Nothing less than the lapse of ten years provided by the statute of New Mexico can bar complainants. Compiled Laws, New Mexico, 1897, § 2938; 1865, p. 192. And see *Storms* v. *Ruggles*, Clark's Ch. 149; *Corning* v. *Stebbins*, 1 Barb. Ch. 591; *Varick* v. *Edwards*, Hoffman's Ch. 417; *S. C.*, 11 Paige's Ch. 291; *Hill* v. *Nash*, 73 Mississippi, 862; *Washington* v. *Soria*, 19 So. Rep. 487; *Cross* v. *Allen*, 141 U. S. 537; *Bryan* v. *Kales*, 134 U. S. 126; *Calhounn* v. *Delhi*, 24 N. E. Rep. 27. The New Mexico statute expressly provides, in effect, that no suit shall be barred within ten years. No part of the statute is superfluous. Potter's Dwarris on Stat. 144; *Early* v. *Doe*, 16 How. 617; *Postmaster-General* v. *Early*, 12 Wheat. 152; *United States* v. *Gooding*, 12 Wheat. 477; *Market Co.* v. *Hoffman*, 101 U. S. 115; *Allen* v. *Louisiana*, 103 U. S. 84; *Mont-*

clair v. *Ramsdell*, 107 U. S. 152; *United States* v. *Fisher*, 109 U. S. 145. If this claim could be barred less than ten years mere delay is not sufficient unless accompanied by other acts of complainants or other circumstances in the case which make it inequitable to give the relief asked and impossible to compensate defendant for the injury which might thereby be inflicted. There is nothing in the circumstances of the present case which makes it inequitable to give the complainants the relief demanded to which they are manifestly entitled under the findings. *Hammond* v. *Hopkins*, 143 U. S. 250; *Galliher* v. *Cadwell*, 145 U. S. 368; *Halstead* v. *Grinnan*, 152 U. S. 416; *Penn Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 698; *Abraham* v. *Ordway*, 158 U. S. 420; *Rubber* v. *Rothery*, 107 N. Y. 315; *Railroad Co.* v. *Dubois*, 12 Wall. 64; *Lux* v. *Haggin*, 69 California, 267; *Waler* v. *Nelson*, 18 So. Rep. (Ala.), 155, and cases cited; Wood on Limitations, secs. 61-63; *Kline* v. *Vogel*, 90 Missouri, 250; Perry on Trusts, § 850; *Hill* v. *Epley*, 31 Pa. St. 333; *Steel* v. *Smelting Co.*, 106 U. S. 456; *Brant* v. *Virginia Co.*, 93 U. S. 336; *Ross* v. *Payson*, 43 N. E. Rep. 402; *McIntyre* v. *Pryor*, 173 U. S. 53; *Johnston* v. *Standard Mining Co.*, 148 U. S. 370; *Hanner* v. *Moulton*, 138 U. S. 495.

The cases cited in the opinion below can be distinguished under the statute of New Mexico.

The bar of a statute of limitations must be set up by defendant in some formal way in the record, in order to be available. Buswell on Limit., 525 *et seq.*; 13 Ency. Pl. & Pr., 181; *Sanger* v. *Nightingale*, 122 U. S. 183; *Retzer* v. *Wood*, 109 U. S. 187.

In this case, no statute of limitations was pleaded by defendants, and it is too late for them to find any protection by its provisions in an appellate court.

Mr. H. B. Fergusson for appellee:

Appellants delayed the institution of their suit in this case for at least eight years. This, under the facts, is laches. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Great West Min. Co.* v. *Woodmas of Alston Min. Co.*, 23 Pac. Rep. 908; *Kinne*

v. *Webb*, 49 Fed. Rep. 512; *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Brown* v. *Co. of Buena Vista*, 95 U. S. 157; *Hayward* v. *Bank*, 96 U. S. 611; *Holgate* v. *Eaton*, 116 U. S. 33; *Societe Fonciere* v. *Milliken*, 135 U. S. 304; *Hammond* v. *Hopkins*, 143 U. S. 224; *Hoyt* v. *Latham*, 143 U. S. 567; also 54 Fed. Rep. 34; *Pratt* v. *California Min. Co.*, 24 Fed. Rep. 369; *Manning* v. *San Jacinto Tin Co.*, 9 Fed. Rep. 726. *Kline* v. *Vogel*, 1 S. W. Rep. 733; *Halsted* v. *Grinnan*, 152 U. S. 412; *Richards* v. *Mackall*, 124 U. S. 183; *McCabe* v. *Mathews*, 133 U. S. 550; *Evers* v. *Watson*, 156 U. S. 327; *Johnson* v. *Atl. Transit Co.*, 156 U. S. 618; *Johnston* v. *Min. Co.*, 148 U. S. 360; *Foster* v. *Railroad Co.*, 146 U. S. 88.

Complainants are required to allege and prove satisfactory reasons or excuses for long delay. *Badger* v. *Badger*, 2 Wall. 87; *Godden* v. *Kimmel*, 99 U. S. 201.

Complainants are held to diligence in efforts to ascertain; and means of knowledge are held to be the same as knowledge. *Morris* v. *Haggin*, 28 Fed. Rep. 275; *Grimes* v. *Sanders*, 93 U. S. 55; *Mining Co.* v. *Watrous*, 61 Fed. Rep. 163.

Delay cannot be excused except by some actual hindrance or impediment caused by the fraud or concealment of the party in possession. *Wagner* v. *Baird*, 7 How. 234; *Lansdale* v. *Smith*, 106 U. S. 391.

The excuse of absence, ignorance and poverty are held not sufficient. *Naddo* v. *Bardon*, 51 Fed. Rep. 493.

In express, continuing trusts, the question of repudiation by the trustee is important. But even in express, continuing trusts, after such notice of repudiation, the statute of limitations and the doctrine of laches both apply in all their vigor. *Speidel* v. *Henrici*, 120 U. S. 377; *Philippi* v. *Philippi*, 115 U. S. 151; *Felix* v. *Patrick*, 145 U. S. 317; *Woods* v. *Carpenter*, 101 U. S. 140; *Godden* v. *Kimmel*, 99 U. S. 201; *Wallensak* v. *Reiher*, 115 U. S. 96.

Appellants' claim that the Statute of Limitations of New Mexico, limiting actions concerning real estate to ten years, and applying in terms to suits in equity, prevents courts of

equity from applying the doctrine of laches for delay short of ten years cannot be sustained. See Compiled Laws of New Mexico, 1897, § 2938.

Laches, however, is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claims to be enforced; an inequity founded upon some change in the condition or relations of the property or parties. As to this see *Galliher* v. *Cadwell*, 145 U. S. 368; *McQuiddy* v. *Ware*, 17 Wall. 91; *Sullivan* v. *Railroad Co.*, 94 U. S. 807; *Davison* v. *Davis*, 125 U. S. 90; *Hall* v. *Russell*, 2 Fed. Cases, 648; *S. C.*, 101 U. S. 503; *S. C.*, 3 Sawyer, 506; *Manning* v. *Hayden*, 16 Fed. Cases, 645; *S. C.*, 106 U. S. 586; *S. C.*, 5 Sawyer, 360; *Lakin* v. *Sierra County*, 25 Fed. Rep. 337; *Bliss* v. *Pritchard* (1877), 67 Missouri, 181; *Kline* v. *Vogel* (Mo. 1886), 1 S. W. Rep. 733; *Tatum* v. *Holliday*, 59 Missouri, 426; *Landrum* v. *Union Bank*, 63 Missouri, 56; *Morseau* v. *Talbot*, 55 Missouri, 297; *Davis* v. *Fox*, 59 Missouri, 127; *Scruggs* v. *Decatur*, 5 So. Rep. 441; *Calhoun* v. *Delhi, etc.*, 24 N. E. Rep. 27; *Haywood* v. *Buffalo*, 14 N. Y. 540; *Venice* v. *Woodruff*, 62 N. Y. 462; *Springfield* v. *Bank*, 75 N. Y. 397; and see *Waller* v. *Nelson* (Ala.), 18 So. Rep. 154; *Frame* v. *Kenny*, 12 Am.Dec. 367; *Nettles* v. *Nettles*, 67 Alabama, 599; *James* v. *James*, 55 Alabama, 525; *Bergen* v. *Bennett*, Gaines Cases (N. Y.), 19; *Sheldon* v. *Kockwell*, 9 Wisconsin, 166, 184; *Novens* v. *White*, 6 Johns. Ch. 360; Kerr on Fraud and Mistake, 303; Story Eq. Jur. § 1520; Pomeroy's Eq. Jur. §§ 817, 917 and note.

Appellants are barred by §§ 2916, 2930, Compiled Laws, 1897, New Mexico.

The agreement, under which Hewitt's duties as trustee were prescribed and the rights of appellants were defined, was an "unwritten contract." Both the original bill of complaint of appellants and the findings of fact made by the courts below establish that no fraud or concealment of appellants' cause of action was practiced by Hewitt, but his denial of the alleged rights of appellants was prompt and open and con-

tinuously adhered to. *St. Paul, &c., Ry. Co.* v. *Sage*, 49 Fed. Rep. 315; *Christy* v. *Sill*, 95 Pa. St. 315; *Hollinshead's Appeal*, 103 Pa. St. 158*a*; *Silliman* v. *Haas*, 25 Atl. Rep. 72; *Way* v. *Hooton*, 26 Atl. Rep. 784; *King* v. *Pardee*, 96 U. S. 90; *Kellum* v. *Smith*, 33 Pa. St. 158; *Willard* v. *Willard*, 56 Pa. St. 119; *Porter* v. *Mayfield*, 21 Pa. St. 263; *Dole* v. *Wilson*, 40 N. W. Rep. 161; *Streitz* v. *Hartman*, 41 N. W. Rep. 804.

If so the trust agreement created an express trust as it was not to be performed within one year, it is void under the statute of frauds. *Childers* v. *Talbot*, 16 Pac. Rep. 275; *Browning* v. *Browning*, 9 Pac. Rep. 677.

Mining claims are real estate. Compiled Laws of New Mexico, 1897, § 2218; *Ducie* v. *Ford*, 19 Pac. Rep. 414.

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

The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means

of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay.

1. In the case under consideration the appellants claim the benefit of section 2938 of the Compiled Laws of New Mexico, to the following effect:

"No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued," etc.

If this were an action of ejectment at law, there seems to be no question but what it could be maintained, since it was brought within ten years from the time the cause of action accrued; but where the statute is in terms applicable to suits in equity, as well as at law, it is ordinarily construed, in cases demanding equitable relief, as fixing a time beyond which the suit will not under any circumstances lie, but not as precluding the defense of laches, provided there has been unreasonable delay within the time limited by the statute. In an action at law courts are bound by the literalism of the statute, but in equity the question of unreasonable delay within the statutory limitation is still open. *Alsop* v. *Riker*, 155 U. S. 448, 460.

If this were not so, it would seem to follow that in the code States, where there is but one form of action applicable both to proceedings of a legal and equitable nature, a statute of limitations, general in its terms, would apply to suits of both descriptions and the doctrine of laches become practically obsolete. This, however, is far from being the case, as questions of laches are as often arising and being discussed in the code States as in the others. In a few cases where the statute of limitations is made applicable in terms to suits in equity, it has been construed as allowing a suit to be begun at any time within the period limited by the statute, notwithstanding the intermediate laches of the complainant, although in those

cases it will usually be found that the language of the statute is explicit and imperative. *Hill* v. *Nash*, 73 Mississippi, 849; *Washington* v. *Soria*, 73 Mississippi, 665.

But the weight of authority is the other way, and we consider the better rule to be that, even if the statute of limitations be made applicable in general terms to suits in equity, and not to any particular defense, the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired. This has been expressly held in Alabama, *Scruggs* v. *Decatur Mineral & Land Co.*, 86 Alabama, 173; in Missouri, *Bliss* v. *Prichard*, 67 Missouri, 181; *Kline* v. *Vogel*, 90 Missouri, 239; and in New York, *Calhoun* v. *Millard*, 121 N. Y. 69. In the last case the question is discussed at considerable length by Chief Judge Andrews, and the conclusion reached that "the period of limitation of equitable actions, fixed by the statute, is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued. . . ."

Indeed, in some cases the diligence required is measured by months rather than by years. *Pollard* v. *Clayton*, 1 Kay & Johnson, 462; *Attwood* v. *Small*, 6 Clark & Finelly, 232.

And in others a delay of two, three or four years has been held fatal. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Hayward* v. *National Bank*, 96 U. S. 611; *Holgate* v. *Eaton*, 116 U. S. 33; *Hagerman* v. *Bates*, 5 Colorado App. 391; *Graff* v. *Portland Co.*, 12 Colorado App. 106.

2. The facts in this case, so far as they concern the applicability of the defense of laches, are that all prior locations made by the claimants to this land were abandoned in August, 1883, when an oral agreement was entered into that Hewitt should be appointed trustee for all concerned; that upon the performance of certain conditions by the parties interested he

should make a deed to each of such parties as should contribute his part to the work and expense necessary to obtain a patent; that each of the appellants contributed his share of the work in the years 1883 and 1884—enough to entitle each of them to a deed of his interest under the agreement; that in April, 1885, Henry J. Patterson demanded a deed of Hewitt, which was refused, but that C. Ewing Patterson did not demand his deed until just before the institution of this suit; that the defendants and their associates, from the year 1885 to 1890, performed a large amount of work in developing the mine to which neither of the appellants contributed any part; that in November, 1890, a large body of rich ore was discovered, and since that time gold to the amount of several hundred thousand dollars has been taken out. Both of the appellants left the Territory of New Mexico during the year 1885, and resided abroad up to the time of the beginning of this suit. Both were aware that Hewitt had refused to deed them their interest in the mine and in the patent which he in the meantime had obtained to the property.

It thus appears that the right of action accrued to the appellants in April, 1885, and that this suit was not begun until eight years thereafter—in 1893. Whether the refusal of Hewitt to make the deeds was right or wrong is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Fergusson, that they were put in possession of this valuable property. If appellants had expected a share in this property they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While

it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstance, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.

3. But little need be said in reply to appellants' argument, that a trust relation was established between these parties by the oral agreement of 1883, under which Hewitt was to take possession, hold the property for the benefit of all concerned, and ultimately to convey to each his proportionate share. In this connection it is sought to apply the familiar rule that neither laches nor the statute of limitations is applicable against an express trust, so long as that trust continues. Conceding all that can be claimed as to the existence of an express parol trust in this case, the refusal of Hewitt to execute the deed to H. J. Patterson of his interest in the property, of which both appellants had notice, was a distinct repudiation of such trust, which entitled the complainants to immediate relief and opened the door to the defense of laches. *Speidel* v. *Henrici*, 120 U. S. 377, 386; *Riddle* v. *Whitehill*, 135 U. S. 621, 634.

The Supreme Court of the Territory also found that the case was within section 2916 of the Compiled Laws of the Territory, requiring that all actions founded upon "unwritten contracts . . . or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified," shall be brought within four years; and that this defense was not

answered by section 2930, declaring that "none of the provisions of this act shall run against causes of action originating in or arising out of trusts, when the defendant has fraudulently concealed his cause of action, or the existence thereof, from the parties entitled or having the right thereto." As there was no evidence that the defendants had fraudulently concealed the facts from the appellants, and abundant proof that the facts were known to them, the latter section was held not to apply. While the case does not necessarily involve it, we see no reason to question the correctness of the court's conclusion on this point.

We are clearly of the opinion that the delay of eight years in this case was inexcusable, and the decree of the court below must, therefore, be

Affirmed.

METROPOLITAN RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 16. Argued October 24, 1904.—Decided November 28, 1904.

A condemnation proceeding initiated before a court in the District of Columbia, conducted under its supervision, with power to review and set aside the verdict of a jury, and with the right of review in an appellate tribunal is in its nature an action at law. The jurisdiction of this court in reviewing the judgment of the Court of Appeals of the District in such a proceeding is not by appeal, but only by writ of error, and this court cannot pass upon errors assigned unless the record contains a bill of exceptions allowed and authenticated by the judge.

Parties cannot by affidavits or agreements cause that to become a bill of exceptions which is not such in a legal sense.

Upon this record the Metropolitan Railroad Company seeks, both by appeal and writ of error, to obtain a review of the action of the Court of Appeals of the District of Columbia, affirming an order of the Supreme Court of the District, which

order sustained an award against the company, contained in the verdict of a jury rendered in condemnation proceedings, under an act of Congress. 31 Stat. 668. The statute referred to is entitled "An act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth street." Briefly, the act authorized and required the company to extend its lines over the streets to which the act referred, and for the purpose of enabling this to be done directed the commissioners of the District to commence the necessary proceedings to acquire the land needed for the widening of the streets. It was directed that the condemnation proceedings should be commenced in the Supreme Court of the District upon notice, under the supervision of the court, to all interested parties. A jury of seven was directed to be empaneled by the court, and this jury, after organizing and viewing the premises, were to "proceed, in the presence of the court, if the court shall so direct, or otherwise as the court may direct, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in the proceedings for the extension of said street." The act required the jury to return a written verdict fixing the amount of damages sustained by the lot owners by reason of the taking of their property for the widening of the streets, and also to ascertain and fix the benefits which would result from the work, not only to the lot owners but to the Metropolitan Railroad Company, and the sum of the benefits was directed to be assessed against the railroad company and the lot owners. Power was conferred upon the court to hear any objections which might be made to the verdict and to set it aside in whole or in part if the court were satisfied that it was unjust or unreasonable.

Section 13 of the act is as follows:

"SEC. 13. That no appeal by any interested party from the decision of the Supreme Court of the District of Columbia confirming the assessment or assessments for benefits or damages herein provided for, nor any other proceedings at law or

in equity by such party against the confirmation of such assessment or assessments, shall delay or prevent the payment of the award to others in respect to the property condemned nor the widening of such streets: *Provided, however*, That upon the final determination of said appeal or other proceeding at law, or in equity, the amount found to be due and payable as damages sustained by reason of the widening of the streets under the provisions hereof shall be paid as hereinbefore provided."

The transcript before us shows that in July, 1900, the commissioners of the District instituted the proceedings in condemnation required by the act, and that among others the Metropolitan Railroad Company was made a party. A jury having been empaneled they were directed by the court to view the premises, and outside of the presence of the court to hear such evidence as might be produced by the interested parties, and to return their verdict to the court. Soon afterwards the railroad company filed an answer praying that it might be dismissed from the proceedings, because the act of Congress requiring the company to extend its lines was unconstitutional, and because the company could not be made liable for any assessment for benefits conferred upon it by the proposed work, as it owned no property in the District embraced by the improvement. Immediately following the answer of the railroad company is set out what purports to be instructions asked by the railroad company to be given by the court to the jury. Each of these instructions is marked by the clerk as filed on a named date, and below each instruction, unaccompanied by any certificate from a judge, is the statement "Rejected with permission to present later." Following these papers is what purports to be a notice on behalf of the railroad company, that on a given day it would present a request to the court for the giving of the refused instructions as well as of others, and the paper in question, as also the instructions referred to in it, are marked filed by the clerk on a date named, and below some of the instructions, without any

certificate whatever by the judge, is a recital "Rejected and exception by the Railroad Company" or "Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property owners."

The transcript shows that the jury returned a verdict to the court fixing the damages and benefits, and that there was assessed against the railroad company for benefits the sum of $25,000. A rule *nisi* was entered to confirm the verdict, and the railroad company filed the following exceptions:

"The Metropolitan Railroad Company excepts to the finding, assessment, and award against it for alleged benefits to it from the proposed widening and extension of the said Columbia road and Sixteenth street, and for cause or ground of exception shows:

"1. That the said finding, assessment, and award are without evidence to support the same.

"2. That the said finding, assessment, and award are contrary to the evidence.

"3. That the said finding, assessment, and award are contrary to the weight of the evidence.

"4. For errors of law in the instructions given and refused by the court to the jury over the objection and exception of the Metropolitan Railroad Company before the said finding, assessment, and award were made, as shown by the record of the said cause."

After the filing of these exceptions the transcript shows that a paper was filed by the clerk, which is styled "Petition of Metropolitan R. R. Co., to make of record testimony as to the benefits to Metropolitan Railroad Company." In this petition it is recited that the evidence before the jury was taken outside of the presence of the court, and that the only testimony before the jury on the subject of the benefits to the railroad company, as shown by affidavits annexed to the petition, was that of James B. Lackey, which was reduced to writing by a stenographer. The court was asked to allow the affidavits and deposition to be filed as part of the record, "the

same being essential to the hearing and determination of this respondent's" exceptions to said award filed in this cause, and it being impossible for this respondent properly to defend its rights in the premises without in some way causing the said evidence, and the fact that it was the only evidence in the case upon the question of said benefits to this respondent, to appear of record." Upon this petition the following endorsement is shown: "Let the within petition be filed. A. B. Hagner, Justice." The transcript then sets out what purports to be the affidavits and testimony of Lackey, referred to in the petition.

It is also shown that upon a subsequent date the Supreme Court of the District, after due notice to all interested parties, and after hearing arguments of counsel upon the exceptions to the verdict, overruled the exceptions and entered a final decree confirming the award and assessment as found by the jury, except in a minor particular, which need not be noticed. There is nothing in the transcript showing that any exception was reserved to the overruling of the objections to the award interposed by the company, and no bill of exceptions is shown to have been allowed by the judge. Immediately at the foot of the final decree appears the following:

"And from so much of the above decree as overrules its exceptions and confirms the verdict, award, and assessment against it, the Metropolitan Railroad Company appeals in open court, and the penalty of the appeal bond is fixed by the court at one hundred dollars.

"A. B. HAGNER, *Asso. Justice.*"

Next follows a stipulation signed by the attorneys for the District and for the railroad company as to what should constitute the transcript of record for the purposes of the appeal of the Metropolitan Railroad Company. Item 11 reads as follows:

"Petition of Metropolitan Railroad Co. to make of record certain testimony and allowance of same, filed November 24, 1900.

"Motion to vacate order on said petition."

The motion last referred to, however, does not appear in the transcript.

On the appeal of the railroad company the Court of Appeals affirmed the order appealed from, 20 App. D. C. 421, and from its action in so doing the railroad company prayed and was allowed an appeal to this court. About a month afterwards the attorney for the railroad company filed in said Court of Appeals a motion in the cause, reading as follows:

"And now comes the appellant by its counsel and shows to the court that because of the fact that the record in this cause contains what may possibly be considered a bill of exceptions it may be that the proper remedy would be held to be a writ of error instead of an appeal to the Supreme Court of the United States. It therefore prays that this honorable court, in addition to the appeal which was granted to it to the Supreme Court of the United States in this cause on the 24th day of October, 1902, it may also be allowed a writ of error to said court, and that the supersedeas bond required upon said appeal may also be taken and accepted as a supersedeas bond upon said writ of error."

An entry appears in the transcript of the allowance of a writ of error, the filing of a bond conditioned for the prosecution both of the appeal and writ of error, and the transcript contains citations, as well on the writ of error as on the appeal, signed by the Chief Justice of the Court of Appeals. The consolidated proceedings, by appeal and writ of error, is the one which is now here for review.

Mr. J. J. Darlington and *Mr. C. C. Cole* for appellant and plaintiff in error.

Mr. E. H. Thomas, with whom *Mr. Andrew B. Duvall* was on the brief, for appellee and defendant in error.

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

Assuming that the matters complained of are susceptible of review by this court, the first question is whether our jurisdiction is dependent upon the appeal or the writ of error.

That a proceeding involving the exercise of the power of eminent domain is essentially but the assertion of a right legal in its nature has been determined. So also the decisions of this court have settled that a condemnation proceeding initiated before a court, conducted under its supervision, with power to review and set aside the verdict of the jury, and with the right of review vested in an appellate tribunal, is in its nature an action at law. *Kohl* v. *United States*, 91 U. S. 367, 376; *Searl* v. *School District No. 2*, 124 U. S. 197; *Chappell* v. *United States*, 160 U. S. 499, 513.

The proceedings provided for in the act of June 6, 1900, being of this character, it is, we think, manifest that the jurisdiction of this court can be exercised only by writ of error.

When both the proceeding by appeal and that by writ of error were allowed the jurisdiction of this court to review the judgments and decrees of the Court of Appeals of the District of Columbia was regulated by section 233 of the Code of the District of Columbia. 31 Stat. 1189, 1227. In effect that section was but a reënactment of the then existing provisions of the eighth section of the act of February 9, 1893, which act established the Court of Appeals of the District of Columbia. By said section of the code the power of this court to review by writ of error or appeal the judgments or decrees of said Court of Appeals, excluding certain exceptional and enumerated cases, is limited to cases where the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, and such power to review is to be exerted only in the same manner and under the same regulations as theretofore prevailed before the organization of the Court of Appeals in cases

of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia.

Now, as it is settled by the authorities previously referred to that the proceeding in question was legal in its nature and not one of equitable cognizance, and as it has also been settled that the jurisdiction of this court prior to the act of 1883, to review the final judgments or decrees of the Supreme Court of the District of Columbia, did not give power to review by appeal, a matter not of equitable cognizance, *Ormsby* v. *Webb*, 134 U. S. 47, 64, it necessarily follows that we are without jurisdiction to review the action of the Court of Appeals of the District of Columbia on the appeal here taken, and that appeal must, therefore, be dismissed.

Thus disposing of the appeal we come to consider the case on the writ of error. The errors assigned in the brief of counsel are as follows:

"The court below erred in sustaining the trial court:

"1st. *In refusing to set aside the assessment because not supported by the evidence, and because contrary to the same and the weight thereof.*

"2d. *In refusing to instruct the jury that no assessment could be made against it as a corporation, but only against such of its property, if any, as might be benefited.*

"3d. *In refusing to instruct the jury that no assessment of benefits could be made against appellant.*"

In view of the condition of the record, as disclosed by the statement of the case which we have made, we are of opinion that we cannot pass upon the errors embraced by these assignments.

The inability so to do results from the fact that there is no bill of exceptions in the record showing that the Supreme Court of the District of Columbia was asked to and refused to give the alleged instructions upon which the second and third assignments of error depend, nor does it appear, from a bill of exceptions or in any other appropriate mode, upon what the Supreme Court of the District of Columbia acted

in considering the exception expressly stated to be based upon the evidence. Not only this, but there is nothing of record exhibiting the fact that any exception was duly taken to the action of the court in overruling the objections urged by the railroad company to be confirmation of the verdict of the jury.

True it is that the transcript contains what purport to be certain instructions asked and refused, marked filed by the clerk. True also is it that there is in the printed transcript a petition and other papers concerning the evidence given before the jury, to which we have referred in the statement of the case. And it is also true that there is in the printed transcript an agreement between counsel, reciting that the court allowed the prayer of the petition. But in the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which we have alone the right to consider in determining the merits of the errors assigned. *Young* v. *Martin*, 8 Wall. 354; *Baltimore & Potomac R. R. Co.* v. *Sixth Presbyterian Church*, 91 U. S. 127; *Clune* v. *United States*, 159 U. S. 590, 593; *Nelson* v. *Flint*, 166 U. S. 276, 279.

In *Young* v. *Martin*, where entries had been made by the clerk in his minutes, stating the filing of a demurrer, argument thereon and overruling of the demurrer, and that exception had been taken by plaintiff, it was held that the exception was not available. The court said (p. 356):

"These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court."

It may be observed in passing that whilst it is not now necessary to seal a bill of exceptions, Rev. Stat. sec. 953, the other requisites referred to are essential.

In *Baltimore & Potomac R. R. Co.* v. *Sixth Presbyterian*

Church—a case similar in character to that under review—the court said (pp. 130, 131):

"Neither depositions nor affidavits, though appearing in the transcript of a common law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions.

* * * * * * * *

"Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the Appellate Court, as nothing of the kind can ever constitute the proper foundation for an assignment of error. *Suydam* v. *Williamson*, 20 How. 433.

* * * * * * * *

"Inquisitions like the present one bear a strong analogy in many respects to the report or award of referees appointed under a rule of court, to whom is referred a pending action. Referees in such cases make their report to the court; and in such a case the report, unlike an award at common law, must be confirmed before the prevailing party is entitled to the benefit of the finding of the referees. When the report is filed in court the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well-settled law that the ruling of the court in overruling such objections is the proper subject of a bill of exceptions. *Railroad* v. *Myers*, 18 How. 250."

In *Clune* v. *United States*, in the course of the opinion the court said (159 U. S. 593):

"Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."

That parties by their affidavits or agreements cannot cause that to become a bill of exceptions which is not such in a legal sense, is settled. *Nelson* v. *Flint*, 166 U. S. 276, 279; *Malony* v. *Adsit*, 175 U. S. 281, 285, and cases cited.

As it results that the record before us does not exhibit error, the judgment of the Court of Appeals of the District of Columbia must be and it is

Affirmed.

OLSEN *v.* SMITH.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 42. Argued November 3, 1904.—Decided November 28, 1904.

State laws regulating pilotage, although regulations of commerce, fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject.

Whether illegal provisions in a pilotage statute granting discriminatory exemptions to vessels of that State can be eliminated without destroying the other provisions of the statute, is a State and not a Federal ques-

tion. For the purpose of determining the validity of state statutes in their Federal aspect this court accepts the interpretation given to the statute by the state court and tests their validity accordingly.

The effect of Rev. Stat. §§ 4237, 4444, is not to interfere with or abrogate state laws regulating pilotage, but to withdraw coastwise steam vessels from the pilotage charges imposed by such state laws.

A state pilotage law subjecting all vessels, domestic and foreign, engaged in foreign trade to pilotage regulations, but which exempts pursuant to law coastwise steam vessels of the United States, is not in conflict with provisions in the treaty between the United States and Great Britain to the effect that British vessels shall not be subject to any higher or other charges than vessels of the United States.

Pilotage regulations being under the control of the State, a state pilotage law otherwise unobjectionable, is not violative of the Fourteenth Amendment because it prevents an unlicensed person from rendering services as a pilot or because it creates a monopoly in favor of the pilots who are licensed under the act.

THE facts, which involved the constitutionality of the pilotage law of the State of Texas, are stated in the opinion.

Mr. Walter Gresham for plaintiff in error:

The act constitutes one scheme and the illegal provisions cannot be separated from the legal provisions. *Spraigue* v. *Thompson*, 118 U. S. 94; *Freeman* v. *The Undaunted*, 37 Fed. Rep. 662. The statute conflicts with the treaty with Great Britain. U. S. Treaties, 1889, 411. The statute conflicts with the anti-trust law of July 2, 1890, 26 Stat. 647. As construed by this court this law prohibits all contracts and combinations creating monopolies or preventing free competition in traffic or commerce between the States or with foreign nations, or hindering or impeding the instrumentalities of interstate or foreign commerce. The Galveston Pilot Association is such a combination. *United States* v. *Freight Assn.*, 166 U. S. 327; *United States* v. *Joint Traffic Assn.*, 171 U. S. 569; *Addyston Pipe Case*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Montague* v. *Lowry*, 193 U. S. 38.

The State cannot declare an occupation to which none of the functions of government attach, to be an office, limit the

number of citizens who may hold the same, and prohibit all others, whatever their qualifications and fitness, from pursuing it. The Texas statute which declares a pilot to be an officer, and limits the number of citizens who can serve as pilots to the defendants in error, and such deputies as they may choose to appoint, is void.

The Legislature has limited the number of deputies and delegated to defendants in error the power to select and limit the number of men who can become qualified to serve as branch pilots. Such a limitation and delegation of authority by the Legislature is illegal, whether a branch pilot be an officer of the State or not. *Willis* v. *Owens*, 43 Texas, 41; *Peoples' R. R. Co.* v. *Memphis R. R. Co.*, 10 Wall. 50; Cooley's Constitutional Limitations, 6th ed., 137 and note 1. A pilot is not a public officer. *Hobart* v. *Drogan*, 10 Pet. 123; *Dean* v. *Healy*, 66 Georgia, 503; Navigation Laws of the U. S., 1899, 53.

He is merely a navigator,—one who is or ought to be familiar with taking charge of a ship, and taking it into or out of the port at the particular place where he is engaged in the business. 18 Am. & Eng. Ency. of Law, 444; *United States* v. *Forbes*, 1 Crab. 558; *S. C.*, Fed. Cas. No. 15,129. As to who are officers, see Texas Const. art. II, § 1, art. IV, § 1; *Petterson* v. *Texas*, 58 S. W. Rep. 100.

The right of the defendants in error to maintain this suit is based upon the hypothesis that a pilot is a state officer. *United States* v. *Hartwell*, 6 Wall. 385; *Atty. Gen.* v. *Drohan*, 169 Massachusetts, 534; *Shelby* v. *Alcorn*, 36 Mississippi, 273; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438.

If a State deprives a citizen who is a skilled seaman, qualified to be a pilot, of his natural right to pursue his occupation it deprives him of the "liberty" and "property" guaranteed him by the Fourteenth Amendment. *Slaughter House Case*, 16 Wall. 79; Brannon's Fourteenth Amendment, and cases cited pp. 109, 115; *Smith* v. *Alabama*, 124 U. S. 480; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *S. C.*, 82 Fed. Rep. 833; *Powell* v.

Pennsylvania, 127 U. S. 684; *Butchers' Union Co.* v. *Crescent City Co.*, 1 U. S. 757, 762; *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 558, 567.

The power over the subject of pilots and pilotage is conferred upon Congress by the commercial clause of the Constitution. Art. I, § 8, cl. 3. This power is without limit and exclusive and cannot be delegated or surrendered.

It has been recognized that the States, in the absence of Congressional action, have authority to regulate the subject of pilots and pilotage, although the lines of argument by which this conclusion has been reached are by no means uniform. At the time when the decisions cited by defendants in error were rendered Congress had not, except the act of 1789, legislated upon this subject, and most of the harbors and rivers of the United States were only known to the local pilots. These conditions are now changed and Congress has legislated in many matters respecting pilotage and the earlier cases can be distinguished.

Mr. James B. Stubbs, with whom *Mr. Charles J. Stubbs* was on the brief, for defendants in error:

The acts of Congress are paramount and nullify all conflicting provisions whatever in a state statute but the objectionable features of the Texas statute are separable. *The Alameda*, 32 Fed. Rep. 333; *Reagan* v. *Trust Co.*, 154 U. S. 362; *Telegraph Co.* v. *Texas*, 62 Texas, 630; *Keokuk &c. Co.* v. *Keokuk*, 95 U. S. 89; *Spraigue* v. *Thompson*, 118 U. S. 90; *The Undaunted*, 37 Fed. Rep. 662, distinguished; *Loeb* v. *Trustees of Columbia Township*, 179 U. S. 490.

The rule requiring ships in the foreign trade to take a pilot, or pay half pilotage, can and was intended to be applicable to such vessels, in any event, regardless of the rules then or thereafter prescribed for domestic or coasting craft. The state exemption of such is broad, including many that the Federal act omits, and it is apparent that the legislature would not have hesitated, if called to its attention, to have made the

state exemptions or options conform to the National. *Tiernan* v. *Rinker*, 102 U. S. 123; *S. C.*, 47 Texas, 393; *T. & P. Ry. Co.* v. *Mahaffey*, 10 T. C. R. 779; *Florida Central Ry.* v. *Schutte*, 103 U. S. 118; *Little Rock & Ft. S. R. Co.* v. *Worthen*, 120 U. S. 102. This court will accept the construction of the Texas courts in such cases as this. *Cargill Co.* v. *Minnesota*, 180 U. S. 460; *Tullis* v. *Lake Erie & W. R. Co.*, 175 U. S. 348; *Mo. Pac. R. Co.* v. *Nebraska*, 164 U. S. 403; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *St. L., I. M. & S. R. Co.* v. *Paul*, 173 U. S. 404; *M., K. & T. Ry.* v. *McCann*, 174 U. S. 586.

The statute does not contravene the foreign treaty or the anti-trust act.

No restraint of commerce or prevention of competition can exist by virtue of any agreement among the pilots themselves. The law alone is responsible for the limited number of pilots, and it alone prescribes the maximum rates of pilotage, and generally provides for the regulation of the service by the Commissioners who are responsible to the Governor.

The formation of a partnership among all the pilots of the port is not unlawful. *Petterson* v. *Board of Pilot Commissioners*, 57 S. W. Rep. 1002; *Jones* v. *Clifford*, 5 Florida, 510; *Levine* v. *Michel*, 35 La. Ann. 121; *The Pirate*, 32 Fed. Rep. 490; *The Dundee*, 103 Fed. Rep. 698; *S. C.*, 108 Fed. Rep. 678; *Mason* v. *Ervine*, 27 Fed. Rep. 459.

An agreement to be in conflict with the anti-trust act must directly and substantially, and not merely indirectly and incidentally, regulate interstate or foreign commerce. *Anderson* v. *United States*, 171 U. S. 615. And see besides cases cited by plaintiff in error. *Hopkins* v. *United States*, 171 U. S. 578.

The State has the right to limit the number of port pilots and require service as a deputy pilot as a condition precedent to appointment as pilot. *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Petterson* v. *Board*, 57 S. W. Rep. 1002;

The power exercised by States in enacting pilotage laws is an original power and not one delegated by Congress. *The*

Chase, 14 Fed. Rep. 854; *Davidson* v. *Sadler,* 57 S. W. Rep. 54.

The position of a pilot is that of a public officer. *People* v. *Woodbury,* 14 California, 43; *Flynn* v. *Abbott,* 16 California, 359; *Doliver* v. *Parks,* 136 Massachusetts, 499; *The California,* 1 Sawy. 596; *S. C.,* Fed. Cas. No. 2313; *Barnaby* v. *State,* 21 Indiana, 450. See also laws in New York and Louisiana referred to in foregoing opinions.

Courts should declare a law unconstitutional only when it is clearly so. *Fletcher* v. *Peck,* 6 Cranch, 87. Where an employment or a duty is a continuing one, defined by rules prescribed by law and not by contract, such a charge or employment is an office. Measured by this rule the Galveston pilots are officers. 23 Am. & Eng. Ency. of Law, 2d ed., 324, and cases cited in note 1.

As to the deputies some preliminary training for pilots is essential, and it is well-nigh the universal practice in our maritime States to require a proper service as deputies or apprentices. *Palmer* v. *Woodbury,* 14 California, 45.

The Fourteenth Amendment was not designed to interfere with the police power of the State, and the pilotage laws are police regulations of commerce. Congress possesses the right to establish these regulations, but as long as it does not assume this power the States may exercise it. *Gibbons* v. *Ogden,* 9 Wheat. 1, 207. If Congress had taken charge of the entire subject its right to prescribe an apprenticeship or a deputyship could not be successfully challenged. Tiedeman's Lim. of Police Power, 626; Hughes on Admiralty, 28, 38; *The China,* 7 Wall. 53; *Wilson* v. *McNamee,* 102 U. S. 572.

Legislation limited in its application, but operating alike on all persons similarly situated, is not within the Fourteenth Amendment. *Barbier* v. *Connolly,* 113 U. S. 27; *A., T. & S. F. Ry.* v. *Matthews,* 174 U. S. 106; *The Chase,* 14 Fed. Rep. 854.

States have delegated to others the authority to recommend in one case, and to appoint in the other, the pilot commis-

sioners of the ports of Boston and New York respectively. Opinion of the Justices, 154 Massachusetts, 603; *S. C.*, 31 N. E. Rep. 634; *Sturges* v. *Spofford*, 45 N. Y. 446; *Cooley* v. *Board of Wardens*, 12 How. 300; and see *Ex parte McNeill*, 13 Wall. 236.

Congress can, if it deems best, assume control of pilotage in every State, but it is well settled that the mere grant to Congress of the power to regulate commerce did not deprive the States of the power to regulate pilots, unless and until Congress should determine otherwise. The only question raised or doubt expressed was as to the validity of the laws or the authority of the States to enact them. *The Carry L. Tyler*, 106 Fed. Rep. 426; *The Creole*, Fed Cas. 13,033; *Darden* v. *Thompson*, 101 Virginia, 635, 755.

Pilot laws of other seaboard States are similar to this as to apprentices. Alabama Code, 1896, §§ 2992, 2996, 2999; Florida, Rev. Stat. 1892, §§ 938 *et seq.*; Delaware Code, 1893, 556, 558; Georgia Code, 1895, §§ 1651, 1653, 1683, 1684; New York, 3 Rev. Stat. pp. 2266, 2273; Virginia Code, 1887, §§ 1955 *et seq.*; New Jersey, 2 Gen. Stats., arts. 56, 59; Mississippi, Ann. Code, §§ 2252, 2258, 2260, 2261; Maryland, 2 Pub. Gen. Laws, art. 74, §§ 4, 6, 10; South Carolina, Rev. Stat. 1893, §§ 1357, 1365; North Carolina, Battle's Rev. ch. 87, §§ 1, 7.

Mr. Justice White delivered the opinion of the court.

The defendants in error, who were plaintiffs in the court of original jurisdiction, as the duly licensed state pilots of the port of Galveston, Texas, sued in a Texas District Court to recover the damages averred to have been caused them by the alleged illegal action of the defendant in offering, when he was not authorized by law to do so, his services "to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston." An injunction was prayed restraining the defendant from acting "in any manner as branch or deputy pilot, or pilot under the laws of the State

of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified." The defendant filed a general demurrer, and, reserving the demurrer, answered, raising special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the defendant, and, on the ground that no defence was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. 68 S. W. Rep. 320. The case was taken to the Court of Civil Appeals for the First Supreme Judicial District, was thence transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District, where the decree below was affirmed, with a slight modification not necessary to be stated. The Supreme Court of the State having declined to review the action of the Court of Civil Appeals, this writ of error was prosecuted to the latter court.

The defenses raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the State of Texas had power to enact laws regulating pilotage in the ports of that State; and, second, if such power existed, whether the provisions of the state statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the Fourteenth Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the State of Texas provide as follows: The governor is authorized to appoint for each port, whose population and circumstances shall warrant it, "a board of five persons of respectable standing, to be known as commissioners of pilotage." Upon this board power is conferred to fix, within the maximum limits provided by law, the charges to be made by branch and deputy pilots for their services, to regulate the manner

in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. Revised Statutes of the State of Texas for 1895, articles 3790, 3791, 3792, 3793, 3794, 3796 and 3803. The maximum rates of pilotage are provided for as follows:

"The rate of pilotage on any class of vessels shall not, in any port of this state, exceed four dollars for each foot of water which the vessel at the time of piloting draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot whose services she so declined, for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before she came in, but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. . . ." Article 3800.

The vessels excepted from the operation of the foregoing provisions are thus stated in article 3801:

"The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to wit: All vessels of twenty tons and under, all vessels of whatsoever burden

owned in the state of Texas and registered and licensed in the district of Texas, when arriving from or departing to any port of the state of Texas; all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the state of Texas; all vessels of seventy-five tons or under owned in the state of Texas and licensed for the coasting trade in the district of Texas when arriving from or departing to any port in the United States."

The first contention in effect is that the State was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the Constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although state laws concerning pilotage are regulations of commerce, "they fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject." *Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236; *Wilson* v. *McNamee*, 102 U. S. 572.

The second proposition relied on is that, albeit the State had power to legislate concerning pilotage until Congress acted, the state laws are void because in conflict with the laws enacted by Congress. This is based upon two provisions of the Revised Statutes of the United States, the one providing "that no regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, and all existing regulations or provisions making any such discrimination are annulled and abrogated," Rev. Stat. § 437; the other being the provision of the statutes, Rev. Stat. § 1444, exempting coastwise steam vessels from the operation

of state pilotage laws. Undoubtedly the exempting clause of the Texas statute is discriminatory, and is therefore void, because in conflict with the law of the United States. The court below so decided. It held, however, that the provisions discriminating in favor of Texas ships and ports were separable from the remainder of the statutes, and therefore the general regulations concerning pilotage were valid, although the discriminating provisions were eliminated. Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other provisions of the state laws regulating pilotage, is a State and not a Federal question. For the purpose of determining the validity of the statutes in their Federal aspect this court accepts the interpretation given to the statutes by the state court and tests their validity accordingly. *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466, and authorities there cited. True it is in *Spraigue* v. *Thompson*, 118 U. S. 90, a case involving the pilotage laws of Georgia, in the course of the opinion it was remarked (p. 95) that the ruling of the Supreme Court of the State of Georgia, that the illegal provision of the statute in question was separable, caused the statute "to enact what confessedly the legislature never meant." But this remark was not made the basis of the conclusion, since it was decided in that case that the pilotage charge in question was invalid, even under the construction given by the Supreme Court of the State of Georgia to the state statute, because the exaction which was in controversy was in conflict with the provisions of the Revised Statutes of the United States, exempting coastwise steam vessels from pilotage charges. In any event, it is apparent that the observation referred to, made in the case of *Spraigue* v. *Thompson*, has been qualified by the later decisions of this court to which we have previously referred.

Of course, whilst accepting the construction of the state court as to the divisibility of the statute, the duty yet remains, for the purpose of the Federal question, to determine whether the statute as construed is valid. As the effect of

the construction below was to eliminate the discrimination from the statute, it is clear, in view of the power of the State to legislate concerning pilotage until Congress acts upon the subject, that the statutes, as interpreted below, were within the power of the State and not in conflict with any act of Congress. Indeed, it is obvious from the provisions of the Revised Statutes, sec. 4237, forbidding discrimination in state legislation concerning pilotage, that Congress did not intend by that section to revoke the power of the States on the subject or to abrogate existing pilotage laws of the several States containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any State discriminating "in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States," in careful language annuls and abrogates only "all existing regulations or provisions making any such discrimination." And this construction of the section in question disposes also of the argument that if the statute be accepted as interpreted by the state court, it is nevertheless repugnant to the law of the United States, since, if the exceptions found in the state statutes are eliminated, then those statutes impose pilotage charges upon all vessels, and hence subject coastwise steam vessels of the United States to such charges, although they are expressly exempted therefrom. Revised Statutes, § 4444. But the provisions of that section clearly contemplated that by the existing state laws, coastwise steam vessels of the United States were subject to pilotage charges, and proposed, whilst withdrawing such vessels from pilotage charges, not in other respects to interfere with the state laws on the subject of pilotage. This is plainly the result of the following provision contained in the section in question:

"Nothing in this Title shall be construed to annul or affect

any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State."

Nor is there merit in the contention that, as the vessel in question was a British vessel coming from a foreign port, the state laws concerning pilotage are in conflict with a treaty between Great Britain and the United States, providing that "No higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States." Neither the exemption of coastwise steam vessels from pilotage, resulting from the law of the United States, nor any lawful exemption of coastwise vessels created by the state law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade. In substance the proposition but asserts that because by the law of the United States steam vessels in the coastwise trade have been exempt from pilotage regulations, therefore there is no power to subject vessels in foreign trade to pilotage regulations, even although such regulations apply, without discrimination, to all vessels engaged in such foreign trade, whether domestic or foreign.

It remains only to consider the contention based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a

monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.

Affirmed.

BIRKETT *v.* COLUMBIA BANK.

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

No. 26. Argued October 28, 1904.—Decided November 28, 1904.

Actual knowledge of the proceedings contemplated by section 17 of the Bankruptcy Act is a knowledge in time to avail a creditor of the benefits of the law and to give him an equal opportunity with other creditors, and not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends.

THIS is an action on a promissory note for $750. The defense is discharge in bankruptcy. The making of the note

was admitted, and the only question presented is the effect of the discharge.

The facts as found by the court are: Plaintiff in error and one Calvin Russell, who died before the commencement of this action, were partners doing business under the name of Russell & Birkett, and in that name made and delivered to the Manhattan Railway Advertising Company a promissory note for $750. The latter company endorsed the note to defendant in error, of which Russell & Birkett had knowledge before its maturity. On April 13, 1899, the firm of Russell & Birkett and plaintiff in error, upon their own petition, were adjudicated bankrupts in the United States District Court for the Northern District of New York, and were discharged September 12, 1899. The claim of defendant in error was not scheduled, either as a debt of the firm or of plaintiff in error, in time for proof and allowance with the name of the defendant in error, though defendant in error was known at the time of filing the schedules to be the owner and holder thereof by plaintiff in error, and that defendant in error had no notice or actual knowledge or other knowledge of the proceedings in bankruptcy prior to the discharge of the bankrupts. No notice of the proceedings in bankruptcy was at any time given to defendant in error by, or by the direction of, the bankrupts or either of them. It was decided that the claim of defendant in error was not barred by the discharge in bankruptcy, and judgment was directed for defendant in error.

Mr. John Murray Downs, with whom *Mr. Thomas Carmody* and *Mr. Robert G. Scherer* were on the brief, for plaintiff in error:

No duty is imposed by the Bankruptcy Law upon the bankrupt to give notice to his creditors. That duty is imposed on the referee.

Pleading the discharge in bankruptcy and proving the same established *prima facie* a complete defense to this action. The bank's claim existed and was a provable debt against the

estate; the bank had actual knowledge of the proceeding in time to prove its claim and have it allowed, and the presumption is that it was barred by the discharge. The burden of proof was with the bank to show not only that it had no notice of the proceeding in bankruptcy, but that it had no actual knowledge. *Fider* v. *Manheim*, 81 N. W. Rep. 2; *Jones* v. *Walter*, 74 S. W. Rep. (Ky.) 249; *Zimmerman* v. *Ketchum*, 71 Pac. Rep. (Kan.) 264; *Smith* v. *Wheeler*, 55 App. Div. 170; *Lamb* v. *Brown*, 14 Fed. Cas. 988; *S. C.*, 12 N. B. R. 522; *Carey* v. *Mayor*, 79 Fed. Rep. 926; *White* v. *Howe*, 29 Fed. Cas. 1019; *S. C.*, 3 McLean, 291; *Lathrop* v. *Stewart*, 14 Fed. Cas. 1185; *S. C.*, 5 McLean, 167.

The burden was not with the plaintiff in error; the bank was not within the exceptions in § 17. *Jarecki* v. *McElwaine*, 107 Fed. Rep. 249.

The discharge in bankruptcy was properly pleaded. N. Y. Code Civ. Pro. § 532; *Livingston* v. *Oaksmith*, 13 Abb. 183; *Schermerhorn* v. *Talman*, 14 N. Y. 93, 125; *Harrison* v. *Lourie*, 49 How. Pr. 124, 127; *Stevens* v. *King*, 16 App. Div. 377; *McCormick* v. *Pickering*, 4 N. Y. 276; *Morse* v. *Cloyes*, 11 Barb. 100; *Small* v. *Graves*, 7 Barb. 577; *Raye* v. *Lapham*, 27 Ohio St. 452; *S. C.*, 15 B. R. 508; *Hall* v. *Robins*, 61 Barb. 33.

A bankruptcy proceeding is in the nature of a proceeding *in rem* before a court of record having jurisdiction and entitled to all presumptions as to its legality and binding effect. *Shawhan* v. *Wherritt*, 7 How. 627; *In re Watts*, 190 U. S. 32. It is a proceeding practically to distribute the property of a bankrupt for the benefit of its creditors and the creditors have a direct representative in the proceedings, the trustee in bankruptcy.

Mr. Julius J. Frank for defendant in error:

The writ should be dismissed or the judgment affirmed because of failure to transmit any assignment of errors with the record. Rev. Stat. § 997. As no "plain error" appears

therein the uniform practice of the court should be followed in this case. *Lucas* v. *Brook*, 18 Wall. 436; *Portland Co.* v. *United States*, 15 Wall. 1; *Ryan* v. *Koch*, 17 Wall. 19; *Treat* v. *Jemison*, 20 Wall. 652; *Maxwell* v. *Stewart*, 21 Wall. 71; *Scholey* v. *Rew*, 23 Wall. 331; *Rowe* v. *Phelps*, 152 U. S. 87. *United States* v. *Pena*, 175 U. S. 500, distinguished.

The cause of action was not barred by the discharge. The bank's name and address did not appear in the schedule of the bankrupt and no notice was sent to it. Loveland on Bankruptcy, 98 note *n*, subd. *a*, § 58 of the act. There is proof to support a finding that no notice was sent by the referee. The court has power to so find. *Ogden* v. *Alexander*, 140 N. Y. 356, 362. Notice too late to be availed of is not a bar. *Stuart* v. *Palmer*, 74 N. Y. 183, 191; *Montana Co.* v. *St. Louis Co.*, 152 U. S. 160, 169.

The circumstances of omitting the name from the schedules warrant the finding of willful and even fraudulent omission of plaintiff's name from the schedules, which, even under the act of 1867, would have "prevented the operation of the discharge on the claim held by the omitted creditor." *Poillon* v. *Lawrence*, 77 N. Y. 207; *Batchelder* v. *Low*, 8 Natl. Bank. Reg. 571; *Matter of Kalish*, Deady, 575; *Tyrrel* v. *Hammerstein*, 35 Misc. 505.

The discharge was insufficiently pleaded, the facts proven did not sustain the defence; where a party claims a statute as a release from an otherwise valid debt, he will he held to strict pleading; if the statute contains an exception, he must strictly plead both the statute and the facts negativing the exception. 1 Kent Com. 463; *Harris* v. *White*, 81 N. Y. 532; *Jones* v. *Axen*, 1 Ld. Raym. 119; *Spieres* v. *Parker*, 1 Term R. 141; Bouvier's Dictionary, "Exception"; Sedgwick, Constr. St. & Const. Law, 50; Potter's Dwarris on Statutes, 119; *Rowell* v. *Janvrin*, 151 N. Y. 60.

The burden of proof throughout was on the defendant below. N. Y. Code Civ. Pro. 514, 516, 522, 532, and he did not sustain it. There was no request to find or any finding

that the bank had notice in time to prove its claim. *Koehler* v. *Hughes*, 148 N. Y. 507, 515; *Loan Assn.* v. *Ebaugh*, 185 U. S. 114, 121; *Hawley* v. *Donoghue*, 116 U. S. 1.

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

The judgment was successively confirmed by the Appellate Division of the Supreme Court and the Court of Appeals. 174 N. Y. 112. Thereupon judgment was entered in the Supreme Court in accordance with the direction of the Court of Appeals. This writ of error was then sued out.

Section 7 of the Bankrupt Law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property and creditors. Among his duties he is required to "prepare, make oath to, and file in the court, within ten days . . . a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee. . . ." To the neglect of this duty the law attaches a punitive consequence. Section 17 provides: "A discharge in bankruptcy shall release a bankrupt of all of his provable debts, except such as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . ."

But plaintiff in error urges that defendant in error did have actual knowledge of the proceedings in bankruptcy, and that Congress contemplated that there might be an intentional or inadvertent omission of the names of creditors from the schedule of debts, and provided against it by other provisions of the

law, especially by that which makes it the duty of the referee to give notice to creditors (sec. 38), and by that which imposes the duty on the bankrupt to appear at the meeting of creditors for examination.

The finding of the trial court is that defendant "had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein." This is made more definite as to time by the Court of Appeals. Defendant in error, upon making an inquiry by letter November 6, 1899, about Russell & Birkett, was informed that they had gone through bankruptcy, and subsequently, (November 17), the Northern District was given as the district of the proceedings. The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (section 65), and to move to revoke the discharge of the bankrupt (section 15). It is hence argued that defendant in error must he held to have had "actual knowledge of the proceedings in bankruptcy," as those words of section 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends (section 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding without penalty to him. It is easy to see

what results such looseness would permit—what preference could be accomplished and covered by it.

Judgment affirmed.

THE CITY OF SEATTLE *v.* KELLEHER.

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

No. 29. Argued October 28, 1904.—Decided November 28, 1904.

An assessment on lands for the entire expense of opening a street levied under a front foot assessment authorized by statute is not necessarily void under the Fourteenth Amendment because levied after the work was completed, or because at the time the work was ordered the municipality had power, under statutes repealed after the completion of the work and before the assessment was made, to include a portion of the expense in the general taxes and to levy the assessment on a valuation basis under which a smaller amount would have been assessed against these lands.

Taxation, whether general or special, is not subject to the rules applicable to a vendor's lien and its enforcement against a *bona fide* purchaser for value, and it is for one purchasing lands after a public improvement has been completed to inquire whether it has been paid for, and the same rules as to the enforcement of the assessment applicable to the former owners are applicable to him.

THE facts are stated in the opinion.

Mr. Mitchell Gilliam, with whom *Mr. Walter S. Fulton* was on the brief, for appellant:

The intention to dedicate and the acceptance of the city appear and constituted a valid common law dedication. Elliott on Roads and Streets, Ch. V, 85; Dillon on Mun. Corp., 4th ed., vol. 2, 737; 5 Am. & Eng. Ency. of Law, 395; *New Orleans* v. *United States*, 10 Peters, 662; *City of Cincinnati* v. *White*, 6 Peters, 431; *Godfrey* v. *City of Alton*, 12 Illinois, 29; *Surgeant* v. *Bank*, 4 McLean, 339. An incomplete statutory dedication may become one at common law by acceptance by

the public. *Fulton* v. *Mehrenfeld*, 8 Ohio St. 440; *Maywood Co.* v. *Village of Maywood*, 6 N. E. Rep. 866.

The owner is precluded from revoking such dedication. 61 Am. Dec. 221; *Heirs of David* v. *New Orleans*, 79 Am. Dec. 586; *People* v. *Jones*, 6 Michigan, 176. Privies in estate are bound to the same extent as grantors. *Warren* v. *Town of Jackson*, 15 Illinois, 236; see also *Kenyon* v. *Knipe*, 2 Washington, 394; *Tilzie* v. *Haye*, 8 Washington, 187; *Schettler* v. *Lynch*, 64 Pac. Rep. 955.

Even if some work was improperly done or an improper item included, the entire assessment would not be vitiated. *Cincinnati* v. *White Lead Co.*, 44 Ohio St. 243; *Dyer* v. *Scalmanini*, 69 California, 637. The act provides a method of objection and appeal and that procedure must be followed or the right lost. *Tumwater* v. *Pix*, 18 Washington, 153; *New Whatcom* v. *Bellingham Bay Imp. Co.*, 16 Washington, 131; *Annie Wright Seminary* v. *City of Tacoma*, 23 Washington, 109.

A reassessment can be made by a different method from that in force when the original assessment was made. *Wilson* v. *Seattle*, 2 Washington, 543.

The question of adopting a method of levying assessments for local improvements lies purely in legislative discretion, and so long as that discretion is exercised in a reasonable manner, and gives parties interested an opportunity to be heard with the right to appeal to the courts from the determination of the city council, it cannot be said that there is a violation of the Fourteenth Amendment. *Norwood* v. *Baker*, 172 U. S. 269; *Tonawanda* v. *Lyon*, 181 U. S. 389; *Wright* v. *Davidson*, 181 U. S. 371; *French* v. *Asphalt Paving Co.*, 181 U. S. 325.

There is nothing in the front-foot method repugnant either to the Constitution of the United States, to the state constitutions and laws, to the decisions of the courts or to the conclusions of practical experience. *Walston* v. *Nevin*, 128 U. S. 582; *Davidson* v. *New Orleans*, 96 U. S. 97, 104.

So the determination of the taxing district and the manner of the apportionment are all within the legislative power. *Spencer* v. *Merchant*, 125 U. S. 345; *Stanley* v. *Supervisors*, 121 U. S. 535, 550; *Mobile* v. *Kimball*, 102 U. S. 591; *Hagar* v. *Reclamation District*, 111 U. S. 107; *United States* v. *Memphis*, 97 U. S. 284; *Laramie* v. *Albany Co.*, 92 U. S. 307; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 176; *Parsons* v. *Dist. of Col.*, 170 U. S. 51; *Kidd* v. *Parsons*, 128 U. S. 1; *People &c.* v. *Brooklyn*, 55 Am. Dec. 276; 24 Am. & Eng. Ency. Law, 1st ed., 71; *Mattingly* v. *Dist. of Columbia*, 97 U. S. 687; *Shoemaker* v. *United States*, 147 U. S. 282; *Paulsen* v. *Portland*, 149 U. S. 30; *Bauman* v. *Ross*, 167 U. S. 590; *Lexington* v. *McQuillan*, 35 Am. Dec. (Ky.) 161; *Dorgan* v. *Boston*, 12 Allen, 238; Cooley's Const. Lim., 6th ed., 623; *Baltimore* v. *University*, 56 Maryland, 499; *Northern Ind. R. R. Co.* v. *Connelly*, 10 Ohio St. 159; 2 Dillon Municipal Corporations, 2d ed., § 761; Elliott on Roads and Streets, 391; Cooley on Taxation, 2d ed., 644; *Whiting* v. *Townsend*, 57 California, 515; *Emory* v. *San Francisco Gas Co.*, 28 California, 345; *Hayden et al.* v. *City of Atlanta*, 70 Georgia, 817; *Bacon* v. *Mayor of Savannah*, 32 A. & E. Corpn. Cas. 244; *Springfield* v. *Green*, 120 Illinois, 269; *Palmer* v. *Stumph*, 29 Indiana, 337; *Amery* v. *Keokuk*, 72 Iowa, 701; *Sheley* v. *Detroit*, 45 Michigan, 431; *Farrar* v. *St. Louis*, 80 Missouri, 379; *Sigler* v. *Fuller*, 34 N. J. L. 232; *O'Reilly* v. *Kingston*, 114 N. Y. 439; *Roberts* v. *First Nat. Bank*, 8 North Dakota, 504; *Upington* v. *Treasurer*, 24 Ohio St. 232; *King* v. *City of Portland*, 2 Oregon, 147; *Harrell* v. *Storrie*, 47 S. W. Rep. 838; *Davis* v. *Lynchburg*, 84 Virginia, 861; *Austin* v. *Seattle*, 2 Washington, 669; *Weeks* v. *City of Milwaukee*, 10 Wisconsin, 243.

After a person has signed a petition for an improvement, which can only be paid for by means of an assessment on contiguous property, he is estopped from contesting the validity of the assessment, especially after the work has been completed and accepted by the proper authorities. Cooley, Tax'n, 819; *Ball* v. *Tacoma*, 9 Washington, 592; *Motz* v. *City of*

Detroit, 18 Michigan, 495; *Wood* v. *Norwood Twp.*, 52 Michigan, 32; *Ricketts* v. *Spraker*, 77 Indiana, 371; *Patterson* v. *Baumer*, 43 Iowa, 477; *Ferson's Appeal*, 96 Pa. St. 140; *Evansville* v. *Pfisterer*, 34 Indiana, 36; Elliot, 420; *Tash* v. *Adams*, 10 Cush. 252; *Wright* v. *Tacoma*, 19 Pac. Rep. 45; *Powers* v. *New Haven*, 120 Indiana, 185; 11 Am. & Eng. Ency. Law, 2d ed., 429; *Taber* v. *Ferguson*, 109 Indiana, 227; *Ross* v. *Stackhouse*, 114 Indiana, 200; *Jenkens* v. *Stetler*, 118 Indiana, 275; *Johnson* v. *Allen*, 62 Indiana, 57.

Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a State may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

Mr. Frederick Bausman, with whom *Mr. Daniel Kelleher* and *Mr. G. Meade Emory* were on the brief, for appellee:

The former owner could have opposed the reassessment. Inviting the municipality to open a highway he did so according to the statute. *Howell* v. *Tacoma*, 3 Washington, 715; *Grant* v. *Bartholomew*, 58 Nebraska, 839; *Birdseye* v. *Clyde*, 61 Ohio St. 27; *Smith* v. *Minto*, 30 Oregon, 351; *Terre Haute* v. *Mack*, 139 Indiana, 99.

When a man's land is assessed unlawfully or in an unconstitutional manner for street improvements, he may contest the validity of the assessment, although he was a petitioner for the improvement.

As to the planking, see Session Laws, Washington Territory, 238, § 7.

Leaving out the violation of plain statutes involved here, there is such inequality as amounts to confiscation. It was grossly unnecessary and unjust to include this vacant, unoccupied tract in a district which was to bear the expense of planking when that planking was extended only along the settled portion of the street, and was to stop a thousand feet from our own tract, vacant and wild. *Norwood* v. *Baker*, 172

U. S. 269; *Sears* v. *Boston*, 173 Massachusetts, 71; Cooley, Tax'n, 1209.

Even if the original owner could not avoid the reassessment his grantee could. The reassessment was by a subsequent law against an innocent purchaser. *Richards* v. *Shingle Co.*, 41 Michigan, 860; *Smith* v. *Allen*, 18 Washington, 1; *Tallman* v. *Janesville*, 17 Wisconsin, 51; *Cross* v. *Milwaukee*, 19 Wisconsin, 509, distinguished.

The lien resisted was a secret one. This seems to us not true of liens reassessed under laws existing before the new purchaser comes in. There he buys with the knowledge that the State has already asserted the right, though it has not yet exercised the intention. As against subsequent laws, the purchaser may well protest that at the time he bought, the State had not even asserted a right. The State should be estopped. *Curnen* v. *New York*, 79 N. Y. 511.

There should be notice of some kind in a district assessment. *Scott* v. *Toledo*, 36 Fed. Rep. 385; *Paulsen* v. *Portland*, 149 U. S. 30.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court declaring an assessment upon the plaintiff's land void under the Fourteenth Amendment, and enjoining the city against enforcing the same. The facts are these: Weller Street, in Seattle, runs east from Elliott Bay, and formerly stopped at the east line of Maynard's Donation Claim. The land now belonging to the appellee, the plaintiff below, is a hundred acres lying on the east of that line, extending to the line of the Jackson Street Addition. Weller Street, if extended eastward, would run through the middle of this land for twenty-five hundred feet. While this land belonged to one Hill, in 1889, he petitioned that Weller Street be extended and graded to the Jackson Street Addition line, and he submitted to the City Council and circulated, although he did not record, plans

showing the extension, with his land on the two sides of it divided into lots and blocks. The plan was approved, and in 1890 the city passed an ordinance that Weller Street be graded from the beginning to Jackson Street Addition, and that sidewalks be constructed on both sides of it coextensive with the grade. Ordinance No. 1285. The street was graded, and, according to the testimony, had to be cut and filled almost continuously. It also was planked for some distance, but the planking stopped about a thousand feet before reaching Hill's tract. Then an assessment was levied, but this was held void. The next things that happened were a sale of Hill's land and a mortgage of it in January, 1892, to the appellee, which later was foreclosed. The appellee, who lived out of the State, alleges that he was ignorant of the submission of the plan by Hill.

On March 9, 1893, an act was approved authorizing a new assessment, when the old one had been declared void, upon the lands benefited, to the extent of their proportionate part of the expense of the improvement, based upon its actual value at the time of its completion, and having reference to the benefits received. Notice by publication of a time for hearing objections was provided for, with an appeal to the courts. Laws of 1893, c. 95. When the improvement in question was ordered, by the charter of Seattle the planking was to be paid for out of the general taxes. Laws of 1885, 1886, pp. 238, 241, § 7. The special assessment for the other elements, according to the assessed value of the land, could be imposed upon the abutting property to one hundred and twenty-eight feet back from the street. This was modified by a new charter adopted later in 1890, and still in force. Under the latter the assessment was to be by the front foot, with different percentages for four parallel subdivisions at successive distances from the street up to one hundred and twenty feet. It was to be for the cost of the improvement. To carry out the plan, local improvement districts were to be established, including all the property within the termini of the improvement, and

not more than one hundred and twenty feet on each side of the margin. Reassessments were authorized. In pursuance of the charter an ordinance was adopted by the city providing the manner in which the local assessments should be made. Ordinance No. 2085.

In this state of the ordinances and laws a reassessment of the whole cost of the improvement was ordered in January, 1894, in conformity with the act of 1893, the new charter and the Ordinance No. 2085. Ordinance No. 3199. The proper steps were taken and the assessment was confirmed on March 5, 1894. Ordinance No. 3267. By this assessment the whole cost of the improvement, $35,620.60, was levied on the abutting land, and $14,262.68 was fixed as the plaintiff's share. It is alleged that he thus is charged forty-four per cent under the present plan, whereas under the one in force when the improvement was made he would have been charged only thirty-two per cent. It also is alleged that, being absent from the State, he did not know of the reassessment proceedings until they were concluded.

The bill disputed, among other things, that the prolongation of Weller Street through the plaintiff's land, ever had been dedicated as a street. But in view of the assumption by the Circuit Court that the dedication was made out and the statement by it that the point had been decided by the Supreme Court of the State, this objection, if open, very properly was not pressed before us. See *Seattle* v. *Hill*, 23 Washington, 92. Therefore we have not gone into details upon that part of the case. We see no cause to doubt that the Circuit Court was right. The main ground of argument is that the planking could not be included in the assessment. The reasons, as summed up by the Circuit Court, are that the law in force at the time of doing the work did not authorize a charge for planking upon the abutting property, that the Ordinance No. 1285 ordering the improvement did not authorize any planking, that the city could assess only the land abutting on the improvement and the plaintiff's land was far away from

the planking, and that such an assessment of the whole cost, including the planking, on the property on Weller Street, is absolutely unfair as to the plaintiff's land.

A general attack upon the statute of 1893 is not attempted. It was within the power of the legislature to create, or to authorize the creation, of special taxing districts, and to charge the cost of a local improvement upon the property in such a district by frontage. *Webster* v. *Fargo*, 181 U. S. 394; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; *McNamee* v. *Tacoma*, 24 Washington, 591, 595; Cooley, Const. Lim., 7th ed., 729. The only question of principle, therefore, raised by the inclusion of the planking in the sum of which the plaintiff was to pay his share is whether it was manifestly unfair in this particular case. Taken by itself it looks like an unwarrantable attempt to make one man pay for another man's convenience.

On the other hand, so far as the work was similar in character, throughout the street, we are of opinion that the improvement might be regarded as one. *Webster* v. *Fargo*, 181 U. S. 394. See *Lincoln* v. *Street Commissioners*, 176 Massachusetts, 210, 212. And if this be admitted we cannot say that the assessing board might not have been warranted in thinking that substantial justice was done. There were many cuts and fills made in grading the road. So far as appears, the heaviest work may have been done on the plaintiff's land, which seems to have been the summit of an ascent. Improvement of one sort may have been the greatest there, while that of a different kind, needed where the travel was, was at the other end of the street. It is true that the Circuit Judge considered that there was manifest injustice in assessing the plaintiff's land, which was empty and unimproved, by the front foot at the same rate as the improved land lower down and nearer to the bay, and that his opinion naturally carries weight, from his probable acquaintance with the condition of the place. But we do not find a sufficient warrant for it on the record. We must consider how things looked at the time. The owner of the land desired the improvements, if carried out

as he wished. The extension of the street helped to bring his land into the market. It was more likely to benefit him than those who were lower down. We cannot invalidate the assessment because the speculation has failed. Assuming, without deciding, that the question is open to the plaintiff in this proceeding, we are of opinion that the record does not justify interference by injunction on the ground that the assessment was manifestly unfair.

The answer to the other objections may be made in few words. If, as is said, planking was not authorized under the word "sidewalks" in Ordinance No. 1285, the city has done or adopted the work and presumably has paid for it. At the end the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. *Bellows* v. *Weeks*, 41 Vermont, 590, 599, 600; *Mills* v. *Charleton*, 29 Wisconsin, 400, 413; *Hall* v. *Street Commissioners*, 177 Massachusetts, 434, 439. If this were not so it might be hard to justify reassessments. See *Norwood* v. *Baker*, 172 U. S. 269, 293; *Williams* v. *Supervisors of Albany*, 122 U. S. 154; *Frederick* v. *Seattle*, 13 Washington, 428; *Cline* v. *Seattle*, 13 Washington, 444; *Bacon* v. *Seattle*, 15 Washington, 701; Cooley, Taxation, 3d ed., 1280. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment, which again depends on the meaning of the words "sidewalk" and "pave" in the old Charter, § 8, taken with the special provision for planking in § 7. Laws of 1885-1886, pp. 238, 241. The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature

could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free "to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property" in any constitutional way. *Norwood* v. *Baker*, 172 U. S. 269, 293; *McNamee* v. *Tacoma*, 24 Washington, 591; *Annie Wright Seminary* v. *Tacoma*, 23 Washington, 109.

We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning *bona fide* purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. See *Tallman* v. *Janesville*, 17 Wisconsin, 71, 76; Cooley, Taxation, 3d ed., 527, 528. Indeed he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made.

Decree reversed.

Mr. Justice Harlan and Mr. Justice Brown dissent.

THE BLACKHEATH.

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

No. 34. Argued October 31, 1904.—Decided November 28, 1904.

Admiralty has jurisdiction of a libel *in rem* against a vessel for the damages caused by its negligently running into a beacon in a channel, although the beacon is attached to the bottom.

THE facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds for the United States, appellant.

Jurisdiction of torts in admiralty depends upon locality—where the cause of action is completed on navigable waters admiralty has jurisdiction, but where it is completed on land the remedy belongs to the courts of common law. *The Plymouth*, 3 Wall. 20, cited and approved in *Ex parte Phœnix Insurance Company*, 118 U. S. 618; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388; *Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406, 411. See *The Rock Island Bridge*, 6 Wall. 213, 215—a proceeding *in rem* against a bridge for damage to a ship where jurisdiction was denied.

This court has not attempted to give a general definition of what is land and what is water within the meaning of the admiralty law and the rule adopted in *The Plymouth*. In *The Robert W. Parsons*, 191 U. S. 17, 33, it was held that repairs to a ship in a dry dock were not made on land.

There are no adjudicated cases involving injury by a ship to a beacon set up in navigable waters. Bridges, piers and wharves which pertain to the land are, in fact, mere extensions of the shore, and therefore torts to them are distinctly different from torts to structures lawfully within navigable

waters, and put there solely as aids to navigation. The question now raised was not decided in *The Plymouth* nor has it been in any other case in this court. But see Hughes on Admiralty, 183; *The Arkansas*, 17 Fed. Rep. 383, 386; *Atlee* v. *Packet Co.*, 23 How. 209; *The Professor Morse*, 23 Fed. Rep. 803; *The F. & P. M. No. 2*, 33 Fed. Rep. 511, 514; *The City of Lincoln*, 25 Fed. Rep. 835.

The lower Federal courts have decided a number of cases wherein they undertook to apply the rule laid down in *The Plymouth*.

The Neil Cochran, Br. Adm. 164, 165; *S. C.*, Fed. Cas. 7996 and 10,087; *The Ottawa*, Br. Adm. 356; *S. C.*, Fed. Cas. 10,616; *The Maud Webster*, 8 Ben. 552; Fed. Cas. 9302; *The Mary Stewart*, 10 Fed. Rep. 137; *The City of Milwaukee*, 37 Fed. Rep. 705; *The H. S. Pickands*, 42 Fed. Rep. 239; *The Mary Garrett*, 63 Fed. Rep. 1011; *The Strabo*, 90 Fed. Rep. 110; *Leathers* v. *Blessing*, 105 U. S. 626; *Rundell* v. *La Compagnie Générale Transatlantique*, 100 Fed. Rep. 655; *Dailey* v. *City of New York*, 128 Fed. Rep. 799; *De Lovio* v. *Boit*, 2 Gall. 398; *S. C.*, Fed. Cas. 3776. And see 6 Rose's Notes, 459, 460.

The opinions of this court discussing the origin, nature and jurisdiction of admiralty courts demonstrate a well defined purpose to construe liberally the terms "all cases of admiralty and maritime jurisdiction" and to ascertain its boundary "by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument and the purposes for which admiralty and maritime jurisdiction were granted to the Federal government." *The Steamer St. Lawrence*, 1 Black. 522, 527; *Ins. Co.* v. *Dunham*, 11 Wall. 1, 22; *Waring* v. *Clarke*, 5 How. 440, 450; *The Genessee Chief*, 12 How. 443; *Ex parte Easton*, 95 U. S. 68. And see also Benedict's Adm. §§ 151, 161, 172, 175, 191; *Crosse* v. *Diggs*, Siderfin, 158; Coke's Inst., Pt. 4, p. 148; Admiralty Act of 1861, 24 Vict. c. 10; Williams and Bruce, Adm. Juris., 3d ed., 73.

The beacon was in no proper sense land, nor any part

thereof. It was not connected with the shore, and was not erected for any purpose pertaining to the land. Lights are highly important adjuncts to navigation, and their safety will be better secured by the speedy processes of admiralty courts than by the actions *in personam* in a court of law. *The Gas Float Whitton*, 2 L. R. App. Cas. 337, 349.

If in admiralty there is no adequate remedy for injuries to harbor and channel lights by foreign ships, the Government is without power to properly protect and preserve these highly important adjuncts to commerce and navigation.

Mr. Benjamin Carter, with whom *Mr. R. H. Clarke* was on the brief, for appellee:

A tort, to be a subject of admiralty jurisdiction, must have been consummated, in some navigable area, (1) merely on or in or (2) through action of the water. This proposition is in harmony with the text of all the decisions for the United States Attorney General cited on the Government's brief which cannot be said to impeach it.

Where the wrongful act and its injurious consequences were indistinguishable, with respect to time and place, the inquiry has turned on the mere locality of the act itself. Under this head many of the cases cited fall.

In other cases discussed or cited in the Government's argument the inquiry was whether the injury following on the tortious act was accomplished by supervening action of the water, mechanical or chemical. But see *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, in which this court held that injury to a dry dock was not cognizable in admiralty.

In the United States admiralty jurisdiction is not derived from any considerations of international or even maritime convenience. It is purely the creature of our Constitution, and so shut off from those accretions which, in view of the policy and institutions of other Christian nations, might be commended. With reference to England, especially, it is clear that, if our admiralty courts have the ancient admiralty juris-

diction, they have not that which exists in England today. *The Maud Webster,* 8 Ben. 552.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from the District Court on the question of jurisdiction, which is certified. The case is a libel *in rem* against a British vessel for the destruction of a beacon, Number 7, Mobile ship-channel lights, caused by the alleged negligent running into the beacon by the vessel. The beacon stood fifteen or twenty feet from the channel of Mobile river, or bay, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom. There is no question that it was attached to the realty and that it was a part of it by the ordinary criteria of the common law. On this ground the District Court declined jurisdiction and dismissed the libel. *The Blackheath,* 122 Fed. Rep. 112.

In *The Plymouth,* 3 Wall. 20, where a libel was brought by the owners of a wharf burned by a fire negligently started on a vessel, the jurisdiction was denied by this court. See also *Ex parte Phœnix Ins. Co.,* 118 U. S. 610. In two later cases there are dicta denying the jurisdiction equally when a building on shore is damaged by a vessel running into it. *Johnson* v. *Chicago and Pacific Elevator Co.,* 119 U. S. 388; *Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique,* 182 U. S. 406, 411. And there are a number of decisions of District and other courts since *The Plymouth,* which more or less accord with the conclusion of the court below. 62 C. C. A. 287, 290. It would be simple, if simplicity were the only thing to be considered, to confine the admiralty jurisdiction, in respect of damage to property, to damage done to property afloat. That distinction sounds like a logical consequence of the rule determining the admiralty cognizance of torts by place.

On the other hand, it would be a strong thing to say that Congress has no constitutional power to give the admiralty

here as broad a jurisdiction as it has in England or France. Or, if that is in some degree precluded, it ought at least to be possible for Congress to authorize the admiralty to give redress for damage by a ship, in a case like this, to instruments and aids of navigation prepared and owned by the Government. But Congress cannot enlarge the constitutional grant of power, and therefore if it could permit a libel to be maintained, one can be maintained now. We are called on by the appellees to say that the remedy for any case of damage to a fixture is outside the constitutional grant.

The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history. As to principle, it is clear that if the beacon had been in fault and had hurt the ship a libel could have been maintained against a private owner, although not *in rem*. *Philadelphia, Wilmington & Baltimore R. R.* v. *Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209; *Atlee* v. *Packet Co.*, 21 Wall. 389; *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280. Compare *The Rock Island Bridge*, 6 Wall. 213. But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. *The Arkansas*, 17 Fed. Rep. 383, 387; *The F. & P. M. No. 2*, 33 Fed. Rep. 511, 515; Hughes, Adm. 183. And again it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an instrument of navigation and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea.

As to history, while as is well known the admiralty jurisdiction of this country has not been limited by the local traditions of England, *The Lottawanna*, 21 Wall. 558, 574, *et seq.*, the traditions of England favor it in a case like this. The admiral's authority was not excluded by attachment even to the main shore. From before the time of Rowghton's Articles he could hold inquest over nuisances there to naviga-

tion and order their abatement. Art. 7, 1 Black Book (Twiss), 224; Clerke's Praxis; 1 Select Pleas in Adm., 6 Seld. Soc. Publ. xlv, lxxx; Articles of Feb. 18, 1633, Exton, Maritime Dicæology, pp. 262, 263; 2 Hale de Port., c. 7, p. 88, in Harg. Law Tracts; Zouch, in Malynes, Lex Merc., 3d ed., 122; Com. Dig. Admiralty, E. 13. See Benedict Adm., 3d ed. § 151; *De Lovio* v. *Boit*, 2 Gall. 398, 470, 471, note. Coke mentions that "of latter times by the letters patents granted to the lord admirall he hath power to erect beacons, seamarks and signs for the sea, &c." 4 Inst. 148, 149. To the French admiral, it is expressly stated, belonged "Contraincte et pugnicion, tant en criminel, que en civil," in this matter. 1 Black Book, 445, 446. See *Crosse* v. *Diggs*, 1 Sid. 158. Spelman says: "The place absolutely subject to the jurisdiction of the admiraltie, is the sea, which seemeth to comprehend publick rivers, fresh waters, creekes, and surrounded places whatsoever within the ebbing and flowing of the sea at the highest water." Eng. Works, 2d ed. 226. Finally, by the articles of February 18, 1633, all the judges of England agreed that the admiralty jurisdiction extended to "injuries there which concern navigation upon the sea." Exton, Maritime Dicæology, ad fin., pp. 262, 263. And "if the libel be founded upon one single continued act, which was principally upon the sea, though part was upon land, a prohibition will not go." Com. Dig. Admiralty, F. 5; 1 Roll. Abr. 533, pl. 18.

What the early law seems most to have looked to as fixing the liability of the ship was the motion of the vessel, which was treated as giving it the character of a responsible cause. Bracton recognizes this as an extravagance, but admits the fact, for the common law. 122*a*, 136*b*. 1 Select Pleas of the Crown, 1 Seld. Soc. Pub. 84. The same was true in the admiralty. Rowghton, *ubi sup.* art. 50; 2 Rot. Parl. 345, 346, 372*a*, *b*; 3 Rot. Parl. 94*a*, 120*b*, 121*a*; 4 Rot Parl. 12*a*, *b*, 492*b*, 493. The responsibility of the moving cause took the form of deodand when it occasioned death, like the steam engine in *Regina* v. *Eastern Counties Ry.*, 10 M. & W. 58, and innum-

erable early instances, but it was not confined to such cases. 2 Black Book (Twiss.), 379. But compare 1 Select Pleas in Adm., 6 Seld. Soc. Publ. lxxi, lxxii. The principle has remained until the present day. *The Malek Adhel*, 2 How. 210, 234; *The China*, 7 Wall. 53.

The foregoing references seem to us enough to show that to maintain jurisdiction in this case is no innovation even upon the old English law. But a very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand.

In the case of *The Plymouth* there was nothing maritime in the nature of the tort for which the vessel was attached. The fact that the fire originated on a vessel gave no character to the result, and that circumstance is mentioned in the judgment of the court, and is contrasted with collision, although the consideration is not adhered to as the sole ground for the decree. It has been given weight in other cases. *Campbell* v. *H. Hackfeld & Co.*, 62 C. C. A. 274; *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 273, 294; Benedict, Admiralty, 3d ed. § 308. Moreover, the damage was done wholly upon the mainland. It never has been decided that every fixture in the midst of the sea was governed by the same rule. The contrary has been supposed in some American cases, *The Arkansas*, 17 Fed. Rep. 383, 387; *The F. & P. M. No. 2*, 33 Fed. Rep. 511, 515, and is indicated by the English books cited above. It is unnecessary to determine the relative weight of the different elements of distinction between *The Plymouth* and the case at bar. It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or en-

countering *The Plymouth* or any other authority binding on this court. As to the present English law, see *The Uhla*, L. R. 2 Ad. & Ec. 29, note; *The Swift*, [1901] L. R. Prob. 168.

Decree reversed.

Mr. Justice Brown, concurring.

I do not dissent from the conclusion of the court, although for forty years the broad language of Mr. Justice Nelson in the case of *The Plymouth*, 3 Wall. 20, has been accepted by the profession and the admiralty courts as establishing the principle that the jurisdiction of the admiralty does not extend to injuries received by any structure affixed to the land, though such injuries were caused by a ship or other floating body. It received the approval of this court in the case of the *Phœnix Insurance Company*, 118 U. S. 610, and in that of the *Chicago & Pacific Elevator Company*, 119 U. S. 388, and has been followed by the courts of at least a dozen different districts, and applied to bridges, piers, derricks and every other class of structure permanently affixed to the soil.

I do not think this case can be distinguished from the prior ones, as, in my opinion, it makes no difference in principle whether a beacon be affixed to piles driven into the bottom of the river or to a stone projecting from the bottom, or whether it be surrounded by twelve feet or one foot of water, or whether the injury be done to a wharf projecting into a navigable water, or to a beacon standing there, or whether the damage be caused by a negligent fire or by bad steering.

I accept this case as practically overruling the former ones, and as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 (sec. 7), extending the jurisdiction of the admiralty court to "any claim for damages by any ship." This has been held in many cases to include damage done to a structure affixed to the land. The distinction between damage done to fixed and to floating structures is a somewhat artificial one, and, in my view, founded

upon no sound principle; and the fact that Congress, under the Constitution, cannot extend our admiralty jurisdiction, affords an argument for a broad interpretation commensurate with the needs of modern commerce. To attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation.

CITIZENS' NATIONAL BANK OF KANSAS CITY *v.* DONNELL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 36. Argued November 1, 1904.—Decided November 28, 1904.

Under §§ 5197, 5198, U. S. Rev. Stat., a national bank which compounds interest in a manner prohibited by the State forfeits all interest even though the total interest amounts to less than the maximum rate permitted by the State.

A national bank, met in an action by the plea of usury, may not avoid the forfeiture of all interest by then declaring an election to remit the excessive interest.

THE facts are stated in the opinion.

Mr. Oliver H. Dean, with whom *Mr. William D. McLeod* and *Mr. Hale Holden* were on the brief, for plaintiff in error:

The national banking act authorizes the taking of the highest rate allowed by the State. The State allowed eight per cent and the bank never took over seven and a half per cent. The interest on the overdraft at twelve per cent only amounted to $14.51 and the principle of *de minimis* applies. The question of what is compound interest is one for the court.

The method of business to be pursued by a national bank cannot be prescribed by a state statute; it rests upon higher authority. Tyler on Usury, 244.

Promises to pay the highest legal rate of interest semi-annually or quarterly are not usurious. *Hawley* v. *Howell*, 60 Iowa, 79; *Goodrich* v. *Reynolds*, 31 Illinois, 490; *Tallman* v. *Truesdell*, 3 Wisconsin, 343; *Mowry* v. *Shumway*, 44 Connecticut, 493; *Brown* v. *Vandyke*, 8 N. J. Eq. 795; *Ragan* v. *Day*, 46 Iowa, 240; *Mann* v. *Cross*, 9 Iowa, 327.

Compound interest is not of itself usurious if it does exceed the legal rate. *Oyster* v. *Longnecker*, 16 Pa. St. 269; *Lamb* v. *Lindsey*, 4 W. & Ser. 449; *Fisher* v. *Beasley*, 1 Doug. 235; *Wade* v. *Wilson*, 1 East. Rep. 195; *Scurry* v. *Freeman*, 2 Bos. & Pul. 381; *Upton* v. *O'Donahue*, 32 Nebraska, 565; *Mills* v. *Johnson*, 23 Texas, 308; *Brestle* v. *Mehaffie*, 19 Pa. St. 117; *Dey* v. *Dunham*, 2 Johns. Ch. 182; *Tefoel* v. *National Bank*, 24 Nebraska, 815; *Smith* v. *Parsons*, 55 Minnesota, 520.

There is no usury where the bond of the debtor bears no interest but includes the amount of the debt with the interest upon it to the time of the maturity of the bond. Webb on Usury, § 115; *Weaver* v. *Paris Exchange Bank*, 53 Texas, 561; *Mills* v. *Johnson*, 23 Texas, 329; *Camp* v. *Bates*, 11 Connecticut, 495; *Wilcox* v. *Howland*, 23 Pick. 169; *Brown* v. *Crow*, 29 S. W. Rep. 653; *Andrews* v. *Hoxie*, 5 Texas, 194; *Miner* v. *Bank*, 53 Texas, 561; *Martin* v. *Bank*, 5 Tex. Civ. App. 171.

Compound interest at the highest rates allowed by law is not unlawful. Webb on Usury, §§ 123, 125, and cases cited; *Wilcox* v. *Howland*, 23 Pick. 167; cases cited *supra; Mocher* v. *Chapin*, 12 Wisconsin, 453; *Stuart* v. *Petree*, 55 N. Y. 621; *Kellogg* v. *Hickok*, 1 Wend. 521; *Hale* v. *Hale*, 1 Cadw. (Tenn.) 233; *Fobes* v. *Cantfield*, 3 Ohio, 18.

Independent of any contract to pay interest on coupons they bear interest from maturity. This is a question of general commercial law not controlled by state decision. *Gelpcke* v. *Dubuque*, 1 Wall. 206; *Aurora City* v. *West*, 7 Wall. 105; *Genoa* v. *Woodruff*, 92 U. S. 502.

Penalties on overdrafts are not unlawful. The custom to debit and credit interest monthly, computing interest on bal-

ances, does not necessarily involve usury, as the balances may be paid. *Hatch* v. *Douglass*, 48 Connecticut, 116.

There is a custom to charge on overdrafts a penalty. 27 Am. & Eng. Ency. of Law, 994, and cases cited; *Wilday* v. *Morrison*, 66 Illinois, 532; *Gould* v. *Bishop Hill Colony*, 35 Illinois, 324; *Weyrich* v. *Hobelman*, 14 Nebraska, 432; *Wight* v. *Shuck*, 1 Morris, 425; *Conrad* v. *Gibbon*, 29 Iowa, 120; *Gower* v. *Carter*, 3 Iowa, 244.

If the debt be not paid at maturity it is not usury to provide that the debtor may pay the creditor's attorneys' fees for the collection of the debt. *Fowler* v. *Equitable Trust Co.*, 141 U. S. 384; *Smith* v. *Silvers*, 32 Indiana, 321; *Daniels* v. *Silvers*, 32 Indiana, 322; *Nelson* v. *Everett*, 29 Iowa, 184; *Dunn* v. *Rogers*, 43 Illinois, 260.

The right to determine this question should be wholly left to this court.

A parol agreement to pay interest upon interest is valid. *Thayer* v. *Star Mining Co.*, 105 Illinois, 541, 553; *Fessenden* v. *Taft* (N. H.), 17 Atl. Rep. 713; *Cameron* v. *Bank*, 37 Michigan, 242; *Brown* v. *Cass County Bank* (Iowa), 53 N. W. Rep. 410; *Gill* v. *First National Bank* (S. D.), 57 N. W. Rep. 503; *First National Bank* v. *Fenn* (Iowa), 39 N. W. Rep. 279.

The new notes were not tainted with usury because the former notes were. *Porter* v. *Jeffries*, 18 S. E. Rep. (S. Car.), 229; *Smith* v. *Heath*, 4 Daly (N. Y.), 123; *Bank* v. *Hoagland*, 7 Fed. Rep. 159; *Farmers' &c. Bank* v. *Joslyn*, 37 N. Y. 353. Usury cannot be imputed before it has arisen. By Missouri law usury once collected cannot be collected back. *Ferguson* v. *Boden et al.*, 111 Missouri, 208; *Ransom* v. *Hayes*, 39 Missouri, 445.

Charging interest on overdue interest is not compounding the interest. 16 Am. & Eng. Ency. of Law, 2d ed., 1074.

When an action is brought by a national bank on a note executed in its favor and usury is pleaded, the court will permit such bank to remit the excessive interest stipulated for and recover the debt, with legal interest. This is espe-

cially true when a transaction is in good faith and there was no intention to violate the law. *Brown* v. *Marion National Bank*, 169 U. S. 416.

Mr. Edward P. Garnett for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to the Supreme Court of Missouri on the ground that the plaintiff in error is denied the rights with regard to charging interest conferred upon it by the national banking act. Rev. Stat. §§ 5197, 5198. The suit was brought by the plaintiff in error upon a promissory note for twenty thousand dollars, with interest at eight per cent, made on April 29, 1892. The facts, shortly stated, are as follows: On October 29, 1892, the plaintiff bought the defendant's note for $15,000, with interest at seven per cent. On July 12, 1895, the defendant being behindhand with his payments of interest and also having overdrawn a bank account which he kept in the plaintiff's bank, he gave the plaintiff a new note for $17,500, and interest at seven per cent, in satisfaction of both liabilities. The amount of this note included three semi-annual interest charges, of $525 each, with a few days' further interest, on the former note, with interest on this interest from the time it was due, and charges of one per cent or more a month on the amount overdrawn each month. It left the defendant with a credit on his bank account of $230.50. On April 29, 1896, the note in suit and another note for $2,000 were given in satisfaction of the last note for $17,500, and of another note for $2,500, of October 1, 1895, with interest accrued on both, and of an overdraft of $919.90, and a balance of $2.42. The overdraft item included, as before, charges of about one per cent a month on the amounts actually overdrawn.

The Supreme Court of Missouri held that the plaintiff must forfeit all interest from the beginning of the above transactions, and could recover only the original fifteen thousand

dollars, the actual overdraft on July 12, 1895, four hundred and seventy-four dollars and twenty-four cents, the bank credit of two hundred and thirty dollars given the same day, the note of October 1, 1895, for twenty-five hundred dollars, the overdraft on April 25, 1896, of eight hundred and seventy-four dollars and eighty-one cents and the bank credit of two dollars and forty-two cents—in all, nineteen thousand eighty-one dollars and ninety-seven cents, less fifty-five hundred dollars collected on account since the action was begun. 172 Missouri, 384.

By the United States Rev. Stat. § 5197, a bank may charge "interest at the rate allowed by the laws of the State, . . . where the bank is located, and no more." By § 5198 taking, receiving, or charging "a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." The Revised Statutes of Missouri fix six per cent as the rate of interest in the absence of agreement, § 3705, but allow parties to agree in writing for not over eight per cent. § 3706. They also allow parties to contract in writing for the payment of interest upon interest, "but the interest shall not be compounded oftener than once in a year," § 3711. It will be seen that the charge on the overdrafts went beyond § 3706, and the compounding of the semi-annual interest on the notes encountered § 3711.

The plaintiff in error denies that the prohibition of compounding oftener than once a year affects the "rate of interest" within the meaning of those words in U. S. Rev. Stat. § 5198, and contends that so long as the total sums received would not amount to more than eight per cent on the debt, it has a right to charge them under U. S. Rev. Stat. § 5197, coupled with Missouri Rev. Stat. § 3706. It disposes of the twelve per cent charge on overdrafts by the suggestion that the amount is trifling and *de minimis non curat lex*, and that this charge was a penalty because of a failure to pay a debt

when due, and therefore not usurious. We are of a different opinion. The rate of interest which a man receives is greater when he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. *Union National Bank* v. *Louisville, New Albany & Chicago Ry.*, 163 U. S. 325, 331. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year it was at a rate greater than was allowed by U. S. Rev. Stat. § 5197, and it was forfeited. The suggestions as to the twelve per cent charge on overdrafts do not seem to us to need answer.

There is no doubt, of course, that the court could go behind the face of the present note and analyze the sum which it represents into its original elements. *Brown* v. *Marion National Bank*, 169 U. S. 416; *Haseltine* v. *Central Bank, No. 2*, 183 U. S. 132, 135, 136. These cases sufficiently show also, if more is wanted than the words of Rev. Stat. § 5198, that the court below did not err in forfeiting all the interest from the beginning.

We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. Stat. § 5198, in absolute terms, by then declaring an election to remit the excessive interest.

Judgment affirmed.

BALTIMORE SHIPBUILDING AND DRY DOCK COMPANY *v.* BALTIMORE.

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

No. 39. Argued November 2, 3, 1904.—Decided November 28, 1904.

A State may tax different estates in land to the different parties thereto and sell only the interest of the party making default.

A State may tax the interest of a company owning a dry dock in land conveyed to it by the United States notwithstanding there is a condition subsequent the nonfulfillment whereof would result in forfeiture and reversion to the United States and the United States has a continuing right to use the dry dock for certain purposes.

THE facts are stated in the opinion.

Mr. E. P. Keech, Jr., and *Mr. Leon E. Greenbaum*, with whom *Mr. Archibald H. Taylor* was on the brief, for plaintiff in error:

Congress authorized the conveyance of the property to the Dry Dock Company on several conditions, and upon the happening of any one of the contingencies the property, with all its privileges and appurtenances, will revert to and become the property of the United States. Any possible right of state taxation would thereby be destroyed. For a description of such an estate and incidents see *Nor. Pac. R. R. Co.* v. *Townsend*, 190 U. S. 267.

While these interests or estates of the United States and of plaintiff in error are not "property" in the sense of things material, as land itself or a horse is, they are "property" according to the more usual legal meaning of "a right or interest which a man has in lands and chattels to the exclusion of others." Austin's Jurisprudence (Campbell's notes), vol. 2, § 1051; Bouvier's Law Dict. (1897), "Property," vol. 2, 780; Anderson's Law Dict. (1889), "Property," 835.

All "property" is not of necessity taxed by the State of Maryland. The provision of Art. I, § 15, Declaration of Rights, is not violated by certain express exemptions. *Buchanan* v. *County Commissioners*, 47 Maryland, 286.

Certain classes of "property" and rights, highly valuable in themselves, are not the subject of taxation at all. *Baltimore City* v. *Johnson*, 96 Maryland, 737, 746; *Balto. &c. Turnpike Co.* v. *The Appeal Tax Court*, Balto. Daily Rec., May 7, 1903.

A State has no power to tax the property of the United States, including land in which the United States has an interest or estate. Maryland Code of Public General Laws, Title, "Revenue and Taxes," sub-title, "Exemptions," art. 81, § 4 (as amended by act of 1897, Ch. 120).

This is but legislative recognition of a fundamental doctrine of our law. Black on Tax Titles, 1893, § 35; Cooley on Taxation, 3d ed., 135; *Howell* v. *State*, 3 Gill. 14; *McCulloch* v. *Maryland*, 4 Wheaton, 316; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Wis. Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 496. So as to any land in which the United States has any interest. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210.

Land of the United States lying within a State is not taxable by the State. If such land has been bought or taken up by an individual, it is not subject to state taxation, so long as something remains to be done by the individual to perfect his right to a patent from the United States. *Kansas Pac. Ry. Co.* v. *Prescott*, 16 Wall. 603; *Union Pac. R. R. Co.* v. *McShane*, 22 Wall. 444; *Tucker* v. *Ferguson*, 22 Wall. 527; *Forbes* v. *Gracey*, 94 U. S. 762; *Colorado Co.* v. *Commissioners*, 95 U. S. 589; *Northern Pac. Ry. Co.* v. *Traill Co.*, 115 U. S. 600; *Hussman* v. *Durham*, 165 U. S. 147.

The assessment in this case is laid upon the land, as such, and not upon the interest of the plaintiff in error therein.

Such an assessment, *i. e.*, upon the land itself, without regard to the various estates of those having interests in it—is

the only form of assessment for which provision is made by the statutes of the State of Maryland. §§ 145, 164, art. 4, Code of Public Laws, amended by Baltimore City Charter, Ch. 123, acts of 1898.

The Dry Dock Company's property is assessed, and the resultant taxes are levied against and constitute a lien upon it, and the payment of them is enforceable, if by no other means, through a sale of the property, the *res* itself. Cooley on Taxation, 3d ed., 721 *et seq.; Baltimore* v. *Canton Company*, 63 Maryland, 218, 234; *Mayor* v. *Boyd*, 64 Maryland, 10; *Cooper* v. *Holmes*, 71 Maryland, 20, 30. As to this feature see §§ 43-48, Baltimore City Charter.

The provision of § 48 is that after the conditions of the sale have been complied with and the required formalities observed, "the purchaser shall have a good title to the property sold."

A purchaser at a tax sale in Baltimore city, has the right to demand, and, *e converso*, the city collector may offer for sale only, a fee simple title to the land levied upon, free from conflicting rights, claims, interests and estates of other parties, and free from all incumbrances, liens and conditions. *Cooper* v. *Holmes*, 71 Maryland, 20; Cooley on Taxation, 3d ed., 960; Black on Tax Titles (1893), §§ 419, 422; Burroughs on Taxation (1877), 346; *Textor* v. *Shipley*, 86 Maryland, 424, 438; *Northern Pacific R. R. Co.* v. *Traill Co.*, 115 U. S. 600; *Heffner* v. *N. W. Mut. Life Ins. Co.*, 123 U. S. 747; *Emery* v. *Boston Terminal Co.*, 178 Massachusetts, 172.

If the assessment can only be made on the land and not on the several estates therein this assessment is but a step in the attempted taxation of property of the United States and is necessarily void. *Moriarty* v. *Boone County*, 39 Iowa, 634.

A State may not tax the interest of a private party in lands in which the United States also have an interest, without the consent of the United States. *Kansas Pac. Ry. Co.* v. *Prescott*, 16 Wall. 603; *Union Pac. R. R. Co.* v. *McShane*, 22 Wall. 444; *Wisconsin Cent. Ry. Co.* v. *Price Co.*, 64 Wisconsin, 579;

Wisconsin Cent. Ry. Co. v. *Taylor Co.*, 52 Wisconsin, 37. And see 22 Wall. 571; 24 Stat. 143; *Cent. Pac. R. R. Co.* v. *Nevada*, 162 U. S. 512; *Northern Pac. Ry. Co.* v. *Myers*, 172 U. S. 589; Cooley on Taxation, 3d ed., 137.

The land with the dry dock on it is a Federal agency, actually used by the United States, in the exercise of its Constitutional powers, and hence is not subject to state taxation. *McCulloch* v. *Maryland*, 4 Wheaton, 316, 436; Cooley's Const. Lim., 7th ed., 45, 678; Cooley on Taxation, 3d ed., 129; Black on Tax Titles, 1893, § 5; cases cited *supra* and *Grand Trunk R. R. Co.* v. *Richardson*, 91 U. S. 454, 468; *Northern Pac. Ry. Co.* v. *Smith*, 171 U. S. 261, 275; *Osborn* v. *Bank*, 9 Wheat. 867; *Thompson* v. *Union Pac. R. R. Co.*, 9 Wall. 579; *Union Pac. R. R. Co.* v. *Peniston*, 18 Wall. 5, distinguished.

The tract, of which the land is a part, was acquired by the United States from its owners with the express and unconditional consent of the State, and Congress is vested with exclusive legislative jurisdiction over it, and the State has no legislative or other power over it, except as expressly permitted by Congress. *United States* v. *Cornell*, 2 Mason, 60; *Commonwealth* v. *Glary*, 8 Massachusetts, 72; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *Railroad Co.* v. *McGlenn*, 114 U. S. 542; *Bannon* v. *Burns*, 30 Fed. Rep. 892; *Martin* v. *House*, 39 Fed. Rep. 694.

Where the State's consent has been given upon condition, and in certain cases falling under acts of Congress, conferring special jurisdiction on the States, a limitation of the rule has been permitted. See Acts of March 5, 1795, Rev. Stat. § 4662; Act of March 5, 1903, 32 Stat. 1220; and see also *Chauvenet* v. *Commissioners*, 3 Maryland, 259.

Mr. Edgar Allan Poe, with whom *Mr. W. Cabell Bruce* was on the brief, for defendants in error:

The interest of the Dock Company in the land and dry dock is not exempt from assessment because under § 2 of the act of Congress there is a possibility that said land and dry dock

may revert to, and become the absolute property of, the United States. It is simply the conditional interest or estate of the plaintiff in error in the land and dry dock which is assessed and taxed. If it should ever become necessary for the State or city to sell the property for the non-payment of taxes, nothing more could be sold than its conditional estate in the land and the permanent improvements thereon, subject to all of the rights of the United States therein. In Maryland taxes are not levied on things, but on the owner of things; the value of the things owned merely fixing the measure of the owner's liability to contribute in taxes towards the support of the government. *Monticello Co.* v. *Baltimore*, 90 Maryland, 425; *Carstairs* v. *Cochran*, 95 Maryland, 500; see art. 50, Baltimore City Code; *Mayor* v. *Whittington*, 78 Maryland, 232. The decision of the state court is binding on this court. *Carstairs* v. *Cochran*, 193 U. S. 10; *Northern Pac. Co.* v. *Townsend*, 190 U. S. 270.

The property has a situs within the territorial limits of Baltimore, and plaintiff in error has been in full possession and enjoyment of said property for over twenty-five years, under a legal title, during that entire period, falling within the definition of a "base fee," or a fee simple title defeasible upon a condition subsequent. As such owner, its interest in said property has been assessed for taxes. No attempt has been made to assess or to tax the contingent interest of the United States Government. The act of Congress in question, and the deed executed by the Secretary of War in pursuance of said act, made no attempt to exempt from taxation the interest acquired by the dock company, and, by the imposition of the tax, there manifestly has been no impairment of the efficiency of the grant or the use and enjoyment of the property by the grantee. *Union Pacific R. R.* v. *Peniston*, 18 Wall. 5.

Plaintiff in error being in possession and full enjoyment of very valuable property, some cogent reason must be shown by it why its said property should not bear its fair proportion of taxation for the benefit of the state and city governments.

It seeks to find this reason in the decisions of this court, in what are known as the "*Land Grant*" cases, to wit: *Kansas Pac. R. R. Co.* v. *Prescott*, 16 Wall. 603; *Union Pac. R. R. Co.* v. *McShane*, 22 Wall. 444; *Northern Pac. R. R. Co.* v. *Traill County*, 115 U. S. 600. But see *Northern Pac. Ry. Co.* v. *Myers*, 172 U. S. 598; *Union Pac. R. R. Co.* v. *Nevada*, 162 U. S. 512; *Wisconsin Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 496.

Nor is the dock company's interest in the property exempt from taxation because the United States may use the dock for the examination and repair of its vessels free of charge. *Thompson* v. *Union Pac. Ry. Co.*, 9 Wall. 590.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to the Court of Appeals of the State of Maryland, brought to reverse a judgment sustaining a tax upon certain land. The plaintiff in error filed a petition and appeal from an assessment by the appeal tax court of Baltimore in the Baltimore City Court, alleging that its land was not subject to taxation, and, if subject, was taxed too high. The City Court reduced the tax but held the land liable, and its judgment was affirmed by the Court of Appeals. 97 Maryland, 97. The land in question formerly belonged to the United States, being part of the property known as Fort McHenry, and is admitted not to have been taxable at that time. Under an act of Congress of June 19, 1878, 20 Stat. 167, it was conveyed to the plaintiff in error on March 26, 1879. By the terms of the deed, following the requirements of the act, the consideration of the conveyance and the condition upon which it was made was that the Dock Company should construct a dry dock upon the land as specified, which it did, and that it should "accord to the United States the right to the use forever of the said dry dock at any time for the prompt examination and repair of vessels belonging to the United States free from charge for docking and that if at any time the property hereby conveyed shall be diverted to any other use

than that herein named or if the said dry dock shall be at any time unfit for use for a period of six months or more, the property hereby conveyed with all its privileges and appurtenances shall revert to and become the absolute property of the United States." This condition is relied upon as still keeping the land outside the taxing power of the State.

It is argued that the United States has such an interest in the land as to prevent the tax, and also that the land is an agency of the Government by the terms of the grant. It is noted that this tax originally was levied upon the land, not upon the Dock Company's interest, and although the language of the final judgment was "the property concerned in the appeal in this case" that is supposed to mean the same thing.

We will deal with the argument drawn from the last consideration first. It is true that commonly taxes on land create a lien paramount to all interests, and that a tax sale often has been said to extinguish all titles and to start a new one. *Hefner* v. *Northwestern Life Ins. Co.*, 123 U. S. 747, 751; *Textor* v. *Shipley*, 86 Maryland, 424, 438; *Emery* v. *Boston Terminal Co.*, 178 Massachusetts, 172, 184. Perhaps it was assumed that this always was the effect of tax sales in *Northern Pacific Railroad* v. *Traill Co.*, 115 U. S. 600. But it needs no argument to show that a State may do less. It may tax a life estate to one and a remainder to another, and sell only the interest of the party making default. With regard to what the State of Maryland has done and what are the purport and attempted effect of the tax in this case, we follow the Court of Appeals. That court treated the tax and the lien as going only to the Dock Company's interest in the land, although probably by an oversight it neglected to modify the judgment according to its own suggestion so as to show the fact. That only the company's interest was taxed is shown by the reduction of the assessment on account of the condition. Of course it does not matter what form of words the judgment employs, when its meaning is thus declared by the court having the matter under its control.

In the next place, as to the interest of the United States in the land. This is a mere condition subsequent. There is no easement or present right *in rem*. The obligation to keep up the dock and to allow the United States to use it carries active duties and is purely personal. The property is subject to forfeiture, it is true, if the obligation is not fulfilled. But it is only by forfeiture that the rights of the United States can be enforced against the *res*. It would be a very harsh doctrine that would deny the right of the States to tax lands because of a mere possibility that they might lapse to the United States. The contrary is the law. The condition cannot be extinguished by the State, but the fee is in the Dock Company, and that can be taxed and, if necessary, sold, subject to the condition. See *Northern Pacific Ry.* v. *Myers*, 172 U. S. 589, 598; *Maish* v. *Arizona*, 164 U. S. 599, 607–609; *Central Pacific R. R.* v. *Nevada*, 182 U. S. 512, 525. The title of the Dock Company was not inalienable, as that of the railroad was held to be in *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267.

Finally, we are of opinion that the land is not exempt as an agency of the United States. The Dock Company disclaimed that position for itself as a corporation, but asserts it for the land. The position is answered technically, perhaps, by what we have said already. The United States has no present right to the land but merely a personal claim against the corporation, reinforced by a condition. But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Railroad Company* v. *Peniston*, 18 Wall. 5.

Judgment affirmed.

HELENA WATER WORKS COMPANY *v.* HELENA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 27. Argued October 28, 1904.—Decided November 28, 1904.

Nothing is to be taken against the public by implication; under the constitution and laws of Montana a grant by a municipality to a water works company of the right to erect and maintain water works, which expressly declares that it is not exclusive, does not raise an implied contract that the grantor will not provide its own water supply during the term of the franchise even though by accepting the terms of the franchise the grantee expressly agrees to furnish water to all the inhabitants of the city who may desire to contract for the same during that period, and the erection of its own plant by the city does not, by reason of the depreciation in value which would result therefrom to the grantee's property, violate a contract obligation or amount to a taking of property without just compensation or due process of law within the meaning of the Federal Constitution.

THIS case was begun by a bill filed in the Circuit Court of the United States by the Helena Water Works Company, successor to the Helena Consolidated Water Company, to restrain the City of Helena from erecting, purchasing or acquiring a water works system for said city, and from acquiring water for such purpose, except it purchase the plant of the complainant company, and from incurring any indebtedness or expenditure of money for such purpose.

The rights in controversy are alleged to result from a contract made by the passage and acceptance by the company of a certain ordinance, number 248, passed and approved in January, 1890.

It is also alleged that the Helena Consolidated Water Company, predecessor of the complainant company, complied with all the terms of the ordinance, and expended large sums of money in erecting and maintaining the plant for supplying water to the inhabitants of the said City of Helena.

It is averred that the said city has adopted certain ordinances and taken certain proceedings to acquire and build a water

system of its own, and that said ordinances and proceedings are in violation of the contract rights of the complainant company, guaranteed by section 11 of article 3 of the Constitution of the State of Montana, and section 10 of article 1 of the Constitution of the United States, and that the proceedings of the city in this behalf will amount to taking the property of the complainant company without just compensation, in violation of section 14 of article 3 of the Constitution of the State of Montana, and that its rights and property will be taken without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

It is further averred that the taxation necessary for the construction of the city plant is in excess of any that can be lawfully levied for such purpose.

The case was tried upon an agreed statement of facts. In the Circuit Court a decision was rendered in favor of the Water Works Company. Upon appeal to the Circuit Court of Appeals that court reversed the decision of the Circuit Court, and remanded the case with instructions to dismiss the bill. 122 Fed. Rep. 1; 58 C. C. A. 381.

The terms of the ordinance relied upon and so much of the agreed statement of facts as is necessary to a determination of the case sufficiently appear in the opinion.

Mr. M. S. Gunn, with whom *Mr. B. Platt Carpenter* and *Mr. Stephen Carpenter* were on the brief, for appellant:

The city has no right to engage in the business of supplying water in competition with appellant. *Walla Walla Water Case,* 172 U. S. 1; *Water Co.* v. *Vicksburg,* 185 U. S. 65. There was an implied contract not to do so.

In the exercise of its private powers a city is regarded the same as a private corporation. Dillon, Munic. Corp. § 66; *Ill. Trust & Savings Bank* v. *Arkansas City,* 76 Fed. Rep. 271; *Walla Walla Water Case,* 172 U. S. 1; *People* v. *Detroit,* 28 Michigan, 228; *Gas Company* v. *San Francisco,* 9 California, 453; *Bailey* v. *New York,* 3 Hill, 531.

A city in providing its inhabitants with a supply of water exercises its private powers—sometimes termed its business or proprietary powers. *Little Falls Elec. & W. Co.* v. *Little Falls,* 102 Fed. Rep. 663; *Baily* v. *Philadelphia,* 39 L. R. A. 837; *Western Savings Fund Society* v. *Philadelphia,* 72 Am. Dec. 730; *Lynch* v. *City of Springfield,* 54 N. E. Rep. 871; *Pike's Peak Power Co.* v. *Colorado Springs,* 105 Fed. Rep. 1.

The whole investment is the private property of the city, as much so as the lands and houses belonging to it. *Lynch* v. *Springfield,* 54 N. E. Rep. 871; *Aldrich* v. *Tripp,* 23 Am. Rep. 434; *White* v. *Meadville,* 34 L. R. A. 567.

Although a State is a party to it, a contract will be construed according to the principles which regulate contracts. *Huidekoper's Lessee* v. *Douglass,* 3 Cranch, 1.

A contract resulted from the acceptance of the franchise and the company is only bound to continue to furnish water by virtue of that contract, otherwise it could remove its mains and abandon its plant.

If, however, there is no provision obligating the company to operate the plant or road, the grant amounts to a mere license. *State ex rel Knight* v. *H. P. & L. Co.,* 22 Montana, 391; *President &c.* v. *Canandaigua,* 96 Fed. Rep. 449; *San Antonio Street Ry. Co.* v. *State,* 35 L. R. A. 662; *State* v. *Helena Power & Light Co.,* 22 Montana, 391; *York & N. Midland Ry. Co.* v. *Queen,* 1 E. & B. 856; *Nor. Pac. R. R. Co.* v. *Washington,* 142 U. S. 492; *Baily* v. *Philadelphia,* 39 L. R. A. 837.

The contract was mutual and the term was for the life of the franchise until 1910.

The contract to supply all of the inhabitants of the city with water precludes the city from becoming a competitor.

The fact that a city cannot establish its own plant except by acquiring the Water Company's plant does not depend on the grant being exclusive. *Walla Walla Water Case,* 172 U. S. 1.

Provided it may incur the indebtedness therefor the city may acquire the Water Company's plant although the original

ordinance does not provide for it. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Bienville Water Supply Co.* v. *Mobile*, 95 Fed. Rep. 539; *S. C.*, 175 U. S. 109; *Water Works Co.* v. *Skaneateles*, 184 U. S. 354; *Joplin* v. *S. W. Missouri Light Co.*, 191 U. S. 150. In all contracts the intention of the parties when ascertained will control. *Water Works Co.* v. *Westerly*, 75 Fed. Rep. 181; *White* v. *Meadville*, 35 Atl. Rep. 695. What is implied will be as much a part of the contract as what was expressed. *United States* v. *Babbit*, 1 Black, 55; *Manistee Iron Works* v. *Shores Lumber Co.*, 65 N. W. Rep. 863; *Canal Co.* v. *Coal Co.*, 8 Wall. 288; *Churchward* v. *Reg.*, L. R. 1 Q. B. 195; *Coghlan* v. *Stetson*, 19 Fed. Rep. 727; *St. Louis Co.* v. *Tierney*, 5 Colorado, 582.

Although the city of Helena can grant a franchise to another corporation it cannot erect and maintain its own plant.

Mr. Edward Horsky, with whom *Mr. E. C. Day* and *Mr. R. Lee Word* were on the brief, for appellee:

There being no obligation in the franchise to take and purchase the water, there could be no damage or injury in a legal or equitable sense, and the city should not on that account be enjoined from bringing in and maintaining its own water plant. No element of estoppel obtains to prevent appellee from installing its own plant as it proposes to do and is doing, in accordance with the Constitution and laws of Montana.

There being no express surrender of the public right of appellee to put in its own plant, but on the contrary, language used which expressly reserves it, no obligation can be implied by which this right has passed and appellee compelled to desist from bringing in its own plant. *The Skaneateles Case*, 184 U. S. 354; Sedgwick, Stat. and Const. Law, 338; *Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Peters, 507; *Rice* v. *Railroad Co.*, 1 Black, 358, 380; *Leavenworth &c. Ry. Co.* v. *United States*, 92 U. S. 733; *Slidell* v. *Grandjean*, 111 U. S. 412, 437; *Barden* v. *Nor. Pac. R. R. Co.*, 45 Fed. Rep. 609; *S. C.*, 154 U. S. 288.

The law secures to the city, as we have seen, the right to put in its own plant, and has not granted it away. The mutual and depending conditions under the ordinance are, the right to use the streets and alleys to maintain the system and the right to sell the city and inhabitants water, provided they desire to purchase it, at specified rates. It expressly also reserves the right to the occupancy of the streets, avenues, alleys and public grounds with water mains and pipes and denies the exclusive right to sell and distribute water to the city and its inhabitants. *Wright* v. *Nagle*, 101 U. S. 791; *Walla Walla Water Case*, 172 U. S. 1, 18; *Bienville Water Co.* v. *Mobile*, 95 Fed. Rep. 539, 543; *S. C.*, 175 U. S. 110; *Iron Mountain R. Co.* v. *Memphis*, 96 Fed. Rep. 113; *University* v. *Canandaigua*, 96 Fed. Rep. 449, 452; *Electric & Water Co.* v. *Little Falls*, 102 Fed. Rep. 667; *Skaneateles Water Case*, 161 U. S. 154; *North Springs Water Co.* v. *Tacoma*, 47 L. R. A. 214; *Thompson-Houston Electric Co.* v. *Newton*, 42 Fed. Rep. 723; *State* v. *Hamilton*, 47 Ohio St. 52; *Gas L. & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Long* v. *Duluth*, 49 Minnesota, 280; *Water Works Co.* v. *Westerly*, 80 Fed. Rep. 611.

When the city granted the franchise contained in Ordinance No. 248, it acted as the agent of the State in granting a franchise vested in the State. *New Orleans W. W. Co.* v. *Rivers*, 115 U. S. 680, 681.

In the construction of all such grants and franchises the rule is well settled that the grant or privilege must be clearly conferred and that all doubts and implications will be resolved against the grant or privilege claimed and in favor of the grantor. *Bartholomew* v. *City of Austin*, 85 Fed. Rep. 359, and cases cited; *Stein* v. *Supply Co.*, 141 U. S. 67, 80; *Detroit Citizens' Street Ry. Co.* v. *Detroit R. R. Co.*, 171 U. S. 48; *Water Co.* v. *Freeport*, 180 U. S. 587.

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

As the ordinance under consideration contains no express

stipulation that the city shall not build a plant of its own to supply water for public and private purposes, and the grant is expressly declared not to be exclusive of the right to contract with another company, this case, unless it can be distinguished, is ruled by recent decisions of this court. *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685, 696; *City of Joplin* v. *Southwest Missouri Light Co.*, 191 U. S 150; *Skaneateles Water Works Co.* v. *Skaneateles*, 184 U. S. 354. These cases hold that the grant of the franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the water works company, and that, in the absence of the grant of an exclusive privilege, none will be implied against the public, but must arise, if at all, from some specific contract binding upon the municipality.

As stated by appellant's counsel: "The position taken by appellants is, that by Ordinance 248 the city has precluded itself from engaging in the commercial business of furnishing water to its inhabitants. We maintain that by the contract contained in this ordinance the Helena Consolidated Water Company [predecessor of appellant,] for itself, its successors and assigns, expressly agreed to furnish water to all of the inhabitants of the city during the term of twenty years, and that by reason of the contractual obligation thus assumed by the company there is the implied promise or undertaking on the part of the city that it will not during such period become a competitor of appellant." A consideration of this contention requires an examination of the sections of the ordinance pertinent to a determination of the question:

"SEC. 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the City of Helena for the purpose of conveying and distributing water throughout the said city, and for the

purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance, hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds, of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

"SEC. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations, to whom such franchises, rights and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may

sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

"SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city, as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

"SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell to them upon the terms and conditions herein provided and expressed."

By section 8 the company was required to provide twenty miles of mains within the limits of the city, and by section 10 the company was required to lay and maintain additional mains, of such sizes, at such times and upon such streets as the city council might from time to time direct. Section 17 provides that the company shall not refuse to permit connections to be made by or to sell water to persons offering to pay for the same.

Section 16 of the ordinance fixes maximum rates for water to be furnished to the inhabitants of the city. Section 21 makes appropriations for the term of five years from and after January 1, 1890, of certain sums for hydrants and the use of water for the benefit of the city. By the first section

of the ordinance, the company is granted the use of the streets, alleys and avenues and public grounds of the city for the laying and maintenance of its pipes and mains for the purpose of conveying water and selling it to those "desiring" to purchase the same, and to the city for fire and other purposes in case the city "desires to purchase the same."

Certainly, there is nothing in this section that savors of a contract beyond the obligation imposed upon the company in consideration of the franchise and privileges granted to furnish water at certain maximum rates to private persons or to the city, when such persons or the municipality desire to purchase the same. When we come to consider section 6 we find an engagement whereby the obligation of the company to furnish water to the city is limited to the term of five years, and in section 21 we find an appropriation made to cover the compensation to be paid by the city for the term of five years for the use of water for public purposes. If these sections can be construed to amount to a contract between the city and the company, binding the city to take its entire supply of water from this company for five years, which would be broken by the erection or building of a plant by the city to supply itself with water, it had expired before the beginning of this suit, and the contract, if it existed after the expiration of the term named in section 6, must be found in other sections of the ordinance. The contention is that as by section 26 the water company was bound during the term of the agreement, which, it is claimed, is twenty years, to provide all the inhabitants of the city, whatever their number, with a water supply, this contract will be impaired and its benefits to the company destroyed if the city should erect an independent plant of its own. But, in our view, this section must be read with section 1, which requires the company to furnish water to such inhabitants of the city as desire to purchase the same, and there is nothing in this agreement which binds the city to take water from the company beyond the term of five years, expressly provided in section 6, and for which, upon specific

terms as to prices, an appropriation was made in section 21. There is nothing in section 26 nor in section 1 undertaking to bind the inhabitants of the city to take water from the company. The city has not and, of course, could not undertake to make any contract upon the subject for the private supply of individuals in the city beyond securing a maximum rate of charge for water supplied. The engagement for their benefit requires the company during the term of the franchise to supply water at not exceeding certain maximum prices, which were fixed by the ordinance. Properly construed, we think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication. *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Long Island Water Supply Company* v. *Brooklyn*, *supra*, and cases cited in the opinion. Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla City* v. *Walla Walla Water Company*, 172 U. S. 1. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable, but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract. The right to tax within certain limits to procure a supply of water for the municipality, which shall be owned and controlled by the city, is authorized by the Constitution of Montana, article 13, § 6. Paragraph 4800 of the Political Code of Montana provides for the carrying into

effect of this constitutional power to tax for a system of water works to be owned and controlled by the municipality. The feature of the law requiring the purchase of existing water works instead of building an independent plant by the city was held unconstitutional by the Supreme Court of Montana in *Helena Consolidated Water Company* v. *Steele*, 20 Montana, 1.

The privilege of building other works was, in the absence of some binding contract forbidding the exercise of the power, clearly within the city's constitutional and statutory rights. We cannot find that the city has precluded itself from exercising this right by anything shown in this case. This conclusion renders it unnecessary to decide whether the city's right to construct a plant of its own was expressly saved in section 3 of the ordinance reserving the right to construct and maintain "sewer work, or other works of a public nature."

This action is also brought by the water company as a taxpayer, and it is claimed that the city had no right to acquire a water supply and build its water works except by acquiring the plant of the company.

In the findings of fact it was expressly stipulated:

"That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellen or Prickly Pear Creeks.

"That the Ordinances Nos. 467 and 483, mentioned in paragraph 27 of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, the City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed

to acquire the same under said ordinances or such others as are necessary for said purpose, as hereinbefore stated, and will engage in furnishing the said defendant, the City of Helena, and its inhabitants, with water, suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property, as stated in paragraph 28 of the complaint, but that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it. . . . That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended, in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so, on account of the facts and admission hereinbefore stated and made."

We agree with the Circuit Court of Appeals that by this stipulation the controversy was narrowed to the question of the right of the city to erect and maintain an independent plant of its own in view of the alleged contract rights of the complainant. For that purpose, if it has the right so to do, it is conceded "it contemplates to raise funds and revenues therefor in the manner provided by law," and will raise revenues within the limits of indebtedness authorized by the Constitution and laws of Montana. This concession renders it unnecessary to notice the allegations of the complaint as to the right to tax for the purpose of erecting such works, or the alleged invalidity of any method of acquiring water works for the city except by purchase from the complainant.

Judgment affirmed.

HILL *v.* McCORD.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 49. Argued November 3, 4, 1904.—Decided December 5, 1904.

Where a commutation entry made in good faith after the passage of the act of March 3, 1891, 26 Stat. 1098, was rightful, save for the fact that it was premature, the act of June 3, 1896, 29 Stat. 197, does away with that objection and confirms the entry, and the right to such confirmation is not destroyed by anything that the entryman may have done in subsequent efforts to protect his title.

THIS was a suit in equity commenced in the Circuit Court of Douglas County, Wisconsin, by Warren E. McCord to obtain a decree adjudging the defendant, now plaintiff in error, John F. Hill, the holder of the legal title to the northwest quarter of section seventeen, in township forty-eight north, of range eight west, in Bayfield County, Wisconsin, in trust for the plaintiff. A demurrer to an amended complaint was sustained by the Circuit Court, but this ruling was reversed by the Supreme Court of the State. 111 Wisconsin, 499. Thereafter an answer was filed, a hearing had, resulting in a decree for the plaintiff, which was affirmed by the Supreme Court, 117 Wisconsin, 306, and thence the case was brought here on error.

The following facts were found by the trial court and the findings were sustained by the Supreme Court: One Philip W. Jacobus made an actual settlement on the land in controversy on January 28, 1891, and actually established his residence thereon February 4. The land was not opened for entry until February 23, 1891, and on that day Jacobus made application at the local land office to enter it as a homestead. On the same day Hill filed a soldier's declaratory statement for the same tract. A contest was had before the local land officers, resulting in a decision in favor of Jacobus. On ap-

peal to the Commissioner of the General Land Office, this decision was affirmed. Hill's declaratory statement was canceled and the entry of Jacobus allowed on July 6, 1892. On September 20, 1892, Jacobus commuted his homestead entry, making and filing in good faith due, regular and truthful proofs of settlement, occupation and improvements, paying $400 and receiving a receiver's receipt and a certificate of entry certifying that he had purchased the land, had made full payment, and was entitled, on presentation of the certificate to the Commissioner of the General Land Office, to receive a patent.

On December 27, 1892, McCord and one Daniel McLeod purchased the land in good faith of Jacobus, paying him the sum of $4,250 and receiving a warranty deed. The negotiations between these grantees and Jacobus commenced on or about December 17, 1892, and prior to that time they had no interest in the land and had no negotiations with him. While negotiating with Jacobus they asked Hill, at the time residing on a part of the tract, whether he had any claim upon the land and whether Jacobus had good title thereto, and Hill then and there said to them that he had been fairly beaten in his contest with Jacobus, that he had no claim, and that if McCord and McLeod would buy the tract he would make no claim. At that time Hill knew that they were looking at the land with a view of purchasing it from Jacobus, and that the inquiry was made of him with reference to that purchase, and they did in fact rely upon Hill's statement and purchased the land and paid for the same by reason thereof.

A few days after the deed, and on January 4, 1893, for the purpose of putting the understanding between themselves and Hill in writing, the grantees had this instrument executed and acknowledged by Hill:

"For the purpose of making a settlement with John F. Hill, and his relinquishment on the N. W. $\frac{1}{4}$ of section 17, township 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the 1st day of May, A. D. 1893, in which to enter on said

land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut nor allow any of his men to cut or destroy any other timber. And in consideration of said logs, I, John F. Hill, being duly sworn, on oath, says that *he is* the man who made a soldier's application for said N. W. $\frac{1}{4}$ of 17-48-8 W., and I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the United States. Signed, sealed and delivered and agreed upon this 4th day of January, A. D. 1893.

"In presence of— DANIEL MCLEOD.
"W. H. PACKARD. W. E. MCCORD. [Seal.]
"TRACY LYON. JOHN F. HILL. [Seal.]"

Prior to the commutation, and on March 3, 1891, Congress had passed an act amending section 2301 of the Revised Statutes, so as to read as follows:

"Nothing in this chapter shall be so construed as to prevent any person, who shall hereafter avail himself of the benefits of section 2289, from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months." 26 Stat. 1098.

Neither Jacobus nor the land officers had any actual knowledge or information of this enactment at the time of the commutation. On May 15, 1893, the Assistant Commissioner of the General Land Office of the United States, having had his attention called to the act, notified Jacobus that he must furnish supplemental proofs showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, together with an affidavit that he had not alienated the land. Of course, compliance with this was impossible, for Jacobus had already made a conveyance. On September 1,

1893, McCord and McLeod, with their wives, made to Jacobus a deed of conveyance of the land for an expressed consideration of $4,300, and Jacobus at the same time executed to them a mortgage upon the lands to secure the payment of the purchase money. On or about September 12, 1893, Jacobus caused to be made and filed in the local land office, in response to the order of supplemental proofs, certain affidavits and proofs, from which it appeared that the land was conveyed to McCord and McLeod and reconveyed, as hereinbefore stated; that Jacobus retained two acres of the land, and shortly after the sale of the said premises, and on or about February 20, 1893, he again went upon the land, and from that time up to the time of the filing of the affidavits continued to reside upon and improve the land. It did not appear that the purpose of the reconveyance and the return of Jacobus to the land was to obtain a title for the benefit of McCord and McLeod.

On or about September 30, 1893, Hill filed in the local land office contest affidavits and objections to the receiving of said offered supplemental proofs. A hearing was had upon this contest and a large number of witnesses sworn. On August 9, 1894, the local land officers decided the contest in favor of Hill, and filed an opinion, in which they held that the residence of Jacobus up to the time of the sale and conveyance to McCord and McLeod in September, 1892, was fairly satisfactory, but that his residence after the sale and conveyance was for the sole purpose of enabling him to make proof to secure title for them, and that the land was reconveyed to him for that purpose alone. On appeal to the Commissioner of the General Land Office the findings of the local land officers were affirmed. On further appeal to the Secretary of the Interior the prior decisions were, on April 28, 1896, affirmed without any restatement of facts. On June 3, 1896, Congress passed an act containing the following provisions (29 Stat. 197):

"That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature

commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs, and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled when the lands made vacant by such cancelation have been reëntered under the homestead act.

"SEC. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement."

Thereupon Jacobus made a motion before the Secretary of the Interior for a review of the decision of April 28, 1896, and also to confirm his entry under the authority of said act of June, 1896, which motions were denied. A patent was subsequently issued to Hill.

Mr. W. F. Bailey, with whom *Mr. W. H. Stafford* was on the brief, for plaintiff in error.

Mr. L. K. Luse, with whom *Mr. A. L. Sanborn* and *Mr. Lyman T. Powell* were on the brief, for defendant in error.

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

There are two well-settled rules of decision, invoked respectively by the parties. One, that findings of fact made by the Land Department in the progress of a contest before it are conclusive upon the courts; the other, that questions of fact decided by a state court are not subject to review by this court in proceedings on error.

Upon the record these questions of fact and law appear: First, was the original entry allowed to Jacobus on July 6, 1892, rightful? In other words, was his evidence of settlement, occupation and good faith true, and, if so, did it entitle him to priority over Hill, his contestant? Second, if that entry was valid, was the commutation entry made on September 20, 1892, illegal? Third, if so, was the defect which invalidated it subject to removal under the act of June 3, 1896? Fourth, if removable, was there anything in the conduct of Jacobus or his grantees after the original entry to prevent the removal?

With reference to the first question, it appears that the original entry to Jacobus followed a contest between himself and Hill. In that contest testimony was taken before the local land officers upon the question whether Jacobus had performed the acts required of a settler upon public lands, and upon a review the Commissioner of the General Land Office, on April 29, 1892, found in favor of his settlement, residence and improvements, and allowed the entry. No appeal was taken from this decision, and if nothing else appeared the findings would obviously be conclusive in the courts as between Jacobus and Hill. It is undoubtedly true that, until the legal title has passed from the Government, proceedings in the land office are *in fieri*, and a question whether of fact or law may be reopened for consideration. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, and cases cited. It is insisted that the validity of the original entry was relitigated

in the land office in pursuance of the contest made by Hill in October, 1893, and a different conclusion reached. While the power of reëxamination is not to be doubted, yet a decision upon a question of fact, once made in a special proceeding finally terminated, should not be regarded as overthrown by findings in a subsequent proceeding in the department unless it appears that those findings directly overrule, or are necessarily inconsistent with the prior decision. The application of Hill, in 1893, to contest the entry of Jacobus charged as a basis of contest that Jacobus never settled on the land in good faith, but for the purpose of speculation; that he did not reside on the land during the next six months preceding the making of his final proof, and that he had sold the land to one W. E. McCord. A hearing was had upon this contest before the local land officers, and quite a volume of testimony taken. Their decision was adverse to Jacobus. It was affirmed by the Commissioner of the General Land Office and reaffirmed by the Secretary of the Interior. In their decision the local land officers stated the questions to be considered in these words:

"Letter 'H' of November 18,. 1893, directed this office to order a hearing on the charges.

"The two questions to be passed upon are:

"(1) Did Jacobus abandon the land?

"(2) Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?"

And upon the first question they found as follows:

"Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders, and the clearing, in extent and

cultivation, compared favorably with that of others in the same neighborhood.

"After learning that supplemental proof would probably be required, Mrs. Jacobus returned to the land in February, 1893, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the claim in March, went there again in the latter part of May, remaining two weeks, and returned for the same time in July. This was apparently her last stay upon the land until after supplemental proof was offered, September 20. A small crop of vegetables and hay was raised that season, as in the two years before.

"Upon the whole the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees."

After this they considered the effect of the sale of the land to McCord and McLeod, and in so doing commented upon the character of the occupation by Jacobus and his wife during the spring and summer of 1893, closing with a decision in these words: "We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be canceled and a preference right of entry awarded the contestant Hill."

Apparently the character of the occupation and improvements by Jacobus prior to the original entry of July 6, 1892, was not a matter considered by the local land officers, although it is true that there was some testimony respecting it. They did not pretend to disturb the approval of the sufficiency of Jacobus' occupation and improvements made in allowing that entry after the conclusion of the original contest between Hill and Jacobus. They assumed that that matter was already settled. This is evident from the two questions which they say were presented, and if they considered it at all they doubt-

less thought the testimony was not such as to justify any change in the previous conclusion. This decision was affirmed by the Commissioner of the General Land Office. In his opinion, after reciting the contest, the decision, and the grounds of appeal, the fact of the commutation of the homestead entry, the direction to Jacobus to furnish supplemental proof as the commutation was premature, he says:

"It is shown by the evidence, that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for $4,250 cash.

"On the question of residence the testimony is very conflicting.

"Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time working at his trade; he made occasional visits to the land on the Sabbath day.

"It also appears that the defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land, but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day."

Obviously the time of occupation referred to was after the commutation. This is made clear by a comparison of this opinion with that of the local land officers. If other grounds were relied on than those stated in the opinion of the local land officers, they would have been distinctly stated, and the fact that the decision was based upon the character of the occupation and improvements prior to the original entry would

have been made clear. This conclusion is strengthened by the final declaration of the commissioner:

"The sale and conveyance of the land is clearly proven, and it is also as clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed."

This decision of the Commissioner of the General Land Office was sustained by the Secretary of the Interior in an opinion which contains no recital of facts, but simply says:

"Said decision fairly sets forth all the facts in this case, and the conclusion therein reached is sustained by the testimony and is in conformity with law, and the decisions of the department, and is hereby affirmed."

In the final opinion of the Supreme Court of the State is this statement (pp. 312, 313):

"We still think it plain, therefore, that no questions involving Jacobus' proceedings up to and including the final proof of September, 1892, were passed upon in the consideration of the contest had in 1894. Indeed, this seems to be the view of appellant's counsel as well, for he declares in his brief that 'no question of *mala fides* was found in the making of proofs, [of September, 1892,] nor was the subject considered. Simply, from the evidence, which was the same as the affidavits, they determined the second question which they stated at the outset, that the sale of the land to *McCord* and McLeod was a bar to the offering of supplemental proof.' "

While no such admission is found in the brief filed in this court, possibly the omission may have been induced by the stress of the case.

We agree, therefore, with that court, that there is nothing in the record to justify a conclusion that the Land Department ever changed its finding, made in allowing the original entry, of the sufficiency of Jacobus' occupation and improvements up to that time.

It is also worthy of notice in passing that the Supreme

Court in its opinion held that the representations and instrument made and executed by Hill estopped him from questioning the validity of the original entry, so far at least as against the plaintiff, although they would not bar the United States from reclaiming the land.

We proceed, therefore, to a consideration of the other questions. At the time the commutation was allowed neither Jacobus nor the land officers had actual knowledge of the act of March 3, 1891. Such is the finding of the state court, and being a question of fact this finding is conclusive. Prior thereto a commutation made as this was would have been valid, and there is neither finding nor testimony that Jacobus or the land officers acted in bad faith in the matter. There was simply a proceeding, theretofore legal and proper, taken in actual ignorance of a restraining statute. The act of 1896 was obviously passed to reach such a case as this, in which a commutation was allowed within less than fourteen months from the date of the homestead entry, and to do away with the objection on account of the matter of time. Certain provisions were incorporated in order to prevent injustice to other parties. But, as between the Government and the entryman, its purpose was to give validity to the commutation if it would have been valid had not the act of 1891 been passed.

Upon what ground did the Land Department set aside the commutation entry and afterwards refuse to reinstate it? The original entry was July 6, the commutation September 20, not three months thereafter. The act of 1891 allowed commutation only fourteen months or over after the entry. The commutation, therefore, was illegal. Within less than six months after the original entry and four months after the commutation, Jacobus sold and conveyed the land, and his grantees became thereafter the parties solely interested. Preemption and homestead entries by statute must be made for the exclusive use and benefit of the parties making the entries, Rev. Stat. secs. 2262, 2290, and in each case an affidavit to that effect is required. Whatever Jacobus did after his con-

veyance in December, 1892, was not for his exclusive use and benefit. He attempted to get around the limitations and requirement of the statute by taking a reconveyance from his grantees, giving to them at the same time a mortgage to secure the consideration stated in the deed, and by an affidavit stating that at the time of his conveyance in December he reserved about two acres of land where his house and other improvements were located, and that when he heard of the act requiring fourteen months' residence before commutation he again took possession of the tract and continued in occupation and cultivation. This was held insufficient to avoid the restraint of the statute, and upon this ground the commutation entry was set aside. The local land officers, in their opinion, say:

"The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus upon the land was as the agent of the transferees and for the purpose of acquiring title for them. This conclusion is strongly supported by the admission of Jacobus upon cross-examination.

"Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land. Granting, therefore, that the reconveyance of September 1st, 1893, was made in good faith by all parties, the slender residence of the wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances, the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself, show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right

of entry awarded to the contestant, Hill;" while the Commissioner of the General Land Office, in his opinion, concludes:

"The sale and conveyance of the land is clearly proven, and it is also clearly shown that the land was reconveyed to defendant, so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed, and defendant's homestead and his cash entry for the land involved is held for cancellation."

While these opinions may have correctly declared the law as it stood when they were delivered, we may remark in passing that Jacobus seems to have acted in an honest effort to protect his grantees from the consequences of a mistake made by himself and the local land officers at the time of the commutation.

When the act of 1896 was passed the matter was still pending in the department, and no entry had been made by Hill. The motions by Jacobus for a review and to confirm his entry were denied by the Secretary of the Interior, the ground of the decision being, as stated in a communication to the Commissioner of the General Land Office:

"The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

"It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs."

The reference in this to the decision of the Commissioner makes it clear that the fraud and the want of good faith mentioned were in the commutation entry and the supplemental proofs. Evidently the Secretary ruled that the act of 1896 did not confirm a previous premature commutation entry if the entryman was guilty of any fraud or wrong subsequent thereto in attempting to make good the title acquired thereby. We do not so understand the law. If at the time of the com-

mutation entry there had been no fraud or lack of good faith, and the only defect was in the matter of time, we do not think the confirmation authorized by the act of 1896 is destroyed by anything like that shown to have been done by Jacobus in his effort to protect the title he had conveyed to McCord and McLeod. In other words, if the commutation entry was rightful save for the fact that it was premature, the act of 1896 does away with that objection and confirms the entry, and the right to that confirmation is not destroyed by that which the entryman may have done in a subsequent effort to protect his title.

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

Affirmed.

CRAMER *v.* WILSON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 47. Submitted November 3, 1904.—Decided December 5, 1904.

Where the trustee in bankruptcy sells the interest of the bankrupt in land, the purchaser acquires only the interest of the bankrupt on the day of adjudication and no interest therein subsequently acquired by him in the property passes by the trustee's deed.

The fact that after the sale and before the subsequent acquirement of interest the bankrupt made an unsuccessful application to have the sale set aside for inadequacy of price is not an adjudication that the bankrupt had an interest in the property sold which passed to the purchaser.

Whether a deed given by a bankrupt a year prior to the adjudication is fraudulent, or whether it was absolute or merely by way of mortgage, leaving him an equity of redemption, are not Federal questions and the decision of the state court is conclusive and cannot be reviewed by this court.

THIS was a bill originally filed February 1, 1888, in the Superior Court of Cook County by the plaintiff in error, Cramer,

under her then name of Fannie N. Dresser, against her sister, Lilly B. Dresser, Henry H. Gage, Julia Wilson and two others, for the partition of certain real estate in Chicago, for a settlement of equities or liens thereon, for a receiver and for the removal of certain clouds upon complainant's title.

The material facts of the case are as follows: Shortly before the beginning of this suit Fannie N. Dresser was the record owner of the property in question through a patent from the United States. On January 31, 1888, the day before this suit was commenced, Fannie N. Dresser conveyed to her sister, Lilly B. Dresser, an undivided one-third of the property in question. The court found this deed to have been collusive, and executed by an arrangement with the defendant Gage, who held certain tax deeds to the premises found to be invalid, and for the purpose of filing this bill for partition, and the removal of a cloud upon the title caused by another tax deed acquired by Frederick R. Wilson in 1864. His interest in the property was conveyed by him to his sister, Julia Wilson, in 1877. Julia Wilson was made defendant to the bill as the owner of this tax title.

It appeared, however, that Julia Wilson died on December 15, 1887, leaving Frederick R. Wilson her sole legatee and executor. The suit was then abated as to Julia Wilson, and Frederick R. Wilson was substituted as defendant in her place. The deed to this property from Frederick R. Wilson to his sister was a conditional conveyance, but by agreement of the parties it was subsequently treated by them as absolute; and upon the death of Julia Wilson, in December, 1887, the property again became vested in Frederick R. Wilson as her only heir at law and next of kin, and as her sole devisee under her last will and testament. Shortly after the deed to Julia, Frederick R. Wilson went into bankruptcy, August 30, 1878, and Robert E. Jenkins was appointed his assignee. The property was subsequently ordered to be sold, and in 1889 was purchased from the assignee by one Taylor E. Snow for the sum of $250. Both Jenkins, the assignee, and Snow, the purchaser, were

made parties defendants to the bill, and subsequently filed answers and a cross bill.

It appeared that Gage, after the beginning of the suit, bought the interest of Lilly B. Dresser, and also that the purchase by Snow at the bankruptcy sale was made in his interest, so that the real parties to this litigation are Gage upon one side and Wilson upon the other.

Upon the first hearing, the court entered a decree of partition denying Wilson's claim of title, and holding that his interest passed to Snow by the assignee's sale. This decree was reversed by the Supreme Court of Illinois upon the ground that the plaintiff had not proved her title from the Government to the property. Leave was given the parties to amend, and subsequently an amended bill was filed and answered. Upon the second hearing, the court held that the premises were the property of Frederick R. Wilson, and had been his from 1864 until 1877, when he conveyed them to his sister; that at the time of bankruptcy proceedings, in 1878, the title was in Julia Wilson, and that upon the death of Julia Wilson in 1887 the title again vested in Frederick R. Wilson; that at the time Frederick R. Wilson was adjudged a bankrupt Julia Wilson was alive and vested with the title to this property, and that the defendant Snow acquired no title when he purchased all of the estate, real and personal, of the bankrupt, Frederick R. Wilson.

This decree was affirmed by the Illinois Supreme Court, 202 Illinois, 83, and it is to reverse that decree that plaintiffs have taken a writ of error from this court.

Mr. Frederick W. Becker, *Mr. Robert A. Childs* and *Mr. Charles Hudson* for plaintiffs in error:

The points involved in this case are Federal questions. *Williams* v. *Heard*, 140 U. S. 529; *Central Nat. Bk.* v. *Stevens*, 169 U. S. 432, 460; *Dushane* v. *Beall*, 161 U. S. 513; *N. O., S. F. & L. R. R. Co.* v. *Delamore*, 114 U. S. 501; *Chapman* v. *Goodnow*, 123 U. S. 540.

The deed to Julia Wilson was fraudulent and void as against creditors, because absolute in form but conditional in fact, creating a secret trust. *Lukins* v. *Aird*, 6 Wall. 78; *Beidler* v. *Crane*, 135 Illinois, 92, 98; *Bostwick* v. *Blake*, 145 Illinois, 85, 89; *Metropolitan Bank* v. *Godfrey*, 23 Illinois, 579; because colorable; and because voluntary and made while the grantor was insolvent or contemplating insolvency. *Dillman* v. *Nadelhoffer*, 162 Illinois, 625.

Such a deed is void not only as to existing but also as to subsequent creditors. *Bostwick* v. *Blake, supra; Gordon* v. *Reynolds*, 114 Illinois, 118, 127. Hence no right or title passed to the sister by virtue of that deed as against creditors, but upon Wilson's bankruptcy all his original right and title passed to his assignee in bankruptcy.

The Bankrupt Act of 1867 vested in the assignee all property of the bankrupt conveyed in fraud of creditors. Rev. Stat. § 5046; *Holbrook* v. *Coney*, 25 Illinois, 543, 547; *Foraast* v. *Hyman*, 138 Illinois, 423; no judicial determination of that fact was necessary to pass title. *Freeland* v. *Freeland*, 102 Massachusetts, 475.

As to nature of title of assignee in bankruptcy, see *Bouton* v. *Dement*, 123 Illinois, 142; *Choteau* v. *Jones*, 11 Illinois, 300; *Hardin* v. *Osborne*, 94 Illinois, 571. That this asset was not scheduled is immaterial. *Holbrook* v. *Coney*, 25 Illinois, 543.

Two years' limitation as to *suits* in bankruptcy has no application to *sales*, *Holbrook* v. *Brenner*, 31 Illinois, 501; and if it has, it would only commence to run from the discovery of the fraud. *Beatty* v. *Nickerson*, 73 Illinois, 605; *Dushane* v. *Beall*, 161 U. S. 513. Election to take by assignee, if necessary, shown by sale. *McKinny* v. *Farmers' Nat. Bk.*, 104 Illinois, 130; *Freeland* v. *Freeland*, 102 Massachusetts, 475. All these questions are *res adjudicata* by the denial of Wilson's application to set aside sale, and he is estopped from raising them now, *Bennitt* v. *Star Mfg. Co.*, 119 Illinois, 9; not only as against the parties thereto, but as against all whose interests are involved. *Barney* v. *Patterson*, 6 H. & J. 182, 203;

Tyler v. *Tyler*, 126 Illinois, 525; *Jamieson* v. *Beaubien*, 3 Scam. 113; *Rogers* v. *Bent*, 5 Gil. 573; *Kirkpatrick* v. *Clark*, 132 Illinois, 342.

Whether the assignee *lost* his title by *laches* is immaterial; it is enough that he *acquired* title, though but for a day, to interrupt the continuity of Wilson's possession. *C. & A. R. R. Co.* v. *Keegan*, 185 Illinois, 70.

The bankruptcy proceedings had the effect on Wilson's adverse possession of a voluntary conveyance, which breaks the continuity, even if the actual possession be not disturbed. *Gower* v. *Quinland*, 40 Michigan, 572; *Root* v. *Woolworth*, 150 U. S. 401; *Hintrager* v. *Smith*, 89 Iowa, 270; *Oberein* v. *Wells*, 163 Illinois, 101.

The deed to Julia Wilson being unrecorded was not notice, Ill. Rev. Stat., ch. 30, § 30; nor was Wilson's possession of the premises after the conveyance. 23 Am. & Eng. Ency. of Law, 2d ed., 506; *Robertson* v. *Wheeler*, 162 Illinois, 566, 575.

Property fraudulently conveyed clothes the grantee with no ownership as against the creditors of the grantor. 1 Am. & Eng. Ency. of Law, 2d ed., 813 *n.*; *Jones* v. *Wilson*, 69 Alabama, 400; *Townsend* v. *Little*, 109 U. S. 504.

Julia Wilson participated in the fraud, 14 Am. & Eng. Ency. of Law, 2d ed., 271, and is not a *bona fide* purchaser. *Met. Bk.* v. *Godfrey*, 23 Illinois, 579; *Powell* v. *Jeffries*, 4 Scam. 387.

The opinion of the Supreme Court of Illinois ignores the real character of the deed to Julia Wilson, and the effect of the bankruptcy proceedings and the Bankrupt Act upon a conveyance in fraud of creditors. The fraudulent features of the deed could not be eliminated by the alleged subsequent agreement.

The suggestion of collusion is ill timed and inconsistent. The motive in instituting the suit is immaterial. *Trainor* v. *Greenough*, 145 Illinois, 543, 549. The following statutes of Illinois are applicable. Rev. Stat., Ch. 106, §§ 1, 6, 39; ch. 59, §§ 4, 5; ch. 30, § 30; ch. 83, § 1.

Mr. David K. Tone and *Mr. George Gillett* for defendant in error:

No Federal question is involved. The state court found that Julia Wilson was the owner of the premises in controversy on August 30, 1878, when this petition in bankruptcy was filed, and that the purchaser took nothing at the assignee's sale. On a writ of error to a state court the findings of fact of the state court are conclusive in this court. *Egan* v. *Hart*, 165 U. S. 188; *Bement* v. *National Harrow Co.*, 186 U. S. 70, 83. A decision of a state court against a party who claims that the title to his demand comes through a bankrupt assignee cannot be reviewed by this court when no construction of such bankrupt act was called in question. *Calcote* v. *Stanton*, 18 How. 243; *Scott* v. *Kelly*, 22 Wall. 57; *McKenna* v. *Simpson*, 129 U. S. 506.

The case should be affirmed on the merits.

The court should refuse to take jurisdiction of a collusive suit prosecuted by a party who has no interest in the controversy as is the case with plaintiff in error. *In re Burdick*, 162 Illinois, 48, 52, 64; *Cleveland* v. *Chamberlain*, 1 Black, 419; *American Wood-Paper* v. *Heft*, 131 U. S. 92; *Dakota Co.* v. *Glidden*, 113 U. S. 222; *The People* v. *Gen'l Elec. Ry. Co.*, 172 Illinois, 129, 143.

That Wilson actually conveyed to his sister is *res judicata* by the final state court judgment. *Wilson* v. *Dresser*, 152 Illinois, 387; *Smith* v. *Neff*, 123 Illinois, 310; *West* v. *Douglass*, 145 Illinois, 164; *McFarland* v. *Washburn*, 26 Ill. App. 355; *World's Columbian Exposition* v. *Lehigh*, 94 Ill. App. 433; *Newberry* v. *Blatchford*, 106 Illinois, 593.

The denial by the District Court of the petition of Wilson to set aside the sale is not *res adjudicata* in reference to Wilson's title, as his present title is based upon a subsequent devise. Julia Wilson was not a party to the bankruptcy proceeding, and hence not bound by it. *Attorney General* v. *C. & E. R. R. Co.*, 112 Illinois, 520, 539; *McCartney* v. *Osburn*, 118 Illinois, 403, 410; *White* v. *Sherman*, 168 Illinois, 589, 612.

Plaintiffs in error were not creditors of Frederick R. Wilson, and hence cannot raise the question, as a fraudulent conveyance can only be assailed by *bona fide* creditors of the grantor. As to third persons, who do not stand in the position of creditors of the grantor, such a conveyance is valid. *Fetrow* v. *Merriwether*, 53 Illinois, 275, 279; *Willard* v. *Masterson*, 160 Illinois, 443; *Rappleye* v. *International Bank*, 93 Illinois, 397, 403; 14 Am. & Eng. Ency. of Law, 280*c*.; *Etter* v. *Anderson*, 84 Indiana, 333, 337.

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

Upon the first hearing, the Superior Court entered a decree of partition, finding that the Dresser sisters were the owners of the property at the beginning of the suit, through a title derived from the Government; that after the suit was begun Lilly B. Dresser conveyed her interest to Henry H. Gage; that Julia Wilson, to whom her brother, Frederick R. Wilson, had conveyed his interest in the property, died testate, leaving her interest in the property to Frederick R. Wilson, and that this interest subsequently passed to Snow by purchase from the assignee, Jenkins.

This decree was reversed by the Supreme Court, 152 Illinois, 387, which held that there was no evidence of a title in fee in complainants derived from the Government; that, although Frederick R. Wilson showed a deed to himself from the city of Chicago, dated May 24, 1864, and possession under such deed, he conveyed his interest to his sister, Julia Wilson, in 1877; that about a year thereafter he went into bankruptcy, and that at the assignee's sale nothing passed to the purchaser, Snow, but the interest of the bankrupt on August 30, 1878. "But," said the court, "the evidence shows that at that time he had no interest, having more than a year prior to that date, July 6, 1877, conveyed it to Julia Wilson, and the evidence is undisputed as to the fact that she took pos-

session under that deed, and retained it by her tenants until the date of her death, and that her tenants remained in such possession when this suit was begun." The court found that there was nothing to show that Julia Wilson had not died seized of the property, and that it was not until her death in 1887 that defendant became repossessed of it. The case was reversed, and remanded with leave to amend the pleadings and put in additional testimony.

Upon a rehearing in the Superior Court, a decree was entered in favor of the defendant Wilson, establishing his title to the premises, subject to the repayment of certain taxes paid by Gage. Upon the second appeal to the Supreme Court that court held that, it having been shown that defendant and his sister had been in possession of the property for more than twenty years prior to the bringing of that suit, defendant had a good title by limitation, unless it was cut off and defeated by the assignee's sale to Snow; but that as he had sold to his sister, Julia Wilson, in July, 1877, thirteen months before the bankruptcy, and she had taken possession, he had no title, and none passed to Snow by purchase from the assignee.

Complainants, however, took the position that the deed from Wilson to his sister was not absolute, but was made to secure a debt, and was constructively a mortgage, and that an equity of redemption remained in Frederick R. Wilson, which would pass to Snow as purchaser at the time of the assignee's sale. But the court held that, under the arrangement between the parties, the deed became absolute long before the defendant was adjudged a bankrupt. That under the law of Illinois, when land has been conveyed by deed, absolute in form, though intended as security for the payment of a debt, the payment of the debt may be abandoned, and the deed treated as an absolute conveyance, although originally intended as a mortgage, and that such arrangement may be made by parol, and be binding. 202 Illinois, 83.

It thus appears that the case turned upon the validity of the deed from the appellee to his sister, Julia Wilson. It was

insisted that the deed was either fraudulent and void as against creditors, or that a residuary interest remained in Frederick R. Wilson, which would pass under the assignee's sale. This was a local and not a Federal question. The deed, having been made a year before the proceedings in bankruptcy were begun, and eleven years before the commencement of this suit, was not attacked as invalid under the bankrupt law of 1867, then in force, but as a fraudulent conveyance under the state law. The question of fraud was ignored by the state court, although it was directly involved in the issue, and hence must be treated as overruled. It was admitted that, if the property were that of Julia Wilson at the commencement of the bankruptcy proceedings, nothing passed under the assignee's sale; and it was only upon the theory that it was the property of the bankrupt that the assignee could convey anything to the purchaser. To reverse the state court upon this point would be to hold that it improperly construed its own laws with reference to fraudulent conveyances. The assignee's sale as a conveyance of the property of the bankrupt was not attacked in any way. He was a mere conduit through which the interest of Frederick R. Wilson, if he had any for himself or his creditors, passed to Snow. We have repeatedly held that, when the question in a state court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the state court decided that he had not, no Federal question is presented. *Scott* v. *Kelly*, 22 Wall. 57; *McKenna* v. *Simpson*, 129 U. S. 506. The same principle was applied to a different class of cases in *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *De Lamar's Co.* v. *Nesbitt*, 177 U. S. 523. In *Williams* v. *Heard*, 140 U. S. 529, relied upon by the plaintiffs in error, the property in dispute belonged admittedly to the bankrupts, and the question was whether it was of such a character as to pass to their assignee. Of course, this involved a construction of the bankrupt act.

If there be any Federal question, it arises from the denial of the petition of the appellee, filed in the bankruptcy court

September 17, 1889, about two months after the sale was confirmed, to set aside and vacate such sale for inadequacy of price and want of notice that the sale would take place. It is insisted that this denial was *res judicata* of Wilson's interest in the property, and that the refusal of the court to so treat it denied to the order of the bankruptcy court the full faith and credit to which it was entitled. But on referring to the order of sale of June 27, 1889, we find that the assignee was directed to sell simply "the interest of such bankrupt and of said asssignee," without attempting to adjudicate what that interest was, or whether he had any interest at all. It was left for other courts in other proceedings to determine what his interest or that of his creditors was on August 30, 1878, the day on which he was adjudged a bankrupt. That interest would, of course, pass to the assignee. We have already seen that the Supreme Court found he had none upon that day. The District Court authorized the sale of such as he had, but made no attempt to determine or guarantee that he had an interest that would pass by the sale. The refusal to set aside the sale was largely a matter of discretion, and may have been justified by the consideration that the bankrupt was not injured by the fact that it had taken place. There was certainly no attempt to adjudicate the amount of his interest.

The circumstance that nine years after his adjudication in bankruptcy he took title to the property as the devisee of his sister does not lend any significance to the fact that at the date of his bankruptcy his sister was the owner, in possession by tenants, and that the Supreme Court found her title to be absolute.

The decree of that court is, therefore,

Affirmed.

UNITED STATES *v.* THOMAS.
THOMAS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 94, 95. Argued October 11, 1904.—Decided December 5, 1904.

While the intention of Congress in the Navy Personnel Act of March 3, 1899, was to put officers of corresponding rank in the Army and Navy on the same general footing with respect to their general pay and to make the act prospective in its application to any future legislation by which the general pay of army officers might be increased, Congress may increase the pay of army officers for services in particular places and under special circumstances without thereby intending such increase to apply to naval officers.

A captain in the Navy is not entitled to the ten per cent additional pay given to army officers under the acts of May 26, 1900, and March 2, 1901, for services in Philippine and Chinese waters or for service beyond the limits of the States comprising the Union.

The term "vessel employed by authority of law" within the meaning of § 1571, Rev. Stat., is restricted to vessels owned or chartered by, or otherwise engaged in the service of, the Government and while an officer is traveling on land or on a vessel other than one so employed by authority of law he is not entitled to pay for sea duty.

THIS was a petition for certain allowances claimed to be due petitioner as a captain in the United States Navy, under act of March 3, 1899, 30 Stat. 1004, equalizing the pay of army and navy officers, and known as the Navy Personnel Act. The findings of fact are too long to be here reproduced, but the several items claimed by petitioner, and from the disposition of which these appeals are taken, are cited by counsel in their brief and by the Court of Claims as follows:

1. From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain, at $4500 a year, and claims ten per cent increase of this pay for service in the Philippines and in China, under the acts of May 26, 1900, and March 2, 1901. 31 Stat. 205, 895.

2. From March 2, 1901, to June 11, 1901, he was paid the sea pay of a captain, $4500 a year, and claims ten per cent

increase of this pay for service outside the United States, under the provisions of the act of March, 2, 1901, 31 Stat. 895, 903.

3. From June 12, 1901, to September 30, 1901, he was paid sea pay at $4500 a year, and claims ten per cent increase under the act of March 2, 1901, for service outside the United States. During this time he was in the waters of the San Francisco Bay, traveling from San Francisco to Puget Sound, and in the waters of Puget Sound. This claim is made provisionally in case his service in Chinese and Philippine waters is not considered to be service "in China" and "in the Philippine Islands," entitling him to ten per cent increase from May 26, 1900, to March 1, 1901. In that event he would claim that his service in waters of the United States was beyond the limits of the States comprising the Union.

4. Between December 2, 1899, when relieved as commanding officer of the U. S. S. Lancaster, and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. Baltimore at Hong Kong, China, he was paid only shore pay, $3825 a year, fifteen per cent less than sea pay. He claims sea pay, $4500 a year during that time.

The last item was disallowed. The first three items were at first disallowed, but on a rehearing were allowed and final judgment rendered for $568.29. 38 C. Cl. 113, 719. Both parties appealed to this court.

Mr. Assistant Attorney General Pradt, with whom *Mr. John Q. Thompson*, Special Assistant Attorney, was on the brief, for the United States.

Mr. George A. King and *Mr. William B. King* for Charles M. Thomas.

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

This case depends upon the construction given to section 13

of the Navy Personnel Act, declaring that "after June 30, 1899, 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 officers of corresponding rank in the army." The object of this act can best be understood by considering the prior legislation of Congress upon the same general subject, and the circumstances under which the act was passed. By the act of July 16, 1862, Rev. Stat. § 1466, the relative rank of army and navy officers was fixed by declaring that rear admirals shall rank with major generals, commodores with brigadier generals, captains with colonels, commanders with lieutenant colonels, lieutenant commanders with majors, lieutenants with captains, etc.

It was, however, a source of dissatisfaction to navy officers that some of them did not receive the same pay as corresponding officers of the army, although others received a larger pay. Thus by sections 1261 and 1556 the highest pay of a rear admiral, when at sea, was $6000, while a major general received $7500, a commodore received $5000 when at sea, while a brigadier general received $5500. A captain, however, when at sea received $4500, while a colonel received but $3500.

To remove this dissatisfaction Congress passed the Naval Personnel Act, assimilating the pay of navy officers to army officers of corresponding rank, with a proviso, however, "that no provision of this act shall operate to reduce the present pay of any commissioned officer now in the navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The effect of this legislation was to raise the pay of certain navy officers to that received by army officers of corresponding rank, and to leave undisturbed the present pay of certain other navy officers, who were already receiving higher pay than army officers of the same rank.

The intention of Congress was evidently to put officers of

the army and navy on the same footing with respect to their general pay, and to make the act prospective in its application to future legislation, so that if Congress should thereafter raise the general pay of army officers as fixed by Revised Statutes, section 1261, a like increase should apply to navy officers. It does not, however, follow that Congress may not increase the pay of army officers for services in particular places or under special circumstances, without thereby intending that the same increase shall apply to naval officers performing the same service under like circumstances. Thus, if the act should allow army officers increased pay when ordered to sea or to a foreign port, it would not follow that naval officers would be entitled to a like increase, since such service would be wholly exceptional in the case of army officers, while it is the natural and normal duty of navy officers to engage in sea service, cruise in foreign waters and lie up in foreign ports. It never could have been the intention of Congress to disable itself from awarding to a particular class of army officers an increase of pay for exceptional services without thereby increasing the pay of navy officers, whose lives are largely passed in performing like services.

Confirmation of this view is found in the second proviso of section 13, "that when naval officers are *detailed for shore duty beyond seas* they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the army detailed for duty in similar places." Here is a distinct recognition of the fact that when naval officers are detailed for a special or unusual duty beyond seas, they shall receive the same pay as army officers detailed for the same duties. This provision, however, would be wholly unnecessary if the act were given the broad application contended for, since the increased pay allowed to army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect. Shore duty beyond seas being an exceptional duty, both to officers of the army and navy, and being probably attended by increased expenditures, and dangers incident to

a tropical climate, it is very natural that Congress should award them both increased compensation.

The principal questions in this case, however, arise from the army appropriation bills of May 26, 1900, and March 2, 1901, making appropriation for the support of the army for the year ending June 30, 1901, and 1902, the first of which contains the following proviso:

"*Provided,* That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men, over and above the rates of pay proper as fixed by law in time of peace." 31 Stat. 211.

Here is an increase of ten per cent allowed to army officers serving in certain designated places. Doubtless if naval officers were detailed for shore duty in any of these islands they would receive a like increase of pay, under the proviso of section 13 of the Personnel Act heretofore quoted. But, unless they are detailed for shore duty, it is impossible to hold that they are entitled to extra pay, without treating as obsolete the above proviso requiring such detail.

The act of March 2, 1901, 31 Stat. 895, 903, making appropriation for the support of the army for the fiscal year ending June 30, 1903, contains the following proviso:

"*Provided,* That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States, comprising the Union and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men, over and above the rates of pay proper as fixed by law for time of peace, and *the time of such service shall be counted from the date of departure from said States to the date of return thereto:*

"*Provided further,* That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, 1900, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

Under this proviso an army officer ordered to the Philippine Islands receives an increase of pay from the day he leaves San Francisco until he returns there. This allowance was undoubtedly based upon the consideration that service both in the Philippines themselves and upon the voyage going and returning was an exceptional service, attended by peculiar hardships; but to say that navy officers shall be entitled to the same increase is practically to add ten per cent to their sea pay from the moment they leave a port of the United States until they return thereto; in other words, to increase their normal sea pay ten per cent whenever they are serving beyond the limits of the States.

So far as applied to naval officers, it goes further than this. The act of 1901 does not, as did the act of 1900, limit the increase of pay to officers serving in our island possessions and in Alaska, but extends it to all serving "beyond the limits of the United States," so that if applied to naval officers, whenever a vessel is ordered to sea beyond the three-mile limit, be it only upon a practice cruise or a voyage from Pensacola to New York, every officer on such vessel is entitled to a ten per cent increase of his ordinary pay from the day he sets sail until the day he returns.

It is not for a moment to be supposed that Congress contemplated any such sweeping innovation. This construction would not only render nugatory and obsolete the proviso of the Personnel Act that officers to be entitled to army pay shall be detailed for shore duty, but largely discriminates in favor of naval officers by adding ten per cent to their pay for their normal sea duties without a corresponding addition to the pay of army officers for the performance of *their* normal duties which are upon land; in other words, instead of assimilating it actually dissimilates the pay of army and naval officers.

In our opinion the proviso that naval officers shall be entitled to army pay "when detailed for shore duty beyond seas," is not repealed or rendered inoperative by anything contained

in the acts of May 26, 1900, and March 2, 1901, and that naval officers are not entitled to an increase of pay while discharging their ordinary sea duties.

It is significant in this connection to notice that in the appropriation act of March 2, 1901, for the support of the army for the fiscal year of 1902, there was an item of $500,000 for an "additional ten per centum increase on the pay of officers serving at foreign stations." 31 Stat. 903. This was followed by a similar provision in the appropriation act of June 30, 1902, for the year of 1903, the amount appropriated being $451,456, 32 Stat. 507, 512, and in the army appropriation act of March 2, 1903, for the year 1904, there was also an item of $200,000 for the same purpose. 32 Stat. 933. So also in the appropriation act of April 23, 1904, 33 Stat. 259, 266, for the year 1905, there is an item for an additional ten per centum increase on the pay of commissioned officers serving in the Philippine Islands, the island of Guam, Alaska, China and Panama of $167,426.30.

Notwithstanding these repeated provisions for the increase of army pay, Congress has never made an appropriation for the largely increased pay to which naval officers would be entitled under the acts of 1900 and 1901, or otherwise recognized their claim for increased pay to which such officers would be entitled upon the theory of the petitioner in this case. This omission lends support to the theory that Congress supposed that the ordinary sea services of naval officers were sufficiently compensated by the addition of fifteen per centum to their shore pay.

2. Different considerations apply to the claim of petitioner to sea pay from December 2, 1899, to February 7, 1900. Claimant was relieved as commanding officer of the Lancaster, then at Barbadoes, December 2, 1899, and ordered to report to the Navy Department, where he arrived, by merchant steamer, December 12, 1899. Upon the following day he was ordered to proceed to Hong Kong for duty on the Asiatic station, and sailed by merchant steamer from San Francisco,

January 6, 1900. He reported in obedience to his orders, and was assigned to the command of the Baltimore at Hong Kong, February 7, 1900. Between December 2, 1899, and February 7, 1900, petitioner was occupied in traveling on duty. partly on merchant steamer and partly on land, and in reporting to the Navy Department. During this time his pay was reduced fifteen per cent from the regular sea pay, in accordance with the first proviso of the Personnel Act, which declares that "such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty."

The order detaching him from the Lancaster was as follows:

"SIR: You are hereby detached from duty in command of the U. S. T. S. Lancaster, will proceed immediately to Washington, D. C., and report at the Navy Department, at that place, for special temporary duty.

"Hold yourself in readiness for orders to sea duty.

"This employment on shore duty is required by the public interest.

"Respectfully,

"(Sgd.) A. S. CROWNINSHIELD,

"*Acting Secretary.*

"Captain CHARLES M. THOMAS, U. S. N.,

"U. S. T. S. Lancaster."

The next day, after reporting to the Navy Department under this order, he was ordered to proceed to San Francisco, California, and thence to Hong Kong. It thus appears that while he was not regularly detailed for shore duty, he was ordered to report at the Navy Department for a special temporary duty, and the final sentence of the latter indicates that it was regarded as an employment on shore duty. He was allowed by the Department fifty dollars traveling expenses from Barbadoes to New York, but was not allowed either mileage or sea pay. The Court of Claims, however, allowed him mileage under section 13 of the Navy Personnel Act, and

a clause of the Army Appropriation Act of March 3, 1899, 30 Stat. 1064, 1068, providing "that hereafter the maximum sum to be allowed and paid any officer of the army shall be seven cents per mile, distances to be computed over the shortest usually travelled routes;" but mileage seems not to have been claimed for his traveling from Washington to Hong Kong, by reason of the further provision of the same act "that actual expenses only shall be paid to officers when travelling to and from our island possessions in the Atlantic and Pacific Oceans." The Government apparently acquiesced in this allowance of mileage, as it made no appeal therefrom.

But the Court of Claims further held that, under Rev. Stat. section 1571, he was not entitled to sea pay, because, by that section "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department and in vessels employed by authority of law."

This construction must necessarily be correct, unless we are prepared to hold that a steamer upon which a naval officer takes passage under the orders of the department is a "vessel employed by authority of law." Obviously, it does not admit of this construction. A person who takes passage upon a steamer or a seat in a railway carriage does not "employ" such steamer or carriage in any just sense. We think the term "vessels employed by authority of law" is restricted to vessels owned or chartered by the Government, or otherwise engaged in the service of the United States.

Sea duty being duty at sea upon such vessels, an allowance for mileage is obviously inconsistent with such duty, as the pay of the officer necessarily includes travel upon such vessels; while it is appropriate to shore duty, since travel upon such duty is performed either upon land or upon vessels not engaged in Government service.

There is nothing in the Navy Personnel Act inconsistent with or repealing Rev. Stat. section 1571, and the case of *Gibson* v. *United States*, 194 U. S. 182, is not in point. In that case it was held that the Personnel Act did repeal sections 1578

and 1585, allowing sea rations, because the later act covered the same subject and superseded the provisions of those sections. There is no such conflict between section 1571 and the Personnel Act.

The ruling of the Court of Claims in this last particular was correct; but for the error in the previous ruling the decree must be

Reversed.

LOCKHART *v.* LEEDS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 10. Argued October 20, 1904.—Decided December 5, 1904.

Pleadings must be construed reasonably and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments actually made.

There is nothing in the intricacy of equity pleading that prevents plaintiff from obtaining the relief under the general prayer to which he may be entitled upon the facts plainly stated in the bill; and the court will not deny the relief if plaintiff is otherwise entitled thereto because it is asked under the general relief prayer on a different theory from that which is advanced under one of the special prayers.

Where the defendants are in possession of a mine, having obtained title thereto from the Government through fraud and connivance with one who was legally bound to take the title for the plaintiff, and the plaintiff cannot maintain ejectment, never having had the legal title, his remedy is by action in equity to have the defendants declared trustees *ex maleficio* for his benefit, and if it also appears that some of them are insolvent the defendants will be restrained from further mining *pendente lite.*

THE appellant filed his bill in this suit in the proper court of New Mexico for the purpose of obtaining relief against the defendants mentioned therein. The defendants demurred on several grounds, among which was that the complainant's

remedy, if any, was at law, and that the bill did not state a case for a court of equity. The demurrer was sustained and the bill dismissed, and the judgment of dismissal was affirmed by the Supreme Court of New Mexico, and the complainant thereupon appealed to this court. Among other things the bill averred that about May 7, 1893, the complainant and one Johnson, and the defendant Pilkey, entered into an agreement in Bernalillo County, New Mexico, by which they were to become partners in the enterprise mentioned in the agreement, and that for the consideration mentioned therein Pilkey was to start out to discover, if possible, and to locate for the purpose of operation by the parties, any mining claim of gold, silver or other metal, and that in order to enable Pilkey to carry out his portion of the agreement he was to be furnished certain tools, etc., and some money. If he discovered any such mine it was his duty to locate the same and to send in to the other partners specimens of the ore in order that its value might be determined. Work was to be begun within twenty days after the signing of the agreement. Any fraud by Pilkey was to forfeit his share, which was to be one-third interest in any mine discovered and worked.

The agreement was to continue for a year, and all discoveries and locations of any mines during that time by Pilkey were to be under the agreement mentioned. After the making of this agreement Pilkey started out to prospect and to discover, if possible, a mining claim of the character mentioned. The parties were aware at the time of the execution of the agreement of the existence of the place where Pilkey went for the purpose of prospecting and discovering a mine, and that there possibly might be a valuable claim at that place. Accordingly, Pilkey at once went to the spot, and on or about the tenth of July, 1893, he discovered the claim at that place, and it turned out to be a valuable mine. He located the mine according to the agreement, and posted the notice thereon provided by the laws of the United States and New Mexico, and proceeded to do work thereon pursuant to the provisions

of those laws, but did not do all the work made necessary by them. The bill then alleges that Pilkey commenced to sink a shaft or cut upon the mineral-bearing lode, and did work enough thereon to arrive at mineral-bearing ore in place, within less than ninety days from the time of taking possession of the lode, and it is then averred that the parties were ready, able and willing in all things to comply with the laws spoken of, "and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned." Some time about October 1, 1893, Pilkey, while so in possession of the lode, wrongfully and fraudulently conspired, combined and confederated with the defendants to defraud plaintiff, and they agreed that said Pilkey, in violation and fraud of the rights of the plaintiff in and to the mine, should transfer, convey and deliver possession of the mine to the defendants, or one of them, without the knowledge or consent of plaintiff and the said Johnson. This was done. It was also agreed that they should do all other acts necessary to transfer the right to defendants. Pilkey was to have a certain proportion of interest in the mine and the defendants the balance. The defendants also caused and procured the defendant Pilkey to stop work upon the mine under the agreement already referred to, and it was also agreed that Pilkey should fail and neglect to record, in the proper office, a copy of the location notice posted by him on the ground. The defendants also covered up and concealed the work which had been done on the ground by Pilkey, and they posted another notice thereon and called the mine the "Washington" mine, and filed a copy of the same for record December 13, 1893, without the knowledge or consent of the plaintiff or his copartner, Johnson, and they made the location for the benefit of themselves as locators under the mining laws of the United States. For the purpose of concealing the interest of Pilkey in such pretended location it was agreed that each of the four defendants named should be entitled to a fifth interest, and that Pilkey should be entitled to the remaining fifth, which last-named interest should

be claimed and held by Walker in trust for Pilkey. Johnson subsequently transferred all his interest, under the agreement of copartnership between plaintiff, Johnson and Pilkey, to the complainant, who was, at the time of the commencement of the suit, the owner of Johnson's interest under the assignment. The bill further states that after the removal by the defendants of the original location notice posted by Pilkey, as already stated, the complainant procured a copy thereof and had the same recorded in the office of the recorder of the county on December 9, 1893. The complainant averred that, by virtue of the premises, he became and was at the commencement of the suit the equitable owner of said mine, and of the gold and silver ores therein contained, so discovered and located by Pilkey under the agreement, and that he was equitably entitled, as against the defendants, to the possession and enjoyment of the same and to the preferential right to acquire the legal title from the United States, and that the pretended location of the mine under the name of the Washington mine, by and in the names of the defendants named, was wholly inoperative and void, and that Pilkey, by reason of his participation in a fraudulent conspiracy with the defendants, forfeited all right or interest in the said mine pursuant to the agreement made by Pilkey with complainant and Johnson, and complainant averred that he was equitably the owner of and entitled to such interest. He further averred that the defendants refused to permit complainant to enter upon the property or to work the same, and that the defendants claim title to the mining property under and by virtue of their agreement with Pilkey and their pretended location of the same as the Washington lode. It is further averred that the defendants were engaged in mining, extracting and converting to their own use the ores and minerals contained in the mine and had mined and removed ores and minerals of great value therefrom, and had converted to their own use all such minerals, and that, unless enjoined, they would remove all the ores and minerals, and thereby the entire sub-

stance and value of the property would be destroyed and the complainant would sustain irreparable injury, as the defendants, or some of them, were wholly insolvent. To this bill the defendants demurred, as already stated.

Mr. J. H. McGowan for appellant:

The facts set out in the bill were sufficient to apprise the defendants what they were called on to answer. They show the fraud of defendants. *Atkins* v. *Dick*, 14 Peters, 114; *United States* v. *Am. Bell Telephone Co.*, 128 U. S. 315; Gould's Eq. Pr. § 176; Ency. Pl. & Pr. § 271; Shipman Eq. Pr. § 231.

The complainant is entitled to equitable relief in the absence of allegations showing why he himself did not record the location notice within the required time beyond those in the bill which set forth the contract and showed that appellant relied on his partner who was to do all the required acts for location according to law.

That appellant has no remedy at law was settled finally in *Lockhart* v. *Johnson*, 181 U. S. 516. The prayer of the bill including that of general relief is sufficient to warrant the court in holding the defendants trustees for appellant. Story Eq. Pl. § 40; *Stanley* v. *Valentine*, 79 Illinois, 544; *Hopkins* v. *Snedaker*, 71 Illinois, 449; *Espinola* v. *Blasco*, 15 Louisiana, 426; *Hilleary* v. *Hurale*, 6 Gill. 105; *McIntyre* v. *Philadelphia*, 24 Pennsylvania, 439; *Van Voorhis* v. *Bond*, 110 Michigan, 3; *Webster* v. *Harris*, 16 Ohio, 490; *Holden* v. *Holden*, 24 Ill. App. 106.

Mr. W. B. Childers for appellees:

The bill was insufficient. There was no averment that possession was taken before the expiration of the ninety days allowed for perfecting a location. Story on Eq. Pl. §§ 241, 246. The facts which determine whether the remedy is at law or equity are not distinctly alleged. *Dillon* v. *Barnard*, 21 Wall. 437. Recovery must be had on the case made by the pleading or not at all. *Grosholz* v. *Newman*, 21 Wall. 488; *Harding* v.

Handy, 11 Wheat. 103; *Harrison* v. *Nixon*, 9 Peters, 483; *Bradley* v. *Converse*, 4 Cliff. 366. The groundwork of the case on which relief is sought must be distinctly alleged in the bill. *Pelham* v. *Edelmeyer*, 15 Fed. Rep. 262; *Foster* v. *Goddard*, 1 Black, 506; *Socola* v. *Grant*, 15 Fed. Rep. 487; *Eyre* v. *Potter*, 15 How. 42; *Kohler* v. *Hubbey*, 2 Black, 715; *Wilkinson* v. *Dobbie*, 12 Blatch. 298; *S. C.*, Fed. Cas. 17,670. As to what particularity is necessary in allegations of fraud, see *United States* v. *Atherton*, 102 U. S. 372; *Ambler* v. *Choteau*, 107 U. S. 589; *Voorhees* v. *Bostwick*, 16 Wall. 16; 9 Ency. of Pl. & Pr. 687, and authorities cited; *Fogg* v. *Blair*, 139 U. S. 127; *St. Louis Ry. Co.* v. *Johnston*, 127 U. S. 577; *Van Weel* v. *Winston*, 115 U. S. 237; *Brooks* v. *O'Hara*, 7 Fed. Rep. 532; *Phelps* v. *Elliot*, 35 Fed. Rep. 455.

General accusations of fraud and collusion are ineffective. 1 Daniell, Ch. Pr., 5th ed., 324, and notes; *Riley* v. *Lyons*, 11 Heisk. 251; *Whitthorne* v. *St. Louis M. I. Co.*, 3 Tenn. Ch. 147; *Hazard* v. *Griswold*, 21 Fed. Rep. 178; *Lafayette Co.* v. *Neely*, 21 Fed. Rep. 744.

The defendants cannot be held as constructive trustees under the prayer for general relief, only such relief as is agreeable to the case made by the bill can be granted. *English* v. *Foxall*, 2 Peters, 612; *Hobson* v. *McArthur's Heirs*, 16 Peters, 182; *Boon* v. *Chiles*, 10 Peters, 177; *Wilson* v. *Graham*, 4 Wash. C. C. 53; *S. C.*, 30 Fed. Cases, No. 17,804; *Allen* v. *Pullman Palace Car Co.*, 139 U. S. 658; *Hayward* v. *National Bank*, and cases cited, 96 U. S. 614; *Georgia* v. *Stanton*, 6 Wall. 77; 1 Daniell's Ch. Pr. 386; *Curry* v. *Lloyd*, 22 Fed. Rep. 264; Story Eq. Pl. § 42; 3 Ency. of Pl. & Pr. 350. The bill was not filed for the purpose now claimed.

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

One phase of this controversy has already been before this court in *Lockhart* v. *Johnson*, 181 U. S. 516, which was an ac-

tion of ejectment brought by the plaintiff (who is the complainant herein) to recover possession of the mine above mentioned from the defendants herein. It was there held that the plaintiff could not maintain an action, as the facts showed that he had no legal title, and that the remedy he might have, if any, was in equity.

Upon the trial of the ejectment action the plaintiff offered to prove in substance the same facts as are set forth in this bill in regard to Pilkey's action under the agreement with plaintiff and Johnson, and the fraudulent conspiracy entered into by the defendants for the purpose of defrauding the plaintiff out of his right to such mine. The evidence was objected to and excluded on the ground that it did not show any legal title in the plaintiff, assuming its truth; that in the courts of the United States an action of ejectment was based upon the strict legal title, and if the plaintiff failed to show that it was in him he must fail in such action. The defendants now contend that if the plaintiffs have any remedy it is at law, and also that there is no cause of action stated in the bill. At the time of the trial of this suit the ejectment action had not been decided by this court, the action having been here decided May 13, 1901. It must be regarded, as determined by the decision in that case, that the complainant herein has no remedy at law, and if he has none in this suit he is without remedy for the gross fraud set out in the bill. All facts well pleaded in the bill are admitted by the demurrer, and the question, therefore, is, whether the bill states facts sufficient to entitle him to relief in a court of equity.

The court below has held that the bill does not state with sufficient certainty the time when plaintiff discovered the alleged fraud set forth in the bill, in that it does not appear by any certain averment that the plaintiff did not discover such fraud before the expiration of the ninety days after the discovery of the lode in which to file a copy of the notice of location in the recorder's office, which, if he had done, he might, by himself filing the copy, have thereby fulfilled all the pro-

visions of the statute relating to the location and recording of the notice of claim. We entirely agree with the court below that the facts constituting the cause of action in equity must be distinctly alleged so that the defendant may know what he has to meet and so that he may, if he choose, put them in the issue. The rule must receive a reasonable interpretation and must be so enforced as to further and not obstruct the administration of justice. We think the court below erred in holding that there was no sufficient averment as to the time of the discovery by plaintiff of the alleged fraud set forth in the bill, assuming such averment to have been necessary. He averred that Pilkey, acting under the agreement with plaintiff and Johnson, discovered the mine and located the same by posting the requisite notice on the ground on the tenth of July, 1893. He also averred that some time about the first of October (the exact time, however, he could not state) the defendants entered into the conspiracy and combination referred to. This was but a few days before the expiration of the statutory time in which to file a copy of the notice of claim in the recorder's office of the county. He averred that the conspiracy and combination was secret, and that while the plaintiff and his copartner Johnson were able and willing to comply with all the laws of the United States and Territory, they failed to do so because of the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned. Those acts were a secret effacement of the work done by Pilkey, the taking down of the notice of claim posted on the ground by him, the failure to file a copy thereof, the posting of a claim on the part of the defendants, and the filing of a copy of such notice in the recorder's office on December 13, 1893.

We think the plain import of these averments is that the conspiracy and combination did not become known to the plaintiff until after the expiration of the ninety days from the discovery of the mine, in which to file a copy of the notice posted on the ground, in the recorder's office of the proper county. That is a sufficiently definite averment of time, and

it is enough to show that the failure to file a copy of the notice within the necessary time was owing to the action of the defendants.

Under the agreement first mentioned between plaintiffs, Johnson and Pilkey, as copartners, it became the duty of Pilkey, in order to complete the location it was his duty to make, to file a copy of the notice in the recorder's office, and the parties to the agreement had the right to rely upon Pilkey to file the necessary copy for record, and it is plain that the failure to file on the part of the plaintiff was because of his ignorance of such failure on the part of Pilkey consequent upon Pilkey's fraudulent conspiracy and agreement with the other defendants not to file it. After the discovery of the conspiracy the plaintiff did procure a copy of the original notice posted by Pilkey on the ground and filed the same in the office of the recorder on the tenth of December, 1893. Taking these allegations together, we think it hypercritical to hold that the bill does not with sufficient distinctness allege the fact that the plaintiff did not discover the fraud until after the expiration of the ninety days mentioned, and hence did not himself file the copy notice within that time.

All pleadings must be construed reasonably, and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments made in the pleading.

The agreement between the plaintiffs, Pilkey and Johnson, shows it to have been the duty of Pilkey to make the necessary filing for record in order to complete the location of the mine which he in the agreement was to do. The plaintiff had the right to rely upon Pilkey carrying out that agreement and fulfilling his duty thereunder by making the necessary filing, and plaintiff alleges that he would have done all things made necessary by law had it not been for this fraudulent combination and conspiracy on the part of the defendants. We

regard the allegations of the bill as sufficient in these particulars.

Again, it is alleged that the bill prays that the location of what is called the Washington lode by the defendants be declared void, and that the plaintiff may have the possession of the claim, while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that under the prayer for general relief no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations in the bill do not justify such relief. All the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because, by reason of the facts, the location made by the defendants was a void location. Whether it was a void location or not, was matter of law arising from the facts appearing in the bill. Those facts were not changed in the slightest degree, nor were any inconsistent facts set up thereafter. The plaintiff now under his prayer for general relief contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees *ex maleficio*, for his benefit.

There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly

stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of *English* v. *Foxall*, 2 Pet. 595; *Boone* v. *Chiles*, 10 Pet. 177; *Hobson* v. *McArthur*, 16 Pet. 182; *Hayward* v. *National Bank*, 96 U. S. 611; *Georgia* v. *Stanton*, 6 Wall. 50, are not opposed to the views just stated.

We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that in substance is what is held by the above cases. The case made by the bill consists of the material facts therein stated, and where all the facts are stated it is no reason for denying relief under a general prayer, because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based upon the same facts clearly set forth in the bill.

The defendants contend that if Pilkey, under the fraudulent agreement alleged, and pursuant thereto, surrendered possession to the defendants, the latter became co-tenants with the plaintiff, and he could maintain an action at law to recover possession from his co-tenants. We have already held that the plaintiff could not, upon the facts, maintain ejectment. When Pilkey surrendered possession to defendants under this fraudulent agreement, and they entered and posted the notice and filed the copy, they did not enable plaintiff to maintain ejectment against them as upon his ouster of possession by defendants.

Neither plaintiff nor Johnson had ever had anything but a constructive possession through the possession of Pilkey, and when he fraudulently surrendered it to the other defendants and they entered and completed their location, the plaintiff could not then sustain ejectment, as we have already held. This is not in opposition to the case of *Erhardt* v. *Boaro*, 113 U. S. 527. The question whether the relief should be at law or in equity was not there raised. The action was commenced

in Colorado, and was in accordance with the usual form in actions for mining claims under the procedure in Colorado, and was brought to recover possession of a mine. There was no discussion as to the forum. The complaint simply followed the usual practice. Here we have already held in the ejectment suit (181 U. S. *supra*), that the relief is not to be had by ejectment, but must be obtained in equity if at all. Under the circumstances we think it immaterial whether Pilkey surrendered possession before or after the expiration of ninety days from the discovery of the mine, July 10, 1893. All the acts of fraud set up in the bill committed by the defendants are, if proved, sufficient to entitle the plaintiff to treat them as trustees *ex maleficio*, and to recover from them as such trustees all the materials taken from the mine. See *Saunders* v. *Mackey*, 5 Montana, 523; *Doherty* v. *Morris*, 11 Colorado, 12. Upon the case made by the bill, some of the defendants being insolvent, we think the plaintiff entitled to an injunction restraining the defendants from further mining during the pendency of the suit; an injunction to issue upon such security as may seem appropriate to the court below.

We decide this case solely upon the questions raised by the demurrer.

The judgments of the Supreme Court of New Mexico and of the trial court must be reversed, and the case remanded to the Supreme Court with directions to remand it to the District Court for the Second Judicial District of the Territory of New Mexico, within and for the county of Bernalillo, with directions to overrule the defendants' demurrer and with leave to answer upon such terms as may seem proper to that court.

So ordered.

NORTHERN PACIFIC RAILWAY COMPANY *v.* AMERICAN TRADING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 24. Argued October 26, 27, 1904.—Decided December 5, 1904.

A shipper in New York, after stating that he was about to make a contract of sale of lead in Japan during the Chinese-Japanese War, and that time of delivery was of vital importance, made a written contract with the general eastern agent of the Northern Pacific Railroad, then being operated under order of the court, by receivers, for shipment of 200 tons of lead at a given rate, to be shipped from Newark before a certain date to Tacoma and thence by Northern Pacific steamer sailing on a specified date. The receivers had a contract with the steamship company authorizing it to make through rates to Asiatic ports. The lead was shipped by the required date and after shipment the clerk of the shipper was given a bill of lading of the railroad company which he did not read and which contained a provision that the railroad company was not liable beyond its own line and which the shipper hypothecated with his bank as collateral. The lead reached Tacoma and was loaded on the steamer sailing on the day specified but the subcollector refused a clearance on the ground that the lead was contraband of war. The master thereupon unloaded the lead, obtained the clearance and sailed. The collector in answer to inquiries of the subcollector notified him not to withhold the clearance, but the vessel had sailed and the shipment was delayed so that it did not reach Japan until six weeks after the vessel specified in the contract, and after hostilities between China and Japan had ceased. Meanwhile the price of lead had fallen and the lead was sold at a loss. In an action by the shipper against the Northern Pacific Railway Company, which had acquired the road subject to all liabilities of the receivers. *Held:*

That the agent of the receivers was not the agent of the steamship company, but the contract made by him was on behalf of the receivers who assumed responsibility beyond the line of their own road; that under the order appointing them and directing them to operate the road, the receivers had power to make a contract of this nature and that it was within the scope of the powers of a general agent to make the contract on their behalf.

That a special written contract to transport by more than one line and to deliver within a specified time is not affected by a provision in the printed part of a through bill of lading, delivered as this was after the shipment of the goods, to the effect that the responsibility of the carrier issuing the bill of lading ceases at the terminus of its own line.

That as it is not illegal to export articles which are contraband of war although the articles and the ship which carries them are subject to the risk of capture and forfeiture, neither any law of the United States nor any provision of international law was violated by the making of the contract notwithstanding the lead was contraband and was to be delivered in the port of a belligerent.

That a collector cannot legally refuse a clearance to a vessel bound to a port of a belligerent because it has on board articles contraband of war.

That the mistaken act of a subordinate official not justified by law in refusing a clearance to a vessel entitled to sail is not sufficient as an excuse for the nonperformance of the contract similar to that involved in this case and is not a "restraint of princes, rulers or people" within that clause of the bill of lading.

THE Northern Pacific Railroad Company made a certain mortgage which was foreclosed, and the Northern Pacific Railway Company purchased the property of the former company under the mortgage at the foreclosure sale, and, by the order of the court, the purchaser was required to pay all obligations or liabilities contracted or incurred by the court's receivers, who had been appointed in the foreclosure suit. The American Trading Company, the appellee herein, intervened in that suit, and, by its petition, asked that by virtue of the decree in foreclosure the purchaser, the Northern Pacific Railway Company, be required to pay damages for the failure of the receivers to perform a special contract for the transportation of goods from Newark, New Jersey, to Yokohama, in Japan. The case was tried before the United States Circuit Court in New York City, which dismissed the petition. This decision was reversed by the Circuit Court of Appeals for the Second Circuit, and the railroad company was directed to pay the damages therein stated to the American Trading Company, the intervening petitioner. The railroad company has appealed from such decree or order to this court. The case was tried upon the agreed statement of facts which follows:

1. In September, 1894, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse were receivers of the Northern Pacific Railroad Company, under an order made in a suit bearing the same title as the present suit, in the United States Circuit

Court for the Eastern District of Wisconsin, to which this suit is ancillary. Under that order the receivers were authorized to continue, and were continuing to carry on the business of the railroad in their charge.

2. The line of railroad in the possession of the receivers extended from Duluth, Minnesota, to Tacoma, Washington. The receivers had contracts with various carriers reaching points on their line, by which through bills of lading were issued from and to points not upon the line of the receivers' railroad, where the freight passed over some part of that line in transit. Among the carriers with whom the receivers had such arrangements was the Northern Pacific Steamship Company. This was an English company, operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the steamship company and the receivers was the contract originally made on March 30, 1892, between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company, and ratified and adopted by the receivers under the authority of an order of the Circuit Court of the United States, made on September 13, 1893.

The receivers held no stock in the steamship company and had no other express contract relation with the steamship company. This stipulation is not to be accepted as an admission by the railroad company or the receivers or their counsel, that there were any relations between the receivers and the steamship company other than those growing out of the facts herein agreed upon.

For convenience in transacting their freight business in the eastern part of the United States, the receivers maintained an office in the city of New York, which was, in September, 1894, in charge of one George R. Fitch, who was their general eastern agent, and made arrangements for the transportation of freight over the receivers' line of railway and connections, including transportation to China and Japan.

At the time of the transactions referred to in this state-

ment of facts, the said Fitch had not received, nor did he receive, any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as agent of that company. His only authority as agent of the steamship company was that created by, or arising from, the contract, Exhibit A. Fitch knew that an arrangement had been concluded by the receivers and the steamship company by which contracts for through shipment to Yokohama might be made by the agents of the receivers, and through bills of lading issued, and he had been instructed by the receivers to solicit freight for through transportation upon bills of lading of which Exhibit C, hereto annexed, is a copy; but Fitch did not know the terms of the contract between the steamship company and the receivers, and the trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company.

It is further stipulated that Fitch had no express general authority to make contracts for through transportation, except as provided by the said bills of lading, and no authority to make the contract in question, unless such express authority be found in the telegrams, of which copies are hereinafter set forth; that the American Trading Company did not know the terms of his express authority, and that this stipulation is not to be taken as an admission by the railroad company or the receivers or their counsel that his implied authority was greater than his express authority.

4. The American Trading Company is, and was in September, 1894, a corporation organized under the laws of the State of Connecticut, having its principal office in the city of New York, and carried on a general commercial business with Asiatic ports.

5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it

was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer, without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate and undertook to forward the lead from New York on or before September 29th and *via* the Northern Pacific steamer "Tacoma," sailing from Tacoma October 30, 1894.

6. Thereupon the trading company cabled to its agents at Yokohama, naming a price and a date at which the lead could be delivered there; and thereupon its agents in Yokohama made a contract for the sale of the lead, which contract provided that it should be delivered in Yokohama by overland route, and the most direct connection at San Francisco, Tacoma or Vancouver, and that in case of unusual or extraordinary delay in transit the contract should be null and void. Neither Fitch nor the receivers knew until September 24th that any contract for the sale of lead in Japan had been concluded by the trading company, and, except as hereinbefore and hereinafter stated, they never received any information in regard to its terms, as made or proposed. Upon the conclusion of its Japanese contract the trading company purchased two hundred tons of pig lead in bond from the Balbeck Smelting and Refining Company.

7. On September 19, 1894, Fitch, in confirmation of his previous statement, wrote and sent to the trading company the following letter:

Northern Pacific Railroad Company.
Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.
Geo. R. Fitch, general eastern agent, 319 Broadway.
TRAFFIC DEPARTMENT, NEW YORK CITY, September 19, 1894.

American Trading Co. 182 Front St. city.

GENTLEMEN: I hereby confirm rate quoted you this day

and accepted by you on shipment of pig lead for export to Japan, as follows:

Pig lead, New York to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs. and to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer sailing from thence October 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly, GEO. R. FITCH,
G. E. Agent.

The trading company wrote and sent in reply (accepting the proposition) the following letter:

September 20th, 1894.

The Northern Pacific R. R. Co., New York city.

DEAR SIRS: In reply to your esteemed favor Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th, namely, on 200 tons pig lead, N. Y. to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before September 29th, in accordance with shipping instructions to be given by you, and to be forwarded from Tacoma, Washington, *via* Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) FRANK P. BALL.

On September 22, 1894, Fitch wrote and sent to the trading company the following letter, giving shipping instructions:

Northern Pacific Railroad Company.
Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.
Geo. R. Fitch, general eastern agent, 319 Broadway.
TRAFFIC DEPARTMENT, NEW YORK CITY, September 22, 1894.

American Trading Co., No. 182 Front St., city.

DEAR SIR: I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows:—To be shipped from Newark, N. J., *via* Penn. R. R. marked Anchor Line rail and Lake care Northern Pacific care A. O. Canfield, agent N. P. R. R., Tacoma, Wash. Please advise me as soon as possible who the shippers will be that I may order the cars and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly, GEO. R. FITCH, *G. E. Agent*,
A. H. P.

8. Before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband in view of the war then existing between China and Japan. In fact, the shipment of pig lead was not prohibited by the Treasury Department at Washington, during the war between China and Japan, and on September 25th, 1894, the trading company made another shipment of pig lead via Pacific Mail steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama.

9. In September, 1894, J. B. Baird was the second assistant general freight agent of the receivers, and J. M. Hannaford was the general freight agent of the receivers; and telegrams of which the following are copies, relating to proposed shipments of pig lead, including the shipment in question, passed between the said Fitch and Baird and Hannaford, but were not disclosed to the American Trading Company:

NEW YORK, September 14, 1894.

J. B. Baird, second A. G. F. A.:

Please wire quick lowest rate one hundred ton lots pig lead from Chicago and Duluth to Yokohama.

GEO. R. FITCH.

September 14, 1894.

Geo. R. Fitch, 319 Broadway, New York, N. Y.:

You may quote as low as sixty cents from Duluth and seventy cents from Chicago to Yokohama on pig lead in one hundred ton lots. Get more if possible.

J. B. BAIRD.

NEW YORK, September 17, 1894.

J. B. Baird, 2d A. G. F. A.:

Your wire fourteenth. Shall I accept fifty cents on pig lead Duluth to Yokohama. Also name lowest rate on two hundred tons St. Louis to Yokohama.

GEO. R. FITCH.

September 18th, 1894.

Geo. R. Fitch, 319 Broadway, New York.

Cannot accept less than sixty cents on pig lead Duluth to Yokohama. Will quote from St. Louis later.

0.900. J. B. BAIRD. WDB.

September 19th, 1894.

G. R. Fitch, 319 Broadway, New York:

You may quote seventy cents on the pig lead in one hundred ton lots St. Louis to Yokohama. Advise if accepted.

0.900. J. B. BAIRD. WDB.

NEW YORK, September 21, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Wire best rate two hundred fifty tons pig lead Duluth to Shanghai.

GEO. R. FITCH.

September 22, 1894.

G. R. Fitch, 319 Broadway, New York:

N. P. Steamship Co. have now declined to handle lead for Yokohama, Kobe, Hong Kong or Shanghai. Please cancel your quotation.

0.900. J. B. Baird. WDB.

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract, which letter is as follows:

September 24th, 1894.

Geo. R. Fitch, Esq., general eastern agent N. P. R. R., No. 319 Broadway, city.

Dear Sir: Respecting your notice just received by us through your Mr. Post, that your company now decline to ship for us via Tacoma the 200 tons of pig lead specified in your contract with us under date Sept. 19th, and confirmed by us under date Sept. 20th, we beg to advise that we shall hold your company responsible for any loss or damage we may suffer from the non-fulfilment of this contract with you.

We remain, dear sirs,

Very truly yours,

The American Trading Co.

(Signed) Wm. H. Stevens, *Treas.*

Thereupon, telegrams of which the following are copies were sent and received as indicated, in relation to the shipment in question, but were not disclosed to the trading company:

New York, September 24, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Shipment lead to Yokohama is now being made shippers

refuse to accept withdrawal, we have given shippers written contract.

GEO. R. FITCH.

NEW YORK, September 24, 1894.

J. M. Hannaford, N. P. R'y, St. Paul, Minn.:

Have notified American Trading Co., that shipment will be refused. They state they will hold us to contract. They are shipping hundred tons from Denver to Yokohama by steamer City of Rio from San Francisco, Oct. fourth and expect to forward this shipment same way, will charge us difference in rate. Advice quick.

GEO. R. FITCH.

September 25, 1894.

G. R. Fitch, 319 Broadway, New York:

Your wire this date to Mr. Hannaford: Dodwell, Carlill & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

0/900. J. B. BAIRD. WDB.

Dodwell, Carlill & Co., mentioned in the last telegram, represented the steamship company.

10. Thereupon the refusal to accept the shipment was withdrawn, and the shipment was made under the contract, and the lead, consisting of two hundred tons, was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, on September 27th, 1894, by the Balbeck Smelting and Refining Company for the account of the American Trading Company. This was the first shipment ever made by the American Trading Company over the line of the Northern Pacific Railroad Company and its connecting carriers. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by Government locks and customs seals. On the after-

noon of September 27, 1894, the shipment left Newark, and started on its journey, and was transferred *via* the Anchor Line, a carrier operating between eastern points and points on the Lakes, to Duluth, and carried from Duluth *via* the receivers' railroad to Tacoma, which it reached in time for shipment by the steamship company's steamer, "Tacoma," sailing October 30, 1894. On September 28th, a cheque for the freight upon the lead from Newark to Yokohama was handed by the trading company to Fitch, of which cheque, with its endorsements, the following is a copy:

The American Trading Co.

Cheque.

NEW YORK, September 28″, 1894. No. 6096.

The National Bank of North America.

Pay to the order of the Northern Pacific R. R. $3360.05.

Thirty-three hundred and sixty & 05/100 dollars.

THE AMERICAN TRADING CO.

WM. H. STEVENS, *Treas'r.*

A. PROCTOR, JR.,

Cashier.

Endorsements.

For deposit in
Ninth National Bank
to Cr. of Geo. R. Fitch,
Gen. east'n ag't.
Ninth Nat'l Bank,
Endorsement,
guaranteed
of the City of N. Y.

The amount of the cheque was credited at the Ninth National Bank to the account of "George R. Fitch, General Eastern Agent," which was the style of the account opened by Fitch as agent of the Northern Pacific Railroad; and the account was never drawn upon in favor of the Northern Pacific Steamship Company, but all through freights received

were deposited to the credit of this account and remitted to the railroad company, or its receivers, and were divided and distributed by them under their contract with the steamship company.

11. On September 28, 1894, a shipping receipt for the shipment was issued to the Balbeck Smelting and Refining Company, of which shipping receipt a copy is hereto annexed marked Exhibit "B," and was delivered by the Balbeck Smelting and Refining Company to the American Trading Company, and was forthwith surrendered by the trading company to Fitch.

A bill of lading in the usual printed form, a copy of which is herein annexed marked "C," was subsequently issued by Fitch to the American Trading Company. It was received by a clerk of the trading company without stated objection to its terms, but was not read or examined by him or by any officer of the company, and was immediately hypothecated with the Hong Kong and Shanghai bank, as collateral security for moneys borrowed thereon by the trading company. The original of the bill of lading was negotiable, and did not have stamped upon it the words "not negotiable, shippers copy," which appear on the shipper's copy hereto annexed, but was similar to the shipper's copy in all other respects.

On September 29th, 1894, Fitch sent a copy of this bill of lading to Dodwell, Carlill & Co., with a letter (not disclosed to the American Trading Company) of which the following is a copy:

Northern Pacific Railroad Company.
Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.
George R. Fitch, general eastern agent, 319 Broadway.
Traffic Department, New York City, Sept. 29, 1894.

Dodwell, Carlill & Co., Tacoma, Wash.

Gentlemen: I hand you herewith my B/L 1507 covering shipment of pig lead for export to Amer. Trading Co. Yokohama, Japan. As I have previously advised you, I have made

contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing Oct. 30th. Will you kindly see that this connection is made without fail.

Yours truly,

(S'g'd) GEO. R. FITCH, *G. E. A.*

The previous letter of advice referred to by Fitch in the foregoing letter is lost and no copy of it exists. It appears, however, from the following letter of acknowledgment to have borne date on September 27th:

TACOMA, WN., October 2nd, 1894.

George R. Fitch, Esq., G. E. A., N. P. R. R., 319 Broadway, New York.

DEAR SIR: We beg to own receipt of and thank you for your favor of the 27th ultimo, and advising the engagement of 40 tons of condensed milk and 225 tons of pig lead for our steamer "Tacoma," sailing hence the 30th instant. Please keep us frequently advised of freight engagements, as we have applications now for more space for flour than our steamers will carry, and we are shutting out considerable of the latter every voyage.

Yours truly,

(Sig.) *p. p.* DODWELL, CARLILL & CO.

A. T. PRITCHARD.

12. At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company and was loaded upon the "Tacoma," the vessel of the steamship company which was to sail on October 30; but about four o'clock in the afternoon of that day the deputy collector of the United States at that port refused to clear the vessel while the lead was on board upon the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions. On the following day, which was the thirty-first of October, the deputy collector at Tacoma received a telegram

from the collector of the United States at Port Townsend, which was as follows:

Department advises that unless you have evidence tending to show that the pig lead at Tacoma and referred to in your telegram of yesterday is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted.

In the meantime, however, the master of the vessel unloaded the lead, which delayed the ship until 9 A. M. on the morning of October 31, when he sailed without it.

The petitioner was not notified of the delay in the transshipment of the lead until November 5, 1894.

The next vessel on the line was the "Sikh," which did not belong to the steamship company, but was a chartered ship. Her captain declined to take the lead on the ground that it was contraband. The Northern Pacific Steamship Company cabled to the owners of the vessel in London, and they adhered to the position taken by the captain.

13. The lead went forward on the next vessel, the "Victoria," on December 11, 1894, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward on the thirtieth of October, 1894.

14. In the meantime hostilities between China and Japan had ceased, the price of lead had fallen very considerably, and the purchaser of the shipment refused to accept it and declared the contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract.

15. The price of the lead under the contract would have been $38,610.17. The lead was delivered to the trading company in Yokohama upon the surrender of the bill of lading, and in consequence of the failure of its vendee to accept the lead, the trading company sold it for $11,331.60, which was the best price obtainable therefor, at the time of the sale. The sale was made as soon as a purchaser could be found.

The value of the lead on January 4, 1895, in Japan, was $11,906.16.

16. Upon the case arising on the foregoing facts, the American Trading Company has duly presented to the receivers and to the Northern Pacific Railway Company, its claim amounting to the sum of $26,704.02, with interest thereon from the 4th day of January, 1895, and has demanded payment thereof, but payment has been refused, and no part thereof has been paid.

Mr. Charles W. Bunn for appellants:

The damages were due solely to delay after delivery to the connecting carrier and the receivers were not responsible for such damage. *Myrick* v. *Mich. Cent. R. R. Co.*, 107 U. S. 102; *Taylor* v. *Maine Central R. R.*, 87 Maine, 302; *Burroughs* v. *Norwich & Worcester R. R. Co.*, 100 Massachusetts, 26; *Washburn & Moen* v. *Prov. & W. R. R. Co.*, 113 Massachusetts, 490.

There is no proof that the court had authorized the receivers to transport goods beyond their own lines or to guarantee the transportation by other carriers, and in the absence of such authorization such contracts were beyond their power. *Chicago Dep. Vault Co.* v. *McNulta*, 153 U. S. 554. Making such guarantees is not part of the necessary or usual business of operating a railroad. *Int. & Gt. Nor. R. R. Co.* v. *Wentworth*, 87 Texas, 311; *Green Bay & Minn. R. R.* v. *Union Steamboat Co.*, 107 U. S. 98; *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371, 385; *Swift* v. *Pac. Mail S. S. Co.*, 106 N. Y. 206, 216. If the general agent made any such contract he exceeded his authority.

The bill of lading is the final and only contract and under it the receivers were not liable beyond their own lines. *Seitz* v. *Brewers' Refrigerating Co.*, 141 U. S. 510; *De Witt* v. *Berry*, 134 U. S. 306. As to being issued after the shipment of the goods the cases cited by appellee do not apply; and see *Shelton* v. *Merchants' Despatch*, 59 N. Y. 258; *Hill* v. *Syracuse &c.*,

73 N. Y. 351; *Germania Fire Ins. Co.* v. *Memphis & Charleston R. R. Co.*, 72 N. Y. 90; *Rubens* v. *Ludgate Hill S. S. Co.*, 20 N. Y. Supp. 481.

The bill of lading was not imposed on an ignorant or unskillful man, the shipper knew he was to receive a bill of lading and received it forthwith after the shipment, really simultaneously with it; it expressed the usual carrier's liability and was not an attempt to lessen it; the shipper assented to its terms by immediately negotiating it at the bank.

The collector's action in refusing to allow the vessel to carry the lead made the performance of the contract not only impossible, but unlawful, and absolved the carrier on whose part there was no fault. The collector was an officer of the United States and had authority even if he erred as it was likely it would have been an offense for the vessel to sail without a clearance. Rev. Stat. § 4197; *Brewster* v. *Kitchell*, 1 Salk. 198; *Bailey* v. *DeCrespigny*, L. R. 4 Q. B. 180; Leake on Contracts, 497, 501; *Nickoll* v. *Ashton*, 2 K. B. 1901, 126. Congress having provided no method of reviewing the collector's decisions it intended them to be obeyed; the ship could not be delayed for a law suit and Federal courts could not mandamus the collector. *McIntyre* v. *Wood*, 7 Cranch, 504; *Bath County* v. *Amy*, 13 Wall. 244; *Davenport* v. *Dodge County*, 105 U. S. 237; *Louisiana* v. *Jumel*, 107 U. S. 711, 727; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Graham* v. *Norton*, 15 Wall. 427. There is no remedy against the collector on his bond for error in the exercise of his discretion. *Kendall* v. *Stokes*, 3 How. 87; *Otis* v. *Walkins*, 9 Cranch, 339; *Crowell* v. *McFadon*, 8 Cranch, 94; *Otis* v. *Walter*, 2 Wheat. 18; *Martin* v. *Mott*, 12 Wheat. 31; *Wilkes* v. *Dinsman*, 7 How. 89, 132; *Gould* v. *Hammond*, 1 McAll. 235. Acts of Congress forbid the sending of troops, munitions of war, guns, warships and war implements to a nation at war with a friendly power. Rev. Stat. § 5281 *et seq.* And clearance should be refused to a ship violating these or any other laws of the United States. Rev. Stat. §§ 3987, 4200, 4202, 4539, 4573.

The ship could not have sailed from Tacoma, or probably have entered any port in Japan, without a clearance. Abbott on Shipping, 9th ed., 288; Lushington Naval Prize Law, 24–34.

Mr. F. B. Jennings, with whom *Mr. Howard Van Sinderen* was on the brief, for appellee:

The contract contained an absolute agreement to ship from Tacoma by steamer sailing on or about October 30. This is evidenced by the correspondence and the receivers ratified the contract. The railroad company can make a contract for transportation beyond its own line. Elliott on Railroads, § 1434, and cases cited; Redfield on Railways, §§ 189, 191, and cases cited; Hutchinson on Carriers, §§ 151, 152; *Ogdensburg &c. R. R. Co.* v. *Pratt*, 22 Wall. 123; *Railroad Co.* v. *McCarthy*, 96 U. S. 258.

The receivers had the same authority as the carrier itself. Elliott on Railroads, § 567; Hutchinson on Carriers, § 67*a;* Beach on Receivers, § 371; *Cent. Trust Co.* v. *N. Y. City & Nor. R. R.*, 110 N. Y. 257; *Little, Receiver*, v. *Dusenberry*, 46 N. J. Law. Rep. 614; *Wall* v. *Platt*, 169 Massachusetts, 400; *Kansas Pacific* v. *Bayles*, 35 Pac. Rep. (Colo.) 744; *Chicago Dep. Vault Co.* v. *McNulta*, 153 U. S. 554, distinguished. The contract was within the authority of the general eastern agent of the receivers.

The real authority of an agent is equal to his apparent authority, and he can make any contract relative to the business under his management which could be made by his principal. *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, 235; *Goldwater* v. *Liverpool &c. Co.*, 39 Hun, 178; *S. C.*, affirmed 109 N. Y. 618; *Pechner* v. *Phœnix Ins. Co.*, 65 N. Y. 195; *Lowenstein* v. *Lombard, Ayres & Co.*, 164 N. Y. 324; *Isaacson* v. *N. Y. C. & H. R. R. R. Co.*, 94 N. Y. 278, 285; *Talcott* v. *Wabash R. R. Co.*, 159 N. Y. 461, 469; Porter on Bills of Lading, § 159; Hutchinson on Carriers, § 267.

A general freight agent can contract for the carriage of goods beyond the carrier's line. Ray on Negligence of Imposed

Duties, 400; *White* v. *M. P. R. Co.*, 19 Mo. App. 400; *Grover & Baker Sewing Mach. Co.* v. *Mo. Pac. R. R. Co.*, 70 Missouri, 672. He can stipulate for carriage within a specified time. *Strohm* v. *Detroit &c. R. R.*, 23 Wisconsin, 126; *Goddard* v. *Mallory*, 52 Barb. 87; *Goodrich* v. *Thompson*, 44 N. Y. 324.

The contract was not merged in or modified by the bill of lading. This could not be done without consent of both parties. *Wheeler* v. *Railroad Co.*, 115 U. S. 340. The receipt of the bill did not constitute such consent. *Bostwick* v. *Balt. & Ohio R. R. Co.*, 45 N. Y. 712; *Mo. Pac. Ry. Co.* v. *Beeson*, 30 Kansas, 298; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 319, 329; *Pollard* v. *Vinton*, 105 U. S. 8; *Gaines* v. *Union Transport Co.*, 28 Ohio St. 418; *Swift* v. *The Pacific Mail S. S. Co.*, 106 N. Y. 206; *Mobile &c. R. R. Co.* v. *Jurey*, 111 U. S. 584; *Park* v. *Preston*, 108 N. Y. 434; *Gillaume* v. *Gen. Transptn. Co.*, 100 N. Y. 491; *Strohm* v. *Detroit and Milwaukee Ry. Co.*, 21 Wisconsin, 545; *King* v. *Woodbridge*, 34 Vermont, 565; Hutchinson on Carriers, §§ 246, 247; *McAbsher* v. *Railroad Co.*, 12 S. E. Rep. 892; *Hamilton* v. *Railroad Co.*, 96 N. Car. 398; *Central R. R. Co.* v. *Dwight Mfg. Co.*, 75 Georgia, 609; *Baker* v. *Mich. S. &c. R. R. Co.*, 42 Illinois, 73; *Merchants' Dispatch Tr. Co.* v. *Furthmann*, 149 Illinois, 66.

The failure to perform was not excused by the unlawful refusal of the deputy collector to clear the ship with the lead on board. That the action was unlawful is conceded. Treasury Decisions, August, 1865–1883; *Hendricks* v. *Gonzales*, 67 Fed. Rep. 351; *Evans* v. *Hutton*, 12 L. J. C. P. N. S. 17.

The collector was liable for the damages sustained by the vessel and the owners could have recovered on his bond. Rev. Stat. 989; *Schell* v. *Cochran*, 107 U. S. 625; *Cruikshank* v. *Bidwell*, 176 U. S. 73, 81; *United States* v. *Sherman*, 98 U. S. 565. The receivers having made the contract should have ascertained what the law was prior to the arrival of the lead at Tacoma, or they should have held the vessel until the telegrams sent to the collector were answered. *Williams* v. *Vanderbilt*, 28 N. Y. 217, 223. Impossibility of performance

arising subsequently to making of the contract constitutes no defense. *Jacksonville* v. *Hooper*, 160 U. S. 514, 527; Hutchinson on Carriers, § 317; *Jones* v. *United States*, 96 U. S. 24, 29; *Robson* v. *Miss. Logging Co.*, 61 Fed. Rep. 900; *S. C.*, 69 Fed. Rep. 777; *The Harriman*, 9 Wall. 161; *Parine* v. *Jane*, Aleyn Sel. Cas. 26; *Beebe* v. *Johnson*, 19 Wendell, 500; *Blight* v. *Page*, 3 Bos. & Parl. 295; *Barker* v. *Hodgson*, 3 Marle & S. 271; *Ashmore* v. *Cox*, 1 Q. B. Div. 1899, 436; *Meredos* v. *Hill*, 8 Bingham, 235; 1 Parsons on Contracts, 566, and cases cited; Story on Contracts, § 1334; *C., M. & St. P. Ry.* v. *Hoyt*, 149 U. S. 1; *Railroad Co.* v. *Baker*, 98 Fed. Rep. 694, distinguished.

The failure to fulfill the contract was due to the negligence of the receivers, who failed to exercise the degree of diligence in the interest of shippers which the law requires. *The M. M. Chase*, 37 Fed. Rep. 708; Hutchinson, §§ 188 *et seq.; Robinson* v. *M. & C. R. R. Co.*, 16 Fed. Rep. 57, 69; and even though the steamship company was the negligent party the receivers were liable under the contract. *O. & M. R. Co.* v. *McCarthy*, 96 U. S. 258; *Ogdensburg &c. R. R. Co.* v. *Pratt*, 22 Wall. 123.

The measure of damages is the difference between the contract price for the sale of the lead in Japan and the market price at the date of arrival with interest, as decided by the court below. *The Caledonia*, 50 Fed. Rep. 567; *S. C.*, 157 U. S. 124, 139; *Schwarzchild* v. *Natl. S. S. Co.*, 74 Fed. Rep. 257; *Railroad* v. *Estill*, 147 U. S. 591, 616; *Railway Co.* v. *Jurey*, 111 U. S. 585; *The Nith*, 36 Fed. Rep. 86; *S. C.*, affirmed, 36 Fed. Rep. 384; *Messmore* v. *N. Y. Shot & Lead Co.*, 40 N. Y. 422; *Booth* v. *Spuyten Duyvil R. M. Co.*, 60 N. Y. 487.

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

The objections to the recovery herein, made on the argument, were:

(1.) That no contract was shown on the part of the receivers to assume any responsibility for the transportation of the lead beyond the line of the railway in their charge.

(2.) That there was no proof that the court had authorized the receivers to assume any such responsibility, and they could not do so without any such authority.

(3.) That if Fitch, the agent, made such agreement it was not within his authority, real or apparent.

(4.) That the bill of lading is the controlling contract, and by its terms the receivers were not liable beyond their own line.

(5.) That the damages were caused solely by the act of the collector, representing the authority of the United States, and the receivers are not liable for damages so caused.

In regard to the first objection, we think the facts agreed upon clearly show a special agreement for the transportation of the lead to Yokohama by the steamship of the Northern Pacific Steamship Company, which was to leave Tacoma on October 30, 1894. The opening of the negotiation was made by the American Trading Company, which applied to Fitch for a rate upon the proposed shipment from New York to Yokohama, Japan. The trading company knew nothing of his steamship agency, and he was informed that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York to Yokohama, on or before September 29, *via* the Northern Pacific steamer sailing from Tacoma October 30, 1894. The trading company thereupon made its proposed agreement through its agents at Yokohama. Although Fitch, the agent, was not thereafter specially informed of the fact that the proposed agreement had been made, yet he was informed that the company intended to make it if a rate could be agreed upon for the transportation of the lead, it is clear that his furnishing of the rate was with reference to the proposed agreement,

and that he understood that if his terms were accepted he was entering into an agreement to transport to Japan the lead in question over the Northern Pacific Railroad to Tacoma, and by the steamship which would leave Tacoma on October 30, 1894. His letter of September 19, 1894, to the trading company, confirming the rate, is a plain agreement, not alone to deliver the lead in time for the sailing of the steamer, October 30, but an agreement that the lead should be forwarded from Tacoma, Washington, *via* the Northern Pacific steamer sailing on that day. Fitch in that letter asked the trading company to forward their acceptance of this proposed agreement as early as possible. On the next day, September 20, the trading company, by letter, did accept the rate "for a shipment of pig lead, to consist of not less than four hundred thousand pounds, to be forwarded from New York to Tacoma, and from Tacoma *via* the Northern Pacific steamer sailing from that port October 30." There is no doubtful expression in these letters. They form a clear and specific contract. It is entirely different from *Myrick* v. *Michigan Central Railroad Company*, 107 U. S. 102. The receipt in that case was plainly not one which established a contract for transportation on the part of the railroad company (defendant) beyond its own line. This court held that while a company might by a contract to that effect be held liable for the transportation and delivery of freight beyond its own line, yet the contract to do so must be clear, and that the mere stating of a through fare on the receipt of the freight does not establish such contract or liability.

In the case at bar we hold that a special agreement is set forth in the statement of facts, to forward to Yokohama by the steamer leaving Tacoma on October 30, 1894. If it had been made by the proper officer of a railroad company in the general course of business, we have no doubt, under the authorities, of the validity of the contract. *Railroad Company* v. *Pratt*, 22 Wall. 123; *Railway Company* v. *McCarthy*, 96 U. S. 258; *Myrick* v. *Michigan Central Railroad Company*, 107 U. S.

102. Whether the fact that it was made by an agent of the receivers of a railroad company makes any difference will be discussed later.

Appellant urges, however, that as Fitch was also agent for the steamship company, his contract, if there was one, to forward by the steamship sailing October 30, was in behalf of the steamship company. Fitch had never received any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as its agent. His only authority as agent of that company was created by the contract made between the two companies. By that agreement the railroad company was to have the exclusive right (with certain exceptions) to appoint agents in the United States, etc., and the steamship company thereby authorized the railroad company and its appointed agents to act as agents for the steamship company, and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for Asiatic points, etc. The trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company. When the trading company, therefore, applied to Fitch for a rate, they applied to him as the agent of the receivers of the railroad company. The letter of Fitch of September 19, confirming the rate already given orally that day, is written on the paper used by the receivers of the railroad company, which paper is headed by the names of the receivers under the words "Northern Pacific Railroad Co.," and in it Fitch describes himself as "general eastern agent," and his department as the "Traffic Department in New York City," and he signs his name and adds the words "G. E. Agent." In his letter of September 29, 1894, to the steamship agent at Tacoma, Washington, he writes on the same kind of paper, with the same heading, and describes himself as "general eastern agent," and in the letter he says "As I have previously advised you I have made contract

guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing October 30. Will you kindly see that this connection is made, without fail." He signs his name and adds the letters G. E. A., meaning, of course, thereby "general eastern agent." It is contended that by the statement of facts it appears that Fitch was acting for two principals, and that the plaintiff must establish that Fitch made the alleged guaranty on behalf of the receivers. We do not think he was acting in behalf of two principals. From all the facts we think it plain that he was acting for the receivers of the railroad company. He was their general eastern agent; he was applied to and he made his rates as such, and as such he signed the letter confirming those rates and containing the agreement to forward the lead on the steamship as already stated. Subsequently, and on the twenty-ninth of September while acting and signing himself as the general eastern agent of the receivers, he writes to the steamship agents at Tacoma the letter in which he says he has guaranteed delivery at Yokohama by our steamer sailing October 30. All this shows the fact that he was acting as agent for the receivers.

We have no difficulty in determining the capacity in which Fitch acted, nor that he made the special agreement, as contended by the trading company.

(2.) Neither do we doubt that the court had authorized the receivers to make such a contract.

Under the modern methods of foreclosing railroad mortgages it has been the custom to appoint receivers to take charge and conduct the business of the railroad mortgagor, during the pendency of the suit. The possession of such receivers frequently lasts for years. It would be in the highest degree disadvantageous to all interested in the railroad company, as well as to the public having occasion to do business with it, if the same power which the company possessed to make special contracts for transportation should not be given to and exercised by the receivers of the company in continuing to run the road in substance as a going concern, so far as these

kinds of contracts are concerned. Such contracts are not of the character spoken of by Mr. Justice Jackson in *Chicago Deposit Vault Company* v. *McNulta*, 153 U. S. 554, as so extraordinary or unusual as not to be included in the authority to carry on the business of the company. On the contrary, this contract is one of that class which we regard as so included.

(3.) We are also of opinion that Fitch had the right to make the agreement in question, and if there could be any doubt on that point, nevertheless the agreement was in fact thereafter ratified by the officers representing the receivers, who had power so to do. *Goodrich* v. *Thompson*, 44 N. Y. 324.

A railroad company has the power, as we have seen, to make such a contract of carriage beyond its lines. A general agent would be presumed to have such power. If the company have the power some individual must exercise it. It would not be supposed that the board of directors would be consulted and authority given by it every time such a contract was to be made. Who is a more proper or fit person to make the contract than the general agent of the company? He must necessarily have large powers in order to conduct the business of his office, and, *prima facie* such power is within the scope of such agency. When the railroad company passes into the hands of a receiver, appointed by the court in a foreclosure suit, and the receiver is directed to conduct and continue the business of the company, the power to appoint general agents necessarily goes with the order to conduct the business of the company, and when the general agent is appointed by a receiver he will be presumed to have the general powers of such an officer when acting for the railroad itself. The words "General Eastern Agent" for a Western railroad company only limit the exercise of the agency to the place so described.

(4.) It is urged that the bill of lading constitutes the sole contract. But there was a plain valid contract existing between the parties before the lead was shipped and before any bill of lading was issued. That special contract was to for-

ward the lead by the steamship leaving Tacoma on October 30. The next day after the lead was shipped at Newark, a bill of lading was delivered to one of the clerks of the trading company, and that bill of lading contains the absolutely inconsistent statement that the carrier is not to be liable for any loss not occurring on its own road, and that the contract as executed is accomplished and all liability thereunder terminates upon the delivery of the property to the steamship.

It is said that the trading company, by receiving this bill of lading and obtaining money on it as the representative of the property therein described, has acquiesced in the total abolition of the special contract the company made with Fitch, and has agreed that the railroad company shall be under no liability after the delivery of the lead to the steamship.

We regard it as entirely clear that no such effacement of the original contract was meant by the receipt of the bill of lading. The railroad company has no power alone to alter that contract, and it could not alter it by simply issuing a bill of lading, unless the other party assented to its conditions and thereby made a new and different contract.

At the time when the bill of lading was issued the lead had been shipped at Newark and had departed for its destination. It was impossible for the trading company to recall it. The particular conditions in the bill are set out in subdivision three and subdivision twelve of the conditions printed in small type and they form part of numerous other printed conditions in regard to the freight received.

Where the acceptance of the bill of lading, under these circumstances, is sought to be made an equivalent to an assent to the change of contract, it is proper to look at these facts in order to determine what weight should be given to such acceptance. At the time it was received the lead was out of the possession of the trading company, on its way West. That company needed the bill of lading as evidence of title to the property described in it, upon the security of which it

desired to raise money, which it could not do without the possession of the bill. Under these circumstances we refuse to hold that the trading company, in accepting the bill of lading, thereby consented to the complete alteration of its original contract, and, without any consideration whatever, agreed to release the railroad company from all liability on that contract and to take in its stead the reduced liability provided for in the bill of lading.

Of course the company expected a bill of lading, for such an instrument is the usual accompaniment in shipping merchandise. The bill showed the amount of the lead, the marks and numbers, etc., and so identified the goods as to enable the shippers to show their amount and general value, and to enable them to negotiate the bill and obtain money on its security.

It is agreed in the statement of facts that this bill of lading was received by a clerk of the trading company without stated objection to its terms, but was not read or examined by him or by any officer of the company, and was immediately hypothecated with a bank as collateral security for the money borrowed thereon by the trading company. We do not state the fact that the bill of lading was not examined, for the purpose of insisting that an examination of such an instrument must always be shown before a contract can be predicated thereon. But where there is a valid contract already in existence, and it is urged that such contract has been abrogated or changed by the receipt of a bill of lading, after goods have passed from the control of the shipper, we think it is important, upon the question of whether such original contract has, in fact, been abrogated, to show that the bill was never read in fact; that the conditions abrogating the original contract were among a number of other conditions printed in the bill in smaller type than the rest of the bill, and that the alleged acquiescence of the trading company in the change of the contract, by virtue of these conditions, is based upon the mere reception of the bill of lading by a clerk without any knowledge of the existence of these conditions and without evidence

of any authority in him to consent to a modification of the contract already made by his employer. The fact that, in such ignorance, that company hypothecated the bill of lading, adds nothing to the alleged acquiescence. What the contract meant as between the railroad company and the bank or other assignee of the bill of lading is not important here, but upon these facts we are unable to see that the receipt and holding of the bill of lading changed the original contract as claimed by the railroad company. See *Bostwick* v. *Railroad Company*, 45 N. Y. 712, where it was held, under the circumstances of that case, the mere acceptance of a bill of lading did not alter a previously made oral contract in relation to the shipment.

(5.) Even if the receivers of the railroad company contracted to forward the lead by the steamer sailing from Tacoma, October 30, it is still insisted that the action of the deputy collector, at Tacoma, in refusing to grant a clearance to the steamship while the lead was on board, made the performance of the agreement not only impossible but unlawful, and for that reason the receivers were absolved from their agreement to forward by that vessel. The contract was not unlawful when made. It may be assumed that the lead was contraband of war, but that fact did not render the contract of transportation illegal nor absolve the carrier from fulfilling it. It is legal to export articles which are contraband of war, but the articles and the ship which carries them are subject to the risk of capture and forfeiture. *The Santissima Trinidad and the St. Ander*, 7 Wheat. 283, 340. Neither any law of the United States nor any provision of international law was violated by the making of this contract, nor by an attempt to export the lead pursuant to its provisions. The case does not come within the principle of *Brewster* v. *Kitchell*, 1 Salk. 198, where it was said that if one covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed.

No act of Congress was passed, subsequently to the making

of the contract, which made it unlawful, and it was lawful when made. It is true that the sailing of the vessel without a clearance would have been unlawful, and the deputy collector refused to grant that necessary document while the lead was on board the steamship. But that did not render unlawful the contract to transport. He had the power to refuse to grant the clearance, and he did refuse unless the lead were taken off. In so doing he undoubtedly violated his duty. He was not justified in exacting any such condition for granting the clearance.

Upon the facts in this case we are of opinion that this refusal of the deputy collector constituted no defense to the action on the contract. It is not within the exception referred to by Mr. Justice Jackson, in delivering the opinion of the court in *Chicago, Milwaukee & St. Paul Railway Company* v. *Hoyt*, 149 U. S. 1. This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contraband of war.

The statement of facts shows that the question of whether the lead might not be excluded from transportation as contraband in view of the war then existing between China and Japan, was fully understood before the contract was made, and after it was made and the steamship refused to carry the lead, the trading company, upon being so informed by Fitch, notified him that they would hold the receivers responsible for failure to fulfill the contract, and thereafter, with the attention of all the parties directed to the subject, it was finally agreed that the lead should be received and transported, and the refusal was then withdrawn.

It is true that the special and particular difficulty was first made by the steamship company which refused to transport the lead, yet, still, the attention of all the parties was, from the very first, directed to the peculiar character of the freight as contraband of war, and whether the contract should on that account be made, or, having been made, whether the shipment should not be refused. The receivers, therefore, knew

that there might be difficulty in relation to the transportation, and yet, after full knowledge on the subject, they agreed to and did withdraw their refusal, and they thereupon took the lead for transportation under the contract.

Under these circumstances it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the non-performance of the contract, which was not thereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually within the minds of the parties to the contract, but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead, because of its character as contraband of war, and in the light of those facts the contract was made and, in substance, ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it.

As the act of the deputy collector was an erroneous one and a clearance should have been given while the lead was on board the steamship, we think his refusal should not be at the expense of the shippers who had obtained this contract for transportation while all parties actually knew the difficulties that might concern the exportation of the lead from Tacoma. The State had not intervened to prevent the performance of the contract, as was the case in *Touteng* v. *Hubbard*, 3 B. & P. 291, where Lord Alvanley held that in such circumstances the party will be excused. In that case there was an embargo laid by the British Government, after the contract was made, on all Swedish vessels.

Here there was no intervention of the Government of the United States. The exportation of lead was never prohibited by the Treasury Department during the war between China

and Japan. There was no change in the law or the policy of this Government subsequently to the making of the contract, by which its performance was excused. The exportation of the lead was legal when the contract was made and continued to be so after the execution of such contract, although the deputy collector mistakenly refused to grant the clearance unless the lead was taken off the vessel. Such mistaken decision did not render the original loading of the lead on the ship unlawful, nor would it have been unlawful for the ship to proceed with the lead on board provided the clearance had been had. It was not an act of the State, therefore, which prevented the sailing of the vessel within the true meaning of such a term, but a mistaken act of a subordinate official not justified by law and not sufficient as an excuse for the non-performance of the contract in question under the circumstances already detailed. If the bill of lading were regarded as applicable for this purpose, the refusal of the clearance did not constitute a "restraint of princes, rulers or people," within that clause of the bill.

It was one of the contingencies of which the receivers undertook by their special contract of transportation to take the risk. It was not a contract that they should violate the law, but they took the risk of its misapplication, believing, of course, that such contingency was most remote and that if the steamship company would receive the lead for transportation the chief obstacle to the fulfillment of the contract would be thereby removed.

After the lead had been unshipped, and within half an hour after the sailing of the vessel, the telegram which the deputy collector had sent to the collector in regard to the matter was answered by the latter in such terms that, undoubtedly, if the ship had been still in port, the lead would have been placed thereon and transported to Japan. The master, however, as soon as the determination of the deputy collector was given, immediately and without appealing to the collector, unshipped the lead and sailed for his destination at once.

The result of the failure thus to carry the lead on that vessel was that it did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, which it would have done had it gone forward as contracted for. In the meantime, the war between China and Japan ceased, the value of the lead fell, and the trading company was damaged as stated in the finding of facts.

We think the objections made to this recovery are untenable, and the decree of the court below is, therefore,

Affirmed.

UNITED STATES AND THE KIOWA INDIANS *v.* MARTINEZ.

APPEAL FROM THE COURT OF CLAIMS.

No. 15. Argued October 21, 22, 1904.—Decided December 5, 1904.

In an action brought under the Indian Depredation Act of March, 3 1891, 26 Stat. 851, a tribe of Indians not originally named in the petition cannot be brought into the action by amended petition after the expiration of three years from the filing of the original petition in the Court of Claims.

THIS action was brought in the Court of Claims on October 24, 1891, to recover damages against the United States and the Ute tribe of Indians in the sum of fourteen hundred dollars, the value of certain sheep alleged to have been taken and destroyed or used in June, 1873, by the said Indians. The petition was filed under the provisions of the act of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations." 26 Stat. 851. On February 5, 1902, the Assistant Attorney General of the United States answered the allegations of the peti-

tion by a general denial. On November 4, 1902, the claimant filed a motion for leave to file an amended petition, charging the depredation to have been committed by the Kiowa Indians, which motion was allowed, and upon the same day the amended petition was filed. On November 5, 1902, the Assistant Attorney General, appearing on behalf of the United States and the Kiowa Indians, filed a plea to the amended petition, setting up that no action had been commenced against the Kiowa Indians within three years after the passage of the act of March 3, 1891. On November 11, 1902, this plea in bar was overruled, and, upon the general issue being pleaded and trial had, the court found as a matter of fact: At the time of the depredation the claimant's decedent was a citizen of the United States. In June, 1873, in Mora County, New Mexico, Indians belonging to the Kiowa tribe took and drove away property of the kind and character described in the petition, the property of claimant's decedent, which was reasonably worth the sum of six hundred and ninety dollars. At the time of said depredation defendant Indians were in amity with the United States.

As a conclusion of law the majority of the court decided that the claimant recover a judgment against the United States and the Kiowa Indians in the sum of six hundred and ninety dollars.

The defendants appealed to this court.

Mr. Lincoln B. Smith (pro hac vice), with whom *Mr. Assistant Attorney General Thompson* was on the brief, for the appellants:

A new party defendant cannot be brought in by amendment after the statute of limitations has run in his favor. The substitution of an additional party defendant is equivalent to the beginning of a new suit. *Miller* v. *McIntyre*, 6 Pet. 61; *Sicard's Lessee* v. *Davis*, 6 Pet. 124; *Crowe* v. *Nagle*, 86 Illinois, 437; *Dunphy* v. *Riddle*, 86 Illinois, 22; *Clark* v. *Manning*, 95 Illinois, 508. A supposed hardship cannot affect the decision

as statutes of limitations are arbitrary in all their operations. *Jones* v. *Lemon*, 26 W. Va. 629; *Kendall* v. *United States*, 107 U. S. 123; *Amy* v. *Watertown*, 130 U. S. 320; *Duran's Case*, 31 C. Cl. 353, distinguished. The objection of the Government is not a technical one. The tribe is a necessary party. *Graham* v. *United States*, 30 C. Cl. 318, distinguished, and see *Woolverton* v. *Nez Perces Indians*, 29 C. Cl. 107. As to the construction of the act and the words "as near as may be," etc., the court may look at the legislative history of the act. *Blake* v. *National Bank*, 23 Wall. 307. A depredation may be committed by Indians whom it is impossible to identify with any tribe and in such case the claimant may recover against the United States alone. *Gorham* v. *United States*, 29 C. Cl. 97; *S. C.*, 165 U. S. 316. But if the claimant fails to do his utmost to bring in the tribe and brings in the wrong one and does not correct the error until after the time specified in the statute has elapsed it is either by his fault or his misfortune that he is barred. The United States is liable as guarantor only and cannot he held where the primary defendant, being known, has not been proceeded against within the statutory time.

Mr. William H. Robeson for appellee:

The objection under the statute of limitations is technical, but the delay was caused by the Government's failure to plead within the proper time. *Duran's Case*, 31 C. Cl. 355. The tribe is not really a necessary party. *Kemp* v. *United States*, No. 4777 C. Cl. Amendments of this nature have from an early time been permitted. *Cowan's Case*, 5 C. Cl. 107; *Thomas's Case*, 15 C. Cl. 335. Judgment may be rendered against the United States alone when the tribe of Indians to which the depredators belonged cannot he identified. *Gorham* v. *United States*, 165 U. S. 316; *Woolverton* v. *United States*, 29 C. Cl. 107.

"As near as may be" as used in the act is complied with by the claimant who attempts to identify the tribe rather than

the one who simply avers the impossibility of doing so. In support of the *Duran Case, supra,* see *Garcia* v. *United States,* 37 C. Cl. 243; *Johnson* v. *United States,* 160 U. S. 546, 552. Also see *Dykes* v. *United States,* No. 10,556 C. Cl.

To deny these claimants their remedy and to award it to others suffering during the same Indian attack, because the others guessed the tribe better, would be unjust and not what Congress intended.

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

This claim arises under the Indian Depredation Act of March 3, 1891, 26 Stat. 851, and presents the question whether, after the expiration of three years from the filing of the petition in the Court of Claims, a tribe of Indians, not originally named in the petition, can be brought into the action by amended petition with a view to proceeding against such tribe to judgment. The record discloses that the original petition was filed on October 24, 1891; the amended petition on November 4, 1902. The Attorney General filed a plea setting up the bar of the statute, which plea was overruled, and thereafter, upon issue joined and testimony taken, judgment was rendered against the tribe of Indians so brought in by the amended petition.

The act in question was before this court in *United States* v. *Gorham,* 165 U. S. 316, and in that case it was held that, where the Indian tribe cannot be identified, a judgment for the amount of the claim can be rendered against the United States. In the opinion of the court in that case the act was analyzed and its various sections construed, and it only remains to consider so much of the act and its purposes as will lead to a solution of the question now under consideration.

The provisions of the first section of the act are positive, that all claims existing at the time of the taking of effect of the act shall be presented to the court by petition, as therein

provided, within three years after the passage of the act, or be forever barred. This section, by itself considered, would seem to conclude the right of the petitioner to bring in a new party to the proceeding after the expiration of three years in such wise as to preclude the right to rely upon the bar of the statute. For obvious reasons, a party brought into court by an amendment, and who has for the first time an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court. *Miller* v. *McIntyre*, 6 Pet. 61. Conceding this proposition as applied to ordinary actions, it is urged that this proceeding is so peculiar in character as to take it out of the general rule. Section 3 of the act provides:

"That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved."

The fifth section of the statute provides:

"That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified."

Section 4 provides for service upon the Attorney General, whose duty it is to appear and defend for both the interests of the Government and the Indians, and giving to any Indian or Indians interested in the proceedings the right to appear and defend by an attorney employed with the approval of the Commissioner of Indian Affairs. By the sixth section the

amount of the judgment is charged against the tribe by which or the members of which the depredation was committed, and if no annuity, fund or appropriation is available as provided, the judgment is to be paid from the Treasury of the United States, to remain a charge against the tribe, and to be deducted from any annuity, fund or appropriation thereafter due from the United States to such tribe. It is contended that inasmuch as the Indian tribes are not necessary parties to the proceeding and are not required to be served with process except so far as the notice to the Attorney General is such service, and are only to be described "as near as may be," they may be brought in at any time before judgment, whenever such tribe "can be identified," as set forth in the fifth section of the act. The reasons for this conclusion are fully set forth in the opinion of the Court of Claims in *Duran* v. *United States et al.*, 31 C. Cl. 353. But we are unable to concur in the conclusions therein reached. In our view, the act provides for a recovery of depredation claims in two classes of cases: The one where the persons, classes of persons, tribe or tribes or band of Indians cannot be identified, in which event the United States may be held liable upon proof complying with other terms of the act, though failing to identify the particular depredators; the other, where the persons or tribe described in the act can be identified, in which event they must be named in the petition, and the judgment will go against the United States and the tribe committing the wrong, to be satisfied primarily out of the funds of the Indians. As was said in the *Gorham* case, *supra:* "It may be fairly claimed that, reading all the provisions together, the act makes it necessary, when known, to join with the United States the Indians or tribe of Indians by whom the illegal acts are alleged or are supposed to have been committed."

Whichever form the action takes it must be brought within three years after the passage of the act, as provided by the first section. In requiring the band or tribe of Indians to be described as near as may be, it is the purpose of the act to

require such tribe primarily liable for the injury to be brought before the court, when they can be identified for the purpose of the judgment authorized in the fifth section. All the sections are to be read together to effectuate the purpose of the law, and when the tribe "can be identified" it must be described as near as may be, that is, with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment, resorting to the liability of the United States alone only in cases where the offending parties cannot be identified. The claimant under the statute has three years for the purpose of investigating his cause of action, and, in cases where it can be done, identifying the tribe sufficiently for the purposes of pleading and judgment against both the United States and the Indian tribe, or, in the alternative, proceeding against the United States alone. It is true that the act does not in terms provide for service upon the Indian tribes, their agents or attorneys, and the Attorney General is required to appear for them as well as for the United States. Of this provision, Mr. Justice Peckham, speaking for the court in the *Gorham* case (*supra*) said: "Although the fourth section provides for the defense of the claim by the law officer of the Government under any circumstances, yet as the interest of the Indians is embraced in the inquiry before the court because of their liability to a judgment against them if identified and to a payment of that judgment out of the annuities or otherwise as provided in the sixth section, it is proper to allow them to appear and defend also by their own attorney." When brought into court they may give by special counsel more careful attention to their particular defense than could be given by the law officer of the Government charged with the defense of thousands of similar claims. But it is said that the Attorney General, by failing to promptly raise by plea the defense of misjoinder, is quite as much in fault as the petitioner in permitting more than three years to elapse before the new party is brought in, and it is said that at the common law this objection could only be raised by such plea season-

ably interposed. At common law, where it was sought to bring in another party jointly liable, a plea by the defendant setting forth the non-joinder, and giving the name of such party, was the proper method of procedure. 3 Chitty on Pleading, 901, and notes. But such is not the present case. The original petition charged positively that the depredation was committed by the Ute Indians. It was sufficient for the Attorney General to plead the general issue to put the plaintiff upon proof of his allegations. It is said that eleven thousand of these cases have been begun, and it is not to be presumed that the Attorney General would know the facts of each case, and be in possession of information to fulfill the requisite of a good plea and furnish the name of the party to be impleaded. It was for the plaintiff to make such investigation as would warrant the beginning of the action against the proper tribe, or against the United States alone, averring that the particular tribe could not be identified.

It is further insisted that it is the purpose of the act, as provided for in the fifth section, to require the judgment to be rendered against the Indian tribe if it can be identified at any time before judgment, and that this construction is required to protect the interests of the United States. But we think this section should be read in connection with the other sections of the act, and the manifest purpose is to join in the petition when it can be identified, the tribe by whom the depredation was committed, and to limit the presentation of the claim to three years from the passage of the act. If this be not so the Indians may be made parties to the proceeding and judgment without being brought into court in any manner until years after the alleged wrong was committed, and when it may be impossible, by reason of the lapse of time or the death or disappearance of witnesses, to make adequate defense. The construction herein put upon the statute will give to the three years' limitation the effect of other statutes of limitation and will, in our judgment, best effectuate the purpose of the act. This act is extremely liberal in permitting

presentation of claims for Indian depredations. All limitations are swept away except the requirement as to the time of filing the petition. In the present case the depredation is alleged to have been committed eighteen years before the action was commenced. Under these liberal provisions we think it was the purpose of the law to require parties to be duly prosecuted within the three years allowed for the filing of petitions, and the liberality of the act should not be extended by construction. As the case was prosecuted against the wrong tribe until after the three years had expired, it cannot be maintained against the Indians sought to be brought in by the amendment, nor can it be sustained against the United States, which is liable by itself only in cases where the depredating Indians or other persons are unknown.

It follows that the judgment of the Court of Claims must be reversed and the petition directed to be dismissed, and it is so ordered.

MR. JUSTICE WHITE, with whom concurs MR. JUSTICE MCKENNA, dissenting.

Under the Indian depredation act of March 3, 1891, the United States was sued by one Gorham in the Court of Claims, and it was averred in the petition that the damage complained of had been inflicted by the Comanche and Kiowa tribes of Indians, who were in amity with the United States. After hearing, the Court of Claims, finding it to be established by the proof that the loss complained of had been occasioned by Indians in amity with the United States, but that the proof did not show that the Comanche and Kiowa tribes were the wrongdoers, nevertheless, without any amendment of the petition, rendered a judgment solely against the United States. The action of the Court of Claims was sustained by this court in *United States* v. *Gorham*, 165 U. S. 316.

In considering the power conferred by the statute it was said (p. 320):

"In conferring jurisdiction in this class of cases upon the Court of Claims, it will be seen that Congress conferred it in regard to all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge. So long as the depredations were committed upon the property of citizens of the United States, and by Indians in amity with the government, without just cause, etc., jurisdiction and authority to inquire into and finally adjudicate upon such claims was granted to the court. This broad ground of jurisdiction would, unless circumscribed by the subsequent provision of the act, permit an adjudication against the United States alone. There is nothing in any other portion of the act which provides in terms for joining as co-defendants with the United States the tribes or bands of Indians by whom the alleged illegal acts were committed. The third section of the act merely provides for the contents of the petition, and by such section it is made the duty of the petitioner to state in his petition 'the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be,' etc. This is for the obvious purpose of giving some notice to the government of the alleged facts upon which the claim is based so that the proper defence, if any exists, may be made to the claim."

Again, after pointing out that the statute made it "the duty of the court to determine in each case, 'if possible, the tribe of Indians or other persons by whom the wrong was committed, and to render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified,'" it was observed (p. 321):

"But the fifth section provides for judgment in favor of claimant and against the United States in any event, where the property of a citizen has been destroyed under the circumstances provided in the statute, but only against the tribe

of Indians committing the wrong 'when such can be identified,' and of course it follows that if they cannot be identified no judgment can go against them. The United States would then be left as alone responsible for the property destroyed provided the proofs were of the character mentioned in the first section of the act; that is the claimant would be bound to prove that he was a citizen of the United States at the time of the taking or destruction of his property; that it had been taken by Indians belonging to some band or tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and that it had not been returned or paid for."

To my mind this decision clearly establishes that under the act of Congress the Indian tribe by whom the depredation was committed was not an essential party to give the court jurisdiction over the claim. This conclusion, it seems to me, is inevitable from the ruling that, although it was alleged in the petition that a particular tribe was the wrongdoer, it was competent for the court to conform to the proof and render a judgment against the United States in a case where the proof did not establish the truth of the averment as to the tribe committing the injury, if only it was shown that the wrong complained of must have been committed by some Indian tribe which was in amity with the United States. Now, the question on this record is simply whether a petitioner who has alleged that the wrong was committed by a particular tribe can, after the three years' limitation, amend by stating another and different tribe as the wrongdoer. It is decided that such amendment cannot be allowed, because to allow it would amount to a fatal departure, that is, the substitution of a new and wholly different cause of action.

Consistently with the ruling previously made, my mind cannot assent to this conclusion. To adopt it without specifically overruling the *Gorham* case, it seems to me, is to declare on the one hand that it is not essential to prove the allegation that the wrong was committed by a particular tribe, and on

the other hand to say that the allegations as to the tribe committing the wrong were essential to the cause of action. That is to declare that a particular allegation is at the same time both essential and non-essential—essential to be alleged, but not essential to be proved.

As it is considered by me that the *Gorham* case is conclusive of this, and as the opinion now announced does not purport to overrule that case, it is not necessary for me to enter into a statement of my reasons for believing that, even if that case did not exist, the construction now given to the statute is not only repugnant to its text, but conflicts both with the rights of individual claimants and those of the United States, as shown by the purpose and spirit of the act.

I therefore dissent.

HUMBIRD *v.* AVERY.

CERTIFICATE FROM AND ORDER TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 7. Argued October 23, 26, 1903.—Decided December 12, 1904.

The act of Congress of July 1, 1898, 30 Stat. 597, 620, c. 546, relating to the land grant to the Northern Pacific Railroad Company, construed: *Held,*

1. That the act embraces land patented as well as unpatented, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, and which has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department.
2. The words in that act providing that the railroad grantee or its successor in interest "shall not be bound to relinquish lands sold or contracted by it or lands it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal,"— do not apply to any lands sold or contracted by the railroad grantee or its successor in interest after the acceptance of the provisions of the act by the Northern Pacific Railway Company; no sale or contracting away of any of the lands embraced by

the act, and in dispute, after the acceptance of the grant could withdraw such lands from the operation of the act.

3. Whatever vested rights were acquired by the railroad company in virtue of the definite location of its route, as to any lands in dispute and embraced by the act of 1898, became subject to the power conferred upon the Land Department by that act.

4. The general doctrine reaffirmed that the courts will not interfere with the discharge of their duties by the officers of the Land Department by mandamus or injunction in reference to any lands, so long as the title thereto remains in the United States.

5. The selection of lands in indemnity limits, after definite location, to supply deficiencies in place or granted limits, does not invest any title in the railroad grantee to such lands until the selections are approved by the Secretary of the Interior. The railroad grantee does not become entitled, by reason of such unapproved selections, to ask a court of equity to intervene as between it or its successors in interest and individual claimants, so as to have the court declare that the latter could not, by any entry or purchase, acquire an interest in the lands so selected after the acceptance of the railroad's map of definite location.

THIS case was brought before us upon questions certified by the Circuit Court of Appeals. Subsequently, the United States was allowed to intervene upon the general ground that the case involved important questions affecting the administration of the public land laws, including the grant to the Northern Pacific Railroad Company then in process of adjustment. And, on motion of the Government, the plaintiffs and defendants concurring, the whole record was ordered to be sent up for our consideration.

The case involves the title to numerous tracts of land situated on the line of the Northern Pacific Railway between Duluth and Ashland. The lands are described in an exhibit attached to the bill.

The plaintiffs Humbird and Weyerhaeuser sue as grantees of the Northern Pacific Railway Company, a Wisconsin corporation, which, it is claimed, succeeded in respect of the lands in dispute to all the rights, interests and ownership of the Northern Pacific Railroad Company created by the act of Congress of July 2, 1864, 13 Stat. 365, c. 217. They allege that the claims of the defendants constitute clouds upon their title.

The defendants assert title under the land laws as settlers and purchasers from the United States or grantees of such settlers and purchasers. But the bill alleges that the lands here in dispute are part of the grant to the Northern Pacific Railroad Company and that the Land Department wrongfully and unlawfully permitted the entries under which the defendants severally claim. The Circuit Court dismissed the bill, but without prejudice, except as to all lands here involved for which patents had been issued. 110 Fed. Rep. 465.

It seems both appropriate and necessary that the facts be fully stated. That statement we now proceed to make, premising that the present controversy had its origin, as will be presently shown, in conflicting orders or rulings in the Land Department as to what was the eastern terminus of the Northern Pacific Railroad.

By the above act of July 2, 1864, c. 217, Congress made a grant of lands to the Northern Pacific Railroad Company in aid of the construction of a railroad and telegraph line from some point on Lake Superior in Minnesota or Wisconsin to some point on Puget Sound with a branch via Columbia River to a point at or near Portland. The act established indemnity limits not more than ten miles beyond the limits of the alternate sections granted. 13 Stat. 365.

By a Joint Resolution, approved May 31, 1870, second indemnity limits were established within ten miles on each side of the road, beyond the limits prescribed in the company's charter. 16 Stat. 378, Res. 67. The effect of this resolution was to allow the company, under the direction of the Secretary of the Interior, to go into second indemnity limits in order to supply any deficiency in lands on its main line or branch.

On the third day of July, 1882, the company transmitted to the Secretary of the Interior a map of definite location covering the proposed line from Thompson Junction on the St. Paul and Duluth Railroad near Duluth, Minnesota, to Ashland in Wisconsin. That map was duly approved by the

Secretary of the Interior, and the lands embraced by it were withdrawn from sale or entry.

By resolution of the Board of Directors of the company, adopted August 28, 1884, Ashland was declared to be the eastern terminus of the road; and that resolution was accepted by the Secretary on December 3, 1884, as establishing such terminus.

The part of the railroad delineated on the map of definite location was constructed and was duly accepted; and in conformity with the direction of the Secretary the company, the Circuit Court states, filed lists of selections of lands, some in the first and others in the second indemnity limits, in lieu of lands lost to it in its place limits—such lists *including all the lands in controversy in this suit.* But the bill avers that no final action has ever been taken by the Land Department upon such lists; and they have not yet been approved by the Department.

Subsequently, on August 12, 1896, the Secretary of the Interior ruled that Duluth, not Ashland, was the eastern terminus of the railroad, and therefore that the land grant of 1864 did not embrace any lands between Duluth and Ashland. The company's lists of selections were thereupon canceled by order of the Secretary, and the lands covered by them were thereafter treated by the Department as unappropriated public lands and were opened for sale and entry.

This appears from an official communication addressed by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, to the Register and Receiver at Duluth. In that communication the Commissioner said: "On August 27th, 1896, the Secretary of the Interior rendered a decision wherein he held that the initial point on Lake Superior or the eastern terminus of the grant to the Northern Pacific Railroad Company was at Duluth, Minnesota, and on December 24th, 1896, he approved a diagram prepared by this office showing the eastern terminal of the grant. On January 23d, 1897, a copy of so much of said

diagram as related to or affected lands within your district was transmitted to you for the use and guidance of your office. The decision of the Secretary aforesaid had the effect of restoring to the public domain all lands lying east of said terminal which had theretofore been withdrawn on account of the grant to said railroad company. Therefore, to the end that all persons interested may have an opportunity to present any claims they may have to any of these lands, you will cause to be published for the period of thirty days, in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company and lying east of the terminal established at Duluth are restored to the public domain and are subject to disposal at your office."

Under the above ruling of the Secretary as to the eastern terminus, the defendants were allowed to make entries and purchases on the line of the railroad between Duluth and Ashland, despite the company's map of definite location and the lists of selections filed by it with the Secretary. In reference to the action of the Interior Department, the Circuit Court said: "By reason of the erroneous ruling of the Secretary of the Interior as to the location of the eastern terminus of said railroad, and his revocation of his prior approval of lawful selections by the railroad company of indemnity lands, and permitting sales and entries of such selected lands as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts; . . . The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land." 110 Fed. Rep. 465, 469.

Such was the situation when Congress incorporated into the body of the Sundry Civil Appropriation act of July 1, 1898,

30 Stat. 597, 620, c. 546, subdivision, "Surveying the Public Lands," certain provisions relating to the Northern Pacific land grant. As these provisions disclose a scheme or plan for the settlement of the disputes arising out of the conflicting rulings in the Land Department in reference to the eastern terminus of the railroad, and its action in reference to the public lands between Duluth and Ashland, they should all be examined in order to ascertain the intention of Congress. They are therefore here given in full.

By that act—dividing it, for convenience, into paragraphs —it was provided:

1. "That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey:

2. "*Provided, however,* That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest Government subdivision. And all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor:

3. "*Provided further,* That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal:

4. "*And provided further,* That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior,

and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor:

5. "*And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted:

6. "*And provided further*, That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their bona fide residence and

amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this act." 30 Stat. 597, 620.

The provisions of that act were formally accepted in writing by the Northern Pacific Railway Company on the thirteenth of July, 1898, in writing, and such written acceptance was promptly transmitted by the company to the Secretary of the Interior.

In a case in the Supreme Court of Wisconsin, determined shortly before the act of 1898, it was held, contrary to the ruling of the Interior Department in 1896, that Ashland, and not Duluth, was the eastern terminus of the Northern Pacific Railway. *Northern Pacific Railway Co.* v. *Doherty*, 100 Wisconsin, 39. Upon writ of error to this court that judgment was affirmed. *Doherty* v. *Northern Pacific Railway Co.*, and *United States* v. *Northern Pacific Railroad Company*, 177 U. S. 421 and 435.

After the above decisions by this court—which were rendered April 16, 1900,—the Secretary of the Interior revoked the order canceling the company's above lists of selections, and reinstated them. Shortly before those cases were argued here, namely, on January 19, 1900,—and apparently to meet the contingency of a reversal by this court of the judgment of the Supreme Court of Wisconsin—the Northern Pacific Railway Company made conveyances with warranty to the

plaintiffs Humbird and Weyerhaeuser, of all the lands, aggregating more than 10,000 acres, the title to which is here in dispute. As appears from the record, these conveyances were made after the Land Department had issued regulations to facilitate the adjustment of claims under the act of July 1, 1898. It should be recalled here that the lands covered by those conveyances were placed on the above lists of selections filed by the railroad company, but those lists had not then nor have they since received the approval of the Secretary.

It is contended by the plaintiffs that the result of the above decisions in this court, adjudging the eastern terminus of the Northern Pacific Railroad to be at Ashland, Wisconsin, and not at Duluth, Minnesota, was that the odd-numbered alternate sections between Duluth and Ashland, on either side of the railroad, as definitely located, to the extent and within the limits prescribed, and not excluded from the grant of July 2, 1864, were to be deemed public lands, from which that grant could be supplied, and to which neither the defendants nor their grantors *after* the definite location of the road as shown by the company's accepted map of location could have acquired any valid title, by entry or settlement, or by purchase, except from the railroad grantee, and that the defense cannot be maintained without violating the rights that were *vested* in the company *in virtue of* such definite location.

The defendants, of course, combat this view of the rights of the parties, and insist that they are fully protected in their claims by the act of 1898, all the provisions of which, as we have seen, were accepted by the railroad company.

In the statement accompanying the certified questions it is set forth that prior to the passage of the act of July 1, 1898, the Secretary of the Interior had, pursuant to his original ruling as to the eastern terminus of the railroad, caused patents to be delivered to defendant settlers or their grantors for about 3,400 acres of the lands involved in this suit; that at the time of the passage of that act about 2,800 acres of the lands in question had been entered by defendant settlers or their

grantors prior to January 1, 1898, but no patents therefor had been issued; that after January 1, 1898, the settlers or their grantors were permitted to enter about 5,000 acres of the lands here in controversy. The situation is thus described in the statement sent up by the Circuit Court of Appeals: Of the lands claimed by the plaintiffs as successors in interest of the Northern Pacific Railroad Company about 3,400 acres thereof were held by the appellees under patents issued by the Government prior to July 1, 1898; for the residue of the lands the settlers held final receipts and final certificates, such final receipts and final certificates, as respects about 5,000 acres, being for tracts entered subsequent to January 1, 1898. In reference to the lands for which final receipts and certificates have been issued nothing, so far as appears, remains to be done by the Land Department except the issuing of patents.

The relief sought is a decree declaring, among other things, that the lands described in the exhibit attached to the bill and all the timber standing or lying thereon belong to the plaintiffs; that the entries, locations, final certificates, land office receipts and patents, under which the several defendants claim, be adjudged to be void and removed as clouds from the titles of the plaintiffs, and the defendants severally enjoined from asserting any title by virtue thereof; and that such of the defendants as hold patents may be declared to hold as trustees for the plaintiffs in respect of any title conveyed by such patents, or any timber, cut or uncut, on such lands.

The questions propounded to this court by the Circuit Court of Appeals are these:

"Is the act of July 1st, 1898, applicable to the determination of the rights of the parties to the 3,400 acres of land which were patented to the appellees or their predecessors in interest prior to the adoption of the act of July 1st, 1898?

"Has the Circuit Court of the United States for the District of Minnesota, or any court, jurisdiction as respects the lands in controversy entered subsequent to January 1st, 1898, and for which the settlers hold final receipts or certificates,

to adjudicate the rights of the parties to this action in respect to said lands in advance of the issuance of patents therefor by the executive branch of the Government, or should the courts decline jurisdiction until the Government has divested itself of the legal title to the lands by the issuance and delivery of patents?"

Mr. William W. Billson and *Mr. Charles W. Bunn*, with whom *Mr. Chester A. Congdon*, *Mr. H. Oldenburg* and *Mr. James B. Kerr* were on the brief, for appellants:

After these lands had been regularly selected by the railroad company, under the direction of the Secretary of the Interior, in lieu of unsatisfied and appropriate losses from place limits, they were wrongfully and finally awarded by the Secretary of the Interior to subsequent entrymen, through error of law as to the eastern terminus of the road; equity will, therefore, enforce the superior right of the railroad company or its grantees. This would be so even though the Secretary's approval of the selections had been expressly required by the terms of the act, and had been withheld or refused. *St. Paul R. R. Co.* v. *Winona & St. P. R. R. Co.*, 112 U. S. 720; *Sage* v. *Swenson*, 64 Minnesota, 517; *So. Pac. R. R. Co.* v. *Wiggs*, 43 Fed. Rep. 333, 338; *McHenry* v. *Nygaard*, 72 Minnesota, 2, 12; *Groeck* v. *So. Pac. R. R. Co.*, 102 Fed. Rep. 632.

Under these circumstances, the courts will decide any questions of fact which, by its error of law, the Department of the Interior was led to ignore. *Cunningham* v. *Ashley*, 14 How. 377; *Lytle* v. *Arkansas*, 9 How. 328; *Ard* v. *Brandon*, 156 U. S. 537; *Duluth & Iron Range R. R. Co.* v. *Roy*, 173 U. S. 587; *Wright* v. *Roseberry*, 121 U. S. 498; *Bisson* v. *Curry*, 35 Iowa, 72.

No controversies are pending in the department even as to such of the lands as are unpatented. Final certificates have been issued in all cases to the entrymen, and stand as the unrevoked, though legally erroneous, final judgment of the department in favor of their claims. Under such circum-

stances, equitable relief is not prematurely sought. *Moore* v. *Robins*, 96 U. S. 530; *Berthold* v. *McDonald*, 22 How. 334; *Orchard* v. *Alexander*, 157 U. S. 372; *S. C.*, 26 Pac. Rep. 196; *Pierce* v. *Frace*, 26 Pac. Rep. 192.

In the recent cases of *Bockfinger* v. *Foster*, 190 U. S. 116, and *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, this view of the law appears to have been tacitly admitted, although under the circumstances existing in those cases relief was denied. With respect to the unpatented lands, the complainants are in any event entitled to relief by way of injunction. *La Chapelle* v. *Bubb*, 69 Fed. Rep. 481.

Threats of trespass are unnecessary. A reasonable probability of trespass or a well grounded apprehension of it may arise from the nature of the situation. *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 840.

The withdrawal for the benefit of the Lake Superior & Mississippi Railroad Company on location of its general route, of lands not falling within its ultimate place limits, did not operate to exempt such lands from the subsequent grant to the Northern Pacific Company. *Nor. Pac. R. R. Co.* v. *Sanders*, 166 U. S. 620; *Menotti* v. *Dillon*, 167 U. S. 703; *United States* v. *Oregon &c. R. R. Co.*, 176 U. S. 28; *Kansas Pac. R. R. Co.* v. *Atchison &c. Co.*, 112 U. S. 414.

Every case in which a withdrawal for the benefit of a railway company has been held to segregate the land as against subsequent legislative grants has been the case of a withdrawal *on definite location*. *Spencer* v. *McDougal*, 159 U. S. 62, distinguished.

In all cases holding that only those lands are a part of the public domain within the meaning of land grant acts, which are open to entry under the general land laws, the withdrawals had been made for the protection of a right which, if all the facts could be known, might appear to have become actually vested. Withdrawals of that character it is presumptively the intention of Congress to respect in making subsequent grants. This court has held (see cases cited *supra*) that with-

drawals on definite location are to be treated as withdrawals of that class, while withdrawals on location of general route are not to be so treated, but are to be regarded as made merely for the accommodation of the company, in order that its rights may have opportunity to attach to the withdrawn lands, subject however to such legislative dispositions as in the interim may be made of them.

These lands having been sold by the railway company prior to their identification by the lists of the Secretary of the Interior for relinquishment by the railroad company under the provisions of the Sundry Civil Act of July 1, 1898, are, by the express terms of the second proviso of that act, exempted from the company's obligation to relinquish. Interpreted in general terms, the case presented by that proviso is that of a statute which makes the legality or force of a transaction (in this instance the service of the Secretary's lists), dependent in part upon the existence of a particular condition (in this instance, whether lands are sold or unsold), without expressly declaring whether it is at the time of the transaction or at the date of the statute, or at the date of its acceptance, or at some other time that the prescribed condition must exist. This is the natural and grammatical and necessary construction of the law if the clause relative to sold lands is to have any practical operation whatever. No one could have conceived it to be necessary to expressly except from the company's obligation to relinquish lands which it had already sold or contracted prior to the act of 1898. The sole object of the clause relative to sold lands was to enable the company to continue its business, and the handling of its grant in the ordinary course, during the many years which would be likely to elapse before the adjustments contemplated by the act of 1898 should have been fully accomplished. Such also is the construction suggested by the analogy of the acts *in pari materia* to this. Act of June 22, 1874, 18 Stat. 194; Act of October 1, 1890, 26 Stat. 674.

The act of 1898 is inapplicable to land patented before its

passage, and is inapplicable to lands purchased by others than actual settlers. If applicable to such purchases as those under the timber and stone land act, it is only in those instances in which the purchase was made or consummated by payment of the money prior to January 1, 1898.

Mr. Assistant Attorney General Campbell and *Mr. A. C. Campbell*, Assistant Attorney, with whom *Mr. F. W. Clements*, Assistant Attorney, was on the brief, for the United States, intervenor:

In view of the provision in § 3 of the act of July 2, 1864, that "other lands shall be selected by said company . . . under the direction of the Secretary of the Interior," and of the provision in the joint resolution of May 31, 1870, that "said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections," etc., the Land Department has uniformly held that until an indemnity selection made by the Northern Pacific Railroad Company is approved by the Secretary of the Interior the title to the lands covered thereby remains in the Government, and that no right vests in the company until such approval is given. *Re Nor. Pac. R. R. Co.*, 2 L. D. 820; *Nor. Pac. R. R. Co.* v. *Miller*, 7 L. D. 100, 123; *Nor. Pac. R. R. Co.* v. *Walters*, 13 L. D. 230, 233; *Nor. Pac. R. R. Co.* v. *Blain*, 27 L. D. 361, 363; *Nor. Pac. R. R. Co.* v. *Fly*, 27 L. D. 464, 466; *Meister* v. *St. P., M. & M. R. Co.*, 14 L. D. 624; *Dunnigan* v. *N. P. R. R. Co.*, 27 L. D. 467. The first ruling in this respect was made in May, 1883, and has been adhered to ever since. It should not therefore be overthrown by the court, unless plainly erroneous. *Hewitt* v. *Schultz*, 180 U. S. 139, 156; *Hawley* v. *Diller*, 178 U. S. 476, 488. In passing upon other land grant acts containing similar provisions this court has upheld this ruling of the Land Department. *Ryan* v. *Railroad Company*, 99 U. S. 382; *Sioux City &c. R. R. Co.* v. *Chi., M. & St. P. Ry. Co.*, 117 U. S. 406; *Wis. Cent. R. R. Co.* v. *Price County*, 133 U. S. 496, 511; *United States* v. *M., K. & T. Ry. Co.*, 141 U. S.

358, 373; *So. Pac. R. R. Co.* v. *Bell*, 183 U. S. 675, 690; *Clark* v. *Herrington*, 186 U. S. 206. The foregoing and the following decisions of this court, viz, *United States* v. *McDaniel*, 7 Pet. 1, 14, 15; *Williams* v. *United States*, 138 U. S. 514, 524; *Knight* v. *U. S. Land Assn.*, 142 U. S. 161, 177; *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 167; *Caha* v. *United States*, 152 U. S. 211, 222; *Kan. Pac. R. R. Co.* v. *Atchison &c. R. R. Co.*, 112 U. S. 414, 421; *Barney* v. *Winona &c. R. R. Co.*, 117 U. S. 228, 232; *New Orleans* v. *Paine*, 147 U. S. 261, 267; *Michigan Land &c. Co.* v. *Rust*, 168 U. S. 589, 592; *Nor. Pac. R. R. Co.* v. *Musser-Sauntry Co.*, 168 U. S. 604, 611; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 308; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, settle beyond controversy the following propositions:

1. Upon the Land Department is imposed the duty of administering the Northern Pacific Railroad land grant, and it is clothed with power and authority to prescribe rules and regulations to that end, which necessarily includes the manner of making indemnity selections by said company, its successors and assigns.

2. It is the duty of the Land Department to pass upon and determine all questions touching the validity of indemnity selections, including the adjudication of adverse claims made for the lands selected, and if found to be legal in all respects, to approve the selections; otherwise to reject them.

3. No title passes from the Government, nor does any vested right attach to lands within a Northern Pacific Railroad indemnity selection unless and until such selection receives the approval of the Secretary of the Interior.

4. When the indemnity selections are approved, the *equitable* title to the lands embraced therein passes under the grant.

5. The legal title does not pass from the Government until patent has issued.

The Secretary of the Interior cannot arbitrarily refuse to approve an indemnity selection made by the railroad company, or defeat such selection by failure or neglect to act

thereon. *Williams* v. *United States*, 138 U. S. 514, 524; *Brown* v. *Hitchcock*, 173 U. S. 473, 478; *Dunnigan* v. *Nor. Pac. R. R. Co.*, 27 L. D. 467, 469. He has not finally passed upon these selections; that he must act upon them and determine all questions affecting their validity before the matters complained of can be carried into the courts by any person claiming an interest in the lands by reason of the indemnity selections. *New Orleans* v. *Paine*, 147 U. S. 261; *Germania Iron Co.* v. *United States*, 165 U. S. 379; *Brown* v. *Hitchcock*, 173 U. S. 475, and until approved, there are no selections in fact, only preliminary proceedings.

In respect to equitable rights to public lands this court has held:

1. That until the legal title passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. *Brown* v. *Hitchcock*, 173 U. S. 473, 476. But until the title has passed to an individual the equities subject to which he holds it cannot he enforced in the courts. *Marquez* v. *Frisbie*, 101 U. S. 473, 475.

2. Until the legal title to public land passes from the Government the Land Department has jurisdiction to determine the question whether or not the equitable title has passed. *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 593; *Hawley* v. *Diller*, 178 U. S. 476, 488. But pending the determination of this question by the Land Department the courts will not pass upon the same in controversies between individuals, but will leave it to be determined by the Land Department. *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578; *United States* v. *Schurz*, 102 U. S. 378, 396; *New Orleans* v. *Paine*, 147 U. S. 261; *Brown* v. *Hitchcock*, 173 U. S. 473; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308.

3. After the Land Department has passed upon all disputed questions of fact and finally determined that the equitable title to public lands has passed from the Government, but not before, the courts may inquire into and determine controversies between individuals in respect to the validity of such

equitable title, together with individual rights claimed thereunder, and will accept the findings of the Land Department as conclusive upon all questions of fact. *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Johnson* v. *Drew*, 171 U. S. 92, 99; *Clark* v. *Herrington*, 186 U. S. 206, 210.

Within the principles as above set forth the courts are without jurisdiction in this case, so far as the unpatented lands are concerned, to grant the relief prayed for by the complainants for the reasons: (1) The legal title is still in the United States; (2) the Land Department has jurisdiction to determine the question whether or not the equitable title has passed; (3) the record shows that the Land Department is now considering this question and has not made a finding upon any questions of fact which may be involved.

It is not a fact, as alleged by complainants, that the Land Department has passed upon the asserted rights of the respective parties to the entered lands, nor has it decided that patents shall issue upon the entries. *Nor. Pac. R. R. Co.*, 26 L. D. 265. Until it does finally pass upon the asserted rights of such parties to these lands and decides to issue patents therefor, no vested rights attach thereto. While it is true that when the right to a patent once becomes vested, it is equivalent, so far as the Government is concerned, to a patent actually issued, *Barney* v. *Dolph*, 97 U. S. 652, 656; *Stark* v. *Starrs*, 6 Wall. 402, 418; *Simmons* v. *Waggoner*, 101 U. S. 260; it is equally true that the right to a patent to public land does not become *vested* "as *against the United States* until all the prerequisites for the acquisition of the title have been complied with, *Shepley* v. *Cowan*, 91 U. S. 330, 338; nor until conflicting claims, if any, to the lands have been finally determined by the Land Department. Cases cited *supra*. The Land Department retains jurisdiction in respect to public lands until patent has issued. *United States* v. *Schurz*, 102 U. S. 396; *Knight* v. *U. S. Land Association*, 142 U. S. 161.

Whether the erroneous decision of the Secretary of the Interior with respect to the eastern terminus of the Northern

Pacific land grant involved merely a question of law, a mixed question of law and fact, or only of fact, the entries in question made because of such erroneous decision are, nevertheless, subject to inquiry by the Land Department and may be and should be canceled by it if found to be illegal. *Marquez* v. *Frisbie*, 101 U. S. 473; *United States* v. *Schurz*, *supra*; *Beley* v. *Naphtaly*, 169 U. S. 353, 364.

Mr. Benton Hanchett and *Mr. H. H. Hoyt* for Avery and other appellees.

Mr. Luther C. Harris submitted a brief for Alger and other appellees.

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

It is appropriate at the outset to refer to certain allegations of the bill which bring the determination of the case within a very narrow compass and make it unnecessary to consider some matters referred to by counsel. After setting out in detail the various steps taken by the railroad company to acquire a right to the lands in dispute, the bill alleges that "but for the *vested* rights" of the Northern Pacific Railroad Company and its grantees the several tracts of land in question would have been unappropriated public lands open to the several kinds of entries or location made with respect to them, severally; also, that "the several applications and proceedings with respect to the said several entries were in due form, and regularly conducted, as required by law, and, *in the absence of the vested rights of the said Northern Pacific Railroad Company and its grantees in the said premises*, would have been operative and effectual to *invest the several entrymen of said lands with complete equitable title thereto*, each of such entries and locations having been finally receipted for, allowed and approved by the proper land officers of the United States; the only act

remaining for the United States or its officers to perform with respect to such entries being the issuance of the patent in cases where the patent has not already issued;" and that all of the said entries and locations of lands referred to in the exhibit filed with the bill were allowed, and the final certificates (and so far as issued the patents) issued therefor "under a mistake of law founded upon a certain erroneous ruling by the Secretary of the Interior, to the effect that the said Northern Pacific Railroad Company, and their successors in interest, were not entitled to any lands by virtue of said act of Congress, approved July 2, 1864, and said joint resolution approved May 31, 1870, granting lands to said Northern Pacific Railroad Company, east of that point on the line of said Northern Pacific Railroad where the same crosses the line of the St. Paul and Duluth Railroad, known as Thompson Junction."

Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers —both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this

action of the legislative department by a prompt acceptance of the act, in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done might be done.

Promptly after the passage of that act the Land Department set about to administer its provisions, and to that end, as we have said, issued regulations for the guidance of all concerned.

During the progress of this work of administration, the railroad company, by conveyances to the present plaintiffs, assumed to pass such interest as it had in the lands here in question, with the effect—it is now claimed by the plaintiffs—to withdraw or exempt all the lands so sold from the operation of the act. The plaintiffs rest this claim upon that part of the act providing that the railroad grantee or its successor in interest "shall not be bound to relinquish lands sold or contracted by it or lands it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal." (See Par. 3, *ante*, p. 486.)

We have seen that the act (Par. 2, *ante*, p. 486) made it the duty of the Secretary of the Interior to ascertain from time to time, and cause to be prepared and delivered to the railroad grantee or its successor in interest, a list or lists of the several tracts purchased, settled upon or occupied, and claimed, at the date of the act, by such settlers, purchasers or occupants, their heirs and assigns, according to the smallest Government subdivision. And the act provided that the railroad grantee or its successor should accept said list or lists "as conclusive, with respect to the particular lands to be relinquished by it." The contention of the plaintiffs, stated more fully, is, in effect, that it was competent for the company, notwithstanding its acceptance of the act, to take out of its operation any lands embraced by its terms, by simply selling or contracting to sell them before the delivery to it or to its successor in interest of the lists above mentioned. In other

words—for the contention comes to that—the railroad company, so far as the act of 1898 was concerned, could, notwithstanding the acceptance of its provisions and on the day after such acceptance, have sold or contracted to sell its right, title and interest in and to all the lands embraced by those provisions. This would have left no lands whatever to which the act could apply. Such a result would have left unsettled all the disputes relating to any lands which the company chose, in its own interest, to sell while the Land Department was proceeding under the statute. We do not believe that Congress intended that it should be in the power of the railroad company in any such mode to defeat the operation of the act. Congress, manifestly, had reference to the situation as it was when the act of 1898 was passed.

If any rights had become vested in the Northern Pacific Railroad Company which could not, against or without its consent, be effected by an enactment like that of 1898, then the objection to legislation, on the ground that it interfered with vested rights, was waived by the acceptance of the act by its successor in interest; for it was entirely competent for the latter company, if it succeeded to all the rights of the railroad grantee, to agree to such a settlement as that devised by Congress. The rights acquired by the definite location of the road, and any selection of lands based thereon, became, upon the acceptance of the act, and so far as that company was concerned, subject to such settlement as the Land Department might legally make under that act. It could not by any sale or contract, made after the acceptance of the act, interfere with the full execution of its provisions. And the plaintiffs who claim to have purchased from the successor in interest of the railroad grantee can occupy no better position than the company from which they purchased. They were in a sense purchasers *pendente lite;* for the Secretary of the Interior was, at the time, as he is now, engaged in administering the act of Congress. By him or under his direction must be ascertained the facts upon which depend the inquiry whether

the lands in question are within the indemnity limits of the land grant to the railroad company and so situated that a right to them attached by reason of the definite location of the road. He must also inquire whether such lands were purchased, by the respective defendants, directly from the United States, or were settled upon or claimed in good faith by qualified settlers under color of title or claim of right under a law of the United States or ruling of the Interior Department, and whether the purchaser, settler or claimant refuses to transfer his entry. Upon these facts also depends the right of the railroad grantee or its successor in interest (its rights being relinquished as provided in the act) to select in lieu of the lands relinquished an equal quantity of surveyed or unsurveyed public lands, not mineral or reserved, and not valuable for stone, iron or coal, and free from any adverse claim, or not occupied by settlers at the time of such selection, situated within any State or Territory into which the railroad grant extends.

Now it is sought, in advance of final action by the Land Department in execution of the act, to have it adjudged, *as between the parties to this suit*, that the lands in dispute, claimed by the defendants, cannot properly be placed on the lists which the Secretary may deliver to the railroad grantee or its successor in interest. But that is a question the solution of which depends, in part at least, on facts within the province, primarily, of the Secretary of the Interior to find. In short, he, and he alone, must ascertain the facts which enter into the question as to what lands are to go on the lists to be delivered to the railroad grantee or its successor in interest. The court should not, by any decree, as between parties who have no contract relations with each other, attempt indirectly to control the authority and discretion of that officer to determine what lands shall and what lands shall not be included in the lists to be prepared under his direction. The plaintiffs cannot invoke the aid of the court to have these questions concluded, even as between them and the defendants, by an admission made in their bill for the purposes of this case, that the final

certificates and final receipts held by the respective defendants will entitle them to the lands they claim but for the "vested" rights acquired by the railroad company in virtue of the definite location of its road. The court should not assume that they are embraced by the act, in order simply that it may have an opportunity, as between the present parties, to decide a question of law, which cannot appropriately arise until at least all the facts are ascertained by the Land Department and final action is taken under the statute of 1898. Although it may be true, as alleged in the bill, that the defendants, not holding patents, have received and hold final certificates or final receipts, and that, so far as they are concerned, nothing more remains to be done in the Department except to issue patents, yet it is in the power of the Department, even after decree here, in this suit, to reopen the case as to each defendant of that class, and, sufficient grounds existing therefor, recall or cancel such certificates or receipts. The whole matter, in respect of the lands in dispute, is yet in the hands of the Department undisposed of finally under the act of 1898. Congress intended that the Department should, within the limit and according to the rules prescribed by the act of 1898, settle the disputes that had arisen between the railroad grantee and settlers, although, after the matter has passed beyond the jurisdiction of the Department, such settlements may become the subject of judicial inquiry for the protection of the rights of parties against any error of law committed by the Department.

Those views are in entire accord with the former decisions of this court. In *Johnson* v. *Towsley*, 13 Wall. 72, 87, it was said: "This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the Government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the

United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, *after the title had passed from the Government*, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another." So, in *Marquez* v. *Frisbie*, 101 U. S. 473, 475: "We have repeatedly held that the courts will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. . . . After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. . . . We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States." What was said in the case just cited as to the power of the court to interfere, in certain cases, in advance of the issuing of the patent, was no doubt in the mind of the Circuit Court when, in its opinion in this case, it said, 110 Fed. Rep. 465, 472: "It is unnecessary to decide whether a case may not arise when, even while the disputed question as to the rights of contesting parties to a tract of public land is pending or cognizable before the Land Department, a court of equity may properly interfere, by injunction at the suit of one of the claimants, to prevent the other claimant from despoiling the land by waste, and appropriating its substantial value, by denuding it of all its merchantable timber, before any final decision upon the disputed claims by the Land Department, which is only rendered by issuing the patent."

So, again, in *United States* v. *Schurz*, 102 U. S. 378, 395: "The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules

and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands. Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizens. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere." As late as *Bockfinger* v. *Foster*, 190 U. S. 116, 126, we reaffirmed the principle, "that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States."

These principles are applicable to the particular scheme devised by the act of 1898 in reference to the lands in dispute. When the Land Department shall have done all that it can do in execution of the act of Congress, as to any particular lands in dispute, it will be time enough for interested private parties claiming an interest in them to invoke the aid of the courts for the determination of such questions of law as may arise out of the action of the Department. It is true that no order is asked here that will directly or in terms operate upon the Land Department. But a decree is asked, as between the parties now before the court, which must necessarily control or affect the action of the Department in respect of matters committed to it by Congress. Such interference by the court, although between private claimants only, would be in-

appropriate, especially as to lands covered by the act of 1898.

What has been said is peculiarly applicable to the unpatented lands in dispute. It is equally applicable to lands patented both before and after the passage of the act, if such lands are *in dispute* and *belong to either of the classes described in the act of 1898*. We agree with the Circuit Court that the act "gives the option to keep or relinquish the disputed land to the individual claimant in every instance. If he elects to retain that land, it is to be listed by the Secretary in lists to be furnished to the railroad claimant, who must relinquish, and whose consent to this was given by the acceptance of the act." In case of such relinquishment by the railroad company, it acquires a right to select other lands in place of those retained by the individual claimant. If the individual claimant, having a patent, elects to surrender his right, then he must reconvey to the United States, and will then be entitled to select other lands in lieu of those surrendered. So that the statute embraces both patented and unpatented lands, in respect of which the railroad company or its successor in interest claims that a right thereto attached by the definite location of its road or by selection, provided they are also such lands as were originally "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department." The duty of a court of equity not to interfere with parties in the prosecution of their rights under the act, whereby the execution of its provisions in advance of final action by the Department would be embarrassed by judicial decision, is quite as imperative in cases of the patented lands in dispute as in the cases of unpatented lands. This view is not at all in conflict with those cases in which it has been held that after a patent issued for public lands the only remedy for one who claims the land, as against the patentee, is to bring a suit against the person holding the patent, and obtain a decree de-

claring the patentee a trustee for the party suing. This general principle does not apply to cases embraced by the act of 1898. That act is peculiar in its provisions, and contemplates that the individual claimant of one of the classes described in it may hold the land patented to him, if he elects to retain it, and that the railroad grantee or its successor in interest can be made whole by taking lieu lands in place of those claimed in virtue of definite location or selection.

For the reasons stated, neither the claim of vested rights in behalf of the railroad grantee, nor the contention that the lands in dispute, having been sold to the plaintiffs, were not for that reason embraced by the act of 1898, furnishes any ground for interference by a court of equity or for the granting of the relief asked.

This conclusion is fortified, if not absolutely demanded, by another consideration, namely, that no title to indemnity lands is vested until a selection be made by which they are definitely ascertained, and the selection made *approved by the Secretary of the Interior*. This principle is firmly established. A full statement of it is found in *Wisconsin Central R. R.* v. *Price County*, 133 U. S. 496, 511. The court there said: "He [the Secretary] was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the Government, or whether any preëmption or homestead rights had attached before the line of the road was definitely fixed. . . . *Until the selections were approved* there were no selections in fact, only preliminary proceedings taken for that purpose; *and the indemnity lands remained unaffected in their title.* Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the

property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts." In *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42, 57, 58, it was said: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee, and approved by the Secretary of the Interior." And in *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 593, the court said: "Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the Government." To the same effect are *Sioux City &c. Railroad* v. *Chicago, Milwaukee &c. Railway*, 117 U. S. 406, 408; *United States* v. *Missouri &c. Railway*, 141 U. S. 358, 374; *Brown* v. *Hitchcock*, 173 U. S. 473, 479; *Kansas Pacific Railroad* v. *Atchison &c. Railroad*, 112 U. S. 414, 421; *Barney* v. *Winona & St. Peter Railway*, 117 U. S. 228, 232; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *St. Paul &c. Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720, 731; *Cedar Rapids & Missouri River Railroad* v. *Herring*, 110 U. S. 27.

Now, the lands here in dispute and claimed by the plaintiffs as grantees of the Northern Pacific Railway Company (the alleged successor in interest of the Northern Pacific Railroad Company) are lands admittedly within indemnity, as distinguished from granted or place, limits. The mere filing of lists of selections, after the acceptance of the map of definite location of the railroad line between Duluth and Ashland, gave the company no such title as could be enforced by the courts in a suit between private parties. It is true the Government was under a promise to give the railroad company lands in the indemnity limits to supply losses in place limits. But, as adjudged in the above cases, that promise passed no title. The promise will no doubt be fulfilled by the Govern-

ment in due time, and in its own way. The selections not having been approved by the Secretary, the title remains in the Government. So that the plaintiffs, having no greater rights than those of the railroad grantee or its successor, has no such interest in the particular lands, specified in the railroad company's lists of unapproved selection, as entitles it, while the title remains in the United States, and while these lands are being administered by the Land Department, to ask a court of equity to decide, as between them and the defendants, that the latter could not by any entry or purchase acquire an interest after the acceptance by the Secretary of the railroad's map of definite location.

But it is suggested that the final action of the Department may be indefinitely postponed, to the great injury of the railroad grantee and those claiming under it. Delay in such matters was a contingency which the alleged successor in interest of the railroad grantee must have taken into account when accepting the act and assenting to the plan of settlement embodied in it. The Land Department was not required to complete its administration of the statute within any designated time. The act, upon its face, directs that the required lists be prepared and delivered to the railroad company "as soon as conveniently may be done." It cannot be assumed upon this record that the Department has not progressed with the work of administration as rapidly as all the circumstances and its convenience permitted. Even if the fact be otherwise, it is not for a court of equity, by its decree to decide, in the first instance, that the selections made by the railroad company of lieu lands shall be approved by the Secretary, or to decide what lands should be on the lists required to be furnished to the railroad granted under the act of 1898; or to control directly or indirectly the work which Congress, with the assent of the railroad grantee, has committed to one of the Departments of the Government, or by an order interfere with the prosecution by the defendants of their claims under the act of 1898.

We are of opinion that the bill should have been dismissed upon the ground that a court of equity should not, in advance of the final action by the Secretary of the Interior in respect of lands embraced by the act of 1898, interfere with the regular and orderly administration of its provisions by means of a decree directed against claimants under that act. And without now expressing any opinion as to what questions may be raised by a claimant after such final action by the Land Department under that act, we adjudge that such dismissal must be without prejudice to any suit that may, according to established principles, be rightfully instituted by a claimant after the jurisdiction of the Department in respect of any particular lands has ceased. Thus modified, the decree of the Circuit Court must be affirmed.

It is so ordered.

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

CITY OF SAN JUAN *v.* ST. JOHN'S GAS COMPANY, LIMITED.

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

No. 41. Argued November 3, 1904.—Decided December 12, 1904.

Under both the common and the civil law, in the absence of a stipulation to the contrary, the character of the money current at the time fixed for performance of, and not at the time of making, a contract is the medium in which payment may be made.

Where there has been a *bona fide* dispute as to the medium of payment under a contract and an agreement is finally reached that a payment in one medium shall extinguish a larger amount in another medium, the payment is a complete accord and satisfaction and the rule that a less

sum although accepted in full satisfaction of a larger liquidated amount is not binding as to the excess for want of consideration is inapplicable.

THE gas company, defendant in error, an English corporation, sued the city of San Juan, the plaintiff in error, to recover $14,600.60, alleged to be due for services in lighting 485 street lamps from November, 1899, to September 16, 1900. Annexed to the petition was an account showing the items from which the balance resulted. The city generally denied, and pleaded that under the contract for lighting it had at various times imposed fines upon the company for neglect of its contract duty, which fines were a set-off, and extinguished the sum sued for. A statement of account was also filed by the city, showing the alleged set-off. Both the accounts credited the gas company for lighting with $15,125.70. In the account of the gas company that company credited itself with several small items for labor and materials supplied to and materials appropriated by the city, aggregating $246.42, and for interest calculated at twelve per cent up to September 16, 1901, the items in question and the interest amounting to $2,215.96, making the total credited to the company $17,588.08. These sums were not in the account of the city. Whilst the credit items in both accounts, therefore, agreed except as above stated, there was this further difference: The account of the gas company stated that the sums to its credit were payable in gold or United States money; whilst the account of the city stated such items as payable in Porto Rican currency, declared to be worth forty per cent less than United States gold or currency. The gas company debited itself with various payments made to it by the city on account of the services rendered and for the sum of a certain ground rent, all amounting to $2,987.42, leaving in its favor the balance sued for. The city's account, whilst debiting the company with payments in United States gold to the amount stated in the gas company's account, treated the debt as being due in Porto Rican currency, and figured the payments in gold as extinguishing a larger amount by forty per cent than the face value

of the gold. In addition the gas company was debited with certain fines imposed and other charges, and was moreover debited in Porto Rican money with two sums aggregating $8,836.88, amounting, if paid in gold, to $5,332.13. These two debits, it was recited in the account, were the sums in Porto Rican money or its equivalent in gold, which the city was bound to pay to the firm of Mullenhoff & Korber, to which firm the gas company, with the consent of the city, had transferred a portion of its claims against the city in Porto Rican money, to be paid in its equivalent in gold. By the result of the debits against the gas company the items credited to it were extinguished and the account balanced. Thus the substantial difference between the two accounts arose from the fact that one stated the debt to be payable in gold or United States money, the other treated it as payable in Porto Rican currency.

Subsequently the city pleaded that it had paid to Mullenhoff & Korber the sum of $5,196.80 in United States gold, and was entitled to due credit therefor, and it was thereafter agreed between counsel that this amount had been paid under the transfer in question. As will hereafter appear, $4,337.32 of the sum was paid as the equivalent of $7,228.20 in Porto Rican currency, the amount due for street lighting up to June 1, 1900, if estimated in Porto Rican money, while the balance of $859.48 was paid as satisfying the charge made for street lighting in the month of June, 1900, also consisting of a larger sum in Porto Rican money.

At the trial the undisputed proof showed that in 1875 the city made a contract, to last for twenty-five years, with one Steinacher for the lighting of the city, which contract, about 1878, was assigned to the gas company; that shortly after there was a difference between the parties as to whether the sums due under the contract were payable in Porto Rican money or in current foreign money. As a result, all the payments up to and exclusive of the items embraced in the suit were received by the gas company, under protest, in Porto Rican currency. So far as any payments made on account of the

items embraced in the suit and stated in both accounts, it was undisputedly shown that they were made in United States gold. There was proof tending to show that the city in making them insisted that the gold should extinguish its equivalent amount in Porto Rican currency, whilst the company claimed that the payments should only extinguish a sum equal to the face value of the United States gold.

Concerning the transfer to the firm of Mullenhoff & Korber, and the payment made by the city to that firm, it was indisputably shown as follows: That the gas company, being in want of funds, had agreed to transfer to the firm a given portion of its claim, and applied to the city to recognize the assignment and to pay to the transferees the sum assigned, and that action was taken on this request by the city and was accepted in writing by Scott, representing the gas company, as follows:

"I, Ramon Negron Flores, secretary of the city council of the city of San Juan, hereby certify, that at the meeting held by the city council of San Juan, on the eighteenth day of this month, the following resolution was passed:

"20.—The president of the city council declared that Mr. Scott, the contractor of the public lighting for the city, and Mr. Korber, a member of the firm of Mullenhoff and Korber of this city had called on his office and stated that the amount of seven thousand two hundred and twenty-eight pesos and eighty-seven cents, Porto Rican currency, total amount of the credit due to Mr. Scott, on account of his services as contractor from November of the year one thousand eight hundred ninety-nine, to last May, being deducted the amounts already collected by the said contractor, should be delivered to the above said firm, to the credit of which Mr. Scott wishes this amount to be passed.

"The city council agreed with the declarations of the president, and passed the resolution considering the said balance of seven thousand two hundred and twenty-eight pesos with eighty cents equivalent of four thousand three hundred and

thirty-seven dollars and thirty-two cents in favor of the firm of Mullenhoff & Korber, being therefore the municipal corporation relieved from any compromise with Mr Scott concerning the said amount, without any prejudice to the resolutions to be passed some time in the future, about the claims previously filed by the said contractor.

"And to begin the respective proceedings, I write and sign this declaration in San Juan of Puerto Rico this twenty-second day of June of the year one thousand nine hundred.

(Signed) R. NEGRON.

"On twenty-second June, being present Mr. Scott and Mr. Korber, the latter acting as representative of the firm, of which he is a partner, I notified them the above resolution, and they affixed their signature as a proof of their acquiescence to the same, declaring at the same time, that the amount of the account of the month of June of this year, should be recognized as due to the same firm, to which the said amount must be paid. I certify it.

(Signed) R. NEGRON.
(Signed) MULLENHOFF & KORBER.
(Signed.) L. A. SCOTT.

SAN JUAN, June 19th, 1900.

Let it be done. The Mayor, EGOZCUE."

There was testimony, admitted without objection, tending to show that at the time the city accepted this transfer it was understood that the reservation made in the written agreement related only to fines which it was contended the city had unjustly imposed on the company. The court rejected the offer of the city to prove that the parties, by their conduct prior to the period covered by the items sued for, had interpreted the contract as meaning that the payments were to be made in Porto Rican money and not otherwise. The court also refused to instruct, at the request of the city, that the contract was payable in Porto Rican money, and charged that

it provided for payment in foreign money, exclusive of Spanish gold, which was current in the island at the time the contract was made. The court further instructed that the payments made by the city to Mullenhoff & Korber in gold should be debited to the city at the face value of those payments, unless the jury found that the minds of the parties had met on a new contract to substitute Porto Rican currency for the foreign current money stipulated by the contract. The court, moreover, refused the request of the city to charge that, if at the time of the transfer to Mullenhoff & Korber, there was a compromise entered into between the parties by which the payment to the firm of a given amount in United States currency should extinguish a larger amount of the debt due the company in Porto Rican money, that the parties were bound thereby, as to such payment. Besides, the jury were instructed that, as there was no proof concerning the fines imposed by the city upon the company as stated in the account of the city, such items must be disregarded, and that interest, as calculated in the account of the city not being exigible under the local law, must also be disregarded.

There was a verdict and judgment thereon against the city for $8,761.35, and this writ of error was prosecuted.

Submitted by *Mr. N. B. K. Pettingill* for plaintiff in error.

Mr. Frederic D. McKenney, with whom *Mr. Francis H. Dexter* and *Mr. John Spalding Flannery* were on the brief, for defendant in error:

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

In order to come to the principal controversy covered by the assignments of error we dispose of certain contentions which we deem of minor importance. We think the court was right in instructing the jury that it must disregard the

items as to fines charged by the city against the gas company, because no proof was offered on the subject. Whilst it is true, as asserted in the argument, that some reference was made to such fines in the testimony of one or more of the witnesses, such reference in no sense tended to establish that the fines had been legally imposed. As to the assignment of error relating to the refusal of the court to allow testimony for the purpose of showing that even if, under the contract, payment in foreign current money was required, the contract was tacitly modified, we deem it unnecessary to express an opinion for the following reasons: The record shows that subsequent to the ruling complained of, without objection, testimony was admitted establishing that although all the payments made up to the first of the items embraced in the claim in suit, were made by the city to the gas company in Porto Rican money, nevertheless that such payments were only received by the gas company under protest, asserting its right to be paid in foreign current money. However conclusive on the gas company may have been the receipt by it of payment in a different medium from that which it asserted the contract required, the fact of the protest operated to prevent the inference that the medium actually received was admitted to be the one in which future payments should be made.

With the questions just referred to out of the way, it is apparent from the statement which we have made of the case that the record requires us to decide only two questions, first, In what money were the sums due under the contract payable? and, second, The effect of the agreement concerning payment made by the city to Mullenhoff & Korber.

1st. *In what currency were the sums due under the contract payable?*

The contract, of which only a translation is in the record, was passed before a notary, and is voluminous, containing in minute detail a recital of all the occurrences which took place from the date of the first steps taken to make a contract and its consummation.

Excluding irrelevant details, it appears as follows:

Some time in 1874 the city advertised for bids for a contract for lighting. Proposals were received from a Mr. Steinacher and Mr. Olney. Steinacher, whilst proposing to bind himself to light lamps for three dollars monthly for each lamp, suggested that the city modify its request for proposals in several particulars, one of which was that there should be included in the contract the purchase by the contractor of gas works then owned by the city. This suggestion was accepted, and preparatory to making a call for bids, after obtaining the authority of the provincial deputation of Porto Rico, the city directed that the gas works be appraised by certain city officials. This appraisement was made as follows:

Recapitulation:	Pesetas.
Value of the buildings	19,176.25
Fixed and loose materials in the gas works	48,908.85
Fixed materials in the city	10,624.00
Total amount	78,709.10

The present appraisement amounting to 78,709.10 pesetas, or $31,741.82 of the currency in commerce.

PORTO RICO, *26th of May*, 1875.

The municipal architect.

(Signed) DOMINGO SESMERO.

The city thereupon called for new proposals. Among the many conditions exacted were, first, that the bidder should agree to light street lamps at $3 monthly for each lamp, and that payment for the same "will be made in the circulating foreign money in commerce for the value that it is received without any premium that will equalize it to the Spanish official current money;" that he should buy the gas works, appraised, as we have above stated, at $78,709.10, Porto Rico money, at its equivalent in foreign currency, $31,741.82; that the bidder should furnish a guarantee of $6,000 in cash or a bond for

$9,000, to be secured by first mortgage on a house in the city, satisfactory to the municipality. Many details were provided in the conditions; as to the manner in which the contractor should perform his duties; as to fines to be imposed by the city for neglect in the quality and character of the light furnished, and for various other delinquencies, and it was also provided "the penalties for faults in the service and supply of gas to the public will be imposed by the alcalde without appeal."

Steinacher was the only bidder in answer to this call for proposals. He offered "to take charge of the city service for the amount of $3 currency for each lamp," and to buy the buildings and apparatus, etc., for the sum of $22,000 in currency, instead of $31,741.82, as required by the requests for bids made by the city. In his proposition, moreover, Steinacher tendered two houses, stating the fact to be that one of them was encumbered by a prior mortgage in favor of the municipality, which he, Steinacher, had given to guarantee a prior contract existing between himself and the municipality. In addition, his bid suggested various modifications in the administrative provisions enumerated by the city in its conditions. The bid, not being in accord with the proposition submitted by the city, was rejected. Negotiations then ensued, the result of which was that the city yielded as to the administrative provisions, and Steinacher yielded as to the price to be paid for the gas works, it being recited in the proceedings of the city on the subject that, in order to terminate the difficulties, "Mr. Steinacher expressed himself disposed to the acquisition of the said buildings, etc., as published in the Official Gazette of the 8th of June last, for the amount of thirty-one thousand seven hundred and forty-one dollars 82 cents in currency, and to take under his charge the public light at three dollars monthly for each lamp, at same currency according to the price published." The houses tendered to secure the bond were accepted by the city, and in order to give the city a first mortgage a liquidation was had between Stein-

acher and the city under the prior contract, and by this liquidation it was established that Steinacher owed the city $203 in "foreign currency," which he paid. To ascertain whether the value of the houses was equal to the requirements of the city, they were appraised by the city officials in Porto Rican money, and this sum was reduced to foreign currency, and as the amount in foreign currency equaled the $9,000 required by the conditions of the city, the houses were accepted and a new mortgage for that amount was given. Under these proposals and acceptance the contract was executed, conforming in all respects to the proposals and bids as modified by the proceedings which we have narrated.

The contention that the $3 per month for lighting street lamps was payable in Porto Rican money is based on the fact that sometimes in the contract the sum to be paid is referred to as in currency without any qualification. The arguments would have cogency if the passages in the contract relied upon stood alone, but its unsoundness becomes apparent by a consideration of the context of the contract. The estimate of the property to be sold in Porto Rican money and its liquidation in foreign currency; the terms of the bid; the proposition of Steinacher, which was accepted, to pay for the gas works at the sum of the foreign current money to which the Porto Rican money was reduced, and to do the lighting at $3 per lamp *in the same currency*, the action of the city concerning the liquidation of the prior account, and the mortgage upon the house, all demonstrate that both the proposals of the city, the acceptance by Steinacher and the contract fixed current foreign money, exclusive of Spanish gold, as the medium in which the service for lighting the street lamps was to be paid. The court, therefore, was right in its instruction as to the medium of payment required by the contract. We find, however, nothing in the contract to support the construction that it required the payment to be made in foreign current money circulating in the island at the time the contract was made, instead of money of that character circulating at the time

the payments were to be made. The general rule, under both the common and the civil law, is that in the absence of a stipulation to the contrary, the character of money which is current at the time fixed for performance of a contract is the medium in which payments may be made. *Butler* v. *Horwitz*, 7 Wall. 258; *Willard* v. *Tayloe*, 8 Wall. 557; *Trebilcock* v. *Wilson*, 12 Wall. 687; Commercial Code of Porto Rico, Art. 312; Spanish Civil Code of Porto Rico, Arts. 1091, 1157, 1170; Code Nap. Art. 1246; Aubrey & Rau. vol. 4, p. 158; Mourlon, vol. 2, p. 749.

There was, therefore, error in instructing that the time of making the contract was to be alone considered in determining the foreign current money for which the contract provided. We think, however, such error was in no sense prejudicial. This follows, because it was conceded that if foreign current money was required by the contract, money of the United States current at the time the contract was made was within the contemplation of the parties, and that such money was also current in the island at the time when performance was due. From this it results that the rights of the parties were in no way affected by the erroneous ruling.

2d. *The effect of the agreement concerning the payment made by the city to Mullenhoff & Korber.*

On the face of the written agreement between the city and the gas company it undoubtedly appears that a stated sum of money, to be paid in United States currency, was to extinguish a larger sum in Porto Rican money.

As we have seen, there was testimony tending to show, and none tending otherwise, that the reservation in the written document concerning "claims previously filed by the said contractor," and which were to be "passed some time in the future," solely related to claims for fines which the city had assessed against the gas company and the justice of which the company disputed. The city asked the court to instruct that if it was found that at the time of the agreement it was stipulated by way of compromise that the larger sum owing

at that time should be extinguished by the payment of the lesser amount, the parties were bound. This request was refused and excepted to. The court, in its general charge, in the fullest manner instructed the jury that, as the medium of payment required by the contract was foreign current money, payment in that money extinguished simply the amount paid in foreign money, unless it was found that the minds of the parties had met on an agreement engendering an entirely new contract substituting Porto Rican money for foreign currency.

It is urged by the city that error to its prejudice resulted from refusing to give the requested instruction. To sustain this proposition the doctrine is invoked that where one receives in payment a different thing or medium from that called for in the contract, such receipt is binding. Undoubtedly the general rule obtains and is based on the premise that the discharge of a contract is a different thing from that for which the contract provides, necessarily is an accord and satisfaction as to the particular payment concerning which the different thing is received. *Sheehy* v. *Mandeville*, 6 Cranch, 253, 263; *Very* v. *Levy*, 13 How. 345, 357; *Bull* v. *Bull*, 43 Connecticut, 455; *Neal* v. *Handley*, 116 Illinois, 418; *Dimmick* v. *Sexton*, 125 Pa. St. 334.

True also it is that it has been settled by this court, *Savage* v. *United States*, 92 U. S. 382, that this doctrine is applicable to the receipt under protest in discharge of a particular payment of a different money medium from that which was required by the contract. Whilst we have not been referred to any Spanish authority showing that these principles obtained under the law in force in Porto Rico, as the doctrine rests upon principles known to the Roman law (L. 17, C. De solut), enforced under the Code Napoleon (Journal de Palais Rèpertoire, v. 10, verbo paiement, p. 10, No. 117; Toulier, t. 12, p. 355; Duranton, t. 12, Nos. 79 and 80), we cannot hesitate to conclude that the doctrine in question prevailed also in the Spanish civil law in force in Porto Rico. Whether it is applicable to the facts of this case is, then, the question.

Now, whilst it may be at once conceded that the doctrine in question is applicable to the payments made in Porto Rican money, before the date of the first item sued for, it is equally clear that it cannot be applied to the payments thereafter made, including those to Mullenhoff & Korber, since they were made in United States currency. The contention that these payments in such money extinguished a larger sum than the par value of the money paid reduces itself to this: that a larger sum was satisfied by the payment of a lesser sum, because there was an agreement to that effect. The gas company in effect insists that this cannot be sustained, because of the well established rule, "that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration." *Chicago, M. & St. P. R. Co.* v. *Clark*, 178 U. S. 353, 364, and authorities there cited.

Conceding, without so deciding, that such rule was controlling in Porto Rico, we think it is not applicable to the case in hand. As pointed out by this court in the case just previously cited, the rule in question is subject, among others, to the well established exception that it does not apply where, at the time of the agreement, there was a dispute between the parties, the subject matter of which dispute is embraced in the agreement to extinguish a greater by a less amount. True it is, as pointed out in *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, it must appear that the alleged dispute really existed and did not arise merely from an arbitrary denial by one party of an obligation which was obviously due. Despite the construction which we have given the contract, we think it is quite clear that the proof established that there was a *bona fide* dispute in this case. As we have seen, from the very inception of the contract the parties differed as to the medium of payment, the one—the city—insisting that it was Porto Rican money; the other—the gas company—that it was foreign current money. During a period of fully twenty years this controversy continued, and in every instance the gas

company, although protesting, accepted the city's view of the contract, and by taking a different medium bound itself as to those payments despite its protest. When the period arrived when the company was no longer willing to so act and stood upon its rights as it understood them, naturally the city stood upon its asserted rights, and thus the parties were at arm's length disputing their respective rights. If there had been no agreement, the solution would have required judicial action. When in view of this dispute an agreement was reached that the payment should be made in United States currency, and that the payment should extinguish a larger amount estimated in Porto Rican currency, there was necessarily a compromise and settlement as to that payment which put the transaction so settled exactly in the position which had resulted from the action of the parties concerning the payments made during the preceding period of more than twenty years.

It follows from the foregoing that the court below erred to the prejudice of the city in refusing the instruction asked by it as to the result of the compromise, and that this error was not cured by the general charge, which instructed the jury that the compromise evidenced by the agreement must be treated as inefficacious as to the particular items to which it related, unless it was found that the minds of the parties had met on an entirely new and independent contract.

The judgment of the court below is reversed, and the cause is remanded with directions to set aside the judgment, and grant a new trial.

Reversed.

UNITED STATES *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

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

No. 54. Submitted November 4, 1904.—Decided December 12, 1904.

Where it does not appear that one claiming to have entered land prior to its withdrawal under a land grant act had done all that was possible to perfect his entry, and had either taken possession or otherwise not acquiesced in the decision, the attempted entry is not sufficient to take the land from jurisdiction of the Secretary of the Interior so as to prevent him from certifying it under the grant as unappropriated lands of the United States.

Under the acts of 1887, 24 Stat. 556, and 1896, 29 Stat. 42, the title of one who holds under the railway company as a *bona fide* purchaser and is in actual ignorance of any defect in the company's title, will not be affected by any constructive notice of such defect with which a purchaser might be chargeable.

Where an entry had been abandoned prior to certification of indemnity lands by the Secretary of the Interior to a State for the benefit of a railroad company under a land grant, the land is unappropriated land of the United States and can be certified under the grant, and the certification will not be set aside in favor of one who attempts to enter the land as a homesteader after the lands have been selected by the railroad company to make up a deficiency in place lands.

THE United States on the sixth day of March, 1893, filed this bill in the Circuit Court of the United States for the District of Minnesota for the purpose of setting aside the certification, under the land grant of Congress, 14 Stat. 87, made by the Secretary of the Interior, of the land described in the bill, to the State of Minnesota, for the benefit of the railroad company, and also to set aside the conveyance thereof by the State to the railroad company, and by the company to one of the individual defendants. A supplemental bill was filed, by leave, March 4, 1901, bringing in by service of the subpœna other individual defendants.

The suit was brought under and pursuant to the act of Congress of March 3, 1887, 24 Stat. 556, entitled "An act to provide for the adjustment of land grants made by Congress

to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes."

Upon trial in the Circuit Court the bill was dismissed, and the decree of dismissal was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, 116 Fed. Rep. 969, and from that decree of affirmance the Government has appealed here.

The facts upon which the controversy arose are, in substance, as follows: On the fourth day of July, 1866, Congress passed an act making an additional grant of lands to the State of Minnesota, 14 Stat. 87, to aid in the construction of railroads in that State. The Southern Minnesota Railroad Company was at the time of the passage of the act of Congress a corporation organized under the laws of Minnesota, with the power to construct a line of railroad as mentioned in that act. The legislature of Minnesota, on the twenty-fifth day of February, 1867, transferred the land granted to it by the act of Congress to the railroad company, subject to the provisions of that act and also of the state statute.

Among the lands thus transferred was a lot eighty acres in extent, in Faribault County, Minnesota, being the property in dispute in this suit. The land was within the indemnity limits of the grant by Congress to the State, as determined by the map of definite location of the railroad, which became effective February 25, 1867. The deficiency in what are termed the "place" lands was largely in excess of eighty acres. On the twenty-ninth day of November, 1870, the Southern Minnesota Railroad Company selected this tract in section 35 in lieu of part of the land lost in the granted limits, and the land was certified to the State of Minnesota by the Secretary of the Interior, March 25, 1871, for the benefit of the railroad company, and on the eighth day of August, 1871, the State of Minnesota conveyed it by deed to the railroad company. In March, 1868, the company had mortgaged all of its property, including the land granted under the act of Congress and all subsequently acquired property, to secure

the payment of its bonds. This mortgage was foreclosed and the property sold and conveyed to a new corporation by the name of the Southern Minnesota Railway Company, and the land was conveyed to that company. On the fifth day of January, 1885, the railway company, by contract in writing, agreed to sell the land in dispute to one A. Boyeson for the sum named in that contract. Boyeson assigned his interest in the contract, on the sixth of January, to Fredericksen, who, on the first day of April, 1885, assigned it to the defendant, Thomas S. Thompson, and, in turn, on the third day of February, 1888, the latter assigned it to Ericksrud, who paid the balance due upon the contract and received the warranty deed for the land from the railway company on the twentieth day of March, 1888.

Ericksrud died intestate on March 27, 1888, and on November 6, 1888, the land was decreed by the probate court to be the property of the widow and heirs at law of Ericksrud, and they remained in possession, and on May 24, 1899, these heirs at law still being in possession, conveyed the same to the defendant Woodwick for the sum of two thousand dollars cash. This is the title of record coming from the United States to the State, thence to the railroad company and, by mesne conveyances, to the defendant Woodwick, and there was nothing of record showing that any other person was entitled to the land at the time when Woodwick paid the two thousand dollars to the heirs of Ericksrud and took the deed therefor. The defendant Donovan, however, lays claim to the land in question pursuant to the facts now to be stated.

Prior to the passage of the granting act of Congress, above referred to, one Luman Barclay had, on the twenty-first day of June, 1866, entered this land in controversy, and also the eighty acres in section 26, adjoining, as a homestead. In the following year (1867) Barclay abandoned the land and went to Canada. Some time after his departure, and in the same year (1867), Donovan, the defendant, sought to acquire a homestead on Government land. He examined the land for

which Barclay had made his entry, and decided to enter it as a homestead. He went to the United States local land office for the purpose and was informed by the register of the land office that he could not make the entry until Barclay's entry was canceled. He was also informed that if he wished to make a claim that Barclay had abandoned his interest, he should publish notice of the time and place where he would make proof upon that matter. He published a notice accordingly, for three weeks, and paid nine dollars as the cost thereof, and in the fore part of August, 1867, made proof that Barclay had abandoned his homestead claim. Donovan insists that he was given to understand that he could enter the land as a homestead, as soon as the local land office received notice from the General Land Office at Washington that Barclay's entry was canceled. He thereupon made one application to enter both tracts of land—the eighty acres in section 26 and the eighty-acre tract in question in section 35, but left the date of application blank, because he could make no entry for the lot in section 35 until Barclay's entry had been canceled. He did this, as he or his witness Bullis said, to head off any other applicant for the land, and he left the application with the local land office. He then went into possession of section 26 and commenced the erection of a house thereon, and he says he commenced the cultivation of a small part of the tract in section 35. This was in the fall of 1867. The Barclay entry was duly canceled at Washington on the fourteenth of January, 1868, and notice thereafter given to the local land office, and Donovan was notified of the fact. On the sixth day of June, 1868, Donovan went to the local land office and applied to enter the two tracts of land. He was there informed that the odd-numbered sections within twenty miles of the road had been withdrawn from market, and that such withdrawal included the section in question, and that he could not, therefore, enter the eighty acres in section 35 as a part of his homestead.

Donovan acquiesced in this determination of the local land

office, and made his entry for the eighty acres in section 26. The old application for the two lots was destroyed and a new one made out for the lot in section 26. He thereafter used the land in section 35 in connection with his own in section 26, and cut grass upon and plowed some of it, but it does not appear that he laid any claim to it as land which he had attempted to enter and which had been improperly or wrongfully refused him. His house and other permanent improvements were on section 26. At the time he made proof (in 1875) for the eighty acres in section 26, Donovan says he offered to make proof also as to the land in section 35, but his offer was rejected because, among other reasons, he had not entered the land in that section. He has obtained his patent for the eighty acres in section 26.

On the twenty-sixth day of June, 1883, Donovan applied at the local land office to enter this tract of land in section 35 as an additional homestead, under the act of March 3, 1879, 20 Stat. 472, and the register certified that the application was for surveyed lands of the class the applicant was legally entitled to enter under the homestead act of 1862; in other words, unappropriated public lands of the United States. The application was rejected upon the ground that the land so applied for had been certified to the State of Minnesota for the benefit of the railroad company. Donovan appealed from this rejection to the Commissioner of the General Land Office, where, it is stated, the matter is still pending and undetermined.

In 1885 the defendant Thompson, an assignee of the contract made by the railway company with Boyesen, went into possession of the eighty acres in section 35, and ordered Donovan off the same, and Donovan left the land accordingly. After Thompson took possession of the land, April 1, 1885, Donovan, in the same year, commenced a suit in the District Court of Faribault County to obtain possession of the land, and on or about the twenty-fourth of March, 1887, the state court decided that Donovan had no title to the land or

right to the possession of the same, and that Thompson had the right to the possession thereof under the contract already mentioned. This judgment against him in the state court was never appealed from by Donovan, nor has it ever been vacated, modified or reversed. In 1888 Donovan applied to the Land Department at Washington for relief by reason of the act of Congress of March 3, 1887, heretofore referred to. In relation to that application the Commissioner of the General Land Office, on February 14, 1889, addressed a letter to the Secretary of the Interior, and therein spoke of Donovan's application for the institution of proceedings under that act of Congress, and said that Donovan had no title to the land, but he sent all the papers to the Secretary for review by him. On the first of April, 1889, the Secretary replied to the communication of the Commissioner of the General Land Office, and therein reversed his holding, and directed the latter to make a demand of the railway company for the reconveyance of the land, as provided for in the act. On the twelfth of April, 1890, the Commissioner sent a communication to the Secretary, informing him that a demand for the reconveyance of the land had been made April 9, 1889, upon the railroad company, and that no answer had been made, although more than a year had elapsed since the demand. On the sixteenth of April, 1890, the Secretary of the Interior transmitted the letter to the Attorney General with a request that suit might be instituted to have the certification of the land in question by the Land Department to the State of Minnesota set aside and canceled if, in the opinion of the Attorney General, the suit could be maintained. After waiting three years, and on the sixth of March, 1893, the United States filed its bill against the Chicago, Milwaukee and St. Paul Railway Company as successor in interest of the former companies, and also against the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson and C. C. Ericksrud. On August 11, 1894, the companies answered the bill. Donovan did not answer it until March 6, 1901, and then confessed the same,

and prayed that the relief asked for might be granted. On March 4, 1901, the United States filed a supplemental bill, wherein it was stated that no service had ever been made upon Thompson or Ericksrud, and that on June 24, 1899, the heirs of Ericksrud had joined in a deed conveying the land in question to Louis K. Woodwick. Process was prayed against the defendants, the heirs of Ericksrud, and also against Woodwick, and subpœnas were served on them, and on May 2, 1901, they answered the supplemental bill. A special examiner was appointed to take testimony, and on January 13, 1902, he submitted his report of the testimony taken in the suit, to the court.

Mr. Assistant Attorney General Purdy for the United States, appellant:

When the Government is a mere formal complainant in a suit, not for the purpose of asserting any legal right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the United States alone. *United States* v. *Beebe*, 127 U. S. 338.

The court below failed to give the proper effect to the act of March 3, 1887, 24 Stat. 556. As to this statute, see *United States* v. *Winona &c. R. R. Co.*, 67 Fed. Rep. 969; *Ore. & Cal. R. R. Co.* v. *United States*, 189 U. S. 103. If there were any laches they were laches of officers of the United States and not of Donovan. *Kelly* v. *Boettcher*, 85 Fed. Rep. 55, 62.

The lands in the indemnity limits of the grant were not withdrawn from market on September 10, 1866, and the cancelation of Barkley's entry on January 14, 1868, restored the 80-acre tract in controversy to market, and subject to entry by the first legal applicant. Where a tract of land in the place or granted limits is subject to a homestead or pre-

emption claim at the date of the grant, it is thereby forever excepted from the grant. *Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S. 535. Where land along the indemnity limits of a railroad grant is subject to a homestead or preemption claim at the time of the grant, which claim is afterward canceled, the land then becomes subject to selection by the railroad company or any other legal applicant. *Ryan* v. *Railroad Co.*, 99 U. S. 382; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 511; *Hewitt* v. *Schultz*, 180 U. S. 139.

Where Congress provides for the withdrawal of lands from market, any withdrawal contrary to such provisions is absolutely void. *Northern Pacific* v. *Davis*, 19 Land Decisions, 87; *Atl. & Pac. R. R. Co.*, 6 Land Decisions, 84, 87; *St. P., Minn. & Man. Ry. Co.* v. *Iverson*, 14 Land Decisions, 79.

Where a homestead or preëmption claim has attached to land, such land is thereby segregated from the public domain, and for the time being is withdrawn from the jurisdiction of the Secretary of the Interior and the Land Department, and so continues until the entry is canceled. *So. Pac. Railway Co.* v. *Bell*, 183 U. S. 675; *Ore. & Cal. R. R. Co.* v. *United States*, 189 U. S. 103.

Donovan's application to the local land office to enter the land was, under the facts in the case, equivalent to a legal entry.

Where a party applies to enter, under the homestead or preëmption laws of the United States, a tract of land which is subject to be so taken, and he is qualified to thus acquire the same, and his application is erroneously rejected by the Government officials, his right thereto attaches just the same as though his application had been allowed; and if he continues in possession and complies with the law so as to be entitled to a patent, he acquires a vested interest of which he cannot be deprived even by an act of Congress. *Shepley* v. *Cowan*, 91 U. S. 330; *Ard* v. *Brandon*, 156 U. S. 537, and cases cited; *Weeks* v. *Bridgman*, 159 U. S. 541; *Tarpey* v.

Madsen, 178 U. S. 215; *Goodale* v. *Olney*, 12 Land Dec. 324; *Coder* v. *Lotridge*, 12 Land Dec. 643.

As Donovan had complied with all the requirements of the law, including payment for the land, to entitle him to a certificate and patent for the same, he thereby acquired a vested interest in the land of which he could not be deprived by any act of Congress. *Gonzales* v. *French*, 164 U. S. 338, 346.

Where a party has paid for the land and has complied with the law for the acquisition of the same he thereby becomes the absolute owner, and may deal with the same as his own, and the same is subject to taxation, although he may not have received his patent therefor. In such case the Government merely holds the legal title in trust for him. *Carroll* v. *Safford*, 3 How. 441; *Astrom* v. *Hammond*, 3 McLean, 108; *Carroll* v. *Perry*, 4 McLean, 26; *Ross* v. *Supervisors &c.*, 12 Wisconsin, 38; *People* v. *Shearer*, 30 California, 645; *Newkirk* v. *Marshall*, 10 Pac. Rep. (Kan.) 571; *Hawley* v. *Diller*, 178 U. S. 476.

Donovan's entry and occupation of the lands in controversy and cultivation of the same up to 1871, with the purpose of entering the same as his homestead, had the legal effect of so withdrawing such lands that the officers of the Land Department had no authority to issue a certification to the State of Minnesota, and their acts in so doing with respect to this tract of land were void. *Doolan* v. *Carr*, 125 U. S. 618, 624, and cases cited.

A patent is but evidence of a grant, and the officer who issues the same acts ministerially and not judicially. *United States* v. *Stone*, 69 U. S. 525; *Hawley* v. *Diller*, 178 U. S. 476; *Newkirk* v. *Marshall*, 10 Pac. Rep. 571; *Burr* v. *Greeley*, 52 Fed. Rep. 926; *Weeks* v. *Bridgman*, 159 U. S. 541; *Gertgens* v. *O'Connor*, 191 U. S. 237.

As to who is a *bona fide* purchaser under the acts of 1887 and 1896, see *United States* v. *Winona &c. R. R. Co.*, 165 U. S. 463, 478; *Colo. Coal & I. Co.* v. *United States*, 123 U. S. 307, 313; *Murray* v. *Ballou*, 1 Johns. 565, and cases *supra*.

Mr. Burton Hanson and *Mr. W. H. Norris* for railway company, appellee:

Mr. Andrew C. Dunn for Woodwick and others, appellees:

The railway company has no proper relation to this suit; and no relation to the relief sought; it has no relation to the suit, except as having been mistakenly made defendant, and as having been as mistakenly joined in answer, as if properly impleaded.

The bill relates solely to one parcel of indemnity land and the cases cited as to the withdrawal of the Secretary being unauthorized are inapplicable. See *Military Reservation*, 6 Land. Dec. 18; *Woolsey* v. *Chapman*, 101 U. S. 768; *Wood* v. *Beach*, 156 U. S. 548; *Dunmeyer Case*, 113 U. S. 629; *Winona & St. Peters' Case*, 165 U. S. 463, 473.

Donovan's attempted entry was illegal. *Bullard* v. *Des Moines &c.*, 122 U. S. 167; *St. P. & P.* v. *Nor. Pac.*, 139 U. S. 1, 18; *United States* v. *Holmes*, 105 Fed. Rep. 41.

Even where the entryman goes on the public land in good faith this fact would not justify ignoring the clear rights of the railroad company under the land grant act. *Nor. Pac.* v. *Amacker*, 175 U. S. 564; *The Whitney Case*, 132 U. S. 364; *Norton* v. *Evans*, 82 Fed. Rep. 804; *Wagstaff* v. *Collins*, 97 Fed. Rep. 3.

The cancelation of the Barkley entry immediately made this tract selectable by the railroad company. *Ryan* v. *Railway Co.*, 99 U. S. 382, 388; *United States* v. *Burlington &c. R. R. Co.*, 98 U. S. 341; *Hahn* v. *United States*, 107 U. S. 402; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Philbrick*, 120 U. S. 62; *Burr* v. *Greeley*, 52 Fed. Rep. 926; *United States* v. *Railroad Co.*, 67 Fed. Rep. 948, 954.

As to Woodwick's good faith, see *Union Trust Co.* v. *So. Nav. Co.*, 130 U. S. 565; *Jorgenson* v. *M. & St. L. Ry. Co.*, 25 Minnesota, 206; *United States* v. *So. Pac. R. Co.*, 184 U. S. 49.

Where the United States is a mere formal complainant as a conduit for litigation for a private person it cannot extend

its immunity as a sovereign government to protect such individual. *Curtner* v. *United States*, 149 U. S. 662, 674; *United States* v. *Beebe*, 127 U. S. 338, 347; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 284; *United States* v. *Des Moines &c. Co.*, 142 U. S. 510, 538; *United States* v. *Bell Telephone Co.*, 167 U. S. 240, 265; *Moran* v. *Horsky*, 178 U. S. 205.

The court will administer the equities between Donovan and Woodwick and not permit the United States to protect Donovan and it will look back of the nominal and find the real parties. *New York* v. *Louisiana*, 108 U. S. 76.

Donovan, apart from the United States, has been guilty of laches himself. *St. P. &c. Ry. Co.* v. *Sage*, 44 Fed. Rep. 315. See Minnesota Statutes, §§ 5134, 5136, 5817, of 1894; ch. 68, March 9, 1874; § 1, ch. 75, Gen. Stat., 1866.

A party by mere settlement upon public lands with intention to obtain title to same under the preëmption laws, does not thereby acquire such vested interest in the premises as to deprive Congress of the power to dispose of the property, and notwithstanding the settlement Congress can reserve the lands from sale. *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77, 82.

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

The Attorney General contends that before the passage of the act of Congress granting the land (July 4, 1866) Barclay had made legal entry upon the books of the local land office of the land in question, under the homestead laws of Congress, and that such legal entry was in existence at the time of the passage of the act of Congress of July 4, 1866; that by reason of such entry the land was excepted from the grant under that act, and that when Barclay abandoned his homestead claim upon the land it immediately became public land of the United States, and did not then pass under the grant to the State pursuant to the act of July 4, 1866, and it was

therefore not legally withdrawn from market by any act of the Land Department, nor could it be certified to the State, and that the attempt to do so was not only erroneous, but absolutely void; that at the time when Donovan made application to enter the land, in June, 1868, it was part of the public lands of the United States, open to entry, and his application, although he had done all that he could, was wrongfully denied by the local land office; that thereafter the filing of the map of definite location by the railway company, and its selection of the land in question, and the certification of the land by the Secretary of the Interior to the State, and the conveyance by the State to the railway company, and the contract and conveyances following thereon, conveyed no interest in or title to the premises in question, but that they rightfully belonged to Donovan, and therefore the certification by the Land Department, etc., should be set aside, to the end that the land may be transferred to Donovan as demanded in the bill.

On the other hand, it is insisted on the part of the defendant Woodwick that the action of the Land Department officials in withdrawing the land in question from market was valid and within the jurisdiction of that department; that the selection of the land by the railway company was proper, as being within the indemnity limits of the grant by Congress, and that its certification by the Secretary of the Interior to the State was within the power of that officer, and the act was not, therefore, beyond his jurisdiction, and that his certification and the action of the State conveyed a good title, or, at any rate, that the defendant Woodwick was a *bona fide* purchaser of the land, and as such his rights were preserved under the act of March 3, 1887. 24 Stat. 556.

If Woodwick is protected under that act, as a purchaser in good faith, even against Donovan, it is unnecessary to pursue an inquiry as to the existence of any other defense. We are of opinion that Woodwick is protected under the fourth section of the act. The plain intent of that section

is, as stated by Mr. Justice Brewer in delivering the opinion of the court in *United States* v. *Winona &c. Railroad*, 165 U. S. 463, to secure one who in good faith and as an honest transaction purchases the land, and to leave to the Government a simple claim for money against the railroad. The justice said (pp. 480, 481):

"It will be observed that the technical term '*bona fide* purchaser' is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent.

" . . . These being the provisions of the act of 1887, the act of 1896, 29 Stat. 42, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has nevertheless purchased in good faith from the railroad company."

The counsel for the Government, while strenuously denying that the legal title to this land passed to the State of Minnesota, by virtue of the certification, in 1871, admits in his brief that if Woodwick bought the land as a *bona fide* purchaser in 1899, and acquired the legal title to the same, then at that present time not only was the right of the United States to recover the land defeated, but Donovan was precluded from thereafter asserting his claim to the land as against such *bona fide* purchaser. His denial that the legal title passed is based upon the contention that Donovan, before the year 1871, when the Secretary of the Interior certified this land to the State had, as stated by counsel, initiated proceedings to obtain this land in section 35 as a homestead, and had done all he could to make entry thereof, and had been in possession for three years before this certification, and that

prior to 1871 an initiatory title had passed from the United States to Donovan by reason of his possession and offer to enter the land, and his payment of the fees and expenses to the local land officers, so as to prevent the passage of the legal title to the State, by virtue of the certification referred to, which, by reason of the acts of Donovan, was rendered wholly void. It is also asserted that if the United States, in 1871, did retain title in itself, notwithstanding Donovan's occupation and cultivation of the land, yet such occupation and cultivation withdrew the land from the jurisdiction of the Land Department, so far as any right or power to issue a certification to the railroad company was concerned, just as effectually as though the land had been reserved or otherwise appropriated specifically by an act of Congress.

We think that in 1871, when the certification was made, jurisdiction over this land remained in the Land Department, to be exercised by the Secretary of the Interior, notwithstanding the acts of Donovan as shown by this record. It is shown by the testimony of Donovan himself and of his witness Bullis, putting it all together, that there never was, in fact, any entry of this land at the local land office, in the name of Donovan, before the certification in 1871. The facts as to what took place at that office in regard to the applications of Donovan in 1867 before the Barclay entry was canceled, and in June, 1868, when the entry was made for the lot in section 26, are set forth in the statement of facts herein, and need not be repeated. The statement shows no such facts as put Donovan in the place of one who, having done all he could to enter the land, had been refused such entry, but had nevertheless not acquiesced in such decision and had taken possession of it as a homestead. On the contrary, Donovan did acquiesce in that decision and amended his application.

There was no entry made on the books of the local land office for this land under the amended application, and the power of the Secretary of the Interior to make the certification, even if we assume that it was erroneously exercised,

was not an act which was beyond the jurisdiction of the Secretary. The legal title was thus transferred by the Government to the State, and at the most it was an erroneous certification within the meaning of the act of 1887. Although under such circumstances, if the certification were erroneous and might have been avoided and the land recovered back by the Government while in the hands of the railroad company, yet Woodwick, if a purchaser in good faith of the lands, was entitled to them under the provisions of the act. He had no notice, actual or constructive, of the claim of the Government in regard to this land. The record title was plain. No suit had been commenced when Ericksrud took his title from the Government and went into possession thereunder. He died within a week thereafter, and his heirs thereupon took possession. They were in possession when the Government commenced this suit, in 1893, but were never served with process therein until 1901, which was two years after Woodwick had purchased the property from them and had in good faith paid them the sum of $2,000 in cash for the land.

Counsel for the Government admits that it is futile to maintain that Woodwick had constructive notice of the defects in his title by reason of the pendency of this suit, which had been commenced by the Government in 1893, but in which the railroad companies alone had been served with process.

Whatever equities Donovan may have had as against the Government by virtue of his so-called attempt to make entry for the eighty acres in section 35, they do not override the plain provisions of the statute of 1887, and also that of 1896, 29 Stat. 42, which save the rights of one who purchased from the railroad in good faith.

As was observed by Mr. Justice Brewer, in the case already referred to, *United States* v. *Winona &c. Railroad*, 165 U. S. at 480, "It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon

the action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands."

Donovan is not brought within the case of *Winona &c. Railroad* v. *United States*, immediately following the above cited case, at page 483, because, among other facts, it appears herein that there was no record of any entry in Donovan's case for this land on the books of the local land office, and it is conceded that he had been out of any possession of the land since 1885. The above cited case is not, therefore, in point. The same may be said of *Duluth &c. Railroad* v. *Roy*, 173 U. S. 587, and *Oregon &c. Railroad* v. *United States* (Nos. 1 and 2), 189 U. S. 103, 116.

Donovan cannot be regarded as having by his action secured a vested interest in this land, so as to make the certification to the State a wholly void act, as an act beyond the jurisdiction of the Secretary. Assuming that it may have been erroneous and voidable, it was not void. We do not decide it was erroneous. In 1871 the legal title, still remaining in the Government, was transferred to the State by the certification of the Secretary, and, as we have said, Woodwick occupied the position of a purchaser in good faith under the acts of Congress.

The judgment is

Affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY *et al.*

APPEAL FROM AND ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 89, 199. Argued October 19, 20, 1904.—Decided December 12, 1904.

The act of Congress of July 24, 1866, 14 Stat. 221, Rev. Stat. §§ 5263 *et seq.*, giving telegraph companies the right to construct and operate their lines through, along and over the public domain, military or post roads and navigable waters of the United States, was a legitimate regulation of commercial intercourse by telegraph among the States and appropriate legislation to carry into execution the power of Congress over the postal service; it was merely an exercise of National power to withdraw such intercourse from state control and interference.

This court has already held in *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, and *Western Union Tel. Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239, and now follows those decisions that the act of July 24, 1866, does not confer upon telegraph companies, the right to enter upon private property without the consent of the owner or grant them the right of eminent domain.

A railroad's right of way is property devoted to a public use and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control but it is so far private property as to be entitled to the protection of the Constitution so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of the power of eminent domain is that the statute conferring it make provision for compensating the owner.

No statute of New Jersey makes railroad property subject to occupation by telegraph companies under the act of Congress of 1866.

THIS is a bill in equity filed in the Circuit Court of the District of New Jersey by the appellant against the appellee, the Pennsylvania Railroad Company, to prevent the latter from removing from various railroad companies' rights of way the telegraph lines of the appellant. The bill was filed in aid of a petition on the law side of the court, praying the court to issue its process or take such modes of procedure as might be

agreeable to the principles and usages of law, to determine the amount of compensation to be paid by appellant to appellee for the use of the right of way of the appellee, and its branches and connecting lines, to construct, maintain and operate a line of telegraph over and along such railways, subject to the conditions and provisions named in the act of Congress of July 24, 1866. 14 Stat. 221, c. 230; Rev. Stat. §§ 5263 *et seq.*

The construction of this act of Congress is the main question in the case.

The appellant, which we shall designate the Telegraph Company, contends that under certain acts of Congress the roads of the Railroad Company and all other railroads in the United States are made post roads, and that by the act of July 24, 1866, the Telegraph Company has the right to construct, maintain and operate lines of telegraph along said roads upon the payment of compensation to the Railroad Company. In other words, the contention is that by the act of 1866 the Telegraph Company is given the power of eminent domain to acquire the right to occupy with its telegraph lines the rights of way of the Railroad Company.

A summary of the bill is as follows: The Telegraph Company is a New York corporation; the Railroad Company is a Pennsylvania corporation. The New Jersey Railroad and Canal Company was incorporated under the laws of New Jersey and is the owner of a railroad extending from Jersey City in the State of New Jersey to the Delaware River at the city of Trenton in said State, with certain branches, which the bill describes. The Railroad Company is the owner of a line of railroad extending from the city of Philadelphia to the city of Pittsburgh in the State of Pennsylvania, and in possession and control of the railroads of the New Jersey Railroad and Canal Company in New Jersey, under a lease or leases for a period of nine hundred and ninety-nine years from the first of July, 1871. By the laws of New Jersey the said railroads were created, and made and are now, public highways, and hence are subject to occupation and use of telegraph companies

under the provisions and conditions of the act of Congress of July 24, 1866.

The Telegraph Company was organized in 1851, and began then to construct and has constructed and acquired a continuous system of telegraph lines, which extends through all of the States and Territories of the United States and connects with telegraph lines in the Dominion of Canada, and with lines also in the Republic of Mexico and South American Republics, and with and by submarine cables with the systems of all telegraph lines of foreign countries.

The system operated directly by the Telegraph Company consists of over 192,000 miles of poles and cables, and over 900,000 miles of wire, and that an important part of the system and connected with its main office in New York City, and with other lines leading to the important cities of the West, is the lines of telegraph over and along the lines of railway operated by the Railroad Company, connecting Jersey City with Philadelphia, and connecting with other lines of the system.

The lines of telegraph along the railways in New Jersey were originally constructed by the American Telegraph Company, a corporation of the State of New Jersey, with the consent of or under contracts and arrangement with the railway company, then owning the said lines of railway, and were constructed more than forty years ago, and since the twentieth of September, 1881, the telegraph lines over the right of way of said railroads have been maintained and operated and compensation paid therefor under the provisions of a contract between the Telegraph Company and the Railroad Company. The contract granted to the Telegraph Company the right to place, maintain and use upon the line of the right of way of the Railroad Company, and of the railroads owned, operated or leased by it, a single line of telegraph poles (in certain cases two were authorized), with the privilege of erecting and maintaining thereon such number of wires as the Telegraph Company might from time to time elect, said lines

to be located and placed under the direction of an officer of the Railroad Company.

The Telegraph Company agreed to pay annually for the privileges granted the sum of $75,000, in monthly installments of $6,250, and to deliver to the Railroad Company certain poles and wire, which were then on certain of their roads. The Telegraph Company also agreed to transmit the messages of the Railroad Company at a compensation which was stated.

The provisions for the termination of the agreement and in the event of its termination are as follows:

"Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their sucessors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing.

* * * * * * * *

"Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered to the treasurer, or an executive officer of the party in default, or if any other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfilment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due, or for damages for non-fulfillment of such covenant or of any other covenant.

"Sixteenth. If no new agreement be made by the parties hereto, the Telegraph Company shall, at the termination of this contract, or at any time hereafter, upon receiving written notice from the Railroad Company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the Railroad Company in good condi-

tion and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the Railroad Company, and if not so removed the Railroad Company may remove them at the expense of the Telegraph Company: *Provided, however,* That the payment agreed to be made by the Telegraph Company to the Railroad Company in the sixth clause hereof, and by the Railroad Company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same."

The agreement contains the following provision:

"Any easement or right of way heretofore acquired by the Telegraph Company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the Railroad Company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the Telegraph Company upon the right of way of said Railroad Company shall be such only as are granted by this agreement, and shall cease with its termination."

The agreement was carried out and the payments made as provided, the last being made on the twentieth of June, 1902.

On the fourteenth of May, 1902, the Railroad Company notified the Telegraph Company in writing to remove its poles, wires and other property from the right of way and property of the Railroad Company and of the other companies mentioned in the agreement, within six months from the first day of June, 1902. The notice stated that in default of compliance the Railroad Company would itself cause such poles, wires and other property of the Telegraph Company to be removed from the right of way at the expense of the latter company.

It is alleged in the bill that, by reason of the facts set forth, and by reason of the receipt of payments after the twenty-first of September, 1901, and after the notice of removal, the agreement was continued in force, and that the Railroad Company had no right, notwithstanding the notice of May 14,

1902, to remove or cause to be removed from the line of its railways the poles, wires and telegraph property of the Telegraph Company at the end of six months from the first day of June, 1902.

It is also alleged that the lines of telegraph have been maintained and operated over the lines of railway without interfering with the ordinary use and operation thereof or the ordinary travel thereon, and, as now located, maintained and operated, can be continued so as not to interfere with the future operation and maintenance of the said railways or the ordinary travel upon them, subject only to such slight changes of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way or shifting the tracks already existing on said railways.

May 20, 1902, the president and general manager of the Telegraph Company, in a letter addressed to the president of the Railroad Company, acknowledged receipt of the notice of removal of May 14, and stated that he understood that negotiations had been in progress between the officers of the respective companies for a renewal of the contract of September 20, 1881, and declared that he would be glad to take up the matter actively, either in New York or in Philadelphia, at the convenience of the president of the Railroad Company. The following day the president of the Railroad Company replied, stating that none of the companies named "desires to renew or extend its contract with the Western Union Telegraph Company," and that the contract between the companies had terminated under its terms on the twentieth of September, 1901, and the notice to the Telegraph Company to remove its poles had been given in accordance with the provisions of the contract. A willingness to discuss any temporary arrangement which might be necessary during the time allowed for the removal of the poles of the Telegraph Company was expressed. A somewhat lengthy reply was made, in which the Telegraph Company claimed that since some of the contracts referred to by the Railroad Company were per-

petual in their terms, or ran during the life of the parties, they could not be terminated by one party without the consent of the other; asserted a right, under the laws of Congress and the laws and constitution of the State of Pennsylvania, to maintain and operate its lines of telegraph on the Railroad Company's roads, subject only, at most, to make a fair and reasonable compensation for such right, which it offered to pay, and requested, if the Railroad Company declined to contract further with it, a meeting for the purpose of agreeing upon the amount of such compensation, or to submit the matter to arbitration. The Railroad Company replied that the meeting requested would be useless, as the Telegraph Company asserted rights upon the lines of the Railroad Company which could not be conceded. It was stated in the reply that the Railroad Company had agreed and contracted with the Postal Telegraph Cable Company covering the railroads included in the contract with the Telegraph Company, and that the Postal Telegraph Cable Company would immediately commence transacting a commercial telegraph business at the stations of the Railroad Company. The Railroad Company offered to permit the Telegraph Company to do business at the railroad stations until September 30, next ensuing (1902); and for the purpose of avoiding unnecessary loss to the Telegraph Company, incident to the removal of its poles, the Railroad Company expressed a willingness to purchase, at a fair valuation, such of the lines as it could make use of.

It is alleged in the bill that the notice given to the Telegraph Company to remove its poles from the railroads, and the refusal of the Railroad Company to negotiate further with the Telegraph Company, was not induced from any compulsion or necessity to use the space occupied by the telegraph lines; but that the purpose of the Railroad Company is to place upon the lines of railway telegraph lines to be owned or used by another telegraph company, and it is alleged that the lines of the Telegraph Company will not interfere with the ordinary travel and use of the railways.

The directors of the Telegraph Company accepted the act of July 24, 1866, and filed an acceptance with the Postmaster General of the United States June 8, 1867.

The acts of Congress hereinafter mentioned and set out are referred to in the bill, and a full compliance therewith alleged, whereby, it is further alleged, the Telegraph Company became and is entitled to maintain its lines on the railroads of the Railroad Company upon paying just compensation, the payment of which was offered. The prayer is that the court order and decree the amount of compensation to be paid by the Telegraph Company, or, if the court order compensation to be ascertained at law, it then be decreed that upon payment of such compensation a perpetual injunction issue.

A preliminary injunction was ordered. 120 Fed. Rep. 981. It was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33.

A controversy ensued upon the form of the decree. The Circuit Court of Appeals simply reversed the order of the Circuit Court granting a preliminary injunction. The Telegraph Company moved that the decree be modified so as to direct the dismissal of the bill. The motion was refused, and the Telegraph Company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the Telegraph Company appealed therefrom to the Circuit Court of Appeals. The case was then removed to this court by certiorari.

Mr. John F. Dillon, Mr. Rush Taggart and *Mr. Henry D. Estabrook*, with whom *Mr. Richard Vliet Lindabury* was on the brief, for appellant and petitioner:

The Telegraph Company, having in 1867 accepted the conditions of the act of 1866, and faithfully performed all the obligations imposed thereby, has paid and is paying to the Federal Government a full and continuing consideration for the rights granted by Congress under those acts, and has thereby become not only a special and peculiar agency of the

Government, but the Government, under its option of purchase, has acquired a vested interest in the property and franchises of petitioner more real and tangible than its interest or property in the public mails committed to its charge. 14 Stat. 221; Rev. Stat. §§ 5263 *et seq.* The Federal Government has a property in the mail. *Searight* v. *Stokes*, 3 How. 151; *In re Debs*, 158 U. S. 583. See also act of June 10, 1872.

The Government of the United States has jurisdiction over every foot of soil within its territory, and within its enumerated powers has full attributes of sovereignty within the limits of those powers, among which are the power over interstate commerce and the power to establish post offices and post roads. *Western Un. Tel. Co.* v. *James*, 162 U. S. 650; *In re Debs*, 158 U. S. 564; *Gibbons* v. *Ogden*, 9 Wheat. 1; *L. S. & Mich. So. R. R.* v. *Ohio*, 173 U. S. 285.

To trace historically the evolution of the doctrine in question, see 2 Story Const., Ch. 18; 1 Kent's Com. 267, and the portions of Elliott's Debates therein referred to; *United States* v. *Kochersperger*, No. 15,541, Fed. Cases; the various cases growing out of the abandonment of the Cumberland Road, particularly *Searight* v. *Stokes*, 3 How. 150, 1845; *Neil* v. *Ohio*, 3 How. 720; *Achison* v. *Huddleson*, 12 How. 293.

Federal sovereignty can appropriate property within a State without the consent or acquiescence of the State. *Trombley* v. *Humphry*, 23 Michigan, 471; Cooley's Const. Lim. cited in *Kohl* v. *United States*, 91 U. S. 367.

When the highways of a State are, by act of Congress, established post roads of the United States, they become part of the postal equipment of the Federal Government and subject to its paramount authority for postal and military purposes.

The constitutionality of the act of 1866 has never been questioned. It has uniformly been held that under this act, telegraph companies accepting its provisions have the right to occupy with their lines of telegraph the streets of a city and the roads of a State which by act of Congress have been

established post roads of the United States. *Postal Tel. & Cable Co.* v. *Oregon Short Line R. R. Co.*, 114 Fed. Rep. 787; *W. U. Tel. Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 554.

If the highways, owned and operated by a State, are subject to the paramount authority of Congress for postal and military uses, could anything less be said of a highway, such as a turnpike, authorized by the State, but operated by a corporate agency created by the State. *West. Un. Tel. Co.* v. *City of New York*, 38 Fed. Rep. 552; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92; *United States* v. *Union Pac. Ry.*, 160 U. S. 1; *Postal Tel. Co.* v. *Oregon Short Line R. R.*, 65 Pac. Rep. 735; *Hewett, et al.*, v. *Western Union Tel. Co.*, 4 Mackey, 424.

The primary use of a highway is for the purpose of travel, but the occupation of the highway by telegraph lines, if so maintained and operated as not to interfere with the primary use, is not only permissible, but, thus limited, has been held not to constitute an additional servitude. A highway is created not alone for the purpose of travel, but for commerce and the transmission of intelligence. *Julia Building Association* v. *Bell Tel.*, 88 Missouri, 258; *Cater* v. *Northwestern Tel. Ex. Co.*, 60 Minnesota, 593; *Magee* v. *Overshiner*, 40 L. R. A. 370; *People* v. *Eaton*, 100 Michigan, 208; *Pierce* v. *Drew*, 136 Massachusetts, 75; *Hershfield* v. *Rocky Mt. Bell Tel. Co.*, 2 Montana, 103.

A post, etymologically defined, is a mode of conveying written or *unwritten* intelligence. According to this the telegraph is a "post." *United States* v. *Kochersperger*, 26 Fed. Cas. 803.

A railroad is a highway, not simply *sub modo*, but intrinsically and *per se*, in the same category precisely as roads, streets, alleys, turnpikes, plank roads, tramways, bridges, ferries, canals and navigable rivers. *Olcott* v. *Supervisors*, 16 Wall. 678; *In re Debs*, 158 U. S. 564; *Monongahela N. Co.* v. *United States*, 148 U. S. 312; *Cherokee Nation* v. *So. Kansas R. R.*,

135 U. S. 641, 657; *L. S. & M. S. R. R.* v. *Ohio*, 173 U. S. 285; *Smyth* v. *Ames*, 169 U. S. 466; *Trunick* v. *Smith*, 63 Pa. St. 18; *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 39; *W. M. & P. R. R.* v. *Jacobson*, 179 U. S. 287, 296; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 696; *Mich. Tel. Co.* v. *City of Charlotte*, 93 Fed. Rep. 11. And taxes may be imposed for their construction and maintenance. *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 673; *Queensbury* v. *Culver*, 19 Wall. 83, 91; *People* v. *Flagg*, 46 N. Y. 401.

The primary purpose of every highway is public travel, traffic, commerce, communication. But the manner of use within the range of physical possibility is for the legislature to determine. It is because railroads are highways that Congress is empowered to establish them as post and military roads of the United States.

The power of Congress to establish the railroads of the United States as military and post roads is not a dormant power, but has been asserted and enforced by the Federal Government from the day the first railroad company was chartered. It has frequently been exercised as to railway bridges. 17 Stat. 99, 120, 160, 379. See also 5 Stat. 283; 10 Stat. 255; 12 Stat. 334; 14 Stat. 66; 17 Stat. 308, where in the case of such highways as the waters of the United States, canals and plank roads, Congress declares them to be post roads "during the time the mail is carried thereon." Is not the omission of this qualification in the case of railroads somewhat significant?

By the act of 1866, and correlated acts, Congress declared a policy and a purpose, that to encourage and facilitate intercommunication among the people, the companies operating the railroads and telegraphs of the United States should be mutually accommodating and coöperative, and should, so far as practicable, construct their lines of railroad and telegraph along the same rights of way. This policy is not only manifest from the title and context of the act of 1866, but from its history and the debates in Congress prior to its passage. This

policy has been discovered and declared by the courts, and numerous States have extended the policy by legislative enactment to include the telephone. Not only so, but through the dictates of self-interest and mutual accommodation, railroad and telegraph companies, from the earliest times, have under contract and agreement, operated side by side, so that today there is not, nor has there ever been, a railroad in the United States, over and along which telegraph lines have not been constructed, maintained and operated. Cong. Globe, Pt. IV, 1st Sess. 39th Cong., pp. 3480-3490; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1, 41, 49; *Tel. Co.* v. *Texas*, 105 U. S. 460; *Postal Tel. Cable Co.* v. *Oregon Short Line*, 114 Fed. Rep. 787; *Postal Tel. Cable Co.* v. *Southern Ry. Co.*, 89 Fed. Rep. 190; *Postal Tel. Cable Co.* v. *Oregon Short Line*, 65 Pac. Rep. 735; *West. Un. Tel. Co.* v. *B. & S. W. Ry. Co.*, 3 McCrary, 130; *West. Un. Tel. Co.* v. *B. & O. Tel. Co.*, 19 Fed. Rep. 660; *Southern Bell Tel. Co.* v. *Richmond*, 78 Fed. Rep. 858.

Not only so, but the statutes of many States extend the right to occupy the highways of the State, including the highways called railroads, to telephone companies—this court having limited the application of the act of July 24, 1866, to telegraph companies proper. *New Orleans, M. & T. R. R. Co.* v. *S. & A. T. Co.*, 53 Alabama, 211; Colorado: *Union Pac. R. Co.* v. *Colo. Postal Tel. Cable Co.*, 69 Pac. Rep. 564; Georgia: *S. F. & W. Ry. Co.* v. *Postal Tel. Co.*, 38 S. E. Rep. 353; Idaho: *Postal Tel. Co.* v. *O. St. Line Ry. Co.*, 104 Fed. Rep. 623; Illinois: *St. L. & C. R. R. Co.* v. *Postal Tel. Co.*, 173 Illinois, 508; Kentucky: *Postal Tel. Co.* v. *Mobile & O. R. Co.*, 54 S. W. Rep. 727; Louisiana: *Postal Tel. Co.* v. *M., L. & T. R. R. & S. S. Co.*, 21 So. Rep. 183; Mississippi: *Mobile & O. R. Co.* v. *Postal Tel. Co.*, 26 So. Rep. 370; North Carolina: *Phillips* v. *Postal Tel. Co.*, 41 S. E. Rep. 1022; Tennessee: *Mobile & O. Ry. Co.* v. *Postal Tel. Co.*, 41 L. R. A. 403; Texas: *T. & N. O. Ry. Co.* v. *Postal Tel. Co.*, 52 S. W. Rep. 108; Virginia: *Postal Tel. Co.* v. *Farmville & P. R. Co.*, 32 S. E. Rep. 468; Utah: *Postal*

Tel. Co. v. *Oregon Short Line*, 65 Pac. Rep. 735; Ohio: R. S. §§ 3454 *et seq.*

By the act of 1866, the Western Union Telegraph Company, having accepted its provisions, was in express terms granted, among other things, "the right to construct, maintain and operate lines of telegraph over and along" the railroads of the defendant railroad company, provided only that its lines be so constructed and maintained as not to interfere with the ordinary travel on the railroads.

The right granted to the Western Union Telegraph Company by the act of 1866, is simply of an easement of use, in an easement, yielding at all times to the necessities of the paramount use, and limited at all times to the non-interference with the primary uses of the railroad company.

A right granted in such manner is not unusual, see cases cited *supra.*

As to whether Congress, under its constitutional powers over the highways of the nation, as military and post roads, may appropriate the use of such post roads for the construction and operation of postal telegraph lines owned by it, or by one of its agencies, so long as the same shall not interfere with the ordinary travel on such military and post roads, without making compensation, either to the owners of the post roads or to the owners of reversionary interests therein, see *Pittsburgh & W. E. Pass. Ry.* v. *Point Bridge Co.*, 165 Pa. St. 37; *Stockton* v. *B. & N. Y. R. R. Co.*, 32 Fed. Rep. 9; *Scranton* v. *Wheeler*, 57 Fed. Rep. 803; *S. C.*, 179 U. S. 141, and authorities cited; *Hawkins Point Light House Case*, 39 Fed. Rep. 77; *S. C.*, 155 U. S. 102; *Gibson* v. *United States*, 166 U. S. 269; *Hewett* v. *W. U. Tel. Co.*, 4 Mackey, 424; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 324; *Hill* v. *United States*, 149 U. S. 593.

As to the public character of a railway, see act incorporating N. J. R. R. and Transportation Company, by the legislature of New Jersey, March 7, 1832; *Civil Rights Cases*, 109 U. S. 3; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, 296; *Lake*

Superior &c. R. R. Co., 93 U. S. 442; § 21 Penna. R. R. Co. Charter, Pamphlet Laws of Pennsylvania, 1846, p. 312; *Trunick* v. *Smith*, 63 Pa. St. 18; *People's Telephone* v. *President &c.*, 199 Pa. St. 411. For decisions *pro* and *con* as to whether a telegraph line is an additional servitude, see *Nichol* v. *Telegraph Co.*, 62 N. J. L. 733, as reported in 7 Am. Elec. Cas. 277, with note by Edw. Q. Keasbey.

If a telegraph company, accepting the obligations of the act of 1866, in attempting to avail itself of the rights and privileges granted it by said act in public and such *quasi*-public property as the military and post roads of the United States, finds it necessary to appropriate to its use private property involved with the public and *quasi*-public property, the grant made by Congress will not be declared void as transcending the constitutional powers of Congress, but the Constitution itself will be read into the act and the act interpreted in connection therewith and the courts will provide the court machinery necessary to determine judicially the amount of just compensation to be paid therefor.

The right to condemn may be exercised on the theory that an implied right has been granted. 10 Am. & Eng. Ency. of Law, 1054.

Statutes should be sustained rather than ignored. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Fenton* v. *Hampdon*, 11 Moore's P. C. 360; Sutherland's Statutory Construction, §§ 295, 324, 332, 340, 341, 343, 344, 379, 382, 388.

The constitutional inhibition against taking private property without just compensation, being negative, is self-executing, and is to be read into every law and statute where applicable. *In re Rugheimer*, 36 Fed. Rep. 369; *Hickman* v. *City of Kansas*, 41 Am. St. Rep. 684, and note; *West. Un. Tel. Co.* v. *Williams*, 8 L. R. A. 429. Compare *Neal* v. *Delaware*, 103 U. S. 370; *East St. Louis* v. *Amy*, 120 U. S. 600; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334. Where a right is given by law or statute, and no special machinery is provided for the enforcement of the law, the courts will supply the machinery,

either by adopting the machinery already in use or the machinery in vogue at common law, which, in cases of condemnation, was the writ *ad quod damnum*, which simply means that the amount of compensation to be paid to an owner for the appropriation of his private property to a public use shall be determined by a full jury. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Jones*, 109 U. S. 513; *High Bridge Co.* v. *United States*, 69 Fed. Rep. 320; *Boom Co.* v. *Patterson*, 98 U. S. 403; *Dashiell* v. *Grosvenor*, 66 Fed. Rep. 338; *New York* v. *Pine*, 185 U. S. 93; *Galway* v. *Elevated Ry. Co.*, 128 N. Y. 132; *Shepard* v. *Elevated R. R. Co.*, 117 N. Y. 442; *Osborne* v. *Mo. Pac. Ry. Co.*, 147 U. S. 248; *McElroy* v. *Kansas City*, 21 Fed. Rep. 357; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *St. Paul &c. Ry. Co.* v. *W. U. T. Co.*, 118 Fed. Rep. 497. As to the writ *ad quod damnum*, see 2 Lewis Em. Dom. § 402; *Scudder* v. *T. D. F. Co.*, 1 Sax. Ch. (N. J.) 694; *Hooker* v. *New Haven & N. Co.*, 14 Connecticut, 146; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Wheelock* v. *Young*, 4 Wend. 650; *Stevens* v. *Middlesex County*, 12 Massachusetts, 466; *Bloodgood* v. *M. & H. R. R. Co.*, 18 Wend. 9; *Beekman* v. *S. & S. R. R. Co.*, 3 Paige Ch. 45; *Upshur County* v. *Rich*, 135 U. S. 467, 476.

The act of 1866, necessarily implies that the beneficiary is vested with the power of eminent domain if, to avail itself of the rights granted, private property, incidentally involved with the specific property appropriated to its use, is also appropriated by it; otherwise the grant would fail. *Murphy* v. *Kingston &c. R. R. Co.*, 11 Ontario, 582, distinguished.

No case involving the principal issue herein has ever been presented to this court. The *Pensacola* case and the *Ann Arbor* case, on this point are not only clearly *obiter*, but by no means justify the significance attributed to them.

While the principal issue has never been presented to this court lesser courts have construed the act of 1866 according to the principles contended for by the petitioner. *Postal Tel.-Cable Co.* v. *Oregon Short Line*, 114 Fed. Rep. 787; *Postal*

Tel.-Cable Co. v. *Southern R. R. Co.*, 89 Fed. Rep. 190; *Postal Tel.-Cable Co.* v. *Oregon Short Line*, 65 Pac. Rep. 735; *St. P., M. & M. R. R. Co.* v. *W. U. Tel. Co.* (C. C. A.), 118 Fed. Rep. 497. Cf. *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 92; *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1, 41; *Southern Bell Telephone Co.* v. *Richmond*, 78 Fed. Rep. 858; *Union Trust Co.* v. *A., T. & S. F. R. R. Co.* (New Mex.), 43 Pac. Rep. 701; *Mercantile Trust Co.* v. *Atlantic & Pac. R. R. Co.*, 63 Fed. Rep. 513; *W. U. Tel. Co.* v. *Los Angeles Electric Co.*, 76 Fed. Rep. 178; but see *contra*, *Postal Telegraph-Cable Co.* v. *C., C., C. & St. L. R. R. Co.*, 94 Fed. Rep. 234.

As to the construction of the act of 1866 and the weight to be given to its title and the discussion attending its passage, see *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 559; *Price* v. *Forrest*, 173 U. S. 410, 427.

While to ascertain the meaning of an act, the mere discussion in Congress is not given special weight in some of the decisions of this court, yet reference is frequently made to reports of committees for the purpose of confirming the construction adopted by the court. *Hepburn* v. *Griswold*, 8 Wall. 610; *Untermeyer* v. *Freund*, 50 Fed. Rep. 80; *Nor. Pac. Ry. Co.* v. *United States*, 36 Fed. Rep. 285; *United States* v. *Union Pac. R. R. Co.*, 37 Fed. Rep. 554; *Austin* v. *United States*, 25 C. Cl. 454; *United States* v. *Burr*, 159 U. S. 85.

Mr. John G. Johnson for appellees and respondents in Nos. 89 and 199 and defendant in error in No. 90.

Power to enter upon a railroad right of way by a telegraph company is not conferred in Pennsylvania by any general or special statute of that Commonwealth. Nor is the Pennsylvania Railroad a public highway within the meaning of the act of 1866. *Nor. Cent. Ry. Co.* v. *Commonwealth*, 90 Pennsylvania, 305; *Telephone Co.* v. *Turnpike Road*, 199 Pennsylvania, 415. As to the status of the railroad company's title see *Junction Railroad Co.* v. *Philadelphia*, 88 Pennsylvania,

427; *P. & R. R. R. Co.* v. *Hummell*, 44 Pennsylvania, 375; *Schuylkill Valley R. R. Co.* v. *Reading Paper Mills*, 149 Pennsylvania, 18; *Philadelphia* v. *Ward*, 174 Pennsylvania, 45; *Railway Co.* v. *Peet*, 152 Pennsylvania, 488.

It is thoroughly well settled by the Pennsylvania decisions that a right of way, appropriated to a corporation for a *quasi*-public use, cannot be appropriated by another *quasi*-public corporation, for its uses, by implication. Under these decisions, an unrestricted general right to appropriate is construed as not including the power to seize the property of another corporation. *Penna. R. R. Co.'s Appeal*, 93 Pa. St. 150; *Pittsburgh Junction R. R. Co.'s Appeal*, 122 Pa. St. 511; *Sharon Railway Co.'s Appeal*, 122 Pa. St. 533; *Groff's Appeal*, 128 Pa. St. 621; *Market Co.* v. *Railroad Co.*, 142 Pa. St. 580; *Pittsburgh Junction R. R. Co.* v. *Alleghany R. R. Co.*, 146 Pa. St. 297; *Perry County R. R. Co.* v. *Railroad Co.*, 150 Pa. St. 193; *Penna. R. R. Co.* v. *Schuylkill Nav. Co.*, 167 Pa. St. 576; *Youghiogheny Bridge Co.* v. *Railroad Co.*, 201 Pa. St. 457. It has recently been held in Pennsylvania that the right of eminent domain does not exist in telegraph companies. *Penna. Telephone Co.* v. *Hoover*, 24 Pa. Super. Ct. 96.

If the Atlantic and Ohio Telegraph Company possessed the right of condemnation claimed by the appellant, such right was exercisable only under a petition by it presented, and the proceedings in Pennsylvania were defective for want of the proper parties. Act of 1871, P. L. 516; P. L. 1868, 1191.

Had the Atlantic and Ohio Telegraph Company been made petitioner in the condemnation proceedings the Circuit Court would have had no jurisdiction because of a lack of diverse citizenship.

No right is conferred upon telegraph companies by the act of 1866 to appropriate any portion of the right of way of railroad companies. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530. *United States* v.

Union Pac. Ry. Co., 160 U. S. 1; *St. Paul Railway Co.* v. *West. Un. Tel. Co.*, 118 Fed. Rep. 497, distinguished.

The Telegraph Company had no consent from the Railroad Company. The act of 1866 makes no provision for compensation and no procedure can be sustained under it. *Postal Tel. Cable Co.* v. *Cleveland Railway Co.*, 94 Fed. Rep. 234; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 90 Fed. Rep. 379.

The Railroad Company was entitled to the remedy given by its contract. If the Telegraph Company was entitled to appropriate part of its right of way, it was restricted, as were all other telegraph companies, to the right arising under such appropriation. It acquired no right before consummation of the condemnation proceedings, to an injunction against the enforcement of its contract.

As the Postal Telegraph-Cable Company had acquired a right antecedently to the alleged appropriation by the appellant, which rendered a location of additional wires and poles by the latter impossible, there was no right on the part of the latter to appropriate even if the act of 1866 allowed condemnation.

There was no waiver of the notice to remove given by the Railroad Company in May, 1902.

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

By an act of Congress, approved July 7, 1838, and by subsequent acts, March 3, 1853, 10 Stat. 249, 255, c. 146; sec. 3964, Rev. Stat., June 8, 1872, 17 Stat. 283, railroads within the limits of the United States were made post routes or roads.

By act of March 1, 1884, it is provided "that all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." 23 Stat. 3, c. 9.

The act of 1866 is as follows, 14 Stat. 221, c. 230:

"*Be it enacted by the Senate and House of Representatives of*

the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams of waters of the United States: *Provided,* That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel of such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may preëmpt and use such portion of the unoccupied public lands subject to preëmption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SEC. 2. *And be it further enacted,* That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"SEC. 3. *And be it further enacted,* That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however,* That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascer-

tained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. *And be it further enacted,* That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this act."

The construction of this act is the fundamental question in the case. The Telegraph Company contends that the necessary implication from the provisions of the act is that telegraph companies may enter and appropriate for their poles and lines a part of the rights of way of railroads *in invitum* upon paying just compensation. In other words, that the act invests telegraph companies with the right of eminent domain. The Railroad Company denies this construction, and asserts that the act gives the consent of the Government to telegraph companies to construct lines through its public domain and over and along its military and post roads, which are not the property of private corporations, and across navigable streams and waters. The act gives no right, the Railroad Company contends, to appropriate private property; but is an exercise by Congress of the national power over interstate commerce to secure telegraph companies from "hostile state legislation or contracts violative of an announced public policy." In other words, the contention of the Railroad Company is, that after the act of 1866 was passed, it "became impossible for the States, by any legislation, to exclude telegraph companies from the post roads." The contentions of the parties are opposed, therefore, only as to the degree of right conferred by the act. It is asserted by one party, and unqualifiedly admitted by the other, that Congress has power to grant the power of eminent domain to corporations organized for national purposes, and the arguments of the parties are addressed only to the considerations which serve to deter-

mine the intention of Congress. Both parties also claim authority for their respective contentions.

1. The act of 1866 came before this court for consideration over twenty-five years ago, in *Pensacola Telegraph Company* v. *Western Union Telegraph Co.*, 96 U. S. 1. The language of the court defining the rights conferred by the act has recently been repeated and sanctioned in *Western Union Telegraph Company* v. *Ann Arbor R. R. Co.*, 178 U. S. 239. In both cases the judgment of the court was adverse to the rights claimed under that act by the Telegraph Company in the case at bar. A review of those cases, therefore, and a consideration of the arguments directed against them and in support of them will constitute the most appropriate discussion of the questions now presented, and apply immediately to their solution the authority of this court.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, the legislature of Florida in 1866 granted to the Pensacola Telegraph Company "the sole and exclusive privilege and right" of maintaining and operating lines of telegraph through certain counties of the State. In 1872 the property of the Alabama and Florida Railroad Company was transferred to the Pensacola and Louisville Railroad Company. On the fourteenth of February, 1873, the legislature of Florida passed an act, which was amended in 1874, authorizing the last-named company to construct and maintain a telegraph line along its railroad, and to connect with lines in and out of the State. This was in the territory embraced by the exclusive grant to the Pensacola Telegraph Company.

On the twenty-fourth of June, 1874, the Pensacola and Louisville Railroad Company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right of way, and transferred to it all the rights and privileges conferred by the acts of February, 1873, and 1874. The Western Union Company immediately commenced the erection of the line, but before its completion the Pensacola Telegraph Company filed a bill to enjoin the work, on account

of the alleged exclusive right of that company under its charter. Upon the hearing a decree was passed dismissing the bill, and an appeal was taken to this court. The Western Union Telegraph Company had accepted the act of 1866, and claimed to erect and maintain a telegraph line under its agreement with the Pensacola and Louisville Railroad Company, and under the provisions of that act. The case, therefore, presented an issue between rights asserted under a statute of Florida and rights given and protected by the act of 1866. The issue was important. The act of 1866 was presented for the first time for interpretation and upon it depended not only the private rights of the contending companies but the more serious conflict of powers derived from the National and state governments. The questions, therefore, which bore on these issues called for, and, it is evident from the opinion of the court, received careful attention.

The first of these questions was whether the act of 1866 was a grant to telegraph companies of portions of the public domain and of rights in the public domain, or a grant of rights having a broader field of exercise—a grant of rights having operation and to be exercised throughout the whole of the United States. There was a marked difference in the rights contended for, and they depended upon different powers. In the public domain the Government was proprietor as well as sovereign, elsewhere only sovereign, and on its powers as sovereign there were limitations, arising not only from the rights of the States, but arising from the ownership of private property and the necessity of a grant of eminent domain to appropriate it. These limitations were of consequence in fixing exactly the rights conferred by the act of 1866, and were regarded by the court in its construction of that act.

The court declared, through Chief Justice Waite, that the act of 1866 was an exercise of the power of Congress over interstate commerce and the power to establish post offices and post roads, and, like other powers of the National Government, could be exercised "upon every foot of territory under

its jurisdiction." It was held, therefore, that the act was not a grant of rights only in the public domain, and the character of the rights was made unmistakable. The statute, the court said, "*in effect amounts to a prohibition of all state monopolies*" in commercial intercourse by telegraph. This is expressed more than once as the fundamental idea and sole purpose of the statute. The court further said: "It (the statute) substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, *so far as state interference is concerned*, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege. *To this extent*, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the power of Congress over the postal service.

And this construction, making the act of 1866 merely an exercise of national power to withdraw from state control or interference commercial intercourse by telegraph, is further emphasized in the opinion and the objections to it completely answered, which were based on the ownership of the post roads by individuals or corporations, and the necessity of implying a grant of the power of eminent domain to telegraph companies to appropriate them. The court said (p. 11):

"It [the act of 1866] gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business, but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And again (p. 12):

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language and the distinctions imported by it were approved in *Western Union Telegraph Company* v. *Ann Arbor Railroad Co.*, 178 U. S. 239. It was a bill in equity filed in the Circuit Court of Benzie County, Michigan, by a telegraph company against a railway company to restrain the latter from interfering with the rights of the telegraph company in a certain telegraph line along the right of way of the railroad. It was removed to the Circuit Court of the United States. The Circuit Court dismissed the bill, and its action was affirmed by the Circuit Court of Appeals. 33 C. C. A. 113. The Western Union Telegraph Company brought the case here. The decrees of both courts were reversed and the case remanded to the Circuit Court with directions to remand the case to the state court. This was decreed on the ground that, by the statement of the complainant's (telegraph company) own case, it was not brought "within the category of cases arising under the laws or Constitution of the United States." We said that the bill was in effect for the specific performance of a contract. "It is not argued," we said (p. 243), by the Chief Justice, "by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their busi-

ness; 'but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.' "

And further (p. 244): "As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction." In other words, by the decision in the *Pensacola* case no such Federal question remained to be based on the act of 1866.

Counsel, however, pronounce the extracts quoted from the *Pensacola* case and their repetition in the *Ann Arbor* case as *dicta*, and urge besides that the irresistible logic of other cases overthrows the authority of both. Neither proposition is tenable. We have said enough to demonstrate that the language we have quoted was the deliberate resolution of the court, and we might content ourselves by observing that, as the *Ann Arbor* case is the last expression of this court interpreting the act of 1866, prior cases, if not reconcilable with its exposition of that act, are superseded. We think they are so reconcilable.

One of the cases which is relied on, *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, asserted the very valuable right obtained by telegraph companies under the act of 1866, and vindicated it against a statute of Massachusetts, which provided for an injunction against the prosecution of business by the company as a means of enforcing the payment of taxes. This is the very essence of the effect given to the act of 1866 by the *Pensacola* and *Ann Arbor* cases. The telegraph company was in occupation of the post roads of the State of Massachusetts, whether railroads or the ordinary highways does not appear. Its right to be there was not controverted, and how it got there was of no consequence. Its right to do business after and during such occupation was

involved and was decided, and to this right the language of the court was addressed, and received limitation from it. The language of the court was substantially the same as that of the act of Congress. It enforced the right given by that act, and gave to the telegraph company the protection of the national power and supremacy, and differs only in the instance, not in the principle, declared in the *Pensacola* case. The telegraph company, indeed, sought for more than the mere exercise of a right. It sought to turn the act of 1866 from a mere permission to exercise a right to the creation of such an instrumentality of the National Government as to be exempt from state taxation. The court rejected that view.

So also must be limited the language in *Telegraph Company* v. *Texas*, 105 U. S. 460, and *United States* v. *Union Pacific Railway Co. & Western Union Telegraph Co.*, 160 U. S. 1. In the first the distinction which was necessary to make was between *intra* and *inter*state commerce, and to determine what rights as to the latter were conferred by the act of 1866. In the second case the efficacy of the act to prevent binding contracts against its policy was involved. The case called for that but no more, as far as the act of 1866 was concerned. Such an agreement was set up, and under it the Western Union Telegraph Company claimed the right to exclude all other telegraph companies from the roadway of the railway company, notwithstanding the act of 1866. Mr. Justice Harlan, speaking for the court, said (p. 42), that such an agreement "directly tended to make the act of July 24, 1866, ineffectual, and was, therefore, hostile to the object contemplated by Congress. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11."

We need not dissent from these views or qualify the general language by which they were amplified and supported. Whatever rights were granted by the act of 1866 were granted to all telegraph companies, and could not be defeated by a binding contract with some one company, nor could such an agreement be used to evade or escape the commands of the statute

constituting the Union Pacific Railway, passed in 1862, or the supplementary act of 1888, which was passed by virtue of a power reserved in the act of 1862. The suit was brought to enforce the duties and obligations imposed by those statutes on the railway company. The statutes are quoted in the opinion, and the act of 1866 is referred to only as reinforcing the provisions of the statute of 1862. It was only necessary, therefore, to declare the policy of the act of 1866 as a grant of rights to all telegraph companies. The consideration of the court was not directed to anything else. The extent of the rights granted as presented in the case at bar could not have been in contemplation. They were not in issue, and it could not have been intended to anticipate and decide the controversies which might be based upon them.

St. Louis v. *Western Union Telegraph Company*, 148 U. S. 92, is also urged by the Telegraph Company as inconsistent with the *Ann Arbor* case. It is clearly not so. The case involved the validity of a charge or rental made by the city of St. Louis for the use of its streets by the telegraph company. The charge was imposed by the same ordinance that gave permission to the telegraph company to occupy the streets of the city. The telegraph company resisted the charge upon several grounds, among which were the provisions of the act of 1866, and its acceptance by the company. The charge was held to be a valid one, but on no ground which involved the consideration of the right of the telegraph company to occupy the streets. The right was not disputed. The ordinance of the city conferred it. The claim made under the act of 1866 was that it exempted the telegraph company from a payment of any compensation. But compensation was decreed on the ground that the franchise or privilege granted by the act of 1866 could only be exercised in subordination to public as well as private rights, and, as entry upon the latter could only be made upon the payment of just compensation, entry upon the former was subject to the same payment. This was all that was necessary to decide to sustain the charge made by the

city. In other words, it was all that was necessary to decide to meet the extreme contention made by the telegraph company, that under the act of 1866 it was entitled to occupy the streets without charge, notwithstanding its occupation was exclusive and permanent, as the court said it was. It is manifest that to hold there can be no entry upon property without payment of compensation, is not to decide that such entry can be made upon tender of compensation. Certainly, as to private property or rights, the non-consent of the owner is a factor to be dealt with. Non-consent, if resolute, can only be overcome by power conferred by law; in other words, by the exercise of eminent domain. The act of 1866 was not considered in that regard.

By this review of the cases it is evident that there is no inconsistency between them and the *Pensacola* case and the *Ann Arbor* case, and we are brought to the discussion of the general considerations urged against the latter cases. Construed, as they construe the act of 1866, it becomes meaningless, counsel say. If the act grants no rights, it is urged, except by permission of the railroad companies, it confers no more than can be obtained from the railroad companies. The objection is best answered by examples. The telegraph company had such permission in the *Pensacola* case. It needed, however, the act of 1866 to make its exercise effectual against the legislation of the State of Florida. In the *Union Pacific* case a claim of a monopoly by one telegraph company was answered by the act construed as a grant of rights to all companies. These examples show important results achieved by the act, and the principles of the cases may come to be applied to prevent other hostile action of States or individuals.

This court, when it came to consider the act of 1866 in the *Pensacola* case, was confronted, as we are confronted now, with the serious nature of the right of eminent domain. It is indeed "inseparable from sovereignty," but it is accompanied and restrained by inexorable limitations. The property taken must be for a public use, and there must be com-

pensation made for it, and compensation, whether it be regarded as part of the power or a limitation upon the power, is so far essential that the absence of a provision for it has been regarded as important in determining the intention of the legislature when a grant of such power is claimed. 1 Lewis Eminent Domain, section 240, and cases cited. We said in *Sweet* v. *Rechel*, 159 U. S. 380, 399, by Mr. Justice Harlan: "It is a condition precedent to the exercise of such power (eminent domain) that the statute make provision for reasonable compensation to the owner." Many state cases were cited, and also (p. 402), *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641. The act of Congress under review in the latter case, it was contended, did not provide for compensation for the property taken. In reply, Mr. Justice Harlan, delivering the opinion of the court, said (p. 659): "The objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty." The requirements of the Constitution were held to be fully met because the act which was under consideration provided that before the railway which was authorized should be constructed through any of the lands proposed to be taken, full compensation should be made to the owner for all property taken, or damage done by reason of the construction of the road, and in the event of an appeal from the finding of the referee the railway company should pay into court double the amount of the award to abide the judgment.

In *Kohl et al.* v. *United States*, 91 U. S. 367, acts of Congress were considered, one providing for the acquisition of a site

for a public building, the other an appropriation act. The appropriation made by the latter was "for the purchase, at a private sale or by condemnation, of ground for a site" for the building. The real controversy in the case was whether the acts of Congress intended the site to be obtained under the authority of the state government in the exercise of its power of eminent domain or by the United States Government in its own right, and by virtue of its own eminent domain. The court held the latter, and, commenting on the sufficiency of the acts to give the right, said (p. 374): "The authority here given [the first act] was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. . . . That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation 'for the purchase at private sale or by condemnation of the ground for a site' for the building."

But in the act of July, 1866, there is not a word which provides for condemnation or compensation. The rule that when a right is given all the means of exercising it are given does not, as we have seen, apply to the extent contended for by the Telegraph Company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication, and this was the reasoning in the *Pensacola* case and applied directly to the act of 1866. We may repeat the language of the court: "If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

In *Sweet* v. *Rechel, Cherokee Nation* v. *Kansas Railway Co.*, and *Kohl* v. *United States*, all cited *supra*, the property to which the constitutional protection was applied was property in private use. Their doctrine applies as well to private property devoted to a public use. There is no difference whatever in principle arising from the difference in the uses.

A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico* v. *United States Trust Co.*, 172 U. S. 171. We there said (p. 183) that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property." And we drew support for this from a New Jersey case, in which State the rights of way in the case at bar are situated. We quoted *N. Y., Susquehanna & Western Railroad* v. *Trimmer*, 53 N. J. L. 1, 3, as follows: "'Unlike the use of a private way—that is, discontinuous—the use of land condemned by a railroad company is perpetual and continuous.'" And it is held in Pennsylvania "that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it." *Philadelphia & Reading Railroad Co.* v. *Hummell*, 44 Pa. St. 375. It is "a fee in the surface and so much beneath as may be necessary for support. . . . But whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature." *Pennsylvania Schuylkill Valley R. R. Co.* v. *Reading Paper Mills*, 149 Pa. St. 18; *Philadelphia* v. *Ward*, 174 Pa. St. 45; *Railway* v. *Peet*, 152 Pa. St. 488.

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power is, we said, in *Sweet* v. *Rechel*, that the statute conferring it make provision for reasonable compensation to the owner of the property taken. This condition is expressed

with even more emphasis in *Cherokee Nation* v. *Southern Kansas Ry. Co., supra.*

A few more words may be necessary to avoid all possible misunderstanding of the purpose for which we have cited those cases and *Kohl* v. *United States.* We have cited them, not as tests of the validity of the act of 1866, but as tests of its meaning, supporting the authority of the *Pensacola* case and *Ann Arbor* case. We have no occasion to consider the validity of the act of 1866 as an attempt to grant the power of eminent domain. We decide the act to be an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph. As such, of course, the act is an efficient and constitutional enactment.

Certain cases decided at circuit are cited for our consideration, and we will close this branch of our discussion by a brief review of them.

In *Postal Telegraph Cable Co. of Idaho* v. *Oregon Short Line Railroad Company,* 104 Fed. Rep. 623, and *Postal Telegraph Cable Company* v. *Oregon Short Line R. R. Co.,* 114 Fed. Rep. 787, there were views expressed favorable to the contentions made in the case at bar by the Telegraph Company, but the judgments in both cases were ultimately rested upon the local statutes—Idaho and Montana—which granted the right of eminent domain to telegraph companies. We may also observe that the first case went to the Circuit Court of Appeals of the Ninth Circuit. That court sustained the judgment of the Circuit Court upon the statute of Idaho and upon general legal principles. It did not refer to the act of 1866. 111 Fed. Rep. 842.

In *Postal Telegraph Cable Co.* v. *Southern Railway Co.,* 89 Fed. Rep. 190, and *Postal Telegraph Cable Co.* v. *Cleveland, C. & St. L. Ry. Co.,* 94 Fed. Rep. 234, the act of 1866 was more directly passed on. Both cases were proceedings in eminent domain—one brought in the courts of North Carolina and removed to the Circuit Court of the United States; the other brought in the Circuit Court of the United States for the

Northern District of Ohio. In passing on the sufficiency of the petition in the first case, Judge Simonton said that the right of petitioner to construct its lines along the right of way of post roads of the United States was given under the act of Congress of 1866, but, he observed, "the mode or method of exercising the right conferred was fixed by the laws of the several States, and it was exclusive in its character in ascertaining the amount of compensation to be allowed." The right of the Telegraph Company was, therefore, considered and adjudged under the North Carolina statutes.

In the second case a motion was made to dismiss on the ground that the power of eminent domain was not conferred by any law of the United States or the State of Ohio. The motion was sustained. District Judge Ricks said: "The act of July 24, 1866, made no provision for compensation or payment for property to be taken, hence the procedure cannot be sustained by virtue of that act." He cited the *Pensacola* case, *supra*.

The Western Union Telegraph Company v. *Ann Arbor R. R. Co.*, 33 C. C. A. 113, and *St. Paul M. & M. Ry. Co.* v. *Western Union Telegraph Co.*, 118 Fed. Rep. 497, were respectively decided by the Circuit Court of Appeals of the Sixth Circuit and the Circuit Court of Appeals of the Eighth Circuit. It is difficult to reconcile them. In one it was decided, following the authority of the *Pensacola* case, that the Telegraph Company could not occupy the line of the defendant's railroad without its consent or that of some predecessor in title. This was wanting. In the other, it was conceded that the right of entry upon private property was not conferred by the act of 1866, without the owner's consent, yet held that, as consent had been given, no reason could be perceived why a court of equity should compel a removal of the Telegraph Company's lines from the railway's right of way, "especially where it appears that *no express agreement was made that they should be removed when its lines were erected.*"

2. It is contended by the Telegraph Company that the charters under which the several railway companies constituting the system of the Railroad Company were organized expressly created them "public highways," and that in the acquisition of land for their purposes they were public agents, "and the land was taken by the Government, and in the eye of the law as completely subject to public uses as though it had been taken by the State itself"—that is to say, if we understand the argument, have become highways in the full sense of that word. And counsel further say the difference between them and ordinary highways "is not a legal difference, but is the difference of the kind of use to which the highway is subject—in the one case, wheel vehicles drawn by horses; in the other, to steam vehicles drawn by locomotives along and upon iron rails." They are subject, therefore, it is urged, as ordinary highways and streets of a city are subject, to the control of Congress by virtue of its power over interstate commerce.

Counsel in advancing the argument exhibit a consciousness of taking an extreme position. It would seem, certainly if considered with other parts of their argument, to make a railroad right of way public property. To that extreme we cannot go, for the reasons which we have already indicated. The right of way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control, and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation. The right of way of a railroad was recognized as private property in the *Pensacola* case, and we are brought back to the main question—the interpretation of the act of July, 1866, and upon that we have sufficiently dilated.

It follows from these views that the act of 1866 does not

grant the right to telegraph companies to enter upon and occupy the rights of way of railroad companies, except with the consent of the latter, or grant the power of eminent domain. Nor does the statute of New Jersey make those rights of way public property so as to subject them to such occupation under the provisions of the act of 1866.

It is admitted that the statutes of New Jersey do not confer the right of eminent domain upon the Telegraph Company.

3. In view of our conclusion, it is not necessary to consider the question whether, if the power of eminent domain were granted by the act of 1866, it would be within the competency of a court of equity to ascertain compensation, or that compensation might be determined at law. That question was pertinent in *Kohl et al* v. *United States*, 91 U. S. 367. It is not pertinent in this case. The acts of Congress passed on in *Kohl et al* v. *United States*, as we have seen, provided for the appropriation of a site for a public building by purchase or *by condemnation*. By the act of 1866 power of condemnation is not given, and, of course, methods of procedure are not involved in its construction.

It is equally unnecessary to consider the questions which might arise if the State of New Jersey gave the right of eminent domain to the Telegraph Company. It is conceded by counsel that such right does not exist, and it happens that under the policy of New Jersey the right of way of the Railroad Company enjoys in that State immunity from compulsory proceedings instituted by the Telegraph Company. But this has no bearing on the act of 1866, nor does it make that act, as construed by us, a grant to railroads of greater power over commercial intercourse by telegraph than the States have. Indeed, we think, a comparison between the States and railroads in that regard is misleading and overlooks the essential difference between restraints on the legislative power of the States and the rights of property.

On account of those restraints, it may be, and finding no

impediment in the rights of property, interstate commerce, by telegraph, has marched to a splendid development, although in the acquisition of the means for its exercise it has relied on the consent of the owner of private property, or the power of eminent domain conferred by the States. We cannot but feel, therefore, that there is something inadequate in the argument which is based on the apprehension that the act of July 24, 1866, construed, as we construe it, gives a sinister power to railroad companies. It gives no power to those companies but that which appertains to the ownership of their property.

Decree affirmed.

MR. JUSTICE BREWER concurred.[1]

MR. JUSTICE HARLAN, dissenting.

In view of the importance of these cases I do not feel that any dissent from the opinion and judgment of the court should be expressed, unless the grounds of such dissent be fully disclosed.

The controlling question before the court is, whether the Western Union Telegraph Company is entitled, in virtue of any existing acts of Congress, to keep and maintain its telegraph lines upon the right of way of the Pennsylvania Railroad Company, assuming that the ordinary travel on that road will not be thereby interfered with.

Congress, having power to establish post offices and post roads, has declared all railroads in operation within the limits of the United States to be Post Roads and Post Routes. 5 Stat. 271, 283, c. 172; 10 Stat. 249, 255, c. 146; Rev. Stat. § 3964; 23 Stat. 3, c. 9.

There was, for many years, as all know, and therefore as the court may judicially know, a widespread belief that the Government and the people of the country were at great disadvantage in matters of business and intercourse as involved

[1] For concurring opinion of MR. JUSTICE BREWER, see p. 593, *post.*

in the use of the telegraph. The conviction was strong and universal that the control of the post roads of the country was being exerted by great railroad corporations in such way as to subserve private and corporate interests at the expense of the United States and without any regard for the convenience of the general public. As a remedy for those evils Congress passed the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230. By that act Congress conferred upon any telegraph company organized under the laws of any State "the *right* to construct, maintain and operate lines of telegraph," not only through and over the public domain and over, under or across the navigable streams or waters of the United States, but "over and along *any* of the military or *post roads* of the United States." By the same act it is declared that on the lines of such companies telegraphic communications between the several departments of the Government should be at rates to be annually fixed by the Postmaster General, and have priority over all other business. § 2. To the exercise of the right thus given, Congress annexed several conditions, but the only one pertinent to the present discussion is the condition that the telegraph lines erected by any company accepting the provisions of the act should be so constructed and maintained as not to obstruct the navigation of the navigable streams and waters of the United States or "interfere with the ordinary travel on such military or post roads."

The object of the act, this court has said, all its members concurring, "was not only to promote and secure the interests of the Government, but to obtain, for the benefit of the people of the entire country, every advantage, in the matter of communication by telegraph, which might come from competition between corporations of different States;" that "it was very far from the intention of Congress, by any legislation, to so exert its power as to enable one telegraph corporation, Federal

or state, . . . to acquire exclusive rights over any post road;" and that "no railroad company, operating a post road of the United States, over which interstate commerce is carried on, can, consistently with the act of July 24, 1866, bind itself, by agreement, to exclude from its roadway any telegraph company, incorporated under the laws of a State, which accepts the provisions of that act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon." *United States* v. *Union Pacific Railway Company & Western Union Telegraph Company*, 160 U. S. 1, 44, 49. Yet, by its present construction of the act of 1866 the court—if we do not misapprehend its opinion—holds that the right which that act gives to construct, maintain and operate a telegraph line upon a post road cannot, in virtue of that act, or under any existing legislation, be exercised by the Western Union Telegraph Company, against the will of the railroad company operating such road; and this, notwithstanding it be absolutely clear that the occupancy of the post road by the telegraph lines of the particular company proposing or desiring to erect them would not, in the slightest degree, interfere with the ordinary travel on such road. It is now held, in effect, that, so far as that act is concerned, and despite its explicit provisions, even the Government cannot, except with the assent of the Railroad Company, enjoy the advantages sought to be secured by its passage. I think it was intended by the act of 1866, in the interest of the postal service and of interstate trade and intercourse, to throw open all the post roads of the country to the use of telegraph companies accepting its provisions, subject to the condition that such use should not interfere with ordinary travel on the post roads so occupied. And that intention is in harmony with the doctrine often announced by this court, that "a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control." *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 657; *Olcott* v. *Supervisors*, 16

Wall. 678, 694; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287.

But it is suggested that the Telegraph Company has not been expressly invested with the power of eminent domain. Nevertheless, it has been given, by express words, the *right* to construct, maintain and operate its lines on any *post road* of the United States; and as it is not contended that Congress has exceeded its power in granting that right the question is whether the right so given can be made effective by any mode of procedure known to our jurisprudence. I have always supposed it to be competent for a court of the United States, having general jurisdiction of suits at law and in equity, in some efficient mode, by some process or form of procedure, to enforce and protect any right constitutionally conferred by the legislative department. The principle is illustrated in *Osborne* v. *Missouri Pacific Railway Company*, 147 U. S. 248, which was an action to enjoin the construction of a track along a public street, because of irreparable damage to be thereby inflicted on the plaintiff. This court, following the decision of Judge Brewer, now of this court, in *McElroy* v. *Kansas City*, 21 Fed. Rep. 257, said (p. 249): "If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainants substantial benefit of the condition, while not restraining defendant from the exercise of his ultimate rights. Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of property for public use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted, with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which complainant would

sustain, upon payment of which the injunction would be vacated." This principle was recognized in the recent case of *New York City* v. *Pine*, 185 U. S. 93.

It is said by counsel that the right given by the act of 1866 is necessarily subject to the condition prescribed by the constitutional provision that private property shall not be taken for public use without just compensation, and that the property interest of the Railroad Company in its right of way cannot be permanently taken from it for public purposes, against its will, without making such compensation.

Upon the subject of compensation the court reproduces from the opinion in *Sweet* v. *Rechel*, 159 U. S. 380, 399, this detached sentence: "It is a condition precedent to the exercise of such power [eminent domain] that the statute make provision for reasonable compensation to the owner." But the court does not apply any such rule to the present case and holds that the act of 1866 is invalid *as not making provision for compensation.* Besides, the above sentence taken in connection with the one immediately preceding it shows clearly that what was said had reference to the taking of *private* property for public use without provision being made in the statute for compensation. The entire paragraph from which the above sentence was taken reads: "When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of the Government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." What was said in *Sweet* v. *Rechel* plainly had no reference to property of a public or *quasi*-public nature. The same observations may be made in reference to the quotation made from *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. What was said in that case had also reference to the taking of private property. If the court were now of opinion that the act of 1866 was invalid *as*

not making provision for compensation, then the object of citing *Sweet* v. *Rechel* and *Cherokee Nation* v. *Kansas Railway* would be both manifest and appropriate. But the court does not hold that the act of 1866 is objectionable on any such ground. On the contrary, it holds a railroad right of way to be private property, and yet, despite its citation of the above cases, recognizes the validity of the act, although it makes no provision for compensation to the owner. It may not be appropriate for me to say that I adhere to what was said in *Sweet* v. *Rechel* and *Cherokee Nation* v. *Southern Kansas Ry. Co.*, the opinions in both of which cases were written by myself, speaking for the court. Whether a railroad right of way over a post road of the United States—such road being a public highway established primarily for the public convenience and subject to governmental control—is private property within the rule that a statute authorizing private property to be taken for public use must make provision for compensation, is a question not wholly free from doubt, and it need not be here discussed; for, the court does not hold that the act of 1866 is subject to that objection.

But let it be granted, for the purposes of this case, that a railroad company has such a property interest in its right of way that it is entitled to compensation, if such right of way be appropriated to the use of a telegraph company, accepting the act of 1866; still, the question remains in what way or by what mode may such compensation be legally ascertained? May it not be ascertained by a court of general jurisdiction, when all parties in interest are regularly being brought in? Here the Telegraph Company comes into the Circuit Court of the United States and seeks, in virtue of the act of Congress, to enforce the right expressly granted to it of occupying the post road in question with its lines. It expresses its readiness to make such compensation to the Railroad Company as the law requires, and informs the court that it has instituted an action at law to ascertain the amount of such compensation. The bill alleges:

"Your orator says further that it is diligently prosecuting said action on the law side of this court for the ascertainment of the amount of compensation to the said railway companies defendant herein, for the right to the use of said railroads to maintain and operate its telegraph line along and over the lines of said railways as prescribed in said act of Congress of July 24, 1866; and that it will continue to prosecute the same to a final determination as rapidly as the business in said court will permit the said cause to he heard and determined and without any unnecessary delay.

"Your orator prays that this court ascertain, order, adjudge and decree the amount of compensation to be paid by your orator to the defendants, as their rights may severally appear, for the construction, maintenance and operation of your orator's telegraph lines over and along the right of way of the defendants' said railroads, under the terms, provisions and restrictions of said acts of Congress hereinbefore mentioned, or, if this court shall order and determine that the amount of such compensation to the defendants shall be such amount as shall be determined or adjudged in the said action at law, that upon due payment of such compensation by your orator to the defendants this court will order, adjudge and decree that your orator is entitled to a perpetual injunction against the defendants herein and each of them, restraining them and each of them from in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendants, under and subject to the provisions and restrictions of the said act of Congress of July 24, 1866, and meanwhile and until the final decree of this court that a temporary injunction be issued against the defendants, prohibiting and restraining them and each of them from in any manner interfering with the use and operation of the telegraph lines of your orator upon the said roadway and right of way of the defendants pending the determination of the said action at law, or until the further order of this court in the premises.

And for such other and further relief as the case may require and to your honors may seem just."

Kohl v. *United States*, 91 U. S. 367, was an application filed in pursuance of acts of Congress authorizing and directing the Secretary of the Treasury to purchase a site for a public building. A site was selected, but the Secretary and private owners could not agree as to price, and the acts of Congress did not direct the particular mode by which the land should be condemned and the compensation to be made by the Government ascertained. The Secretary of the Treasury, in order to carry out the will of Congress, did not institute formal proceedings of condemnation as one of the acts, under which he proceeded, authorized him to do. But he instituted a suit in a Circuit Court of the United States to appropriate a certain parcel of land for the proposed building. It was objected that the Circuit Court was without jurisdiction, but that objection was overruled. It was contended in argument that while the United States had the right of eminent domain, Congress had not given to the Circuit Court jurisdiction of a proceeding for the condemnation of property brought by the United States in the assertion or enforcement of that right; and that the act of Congress meant that the land for the proposed public building was to be obtained under the authority of the state government in the exercise of its right of eminent domain. It was further contended that if the proceeding was properly instituted in the Circuit Court, then the act of Congress required that it should conform to the provisions of the state law in a like proceeding in the state court. This court said (p. 375): "Doubtless Congress might have provided the mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. *The investment of the*

Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him *also* the power to obtain it *by any means that were competent to adjudge a condemnation* (p. 376). . . It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi-judicial.* Certainly no other mode than a judicial trial has been provided. . . . *But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law;* and hence, as the Government is a suitor for the property *under a claim of legal right to take it,* there appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit, *under the general grant of jurisdiction made by the act of* 1789."

In *United States* v. *Jones,* 109 U. S. 513, which was a proceeding to condemn property for the use of the United States, this court, referring to a certain proposition advanced by counsel, said (pp. 518, 519): "There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom Company* v. *Patterson,* 98 U. S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. . . . But there is no reason why the compensation to be made may not be ascertained *by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the*

appropriating power. The proceeding for the ascertainment of the value of the property and consequent compensation to be made, *is merely an inquisition to establish a particular fact as a preliminary to the actual taking;* and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is *that it shall be conducted in some fair and just manner,* with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon."

The vital object of the present suit was to secure the recognition and enforcement of the right of the Telegraph Company, under the act of 1866, to keep and maintain its lines upon the railroad's right of way. If it had such right—the authority to confer the right is, we repeat, not disputed—then this suit in equity was an appropriate mode by which the right could be adequately protected and compensation secured to the railroad company. To assert the right and to ask that the amount of compensation shall be ascertained made the proceeding a suit or controversy within the meaning of the judiciary acts, and made the case one—in legal effect—for condemnation. I perceive no reason why the court, in advance of a final decree recognizing and enforcing that right, could not have instituted, as it was asked to do, an inquiry in respect of the compensation which the Railroad Company was entitled to receive for the proposed use of its right of way, and have made the payment of such compensation a condition precedent to the exercise by the Telegraph Company of the right given by the act of 1866. Having all the parties interested before it, could not the court have directed a jury to be impanelled to inquire, under the direction of the court, as to the amount of compensation to be paid to the Railroad Company? Could it have done any more under regular proceedings of condemnation? Instead of adopting that course, the Circuit Court proceeded upon the ground that even if the use of the defendant's road by the Telegraph Company would not interfere with ordinary travel on and

over it, it was compelled by the former decisions of this court to hold that neither in virtue of the act of 1866, nor of any other exising Federal statute, could the Telegraph Company occupy the railroad's right of way without the consent of the Railroad Company.

The cases in this court which, it is supposed, adopted this view of the act of 1866 are *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, and *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243. But the utmost ingenuity is inadequate to show that the present question was involved in either of those cases, or that the decision in either case depended in the slightest degree on its solution.

It appears from the *Pensacola* case that the Western Union Telegraph Company had the right to place and operate its lines upon the right of way of a certain railroad company between points in Alabama and points in Florida. There was no controversy in that case between the railroad company and the telegraph company as to the right of the latter to have its lines on the railroad right of way. The railroad company, as the report of the case shows, had consented to the occupancy of its right of way by the lines of the Telegraph Company, and that fact was not disputed. The railroad company was not even a party to the suit. It had no quarrel with the telegraph company. What need, then, had the court to consider the rights of the Western Union Telegraph Company, under the act of 1866, when it was conceded that that company had the consent of the railroad company to occupy its right of way? This view of the case was distinctly announced by this court when it said in the *Pensacola* case that "*the present case is satisfied, if we find* that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its [the telegraph's] usefulness." The sole question in the case was as to the validity of a Florida statute, under which a Florida telegraph company was given *exclusive* telegraphic rights over the route to be occupied by the Western Union Telegraph Company with the consent of the railroad

company; and the charter of the Florida company authorized it to locate and construct its lines within certain named counties of Florida "along and upon any public road or highway, or across any water, or upon any railroad or private property for which permission shall have first been obtained from the proprietors thereof." This court held that the attempt of the State to exercise exclusive control over telegraphic communications between it and other States was in conflict with the commerce clause of the Constitution of the United States, and that the Florida statute was void, so far as it assumed to grant exclusive privileges to a particular telegraph company.

Referring to the act of 1866 the court said (p. 11): "It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if *they accept the terms proposed by the National Government for this national privilege.* To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." What was meant by the words, "but it [the act] does provide that, whenever the consent of the owner is obtained," I cannot understand. The act of 1866 does not contain any such provision nor anything like it. Not a single word is to be found in it

that refers to the consent of the owner of the property to be taken. The court proceeds: "It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, 'Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military *and post roads*, and the navigable waters of the United States. These are all within the dominion of the National Government to the extent of the national powers, and are, therefore, subject to legitimate Congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of *public* property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language, it seems to me, has not been correctly interpreted. Undue stress has been laid upon the words "private property without the consent of the owner," and the words "private property . . . obtained by private arrangement with its owner." They have been so interpreted as to make the court decide a question not before it, not necessary to the decision, not involved in the isuses made, and never suggested by counsel. The briefs of counsel in that case show that no such question was in their minds; for they as well as the court knew, from the record before them, and as we may know from an examination of that record, that the Western Union Com-

pany was entitled, so far as the consent of the railroad company was concerned, to maintain its lines on the railroad right of way. Upon the above quoted words the contention is based that the court intended to decide that no railroad right of way could, *in virtue of the act of* 1866, be occupied by any telegraph company without the consent of the railroad company first obtained. I cannot believe that any such question was intended to be decided. As already shown, the court expressly said that the only question to be decided was whether Congress had power to prevent a State from obstructing interstate telegraphic communications, by granting exclusive privileges to a particular telegraph company of its own creation. It is a mistake to say that the court declared that the *sole* purpose of the act of 1866 was to prevent state monopolies, or that the act was merely an exercise of national power to forbid state interference with telegraphic communications. It did say that the case then before the court would be satisfied if the question as to state interference was decided, that is, that the case involved no other question. Besides, the whole context of the opinion in the *Pensacola* case shows that the court did not include railroad property employed in commerce when it used the above quoted words. It was argued in that case that the act of 1866 had reference only to the "public domain," that is, to the public lands owned by the United States. This view was distinctly rejected, and post roads were placed by the court, so far as the privileges granted by the act were concerned, on the same plane as the public domain, so that not even a State could interfere with the national privilege granted by Congress, if the telegraph company accepted the terms of the act. The court said that any telegraph company, accepting the provisions of the act, could put its lines on any post road, if ordinary travel thereon was not interfered with, and that not even the State could stand in the way. It then added, as if out of abundant caution, and to show that Congress had no purpose to interfere with the rights of private owners, that no attempt was made by Congress to provide for

the appropriation of private property, and that "the use of *public* property *alone* is granted." That meant that the act had not granted any right to telegraph companies to occupy *private* property with telegraph lines. Having said that the act granted the use of post roads for telegraphic purposes; that it embraced the use of such roads *equally* with the public domain; and that "the use of *public* property *alone* is granted," it is inconceivable that the court employed in the same connection the words "private property," as embracing post roads, or the use of such roads. To relieve the minds of those who apprehended danger arising from the act of 1866 to state sovereignty and to rights that were strictly private, the court took care to say that neither state sovereignty nor private rights were interfered with; that only national privileges were granted; but that, in respect of the use of the public domain and military and *post roads*, Congress had power to pass the act of 1866, and in dealing with the use of post roads, by telegraph companies, it dealt with public property.

When the court held in the *Pensacola* case that telegraphic communications between the States could be regulated by Congress under its power to regulate commerce, and that the statute of Florida, which assumed to give to a Florida telegraph company an exclusive right in respect of telegraphic communications over certain territory in that State, was inconsistent with the act of 1866, that was an end of that case, and nothing remained to be done, except to dismiss the suit. The court itself so declared. Nothing more was in issue between the parties. The case involved, I confidently insist, no question as to the previous assent of the railroad company being a condition of the exercise by the Western Union Telegraph Company, of the rights given by the act of 1866.

Nor is the case of *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243, 244, an authority for the action of the Circuit Court. That was a case in which the only relief sought was the *specific performance* of a contract under which a telegraph company claimed the right to remain in the occupancy

of the right of way of a railroad company. The court pertinently observed in that case that it was not claimed that "the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property." It was, however, claimed that as the telegraph company was in the discharge of public duties, the Circuit Court "should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement, to be ascertained by the court." But that view was rejected because the bill "was not framed in that aspect," and so as to protect the occupancy of the telegraph company subject to the condition of its making compensation, and the court also said that the relief asked could not be given under the prayer for general relief, because not "agreeable to the case made by the bill."

Now, the present bill has been framed so that the court can protect the right given to the Telegraph Company by the act of 1866 to have its wires and poles on the company's right of way, upon its being ascertained that such use will not interfere with the ordinary travel on the railroad, just compensation being made for that use, and the amount of compensation to be ascertained by the court in some appropriate way.

In my judgment, nothing involved or in judgment in the *Pensacola* and *Ann Arbor* cases requires the affirmance of the decree of the Circuit Court.

The affirmance of that decree of the Circuit Court will mean that the efforts of Congress, by the act of 1866, to obtain for the people of the country the advantages accruing from competition between corporations of the different States in the matter of telegraphic communications, and also to promote and secure the interests of the Government as involved in the conduct of its postal and military business, will prove of but little value. Indeed, as construed, it might have been better for the country if the act of 1866 had not been passed, and the States left free to establish such regulations in refer-

ence to telegraphic communications, within and over its territory, as would be appropriate and valid in the absence of Congressional legislation on the subject. As the matter now stands, the whole subject is practically committed to the railroad companies. The court says that the act of 1866 is an efficient enactment for the purpose of preventing state interference with interstate telegraphic communications. As now construed, it would seem to be most efficient in tying the hands of the States and leaving railroad companies operating post roads, so far as existing legislation is concerned, absolute masters of interstate communication by telegraph.

In the *Pensacola* case it was decided, and I think rightly, that in respect at least, of interstate telegraphic communications, a State could not give exclusive privileges to a particular telegraph company. But, as just stated, by the necessary operation of the judgment now rendered a railroad company, operating a post road, can, in effect or practically, confer exclusive privileges upon a particular telegraph company, in respect of its right of way, by simply withholding its consent for a second telegraph company to occupy any part of such right of way with its wires and poles. If the Government should be of opinion that the public business imperatively required another telegraph line upon the post road now occupied by the Pennsylvania Railroad, that company need only object to other telegraph lines being placed upon its right of way, and that will be the end of the matter, so far as the act of 1866, as now construed, is concerned. If the Government, and a telegraph company fully equipped, should jointly represent to the railroad company that an additional company can be admitted to its right of way without obstructing the ordinary travel on that road, the company need only reply that no other telegraph company than the one now there can occupy its right of way, and that will be the end of the matter, so far as the act of 1866, as now construed, is concerned. All this is now made possible, notwithstanding the decision of this court in *United States* v. *Union Pacific Rail-*

way, 160 U. S. 1, above cited. In that case we propounded this question, p. 44: "Can it be said that after the passage of the act of 1866, and while it was in force, a railway company, operating a post road of the United States, could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provisions of that act?" We said that this question could be answered only in one way, "namely, that every railroad company operating a post road in the United States, over which commerce among the States is carried on, was inhibited, after the act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operations." The court added that it was very far from the intention of Congress by any legislation to so exert its power as to enable one telegraph corporation, Federal or state, to acquire exclusive rights over any post road. But now, a railroad corporation operating a post road, and wishing its right of way occupied only by a single company, with which it may have a special business arrangement, for its own purposes, need not make even a secret agreement granting exclusive privileges to that company. It need only keep silence and withhold its assent to the occupancy of its right of way by another company, and in that way give exclusive privileges to the company with which it has a special arrangement; it may be to one organized wholly in the interest of the railroad company. In the *Pensacola* case it was said that one of the objects of the act of 1866 was to prevent state monopolies in telegraphic communication, and that the privilege granted by that act was a national privilege. Now, although state monopolies cannot exist, railroad monopolies in telegraphic communications may exist; and the national privilege granted by the act of 1866 is left at the mercy of railroad companies operating the post roads of the United States.

Practically, the railroad corporations operating post roads —looking to their own interests and perhaps caring little for the general welfare—are recognized as now having more power

than a State. I cannot assent to any interpretation of the act of 1866 from which such a result can follow. No such result is, in my opinion, consistent either with the words of the act or with the objects which Congress, as this court has said, intended to accomplish by its passage. The act, reasonably interpreted, was, I think, intended to give a telegraph company accepting its provisions the absolute right to put its wires and poles upon any post road—a public highway established primarily for the public convenience—if the ordinary travel on such road was not thereby interfered with.

For these reasons, I am constrained to dissent from the opinion and judgment of the court.

MR. JUSTICE BREWER, concurring.

I concur in the judgments in these cases but do so distinctly on the ground that the questions have been settled in prior cases. If the matter was *res integra* the views expressed by Mr. Justice Harlan would be very persuasive. *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1, and *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239, seem to me controlling. In the first of these cases, the scope of the power and authority granted by the act of 1866 was distinctly presented. It was within the proper limits of inquiry, and the opinion of the court shows that it was fully considered. The declarations in that opinion are clear and precise, and cannot be considered in any just sense *obiter dicta*. The decision was announced in 1877, and was reaffirmed in 1890 in the *Ann Arbor* case. If the court erred in its construction of the act, Congress has had twenty-seven years in which to correct the mistake. Its omission to take any action must be considered as an acquiescence on its part in that construction. And I am of the opinion that when this court has construed a statute of Congress, and that construction has remained for more than a

quarter of a century, neither changed by any judicial decisions or set aside by any Congressional legislation, it ought not to be disturbed except for the most cogent reasons.

WESTERN UNION TELEGRAPH COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

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

No. 90. Argued October 19, 20, 1904.—Decided December 12, 1904.

Western Union Tel. Co. v. *Pennsylvania R. R. Co. et al, ante,* p. 540 followed to effect that the act of July 24, 1866, 14 Stat. 221, does not confer any right of eminent domain on telegraph companies and that a railroad company's right of way is not a public highway within the meaning of that act.

Eminent domain cannot be delegated, and the lessee of a corporation cannot exercise the power of condemnation conferred by legislature on the lessor.

THE facts are stated in the opinion.

Mr. John F. Dillon, Mr. Rush Taggart and *Mr. Henry D. Estabrook* for plaintiff in error as to the special points involved in No. 90.[1]

The Atlantic and Ohio Telegraph Company was authorized by its charter to appropriate to its use, within specified limitations, property of a specific character, to wit, the roads, highways, streets and waters of the State of Pennsylvania. Defendant's railroad is not only a highway of the State in its very nature, but by its charter and the constitution of Pennsylvania is expressly declared to be a highway. Hence, it is subject to the appropriation of the Atlantic and Ohio Telegraph Company, within the limitations of the right granted. § 1, art. 17; §§ 3, 12, art. 16, constitution Pennsylvania; cl. 1, § 33, and cl. 2, ch. 6, act of Pennsylvania legislature, April 29, 1874; *Trunnick* v. *Smith,* 63 Pa. St. 18.

[1] For abstract of argument on other questions involved in this case, see *ante,* p. 547.

As lessee of the franchises of the Atlantic and Ohio Telegraph Company, the Western Union Telegraph Company has the right in its own name to exercise such franchises, including the franchise of eminent domain.

This was practically conceded by the trial judge, who held, however, that the Atlantic and Ohio Telegraph Company was not authorized under its charter to appropriate to its use a railroad right of way, even within the limitations imposed—to wit, that the use should not interfere with the common use of such highway, or incommode the public use thereof.

Not only would the Western Union Telegraph Company have the right to condemn in its own name, under the express terms of the Atlantic and Ohio charter already quoted, but it would have the right under the general principles and policy of law, which justifies the condemnation only upon the theory that the property when condemned is for the use of the public, by whomsoever condemned, and that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. *Abbott* v. *N. Y. & New England R. R. Co.* (Mass.), 15 N. E. Rep. 91; *Cal. Cent. Ry. Co.* v. *Hooper*, 76 California, 404; *Crolley* v. *Minn. & St. Louis R. R. Co.*, 30 Minnesota, 541; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Illinois, 156; *Kip* v. *N. Y. & Harlem R. R. Co.*, 6 Hun, 24; *S. C.*, 67 N. Y. 227.

Mr. John G. Johnson for defendant in error.[1]

Mr. Justice McKenna delivered the opinion of the court.

This was a petition on the law side of the Circuit Court for the Western District of Pennsylvania to condemn part of the defendant's right of way and appropriate it to telegraph purposes. There was also a bill on the equity side praying for an injunction to restrain defendant in error from dispossessing

[1] For abstract of argument in this case, see *ante.*, p. 555.

plaintiff in error during the pending of the condemnation proceedings.

The Circuit Court refused to approve the bond tendered with the petition for condemnation and ordered the petition dismissed. 120 Fed. Rep. 362. The Circuit Court of Appeals affirmed that action. 123 Fed. Rep. 33.

The bill in equity, though not before us technically, has been freely referred to in argument, and, besides, many of the allegations of the petition are the same as those in the bill and appeal passed on in Nos. 89 and 199. The same rights are asserted under the act of July 24, 1866, as there considered. The contention here, as there, is that the Telegraph Company has the right to maintain its lines of telegraph over and along the railroads of the Railroad Company upon making compensation to the Railroad Company for the use so appropriated, so long as the maintenance of its telegraph lines does not materially interfere with the ordinary travel of such roads, and that the right can be asserted by proceedings in eminent domain. It is conceded that there is no general law of Pennsylvania giving that right to the Telegraph Company. The contention that such right is given by the act of 1866 we considered in Nos. 89 and 199, and decided against the contention. But there are other elements in this case. The Telegraph Company is the lessee of the Atlantic and Ohio Telegraph Company (the lease is terminable at the option of either party by giving six months' notice) and claims eminent domain as successor of that company. The claim rests upon the statute of Pennsylvania incorporating the Atlantic and Ohio Telegraph Company. That statute was passed in 1849, and provided, in section five, that it should be lawful for the company "to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this State; the said works to be so placed as not to interfere with the common use of such roads, highways, streets and waters." The company was authorized to enter into and occupy any land for the purposes of locating and

constructing its lines upon securing or tendering such compensation as might be agreed on between it and the owners of the land, or in the manner mentioned in the statute. The Circuit Court and the Circuit Court of Appeals rejected the claim of the Telegraph Company based on that act. The decision was rested on two grounds: (1) That railroads were not highways within the meaning of the statute; and (2) as expressed in the opinion of the Circuit Court of Appeals: "No authority to enter upon the right of way of railroads was plainly and distinctly granted, and it is well settled that the right of eminent domain may be exercised by a corporation, in any case, only when granted in express terms or by necessary implication, and that property held and applied by one corporation for a public use cannot be appropriated by another for its use without authority clearly expressed, or which may be implied from the fact (which in this case does not exist) that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. *Penna. R. R. Co.'s App.*, 93 Pa. St. 150; *Pittsburg Junction R. R. Co.'s App.*, 122 Pa. St. 511; *Sharon Ry. Co.'s App.*, 122 Pa. St. 533; *Groff's App.*, 128 Pa. St. 621; *Perry Co. R. R.* v. *N. & S. V. R. R. Co.*, 150 Pa. St. 193; *Phillips* v. *D., W. & P. R. R. Co.*, 78 Pa. St. 177; *Glover* v. *Boston*, 14 Gray, 282."

(1) In the opinion in Nos. 89 and 199 we marked a distinction between highways and railroads against a contention which identified them in legal meaning and effect. We need not enlarge upon what we there said. Highways and railroads may be assimilated in legal contemplation to a certain extent, and considerations which apply to one within that extent apply to the other. To apply them beyond that extent would be to confound the distinctions of common speech and practice and destroy property rights long recognized to exist. And we do not deem it necessary to follow and answer in detail the very able arguments of counsel. It is enough to say that they have carried the analogies between ordinary high-

ways and railroads too far; indeed, have gone beyond analogy, and have contended for almost legal coincidence in attributes and effect.

(2) But there is another rule applicable to grants of eminent domain which is also fatal to the contention of the Telegraph Company for the rights claimed by the Telegraph Company under the lease from the Atlantic and Ohio Telegraph Company. Eminent domain cannot be delegated. Lessees cannot exercise it. 1 Lewis Eminent Domain, section 243, and cases cited. It is to meet this prohibition probably that certain allegations of the petition are made. It is alleged that the Atlantic and Ohio Telegraph Company entered into a "contract to lease" with the Telegraph Company the first of April, 1864; that afterwards the former company made an agreement with the Railroad Company whereby the latter company granted to the said Atlantic and Ohio Telegraph Company permission to construct and maintain a line of telegraph wires "along and adjacent to the line of railroad" from Philadelphia to Pittsburgh, "without limit as to term and duration," which contract was afterwards assigned to the Telegraph Company (plaintiff in error), and the assignment was ratified and affirmed by the act of the legislature of Pennsylvania, entitled: "An act supplemental to an act entitled 'An act to incorporate the Atlantic and Ohio Telegraph Company, approved March 24, 1849, and to confirm certain agreements executed by said company,'" approved May three, one thousand eight hundred and seventy-one, the same as if the said lease and contract had been made by virtue of express authority of law, the said act of assembly also providing that said Atlantic and Ohio Telegraph Company should have and possess all the rights, powers and privileges conferred by the third and fourth sections of the act of the legislature of Pennsylvania to incorporate the Eastern Telegraph Company, approved the fifth day of April, 1866.

This act, the petition alleged, gave to the Telegraph Company "all the corporate rights, powers, privileges and fran-

chises of said Atlantic and Ohio Telegraph Company, including the right to appropriate, on inability to agree with the owner, all lands necessary for the construction, maintenance and operation of the said lines of telegraph from Philadelphia to Pittsburgh, with any and all such branches therefrom as it may think proper."

The acts cited affirmed agreements or leases theretofore made. Subsequent agreements were provided for, if at all, by sections 3 and 4 of the act incorporating the Eastern Telegraph Company, as follows:

"SEC. 3. That the said corporation shall have power to connect by contract, with other persons or corporations having other telegraphic lines within or out of this State, for the purpose aforesaid; and it may also form a union with or lease to other corporations, associations or individuals, incorporated by this Commonwealth or any other State, its own lines, with their fixtures and apparatus, or lease from any individuals, associations or corporations incorporated by this Commonwealth, or any other State, their lines, fixtures and apparatus, and when such unions as aforesaid are formed the stock may form a common stock upon such terms and conditions as the said companies or associations respectively shall agree upon, and that as soon as such union shall be effected and a true copy of the agreement made for that purpose, duly certified under the corporate seal of the said companies, shall have been filed in the office of the secretary of the Commonwealth, the stockholders of the said companies shall become one body, corporate and politic, under such name and style as they shall adopt and agree upon and embody in their certificate, with all the rights and privileges incident to a corporation and with all the rights, powers and privileges which, by virtue of this act, are vested in the company hereby incorporated.

"SEC. 4. That the said corporation shall have power to purchase, make, use and maintain any connecting or side lines."

Under those sections the Atlantic and Ohio Telegraph Com-

pany was authorized to lease its lines to the Telegraph Company. A lease had already been made, as we have seen. Those sections also authorized the companies to "form a union" and "become a body corporate and politic, under such name and style" as they should adopt. That was not done. The Telegraph Company, therefore, is the simple lessee of the Atlantic and Ohio Company, and has only the powers of a lessee, and as such cannot exercise the right of eminent domain conferred on the Atlantic and Ohio Company.

It is, however, further alleged that the Telegraph Company, by the power vested in it by the lease from the Atlantic and Ohio Company and the acts of the Pennsylvania legislature confirming the same, and "in the exercise of all and every other power enabling it in anywise to do so," duly located a single line of telegraph along and upon the right of way of the Railroad Company and attempted to agree with the latter company upon the prices of compensation therefor; and "that the aforesaid corporate action of the Western Union Telegraph Company has been duly ratified and approved by corporate action in that behalf by the said Atlantic and Ohio Telegraph Company."

It will be observed that the location, so called, was made by the Telegraph Company and in its own name. It was not made by the Atlantic and Ohio Company and in its name. And the Atlantic and Ohio Company is not a party to this action. The action was commenced and is prosecuted by the Telegraph Company alone. The prayer is that, upon the payment of the compensation which shall be directed to be paid for the "rights and interests acquired thereby (that is, by the statutes and proceedings set out in the petition) by the said Western Union Telegraph Company, possession be adjudged to the Western Union Telegraph Company by this court of the said use, right and interests according to law, and that the title to the said rights and interests as against the defendant thereby vest in the said Western Union Telegraph Company for the purposes aforesaid; . . ."

If it can be said that under the allegations of the petition the Atlantic and Ohio Company retains its rights as the lessor of the Telegraph Company, still as to such rights it is a necessary party. To have made it a party might have precluded jurisdiction in the Circuit Court.

But the Telegraph Company contends for eminent domain in its own right as lessee of the Atlantic and Ohio Telegraph Company, and in its own name, and combats the view that it cannot receive a delegation of that power. The following cases are relied on: *California Central Ry. Co.* v. *Hooper*, 76 California, 404; *Crolley* v. *Minneapolis & St. Louis Ry. Co.*, 30 Minnesota, 541; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Illinois, 156; *Kip* v. *N. Y. & Harlem R. R. Co.*, 6 Hun, 24; aff'd, 67 N. Y. 227; *Abbott* v. *N. Y. & N. E. R. R. Co.*, 145 Massachusetts, 450.

These cases do not sustain the contention. In the case in 76 Calfornia a corporation commenced proceedings in eminent domain. It afterwards consolidated with other corporations. The new corporation thus created was held to be entitled to continue the proceedings in its own name and for its benefit, because it had acquired that right in the manner provided by the statutes of the State.

In 30 Minnesota a railroad corporation condemned, paid for and took certain land for its right of way. Without constructing its road, it transferred the right of way to another railroad corporation. The owner of the land taken brought ejectment for it, alleging the invalidity of the transfer. It was held that his interests were not affected by the transfer, and he could not question the capacity of the first company to make, nor the second company to receive, the transfer.

In 113 Illinois the facts are somewhat complicated, but the point decided relevant to our present discussion is, that it mattered not that the necessity for an increase of a right of way of a railroad company for additional tracks was caused by the use of the road by other companies acting under lease or by contract, nor by what company or companies the road

was operated. It was still a public use, and (to quote the court) "the needs of the lessees are as those of the lessor company, and any condemnation for their wants may proceed in such latter company's name, and it all the while stands responsible for the running of the road." *Kip* v. *N. Y. & H. R. Co.*, 6 Hun, 24; *S. C.*, 67 N. Y. 227, were cited.

If this case supports one contention of the Telegraph Company, it destroys another. It establishes that if the right of eminent domain is given to the Telegraph Company by the lease from the Atlantic and Ohio Telegraph Company that right can only be exercised in the name of the latter company. And such is also the effect of the cited cases, or rather the cited case, for it is only one case appearing at different stages in the reports. The plaintiff in the case, who was appellant in the Court of Appeals (67 N. Y. 227), brought suit against the defendant company to restrain it from prosecuting proceedings to condemn certain lands owned by him in the city of New York. He had leased them to the company for twenty-one years, and his contention was that the condemnation proceedings would impair the obligation of the lease and should be enjoined.

The plaintiff alleged also a lease by the defendant of its road and property to the New York Central and Hudson River Railroad Company for 401 years, and claimed that the lease abrogated the proceedings to condemn the land, and terminated and removed all necessity for its acquisition for the use of the defendant. It was held (1) that the relation created by the lease was no impediment to the exercise of eminent domain conferred upon the company by the statute of the State; and (2) that the proceedings to condemn were not affected by the lease. The court observed that the same necessity existed in favor of the defendant after as before the lease, and if the necessity was only in favor of the lessee it was competent for "the lessee to continue the proceedings *in the name of the defendant.*" (Italics ours.)

In *Abbott* v. *N. Y. & N. E. R. R. Co.*, the question involved was whether the power to take land by eminent domain may be given to a foreign corporation, and whether a corporation by the consent of the legislature may take the power as a *quasi* successor of another corporation to which it was originally granted. Under the statutes of the State those questions were answered in the affirmative, and it was in regard to those questions and statutes that Chief Justice Holmes, now a justice of this court, said that the reasons which have led some courts and judges to doubt the necessity of the consent of the legislature to a transfer of the right of eminent domain from one corporation to another "show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred." The case is not like that at bar, and need not be further analyzed.

A case more applicable to the case at bar is *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R. R. Co.*, 109 Massachusetts, 103. In that case the railroad company was required to unite with others in establishing a passenger station. Resisting the proceedings which were brought to appoint commissioners to select a location, it was urged that it might become necessary to exercise the right of eminent domain, and against that the railroad pleaded a lease to the Boston, Hartford and Erie Railroad Company, which had been confirmed by the legislature. There were other transfers of interests, and of them and the lease the court said: "Yet none of these leases or assignments can be construed to extend to the lessees or assignees the power to exercise the right of eminent domain, or to restrict the right of the legislature to alter or repeal the charters." And again: "The lease by the Norwich and Worcester Railroad Company did not make the lessees, or their representatives, parties to the grant of power to exercise the right of eminent domain. The right remained in the original corporation, and the legislature might properly deal with it exclusively in amending their (its) charter."

Judgment affirmed.

MR. JUSTICE HARLAN, dissenting.

The judgment of the Circuit Court in this case rests mainly upon the same grounds as the judgment in cases Nos. 89 and 199. For the reasons stated in my opinion in those cases, I dissent from the opinion and judgment in this case.

Ex parte THE REPUBLIC OF COLOMBIA.

IN THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR WRIT OF MANDAMUS TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

No. 13, Original. Argued November 28, 1904.—Decided December 12, 1904.

Nothing in the decree of this court in *Colombia* v. *Cauca Co.*, 190 U. S. 524, prohibits the Circuit Court from allowing interest on the amount of the items allowed.

THE facts are stated in the opinion.

Mr. William G. Johnson for the Republic of Colombia, petitioner.

Mr. John W. Beaumont, with whom *Mr. Hugh L. Bond, Jr.*, and *Mr. J. Walter Lord* were on the brief, for the Cauca Company, respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of mandamus to the Circuit Court, ordering it to correct its decree entered in pursuance of the decision in *Colombia* v. *Cauca Company*, 190 U. S. 524.

The decree appealed from in that case confirmed an award against the Republic of Colombia after rejecting certain items, and ordered interest to be paid on the remainder from January 26, 1898, the date fixed for payment by the award. In this court other items of the award were disallowed and a decree was made reversing the decree below and remanding the case, "with directions to enter a decree confirming the award for and up to the sum of $193,204.02." The Circuit Court thereupon entered a decree for that sum, with interest from the above mentioned date. The giving of interest is the error alleged, and it is contended that by the proper construction of the decree of this court interest should not have been allowed.

Of course, the only question open in this proceeding is, whether the decree of this court prohibits the allowance of interest. *Re Sanford Fork & Tool Co.*, 160 U. S. 247. As to that it is to be noticed that nothing is said upon the subject either in the decree or in the discussion of the case. In the opinion, however, the items were treated as separate matters; "some of which," it was said, "may be disallowed without affecting the rest." The only ground suggested for reversal was the inclusion of the separable items. By confirming the award as to the others this court in effect declared that they should have been paid in gold coin of the United States of America, in the city of New York, on January 26, 1898, in accordance with the terms of the award. To that extent the decree below stood approved, and as no disapproval was expressed of the consequence attached by that decree to the failure to pay, it is impossible to say that there was any implied prohibition of again attaching the same consequence in the new decree. "The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects." *Gaines* v. *Rugg*, 148 U. S. 228, 238. This language is sufficiently applicable to be

instructive, although not absolutely in point. See also *Kneeland* v. *American Loan & Trust Co.*, 138 U. S. 509.

It may not be improper to add that when the Republic of Colombia made its voluntary submission to arbitration it agreed that, if the award was against it, in excess of a sum paid in advance, the Government should "pay the excess at such time, in such manner, and on such terms as may be determined by the Commission." Art. 10. See Art. 9. This language authorized the allowance of interest, and the first draft of the award gave interest at six per cent in case of failure to pay at the time fixed, allowing, on the other hand, a discount of five per cent for cash. Both of these provisions were omitted from the final award, which stopped with fixing the time. But when the Republic submitted itself to the courts it must be taken to have done so on the same terms as other litigants, so far as fixing the amount which it was to pay was concerned, that being the matter on which the action of the courts was invoked, it seems to us that it was competent for the Circuit Court to decree the payment of interest as in an ordinary case.

Rule discharged. Petition denied.

BULLIS *v.* O'BEIRNE.

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

No. 60. Argued November, 10, 11, 1904.—Decided December 12, 1904.

On writ of error to a state court reviewing its refusal to cancel a judgment after discharge of the debtor in bankruptcy on the ground that the judgment was in an action for fraud, the Federal question is not whether the complaint sufficiently charged fraud to warrant the judgment but whether the action was for fraud; and if there are facts charged and found to the effect that false and fraudulent representations were made and relied on which in the state court were sufficient to warrant relief on the ground of fraud the judgment comes within the exception of § 17 of the bank-

rupt act and will not be canceled although the suit may originally have been brought in equity for specific performance instead of for money judgment. A statement made fraudulently with knowledge of its falsity must necessarily be intended to deceive.

THE plaintiff in error, Spencer S. Bullis, having been discharged in bankruptcy on September 19, 1899, which discharge covered provable debts existing on November 14, 1898, made application under the New York Code, section 1268, for the cancelation and discharge of certain judgments rendered against him in the Supreme Court of New York. The defendants in error, judgment creditors of said Bullis, opposed the granting of the order upon the ground that the judgments against Bullis were in an action for fraud, and therefore not discharged under the terms of the bankrupt law. The Supreme Court of New York denied the application. Upon appeal to the Appellate Division, Fourth Department, this judgment was affirmed. 68 App. Div. 508. Bullis then appealed to the Court of Appeals of New York, which affirmed the judgment of the court below without opinion. 171 N. Y. 689.

The facts necessary to be noticed in this case are in substance: James R. O'Beirne, in behalf of himself and other bondholders, filed a complaint, setting forth, among other things, that, on September 8, 1899, Bullis and one Barse owned the capital stock of three railroads, two organized under the laws of Pennsylvania and one under the laws of the State of New York, which railroads were constructed for the purpose of reaching timber on large tracts of land. At that time the length of the railroads was about sixteen miles, but an extension of the lines was contemplated so as to cover about thirty miles. Certain agreements are alleged between said Bullis and Barse and a firm of bankers, Newcombe & Company, of New York, by the terms of which Bullis and Barse were to execute a mortgage to the Central Trust Company of New York, to secure $250,000 of first mortgage bonds running thirty years, which mortgage was to cover the railroad properties and 30,000 acres of timber lands in Duquesne

County, Pennsylvania. The property was to be under the management of a new corporation, to be organized with a capital stock of $250,000. Various agreements were made as to the organization and management of said corporation. Another agreement was entered into between the parties, providing for the merger and consolidation of the railroads into a new company with a capital stock of $500,000, and for a mortgage to the Central Trust Company as trustee to secure $500,000 of first mortgage bonds. The railroad lines were to be extended to seventy miles and 16,000 acres of timber lands to be included, making 46,000 acres to be owned by the new company. Three hundred thousand dollars of the bonds were to be put upon the market, to represent forty-six miles of the railroad. Newcombe and Company were to dispose at par of $260,000 of these bonds in accordance with the terms of the agreement. Bullis and Barse were to enter into an agreement for consolidating the said railroads into one system, by agreement with the International Interior Construction and Improvement Company. On September 10, 1899, the Construction Company made a contract with the Allegheny and Kinzua Railroad Company, owned by Bullis and Barse, and one with Bullis and Barse, providing for the construction and consolidation of the railroads and for the distribution of the proceeds of the bonds, a considerable portion of which were to be given to Bullis and Barse.

The complaint specifically charges: That Bullis and Barse falsely and fraudulently pretended and represented to the said firm of Newcombe & Company that said tract of 30,000 acres to be conveyed was free and clear from all encumbrances; that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed or projected, and the said land was covered by a large quantity of merchantable timber, capable of yielding and producing seventy tons of freight in timber, lumber and bark for each acre of land, for transportation over said railroad. It is further alleged that, in fulfillment of said agreements, the

defendant railroad corporation, on the first day of February, 1890, executed its first mortgage deed of trust to said trust company, conveying to it said railroad properties and franchises, and providing for an issue of bonds limited to $500,000, to be secured by said properties and the 46,000 acres of timber to be conveyed by said Bullis and Barse to said trustee. That the defendants Bullis and Barse caused the said Bullis and Sarah E., his wife, to join with said railroad company in said mortgage, and that by said mortgage they assumed to convey to said trustee land contiguous to the line of said railroad and free from encumbrances, and covered by a quantity of merchantable timber, aggregating 30,954.10 acres, and which by the terms of said agreements was to be a condition precedent to the issue of $300,000 of said bonds to be used in building and completion of said forty-six miles of said railroad; that in reliance upon the conveyance of said lands bonds to the amount of $300,000 were issued and were sold by Newcombe & Company, ten of which were purchased by the plaintiff in the action; that all the proceeds of the said bonds have been used in the construction of said lines and in the payment of prior liens upon the property and the constituent lines, and that the defendant railroad company, which is the consolidated company, is wholly without funds, and that the extension thereof is essential to enable it to obtain money to meet its liabilities; that said Bullis and Barse refused to convey to said trustees the remaining 16,000 acres of such land and to provide for the building of the balance of said railroad, whereby the construction company is unable to proceed with its work of completing the same.

The complaint further alleges that said 30,954.10 acres of land, conveyed by Bullis and his wife, were not free from encumbrances; that the same at the time were subject to prior liens aggregating $159,000, besides interest; that $144,776.07 of said indebtedness still remain unsatisfied; that said land was not covered with merchantable timber, but was waste land from which the salable timber had been removed,

and that a large portion of said land was not adjacent to the line of said railroad, and the timber thereon not accessible to be transported thereon; that a large portion of the land so assumed to be conveyed was not owned by either of the said defendants, and was not conveyed at all by said deed. All of which facts the said Bullis and Barse well knew at the time they made said pretended conveyance, and said conveyance is in reality false and fraudulent; that by reason of the fraud and failure of said Bullis and Barse to convey said land free of liens a great fraud has been committed by them which will cause irreparable injury to the bondholders, including the plaintiff, unless the performance of the said agreements and the conveyance of 30,000 acres of unencumbered timber land to said trustee are specifically decreed.

The prayer of the complaint is—

"Wherefore, plaintiff demands judgment that immediate specific performance by the said defendants Bullis and Barse and said defendant railroad company of their said agreements to convey unto the trustee of said defendant railroad company's mortgage, and place under the lien of said instrument 30,000 acres of timber land contiguous or tributary to the line of railroad of said railroad company, as in said agreements stated, free of all encumbrance of whatsoever nature prior to the said mortgage above mentioned; or that said defendants pay to said trustee, for the security of said bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of said lands and real estate, conveyed as aforesaid, which are not in conformity with the terms of said several agreements, and said bonds, and the mortgage or deed of trust securing the same; and in addition thereto 16,000 acres of like timber land, in all respects similarly situated, and free from encumbrance, as security to authorize the issue of $200,000 of bonds in said agreements specified, and set apart for the construction of the twenty-four miles of railroad of said company additional to the forty-six miles above mentioned."

And for injunction and general relief.

The case was tried at special term of the New York Supreme Court. That court dismissed the complaint, holding that as Bullis and Barse did not own the lands, specific performance could not be decreed and the case could not be held for the assessment of damages. This judgment was reversed by the General Term. 80 Hun, 570. Upon appeal taken by the Allegheny and Kinzua Railroad Company, one of the defendants, this judgment of the General Term was affirmed by the Court of Appeals of New York. 151 N. Y. 372. Bullis and Barse, after the reversal at General Term, went to trial at special term, and upon the allegation of fraud, findings were made, among others: That Bullis and Barse pretended and represented to the said firm of Newcombe & Company that the 30,000 acres of land were timbered, free and clear of all encumbrances, and contiguous and adjacent to the line of the defendant railroad company, as the same was then constructed and projected, and that said land was covered by a large quantity of merchantable timber, which would actually provide said railroad company with at least seventy tons to the acre, for conveyance over said railroad at rates from twenty-five to fifty cents per ton, in addition to the percentage accruing to said defendant railroad company from divisions of other lines. That said agreements were entered into at the request of Bullis and Barse; that engineers were sent from New York to inspect the timber on the land to be conveyed; they were escorted through certain timber lands by said Bullis, and these lands were heavily timbered, and said Bullis stated that said lands were to be placed under the mortgage to the trustee, and a report in accordance with this statement was made by the engineers, and upon this report said Newcombe & Company embarked in the enterprise and entered into said scheme of consolidation and extension. That the lands so defined and pointed out were worth from eighteen to twenty dollars an acre. That Bullis and Barse had stated to Newcombe & Company that the mortgage was to be a first lien, the lands to be well tim-

bered, and contiguous and tributary to said line of railroad; that said trust mortgage was approved and accepted in the belief that said representations were true in fact, and that Bullis and Barse were in good faith performing their said covenants.

The court further found that the plaintiff was, in fact, deceived by said statements and representations; that said statements and representations were false; that said agreement was, in fact, fraudulently made with respect to the lands agreed to be conveyed by Bullis and Barse; that a great part of the lands included in the deed was not the property of Bullis, and the value of that owned by him and not timbered was $13,350, while that apparently covered by the deed, but not owned by him, was worth $175,502.77, and a considerable part of that included in the conveyance was encumbered; that the statements of Bullis and Barse with respect to said timber lands were false and fraudulent and made with intent to deceive.

As a conclusion of law, the court decided that it had jurisdiction to proceed in the cause by reason of the fraud practiced by the defendants Bullis and Barse in the premises and because of the fact that the plaintiff had been deceived by the fraudulent statements and misrepresentations of the defendants. This decision was affirmed. *O'Beirne* v. *Bullis*, 2 App. Div. 545. Upon appeal to the Court of Appeals of New York this judgment was affirmed. 158 N. Y. 466.

It appearing that Bullis and Barse were unable to specifically perform the original agreement, but that they were liable for false representations, judgment was rendered against them in favor of the Central Trust Company, representing the bondholders, in the sum of $341,745.65, and for the plaintiff in the sum of $3,586.40.

Mr. Adelbert Moot, with whom *Mr. Charles S. Cary* was on the brief, for plaintiff in error:

The action against Bullis was upon contract, and not an

action for fraud or misappropriation, and, therefore, the discharge in bankruptcy entitles him to have the judgments discharged. The suit based on fraud could not have been maintained by a single bondholder on behalf of all bondholders. *Gray* v. *Rothschild*, 112 N. Y. 668; *O'Brien* v. *Fitzgerald*, 6 App. Div. 509; *S. C.*, 150 N. Y. 572. The construction put on the complaint by the courts was that it simply set forth a cause of action in equity for specific performance of contract, and the then defendant could not demand a jury trial. *Untermyer* v. *Beinhauer*, 105 N. Y. 521; see this case 158 N. Y. 466, 469, 719.

Successful counsel on prior appeals cannot now step into the shoes of defeated counsel and get the courts to face about and determine that the action was always an action for fraud and misappropriation of money, wherein a jury trial is a matter of right, no matter how many equitable causes of action are added to it in the complaint. *Davis* v. *Morris*, 36 N. Y. 569; *Davidson* v. *Associates*, 71 N. Y. 333; *Wheelock* v. *Lee*, 74 N. Y. 495.

The judgment was not one which the bankrupt act excepts from the general discharge. *Burnham* v. *Pidcock*, 58 App. Div. 273; *Hargadine-McKittrick Co.* v. *Hudson*, 111 Fed. Rep. 361; *S. C.*, 122 Fed. Rep. 232; *Re Rhutassel*, 96 Fed. Rep. 597. *Forsyth* v. *Vehmeyer*, 177 U. S. 177, distinguished, and see *Collins* v. *McWalters*, 35 Misc. N. Y. 650.

The state courts erred in overlooking the broad distinction between actions *ex delicto* and actions *ex contractu*, and in the consequent conclusion that "the respondent is not concluded because he elected to proceed by a suit in equity;" also in its conclusion that "the back-bone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants, was the fraud of the latter."

In the complaint allegations of *scienter* were omitted because they might have made the action one *ex delicto* and resulted in plaintiff's defeat. *People* v. *Dennison*, 80 N.

Y. 656; *S. C.*, 84 N. Y. 272; *Banks* v. *Memphis*, 84 N. Y. 428.

There is nothing in the allegations about having good title, or about the land being free from incumbrances, or about the land being all timbered land. In an action for specific performance brought on such a contract, the court cannot take oral testimony of oral statements to put into this contract covenants concerning the title and the incumbrances, and the amount and character of the timber. *Tuthill* v. *Wilson*, 90 N. Y. 427; *McConihe* v. *Fales*, 107 N. Y. 408, and cases cited; *Van Werl* v. *Winston*, 115 U. S. 228.

No execution of the judgment was ever issued against the person nor was any claim ever made that it could be issued. As to what is *ex contractu* or *ex delicto*, see *Byxbie* v. *Wood*, 24 N. Y. 607, 611; *Ledwith* v. *McKim*, 53 N. Y. 307, 316; *Segelken* v. *Meyer*, 94 N. Y. 473, 484; *Brackett* v. *Griswold*, 112 N. Y. 454, 467; *Arthur* v. *Griswold*, 55 N. Y. 400; *S. C.*, 68 N. Y. 294; *S. C.*, 80 N. Y. 128; *S. C.*, 89 N. Y. 112; *S. C.*, 112 N. Y. 454; *S. C.*, 128 N. Y. 644, 648; *Lorillard* v. *Clyde*, 99 N. Y. 196; *Gould* v. *Cayuga Co. Bank*, 86 N. Y. 75; *Kaufman* v. *Reader*, 108 Fed. Rep. 171; *Reubens* v. *Joel*, 13 N. Y. 488; *Goulet* v. *Asseler*, 22 N. Y. 225; *Disler* v. *McCauley*, 66 App. Div. 42; *Colwell* v. *Tinker*, 169 N. Y. 531; *O'Neill* v. *Clark*, 95 U. S. 704.

As to when the plaintiff elects to stand on the contract instead of the fraud, see *Madge* v. *Ping*, 71 N. Y. 608; *Nejtel* v. *Lighthouse*, 77 N. Y. 96; *Goodwin* v. *Griffis*, 88 N. Y. 638; *Rothschild* v. *Mack*, 115 N. Y. 1; *People* v. *Woods*, 121 N. Y. 522, 528; *Terry* v. *Munger*, 121 N. Y. 161; *Kaufman* v. *Reader*, 108 Fed. Rep. 171.

The contract is promissory in its nature and even if there was fraud in subsequent transactions that fraud would not relate back to the original contract on which the action is founded. *Oakley* v. *Lewin*, 47 Barb. 18; *Francis* v. *Railway*, 17 Abb. N. C. 1; *Sparman* v. *Keim*, 83 N. Y. 245.

The Federal rule is the same. *Mo. S. & L.* v. *Rice*, 84 Fed. Rep. 131; *Slaughter* v. *Col. F. &c.*, 119 Fed. Rep. 588.

Bullis was entitled to his discharge and the court should have so ordered. He had been rendered bankrupt himself by these very transactions long before the judgment was entered in which he was an innocent party. *Brown* v. *Broach*, 52 Mississippi, 536; *Stitt* v. *Little*, 63 N. Y. 427; *Meyer* v. *Amidon*, 45 N. Y. 169; *Orlander* v. *Spiers*, 45 N. Y. 175. The policy of the law is to free men from liabilities so that they reënter commercial life.

Mr. Frank Sullivan Smith, with whom *Mr. Adrian H. Joline* was on the brief, for defendant in error.

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

This action involves the construction of section 17 of the bankrupt act of 1898, 30 Stat. 544, 550, as it stood prior to the amendment of February 5, 1903. So far as it pertains to this case, this section is as follows:

"A discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

In *Crawford* v. *Burke*, decided at this term, *ante*, p. 176, this court held that subdivision 4 of this act was limited to frauds, embezzlements, misappropriations or defalcations while acting in an official character, or in a fiduciary capacity, and did not apply to other debts or obligations fraudulently created. The question therefore presented in this case is, was the judgment against Bullis and Barse as finally reached in the New York courts one in an "action for fraud" within the meaning of the act?

It is distinctly charged in the complaint and found in the judgment that the agreement was fraudulently made; that Bullis and Barse falsely and fraudulently pretended that the large tract of timber land which they were to put under the mortgage for the security of the bondholders was free from all encumbrances; that it was near the line of the projected railroads and covered by a large quantity of merchantable timber, when, in fact, as Bullis and Barse well knew, the 30,000 acres of timber land actually mortgaged was not free from encumbrances but was subject to $159,000 and interest of prior encumbrances, and that it was waste land from which the timber had been removed; that the lands were not adjacent to the lines of the railroads; that the timber was not accessible, and that a large portion of the land to be conveyed was not owned by either of the defendants; that all of these facts were well known to Bullis and Barse when they made the false and fraudulent representations aforesaid, and were relied upon to the prejudice of the bondholders. The New York courts found that the agents of the New York brokers attempting to negotiate the bonds, when they went to see the lands, were shown those not included in the mortgage, and which were falsely and fraudulently pointed out as being the intended lands. Under these allegations and proofs the New York courts have seen fit to render a money judgment, not for specific performance as upon contract, but for the frauds charged against the defendants.

As was said of the action and the relief granted, in the opinion of the Appellate Division, 68 App. Div. 508, affirmed in 171 N. Y. 689: "The action for specific performance in the strictest sense thereof was founded upon the actual positive fraud of the defendants Bullis and Barse. They had in fact, in pretended compliance with their agreement, conveyed to the designated trustee 30,000 acres of land. The plaintiff alleged that the defendants fraudulently included in this conveyance lands not owned by the grantors, and that the bulk of the tract was not timber land, was encumbered, and was

not adjacent to the railroad lines described. . . . The gist, the intrinsic ingredient of the action, was consequently the fraudulent scheme, the false representations, of these defendants."

Considerable argument was made by the learned counsel for the plaintiff in error as to the essential allegations of a pleading where relief for fraud is sought. It is said that there is no averment in the complaint in this case of knowledge or intent to deceive upon the part of the plaintiff in error, but it is averred that the representations were falsely and fraudulently made with the intent to further the pecuniary interest of the plaintiff in error, and were known to be false when made. Such allegations have frequently been held the equivalent of averments of specific intent. Indeed it is difficult to perceive how a statement falsely and fraudulently made can be otherwise than intended to deceive. A statement fraudulently made with knowledge of its falsity must necessarily be intended to deceive. *Bank of Montreal* v. *Thayer*, 7 Fed. Rep. 622, and cases cited in the opinion. It is argued that Bullis, one of the defendants, regarding the case as one for fraud, demanded a jury trial, which was denied him, and that this shows the character of the case. But, as appears in the opinion of the New York Court of Appeals, 158 N. Y. 466, 468, when the demand for a jury trial was made the defendants had not set up their inability to perform the contract, but had taken issue upon the allegations of fraud and misrepresentation. In this attitude of the case it was held that a jury trial was properly denied.

But it is unnecessary to further consider questions of practice peculiar to the jurisdiction where the judgment was rendered. Whether the complaint sufficiently charged fraud to warrant the judgment given is not a Federal question. *Forsyth* v. *Vehmeyer*, 177 U. S. 177, 180. The question for this court is whether the judgment rendered by the New York court is in an action for fraud. If so, it is excepted from the effect of a discharge in bankruptcy.

We think an inspection of the record as well as the interpretation put upon the pleadings and judgment by the courts of New York in the various trials and proceedings had, show that the relief was granted upon the ground of fraud. When the case was first before the New York Court of Appeals, Judge Gray, delivering the opinion of that court, said:

"The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse; having for its object the consolidation of certain railroad properties, owned and controlled by them, and the issuance of a large number of bonds by the consolidated company, which should be placed with the public at par through the coöperation of Newcombe & Company, whose assistance to the scheme, in the negotiation of the bonds, should be gained by representations and agreements of such a nature, as to the timber tracts to be furnished as additional security under the mortgage that the bonds would appear to be attractive and salable securities. We are not called upon, at the present time, to pass upon the liability of Bullis and Barse for the parts they have played in the development and consummation of this scheme, inasmuch as they have gone back to a new trial; but on the face of this record that the evidence amply warranted the findings by the trial court is not to be denied, and it would have justified the granting of relief to the plaintiff had the case been in a shape to make that possible." 151 N. Y. 372, 384.

When the case was sent back for trial, after it had been held that it might be retained for the assessment of damages, in its conclusions of law the Supreme Court at special term decided that it "had jurisdiction to proceed in the cause by reason of the fraud practiced by the defendants Bullis and Barse in the premises." This manner of exercising jurisdiction by the lower court was expressly affirmed by the Supreme Court at general term, 2 App. Div. 545, and finally by the Court of Appeals of New York, 158 N. Y. 466. In the latter case the court said:

"The theory upon which the decision proceeded was that they [Bullis and Barse] devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable, that upon those facts the court would have been justified in granting relief to the plaintiff against them, and that the corporation having been the instrumentality employed by them, was also liable. Thus it was that the liability of the appellants was involved in that decision. We adhere to the principle of our decision upon that appeal."

It is thus apparent that the courts of New York, in conformity to their own practice, have rendered a judgment against Bullis and Barse by reason of the fraudulent scheme found, and because of the fraudulent representations made to and relied upon by the parties to whom the relief was granted. The Federal question is, is such a judgment entitled to be discharged in bankruptcy? Under the bankrupt law of 1867 it was provided: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." Rev. Stat. 5117.

In the law of 1898, for reasons which have been the subject of much diversity of view in the courts, but which were sufficient in the judgment of Congress in passing the act to necessitate a change, it is provided, instead of exempting debts created by fraud from the operation of the discharge, that only judgments in actions for fraud shall be discharged. Under this act, (as it was before the passage of the act of February 5, 1903), claims grounded in fraud will not be discharged unless reduced to judgment, but the essential character of the fraud which is here meant has not been changed. By the decisions of this court, which are collected in the

opinion delivered in *Forsythe* v. *Vehmeyer, supra,* it was held, reviewing the former cases in this court, that, under the act of 1867, the fraud referred to meant positive fraud, or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud, which may exist without an imputation of bad faith. "Such a construction of the statute," it was said in *Neal* v. *Clark,* 95 U. S. 704, 709, "is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." This language, we think, equally applies to the present case. The difference is that under the act of 1898 claims for fraud prosecuted to judgment will not be discharged. The reason for this change, as suggested by Mr. Justice Brown, in delivering the opinion in *Crawford* v. *Burke,* may be that Congress did not intend to offer any inducement to change unliquidated claims into actions for fraud, and therefore limited the exception from the operation of the discharge to such cases only as had been litigated and reduced to actual judgment. When such is the case we think a correct interpretation of the law does not require a close examination into the form of the action to determine whether technically it is one *ex delicto* or otherwise, but the real question is, was the relief granted in the judgment, based upon actual as distinguished from constructive fraud of the bankrupt. If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned.

As thus interpreted, we think there can be no question that the judgment rendered in this case was based upon the fraud of Bullis and Barse. The facts charged and found showed false and fraudulent representations as to the character of the property which was to be the security of those who should

purchase the bonds and resulted in depriving them wrongfully of valuable rights. These findings were held sufficient in the state tribunals to warrant relief on the ground of fraud, and the judgment in this case is, in our opinion, in an action for fraud within the meaning of the bankrupt law.

The judgment of the Supreme Court of New York is, therefore,

Affirmed.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 10, TO DECEMBER 12, 1904.

No. 176. Rufus Binyon, Plaintiff in Error, *v.* The United States. In error to the United States Court of Appeals for the Indian Territory. Argued October 14, 1904. Decided October 17, 1904. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Brown* v. *United States*, 171 U. S. 631; *Cross* v. *United States*, 145 U. S. 571. *Mr. W. H. Green* for plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Purdy* for defendant in error.

No. 333. Lee Look, Plaintiff in Error, *v.* The People of the State of California. In error to the Supreme Court of the State of California. Motions to dismiss or affirm submitted October 11, 1904. Decided October 17, 1904. *Per Curiam.* Dismissed for the want of jurisdiction, but without costs. *Mr. Henry C. McPike* and *Mr. A. H. Jarman* for plaintiff in error. *Mr. U. S. Webb* and *Mr. James H. Campbell* for defendants in error.

No. 45. Pedro Perea et al., Administrators, etc., Appellants, *v.* Guadalupe Perea de Harrison et al. Appeal from the Supreme Court of the Territory of New Mexico. Motion to dismiss submitted October 17, 1904. Decided October 24, 1904. *Per Curiam.* Dismissed for the want of jurisdiction. *McLish* v. *Roff*, 141 U. S. 661; *Meagher* v. *Minnesota Thresher Manufacturing Company*, 145 U. S. 608; *Chicago and Northwestern Railway Company* v. *Osborne*, 146 U. S. 354; *Haseltine* v. *Bank*, 183 U. S. 130. *Mr. T. B. Catron* for appellants. *Mr. W. B. Childers* for appellees.

No. 25. NATHAN C. JESSUP, PLAINTIFF IN ERROR, *v.* THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF SOUTHAMPTON. In error to the Supreme Court of the State of New York. Argued October 27, 1904. Decided October 31, 1904. *Per Curiam.* Dismissed for the want of jurisdiction. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89. See *Trustees* v. *Jessup*, 162 N. Y. 122; *Trustees* v. *Jessup*, 173 N. Y. 84; *People* v. *Jessup*, 160 N. Y. 249. *Mr. Charles M. Stafford* for plaintiff in error. *Mr. Thomas Young* for defendants in error.

No. 30. MINNIE KILPATRICK, PLAINTIFF IN ERROR, *v.* THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY. In error to the United States Circuit Court of Appeals for the Eighth Circuit. Submitted October 28, 1904. Decided October 31, 1904. *Per Curiam.* Judgment affirmed with costs, on the authority of *Southern Pacific Company* v. *Seley*, 152 U. S. 145, and case remanded to the United States court for the Central District of the Indian Territory. *Mr. W. O. Davis* for plaintiff in error. *Mr. J. W. McLoud* for defendant in error.

No. 390. SEATTLE DOCK COMPANY, PLAINTIFF IN ERROR, *v.* SEATTLE AND LAKE WASHINGTON WATERWAY COMPANY ET AL.; and No. 391. CANNEL COAL COMPANY, PLAINTIFF IN ERROR, *v.* SEATTLE AND LAKE WASHINGTON WATERWAY COMPANY ET AL. In error to the Supreme Court of the State of Washington. Motions to dismiss or affirm submitted October 24, 1904. Decided October 31, 1904. *Per Curiam.* Judgments affirmed with costs. *New Orleans* v. *New Orleans Waterworks Company*, 142 U. S. 79; *Yesler* v. *Commissioners*, 146 U. S. 646; *Shively* v. *Bowlby*, 152 U. S. 1; *Allen* v. *Forrest*, 8 Washington, 700; *Mississippi Valley Trust Company* v. *Hafins*, 20 Washington, 272, and these cases, 77 Pac. Rep. 845. *Mr. R. A. Ballinger*, *Mr. M. A. Ballinger*, *Mr. J. T. Ronald* and *Mr. Alfred Battle*

for the plaintiffs in error. *Mr. Julius F. Hale* and *Mr. Eugene Semple* for defendants in error.

No. 66. Siegmund Lubin, Appellant, *v.* Thomas A. Edison. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss submitted October 31, 1904. Decided November 7, 1904. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *McLish* v. *Roff*, 141 U. S. 661; *Insurance Company* v. *Kirchoff*, 160 U. S. 374. *Mr. Charles N. Butler* for appellant. *Mr. Melville Church* for appellee.

No. 57. The Yazoo and Mississippi Valley Railroad Company, Plaintiff in Error, *v.* Henry Truman. In error to the Circuit Court of Franklin County, State of Mississippi. Submitted November 4, 1904. Decided November 14, 1904. *Per Curiam.* Judgment reversed with costs on the authority of *Chicago, Rock Island and Pacific Railway Company* v. *Sturm*, 174 U. S. 710, and cause remanded for further proceedings. *Mr. J. M. Dickinson* and *Mr. Edward Mayes* for plaintiff in error. No appearance for defendant in error.

No. 64. William M. Meffert, Plaintiff in Error, *v.* E. B. Packer et al., etc. In error to the Supreme Court of the State of Kansas. Argued and submitted November 11, 1904. Decided November 14, 1904. *Per Curiam.* Judgment affirmed with costs. *Hawker* v. *New York*, 170 U. S. 189; *Dent* v. *West Virginia*, 129 U. S. 114; *Reetz* v. *Michigan*, 188 U. S. 505; *Gray* v. *Connecticut*, 159 U. S. 574; Case below, 66 Kansas, 710. *Mr. J. Jay Buck* for plaintiff in error. *Mr. Clad Hamilton* and *Mr. C. C. Coleman* for defendants in error.

No. 214. J. W. Toney et al., Plaintiffs in Error, *v.* The

MAYOR AND CITY COUNCIL OF THE CITY OF MACON. In error to the Supreme Court of the State of Georgia. Motions to dismiss or affirm submitted November 28, 1904. Decided December 5, 1904. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Meagher* v. *Minnesota Thresher Manufacturing Company*, 145 U. S. 608, 611; *Haseltine* v. *Central Bank*, 183 U. S. 130, and cases cited. See *Charleston, etc., Railway Co.* v. *Miller*, 115 Georgia, 92; *Augusta Railway Company* v. *Andrews*, 92 Georgia, 706. *Mr. John Randolph Cooper* for plaintiffs in error. *Mr. Minter Wimberly* for defendants in error.

No. 219. CHARLES F. DODGE, APPELLANT, *v.* GEORGE ELLIS AND JOHN J. HERLIHY. Appeal from the District Court of the United States for the Southern District of Texas. Motions to dismiss or affirm submitted November 14, 1904. Decided December 5, 1904. *Per Curiam.* Final order affirmed with costs. *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80; *Kohl* v. *Lehlback*, 160 U. S. 293; *Hyatt* v. *People ex rel. Cochran*, 188 U. S. 691. *Mr. Wayne MacVeagh*, *Mr. Frederic D. McKenney* and *Mr. J. S. Flannery* for appellant. *Mr. Henry G. Gray* and *Mr. Howard S. Gans* for appellees.

No. 301. THE UNITED STATES EX REL. FRANK D. EDWARDS, LIEUTENANT, ETC., PLAINTIFF IN ERROR, *v.* WILLIAM H. TAFT, SECRETARY OF WAR ET AL. In error to the Court of Appeals of the District of Columbia. Motion to dismiss submitted November 14, 1904. Decided December 5, 1904. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *South Carolina* v. *Seymour*, 153 U. S. 353; *United States* v. *Lynch*, 137 U. S. 280; *United States ex rel. Phillips* v. *Ware, Commissioner; Same* v. *Hitchcock, Secretary*, 189 U. S. 507. *Mr. Henry A. Craig* and *Mr. J. W. Catharine* for plaintiff in error. *The Attorney General* and *Mr. Solicitor General Hoyt* for defendant in error.

No. 179. St. Louis Expanded Metal Fireproofing Company, Plaintiff in Error, *v.* Standard Fireproofing Company. In error to the Supreme Court of the State of Missouri. Motions to dismiss or affirm submitted December 5, 1904. Decided December 12, 1904. *Per Curiam.* Dismissed for the want of jurisdiction. *Mutual Insurance Company* v. *McGrew*, 188 U. S. 291; *Turner* v. *Richardson*, 180 U. S. 87; *Home for Incurables* v. *New York*, 187 U. S. 155; *Layton* v. *Missouri*, 187 U. S. 356. Case reported below 177 Missouri, 359. *Mr. James A. Carr* for plaintiff in error. *Mr. Frank L. Shepard* and *Mr. Hervey S. Knight* for defendant in error.

No. 356. Copper King of Arizona, Appellant, *v.* Peter Johnson et al. Appeal from the Supreme Court of the Territory of Arizona. Motions to dismiss or affirm submitted December 5, 1904. Decided December 12, 1904. *Per Curiam.* Judgment affirmed with costs. *Rio Grande, etc., Company, v. Gildersleeve*, 174 U. S. 603, 609; *Sparrow* v. *Strong*, 4 Wall. 584; *Kerr* v. *Clampitt*, 95 U. S. 188. Revised Statutes of Arizona (1901), sections 1214, 1389, 1493, 4104. Case reported below 76 Pac. Rep. 594. *Mr. William C. Prentiss* for appellant. *Mr. Allen R. English* for appellees.

Decisions on Petitions for Writs of Certiorari from October 10, *to December* 12, 1904.

No. 337. Tacoma Mill Company, Petitioner, *v.* Black Hills and Northwestern Railway Company et al. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Frederic D. McKenney, Mr. James H. Ashton* and *Mr. E. C. Hughes* for petitioner. *Mr. James B. Howe* for respondents.

No. 236. Thomas F. Curley et al., Petitioners, *v.* The United States. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Heman W. Chaplin* for petitioners. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 253. The Bettendorf Patents Company, Petitioner, *v.* J. R. Little Metal Wheel Company. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James S. Harlan* for petitioner. *Mr. John R. Bennett* for respondent.

No. 258. William Burrill et al., Petitioners, *v.* George W. Crossman et al. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Kneeland* for petitioners. *Mr. Everett P. Wheeler* for respondents.

No. 268. The Western Union Telegraph Company, Petitioner, *v.* Charles J. Swan. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. H. N. Low* and *Mr. H. D. Estabrook* for petitioner. *Mr. Henry Calver* for respondents.

No. 276. John T. Andrews, Petitioner, *v.* Chicago and Northwestern Railway Company. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. C. Parker* for petitioner. *Mr. James C. Davis* for respondent.

No. 277. William H. Flannery et al., Petitioners, *v.*

ISAAC B. LEWIS. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin, Mr. LaRoy S. Gove* and *Mr. Robert D. Benedict* for petitioners. *Mr. Herbert Green* for respondent.

No. 278. ÆTNA INSURANCE COMPANY, PETITIONER, *v.* ISAAC B. LEWIS. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. LaRoy S. Gove* for petitioner. *Mr. Herbert Green* for respondent.

No. 284. MUNICH ASSURANCE COMPANY, LIMITED, ET AL., PETITIONERS, *v.* DODWELL & COMPANY, LIMITED. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Milton Andros* for petitioners. *Mr. Charles Page* and *Mr. E. J. McCutchen* for respondent.

No. 310. THE PORTLAND FLOURING MILL COMPANY, PETITIONER, *v.* THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. E. S. Wood, Mr. George H. Williams, Mr. Thomas D. Rambaut* and *Mr. A. B. Browne* for petitioner. *Mr. Zera Snow* and *Mr. Wallace McCamant* for respondent.

No. 318. BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, PETITIONER, *v.* CHARLES T. JONES. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Myron A. Folsom* for petitioner. *Mr. Thomas Day* and *Mr. F. C. Robertson* for respondent.

No. 372. Brennan & Co. Southwestern Agricultural Works et al., Petitioner, *v.* Dowagiac Manufacturing Company. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Border Bowman* and *Mr. Augustus E. Willson* for petitioners. *Mr. Fred L. Chappell* for respondent.

No. 377. The Minnesota Moline Plow Company et al., Petitioners, *v.* The Dowagiac Manufacturing Company. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for petitioners. *Mr. Fred L. Chappell* for respondent.

No. 379. M. S. Buckingham, Trustee, et al., Petitioners, *v.* The First National Bank of Chicago et al. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William H. Carroll* for petitioners. *Mr. Thomas B. Turley* for respondents.

No. 382. The Ohio Baking Company et al., Petitioners, *v.* The National Biscuit Company. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for petitioners. *Mr. Charles K. Offield* and *Mr. Earl D. Babst* for respondent.

No. 385. The Buffalo Tin Can Company, Petitioner, *v.* E. W. Bliss Company. October 17, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert P. Bissell* for petitioner. *Mr. Thomas Thacher* for respondent.

No. 380. THE UNITED STATES, PETITIONER, *v.* R. F. DOWNING & Co. October 24, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, Mr. Solicitor General Hoyt* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. Albert Comstock* for respondents.

No. 223. F. AUGUSTUS HEINZE ET AL., PETITIONERS, *v.* THE BUTTE AND BOSTON CONSOLIDATED MINING COMPANY. October 24, 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. John A. Garver* and *Mr. James M. Beck* for respondent.

No. 326. THE EUREKA COUNTY BANK, PETITIONER, *v.* IDA K. CLARKE. October 24, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James C. Campbell, Mr. A. E. Cheney* and *Mr. Oscar J. Smith* for petitioner. *Mr. Alfred Chartz* for respondent.

No. 373. THE MOBILE TRANSPORTATION COMPANY, PETITIONER, *v.* THE CITY OF MOBILE ET AL. October 24, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick G. Bromberg* and *Mr. Eugene H. Lewis* for petitioner. *Mr. Harry T. Smith* for respondents.

No. 387. STUART R. KNOTT ET AL., PETITIONERS, *v.* LOUISVILLE TRUST COMPANY, RECEIVER. October 24, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alexander P.*

Humphrey, Mr. James P. Helm, Mr. Helm Bruce and *Mr. Walker D. Hines* for petitioners. *Mr. John L. Dodd, Mr. Aaron Kohn, Mr. J. C. Dodd* and *Mr. D. W. Baird* for respondent.

No. 381. CHESLEY C. MOSES, PETITIONER, *v.* THE UNITED STATES. October 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederic D. McKenney* for petitioner. *The Attorney General, Mr. Solicitor General Hoyt, Mr. Assistant Attorney General Pradt* and *Mr. Felix A. Brannigan* for respondent.

No. 386. A. F. KENNEY, CLAIMANT, ETC., PETITIONER, *v.* ALBERT LOUIE. October 31, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. James M. Ashton* for petitioner. *Mr. Albert W. Buddress* for respondent.

No. 397. PHYLLIS E. DODGE, CLAIMANT, ETC., PETITIONER, *v.* THE UNITED STATES. November 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. W. Wickham Smith* for petitioner. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 399. PACIFIC MAIL STEAMSHIP COMPANY, ETC., PETITIONER, *v.* SARAH GUYON, ADMINISTRATRIX, ETC., ET AL. November 7, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maxwell Evarts* and *Mr. Charles Page* for petitioner. *Mr. William Denman* for respondents.

No. 417. THOMAS J. SPARKS, PRESIDING JUDGE, ETC., ET AL., PETITIONERS, *v.* FRANK C. GUTHRIE. November 14, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry Burnett* for petitioners. *Mr. D. M. Rodman* for respondent.

No. 413. THE UNITED STATES, PETITIONER, *v.* MORRIS WHITRIDGE ET AL., ETC. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *The Attorney General, Mr. Solicitor General Hoyt* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. Albert Comstock, Mr. William R. Sears* and *Mr. A. B. Browne* for respondents.

No. 403. FREDERICK H. SHELDON, PETITIONER, *v.* THE AMERICAN SURETY COMPANY OF NEW YORK. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. C. Berkeley Taylor* for petitioner. *Mr. H. Gordon McCouch* for respondent.

No. 405. THE IDEAL STOPPER COMPANY, ETC., ET AL., PETITIONERS, *v.* THE CROWN CORK AND SEAL COMPANY, ETC. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Philip Mauro* and *Mr. Reeve Lewis* for petitioners. *Mr. Robert H. Parkinson* and *Mr. John C. Rose* for respondent.

No. 409. STANLEY INSTRUMENT COMPANY, PETITIONERS, *v.* WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY. November 26, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Charles E. Mitchell, Mr. Wm. Houston Kenyon*

and *Mr. Henry B. Brownell* for petitioners. *Mr. W. K. Richardson* and *Mr. Thomas B. Kerr* for respondent.

No. 415. Atlanta, Knoxville and Northern Railway Company, Petitioner, *v.* Southern Railway Company. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles N. Burch* for petitioner. *Mr. Alexander Pope Humphrey, Mr. W. A. Henderson* and *Mr. L. Jourolmon* for respondent.

No. 418. Goldenberg Brothers & Co., Petitioners, *v.* The United States. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas H. Clark* for petitioners. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 422. George W. Sample, Petitioner, *v.* The American Soda Fountain Company et al. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William G. Henderson* for petitioner. *Mr. Joshua Pusey* for respondents.

No. 426. Armour Packing Company, Petitioner, *v.* The Metropolitan Water Company. November 28, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James Russell Soley* and *Mr. Frank Hagerman* for petitioner. *Mr. Joseph Coult* for respondent.

No. 400. The Baltimore and Ohio Coal Company, Peti-

TIONER, *v.* THE COLONIAL TRUST COMPANY, TRUSTEE, ETC., ET AL. December 5, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry B. Arnold* for petitioner. *Mr. Louis Marshall* and *Mr. John H. Doyle* for respondents.

No. 428. JOSEPH B. BARTRAM ET AL., PETITIONERS, *v.* THE UNITED STATES; No. 429. BENJAMIN H. HOWELL ET AL., PETITIONERS, *v.* THE UNITED STATES; and No. 430. THE AMERICAN SUGAR REFINING COMPANY, PETITIONER, *v.* THE UNITED STATES. December 5, 1904. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John E. Parsons* and *Mr. Henry B. Closson* for petitioners. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 432. NEW YORK BAKING POWDER COMPANY ET AL., PETITIONERS, *v.* RUMFORD CHEMICAL WORKS. December 5, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur V. Briesen* and *Mr. Paul Bakewell* for petitioners. *Mr. Philip Mauro* for respondent.

No. 438. THE UNITED STATES, PETITIONER, *v.* GEORGE E. CADARR ET AL. December 5, 1904. Petition for a writ of certiorari to the Court of Appeals for the District of Columbia granted. *The Attorney General* and *Mr. Solicitor General Hoyt* for petitioner. No one opposing.

No. 441. W. J. MCCAHAN SUGAR REFINING COMPANY, PETITIONER, *v.* THE STEAMSHIP WILDCROFT, ETC. December 5, 1904. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Third Circuit granted. *Mr. H. L. Cheyney* and *Mr. John F. Lewis* for petitioner. *Mr. J. Parker Kirlin* for respondent.

No. 339. Blue Mountain Iron and Steel Company of Baltimore City, Petitioner, *v.* Frank Portner et al. December 12, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry C. Terry* and *Mr. Abraham Sharp* for petitioner. *Mr. Bernard Carter, Mr. J. Kemp Bartlett,* and *Mr. C. Andrade, Jr.,* for respondents.

No. 414. The Western Transit Company, Petitioner, *v.* The Minnesota Steamship Company et al. December 12, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harvey D. Goulder, Mr. S. H. Holding* and *Mr. F. S. Masten* for petitioner. *Mr. James H. Hoyt, Mr. John C. Shaw, Mr. Martin Casey, Mr. Charles B. Warner* and *Mr. Wm. B. Cady* for respondents.

No. 436. Edgar A. Davis et al., Petitioners, *v.* A. Booth & Co. December 12, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fred A. Baker* for petitioners. *Mr. Henry M. Duffield* and *Mr. Charles S. Thornton* for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 10, TO DECEMBER 12, 1904.

No. 28. The United States, Plaintiff in Error, *v.* The S. P. Shotter Company. In error to the Circuit Court of the

United States for the Southern District of Alabama. October 11, 1904. Dismissed, on motion of *Mr. Solicitor General Hoyt* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. John Ridout* for defendant in error.

No. 101. GIOVANNI ZARCONE, APPELLANT, *v.* WILLIAM WILLIAMS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the Circuit Court of the United States for the Southern District of New York. October 11, 1904. Dismissed with costs, on motion of *Mr. Solicitor General Hoyt* on behalf of counsel for appellant. *Mr. Alex. Rosenthal* for appellant. *The Attorney General* for appellee.

Nos. 11 and 12. WILLIAM L. ELKINS, APPELLANT, *v.* THE CITY OF CHICAGO ET AL. Appeals from the Circuit Court of the United States for the Northern District of Illinois. October 11, 1904. Stricken from the docket, per stipulation. *Mr. Henry Crawford* and *Mr. John S. Miller* for appellant. *Mr. John C. Mathis* for appellees.

No. 161. BARBARA WARNER, AS ADMINISTRATRIX, ETC., PLAINTIFF IN ERROR, *v.* THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY ET AL. In error to the Circuit Court of the United States for the District of Nebraska. October 11, 1904. Dismissed at costs of defendants in error, per stipulation of counsel. *Mr. William D. McHugh* for plaintiff in error. *Mr. H. C. Brome* for defendants in error.

No. 163. THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT, *v.* THE CITY OF TOLEDO ET AL. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. October 11, 1904. Dismissed with costs, on authority of ap-

pellant. *Mr. H. D. Estabrook* and *Mr. John W. Warrington* for appellant. *Mr. U. G. Denman* for appellees.

No. 177. Walter C. Peacock, Appellant, *v.* The United States. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. October 11, 1904. Dismissed, per stipulation. *Mr. Oliver Dibble* for appellant. *The Attorney General* for appellee.

No. 1. Houghton E. James et al., Appellants, *v.* The Germania Iron Company; and No. 2. James Belden, Appellant, *v.* The Midway Company. Appeals from the United States Circuit Court of Appeals for the Eighth Circuit. October 11, 1904. Dismissed with costs, on authority of appellants. *Mr. Frank B. Kellogg* and *Mr. C. A. Severance* for appellants. *Mr. Walter Ayers* for appellees.

No. 9. William A. Paulsen, Plaintiff in Error, *v.* The People of the State of Illinois. In error to the Supreme Court of the State of Illinois. October 12, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. S. S. Gregory* for plaintiff in error. No appearance for defendants in error.

No. 31. The Farmers Loan and Trust Company, Trustee, Petitioner, *v.* The Lake Street Elevated Railroad Company. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. October 26, 1904. Dismissed with costs, pursuant to the nineteenth rule. *Mr. I. K. Boyesen* for petitioner. *Mr. Charles H. Aldrich* and *Mr. Clarence A. Knight* for respondent.

No. 46. The Interstate Commerce Commission, Appellant, *v.* The Nashville, Chattanooga and St. Louis Rail-

WAY COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 31, 1904. Dismissed with costs, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellant. *The Attorney General* for appellant. *Mr. Ed. Baxter* for appellees.

No. 83. THE INTERSTATE COMMERCE COMMISSION, APPELLANT, *v.* THE SOUTHERN RAILWAY COMPANY. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. October 31, 1904. Dismissed with costs, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellant. *The Attorney General* for appellant. *Mr. Ed. Baxter* for appellee.

No. 35. EDWARD W. ANDERSON ET AL., PLAINTIFFS IN ERROR, *v.* BAXTER MORTON. In error to the Court of Appeals of the District of Columbia. November 1, 1904. Dismissed, with costs, pursuant to the tenth rule. *Mr. West Steever* for plaintiffs in error. *Mr. James S. McDonogh* for defendant in error.

No. 91. DOMINGO FELICI ET AL., PLAINTIFFS IN ERROR, *v.* GEORGE W. WHITEHEAD. In error to the Circuit Court of the United States for the Southern District of New York. December 5, 1904. Dismissed, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the defendant in error. *Mr. Henry M. Ward* for plaintiffs in error. *The Attorney General* for respondent.

No. 447. THE SALT RIVER VALLEY CANAL COMPANY, APPELLANT, *v.* HENRY E. SLOSSER; No. 448. THE MARICOPA CANAL COMPANY, APPELLANT, *v.* MARTIN GOULD; and No. 449. THE GRAND CANAL COMPANY, APPELLANT, *v.* TOM BROCKMAN.

Appeals from the Supreme Court of the Territory of Arizona. December 5, 1904. Docketed and dismissed with costs, on motion of *Mr. C. J. Kappler* for the appellees. No one opposing.

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No. 295. Isaac Hunsaker, Sr., et al., Plaintiffs in Error, *v.* Toltec Ranch Company. In error to the Circuit Court of the United States for the District of Utah. June 9, 1904. Docketed and dismissed on motion of *Mr. Wm. T. S. Curtis* for defendant in error. No counsel opposing.

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BANKRUPTCY.

1. *Discharge—Judgment within exception of section 17 of Bankruptcy Act.*

On writ of error to a state court reviewing its refusal to cancel a judgment after discharge of the debtor in bankruptcy on the ground that the judgment was in an action for fraud, the Federal question is not whether the complaint sufficiently charged fraud to warrant the judgment but whether the action was for fraud; and if there are facts charged and found to the effect that false and fraudulent representations were made and relied on, which in the state court were sufficient to warrant relief on the ground of fraud, the judgment comes within the exception of § 17 of the bankrupt act and will not be canceled although the suit may

originally have been brought in equity for specific performance instead of for money judgment. *Bullis* v. *O'Beirne*, 606.

2. *Actual knowledge contemplated by section 17 of Bankruptcy Act.*

Actual knowledge of the proceedings contemplated by section 17 of the Bankruptcy Act is a knowledge in time to avail a creditor of the benefits of the law and to give him an equal opportunity with other creditors, and not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends. *Birkett* v. *Columbia Bank*, 345.

3. *Preferential payment—Question for jury—Interest recoverable—Preferential payee entitled to set-off of amount subsequently loaned bankrupt.*

In an action by a trustee in bankruptcy to recover a preferential payment the insolvency of the bankrupt at the time of payment and whether the payee had reasonable cause to believe that a preference was intended are questions of fact determined by the verdict of the jury. The commencement of an action by a trustee in bankruptcy to recover a preferential payment is a demand and he is entitled to interest from that time. One who after receiving a preferential payment from the bankrupt, loans him money in good faith without security and which actually passes into the bankrupt's possession, is entitled to have the amount loaned set off from the amount recoverable by the trustee. *Kaufman* v. *Treadway*, 271.

4. *Provable debt—Form of action affecting character.*

A debt, originating or founded upon an open account or upon a contract express or implied, is provable against the bankrupt's estate, though the creditor may have elected to bring his action in trover as for a fraudulent conversion instead of in assumpsit upon an open account. *Crawford* v. *Burke*, 176.

5. *Provable debt—Claim against broker fraudulently selling stocks carried on margin.*

The language of paragraph 4 of section 17 of the Bankruptcy Act of 1898 is different from that of section 33 of the act of 1867 and the words "fiduciary capacity" extend back to and qualify the words "fraud, embezzlement and misappropriation," and an unliquidated claim of a principal against his broker for fraudulently selling stocks carried on margin is not within the exception of section 17 but is a provable debt and is barred by the discharge in bankruptcy. *Ib.*

6. *Status of commission merchant and factor who sells for others.*

A commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him and this rule applies to a broker carrying stocks on margin who sells the same and does not pay over the proceeds to his principal. *Ib.*

7. *Sale—Interest in land passed by trustee's deed.*

Where the trustee in bankruptcy sells the interest of the bankrupt in land

the purchaser acquires only the interest of the bankrupt on the day of adjudication and no interest therein subsequently acquired by him in the property passes by the trustee's deed. The fact that after the sale and before the subsequent acquirement of interest the bankrupt made an unsuccessful application to have the sale set aside for inadequacy of price is not an adjudication that the bankrupt had an interest in the property sold which passed to the purchaser. *Cramer* v. *Wilson*, 408.

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CARRIERS.

Connecting carriers—Agency—Responsibility of Receivers of initial carrier under contract for through carriage of goods via connecting carrier—Effect of printed provision in through bill of lading—Contract of carriage not affected by character of shipment as contraband of war.

A shipper in New York, after stating that he was about to make a contract of sale of lead in Japan during the Chinese-Japanese War, and that time of delivery was of vital importance, made a written contract with the general eastern agent of the Northern Pacific Railroad, then being operated under order of the court by receivers, for shipment of 200 tons of lead at a given rate, to be shipped from Newark before a certain date to Tacoma and thence by Northern Pacific steamer sailing on a specified date. The receivers had a contract with the steamship company authorizing it to make through rates to Asiatic ports. The lead was shipped by the required date and after shipment the clerk of the shipper was given a bill of lading of the railroad company which he did not read and which contained a provision that the railroad company was not liable beyond its own line and which the shipper hypothecated with his bank as collateral. The lead reached Tacoma and was loaded on the steamer sailing on the day specified but the subcollector refused a clearance on the ground that the lead was contraband of war. The master thereupon unloaded the lead, obtained the clearance and sailed. The collector in answer to inquiries of the subcollector notified him not to withhold the clearance, but the vessel had sailed

and the shipment was delayed so that it did not reach Japan until six weeks after the vessel specified in the contract, and after hostilities between China and Japan had ceased. Meanwhile the price of lead had fallen and the lead was sold at a loss. In an action by the shipper against the Northern Pacific Railway Company, which had acquired the road subject to all liabilities of the receivers. *Held:*

(*a*) That the agent of the receivers was not the agent of the steamship company, but the contract made by him was on behalf of the receivers who assumed responsibility beyond the line of their own road; that under the order appointing them and directing them to operate the road, the receivers had power to make a contract of this nature and that it was within the scope of the powers of a general agent to make the contract on their behalf.

(*b*) That a special written contract to transport by more than one line and to deliver within a specified time is not affected by a provision in the printed part of a through bill of lading, delivered as this was after the shipment of the goods, to the effect that the responsibility of the carrier issuing the bill of lading ceases at the terminus of its own line.

(*c*) That as it is not illegal to export articles which are contraband of war although the articles and the ship which carries them are subject to the risk of capture and forfeiture, neither any law of the United States nor any provision of international law was violated by the making of the contract notwithstanding the lead was contraband and was to be delivered in the port of a belligerent.

(*d*) That a collector cannot legally refuse a clearance to a vessel bound to a port of a belligerent because it has on board articles contraband of war.

(*e*) That the mistaken act of a subordinate official not justified by law in refusing a clearance to a vessel entitled to sail is not sufficient as an excuse for the nonperformance of the contract similar to that involved in this case and is not a "restraint of princes, rulers or people" within that clause of the bill of lading. *Northern Pac. Ry. Co.* v. *Amer. Trading Co.*, 439.

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Western Union Tel. Co. v. *Penn. R. R. Co. et al.*, 195 U. S. 540, followed in *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 594.

Yick Wo v. *Hopkins*, 118 U. S. 356, followed in *Dobbins* v. *Los Angeles*, 223.

CITIZENSHIP.

Of members of local corporation, for purposes of suit in Federal court.

For the purpose of suing and being sued in the Circuit Court of the United States the members of a local corporation are conclusively presumed to be citizens of the State by whose law it was created and in which alone the corporate body has a legal existence. *Thomas* v. *Board of Trustees*, 207.

See JURISDICTION, C.

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See CONSTITUTIONAL LAW, 5.

COMBINATIONS.

See CONSTITUTIONAL LAW, 4.

COMMERCE.

1. *Pilotage—Effect of Rev. Stat. §§ 4237, 4444, upon state laws.*

The effect of Rev. Stat. §§ 4237, 4444, is not to interfere with or abrogate state laws regulating pilotage, but to withdraw coastwise steam vessels from the pilotage charges imposed by such state laws. *Olsen* v. *Smith*, 332.

2. *Pilotage—Treaty with Great Britain not affected by state law.*

A state pilotage law subjecting all vessels, domestic and foreign, engaged in foreign trade to pilotage regulations, but which exempts pursuant to law coastwise steam vessels of the United States, is not in conflict with provisions in the treaty between the United States and Great Britain to the effect that British vessels shall not be subject to any higher or other charges than vessels of the United States. *Ib.*

3. *Pilotage—Constitutionality of Texas law.*

Pilotage regulations being under the control of the State, a state pilotage law, otherwise unobjectionable, is not violative of the Fourteenth Amendment because it prevents an unlicensed person from rendering services as a pilot or because it creates a monopoly in favor of the pilots who are licensed under the act. *Ib.*

4. *Pilotage—Power of State to regulate.*

State laws regulating pilotage, although regulations of commerce, fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject. *Ib.*

See CONGRESS, POWERS OF, 1.

COMMON CARRIERS.

See CARRIERS.

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See EMINENT DOMAIN;
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CONGRESS, POWERS OF.

1. *Granting right of way to telegraph companies—Regulation of postal service.*
The act of Congress of July 24, 1866, 14 Stat. 221, Rev. Stat. §§ 5263 *et seq.*, giving telegraph companies the right to construct and operate their lines through, along and over the public domain, military or post roads and navigable waters of the United States, was a legitimate regulation of commercial intercourse by telegraph among the States and appropriate legislation to carry into execution the power of Congress over the postal service; it was merely an exercise of National power to withdraw such intercourse from state control and interference. *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 540.

2. *Right to make laws for government of Territories.*
Congress has the right to make laws for the government of Territories, without being subject to all the restrictions which are imposed upon it when passing laws for the United States, considered as a political body of States in union, and, until territory ceded by treaty has been incorporated into the United States, it is to be governed under Congress subject only to such constitutional restrictions upon its powers as are applicable to the situation. *Dorr* v. *United States*, 138.

3. *Power to authorize temporary government of Territory.*
The power of Congress to authorize the temporary government, such as that established under the Spooner Resolution of March 2, 1901, for the Philippine Islands, has been frequently exercised and is not now open to question, and the Philippine Commission established under that act had power to enact the libel law involved in this case. *Ib.*

See CONSTITUTIONAL LAW, 7, 8; NAVY PERSONNEL ACT;
COURTS; OLEOMARGARINE ACT, 2;
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See ACTS OF CONGRESS.

CONSPIRACY.

See CONSTITUTIONAL LAW, 4.

CONSTITUTIONAL LAW.

1. *Contracts—Impairment of obligation of mortgage by statute passed subsequently.*
When by a statute passed subsequently to a mortgage, and going into effect after the mortgagee has taken possession as such, on condition

broken, it is enacted that if the mortgagee, being in possession, bids in the mortgaged premises at sale on foreclosure at less than the amount found due on the mortgage, and the mortgagor does not redeem, the legal title of the mortgagee and his right of possession shall be forfeited by failure to obtain a deed within the time prescribed to the mortgagor, who has not redeemed or in fact paid anything in extinguishment of the mortgage, such statute impairs the obligation of the prior mortgage contract and operates to deprive the mortgagee of property rights without due process. *Bradley* v. *Lightcap*, 1.

2. *Contracts—Implied contract that municipality will not erect its own waterworks not raised by grant of franchise to private corporation.*

Nothing is to be taken against the public by implication; under the constitution and laws of Montana a grant by a municipality to a waterworks company of the right to erect and maintain waterworks, which expressly declares that it is not exclusive, does not raise an implied contract that the grantor will not provide its own water supply during the term of the franchise even though by accepting the terms of the franchise the grantee expressly agrees to furnish water to all the inhabitants of the city who may desire to contract for the same during that period, and the erection of its own plant by the city does not, by reason of the depreciation in value which would result therefrom to the grantee's property, violate a contract obligation or amount to a taking of property without just compensation or due process of law within the meaning of the Federal Constitution. *Helena Water Works Co.* v. *Helena*, 383.

3. *Due process of law—Assessment for public improvements.*

An assessment on lands for the entire expense of opening a street levied under a front-foot assessment authorized by statute is not necessarily void under the Fourteenth Amendment because levied after the work was completed, or because at the time the work was ordered the municipality had power, under statutes repealed after the completion of the work and before the assessment was made, to include a portion of the expense in the general taxes and to levy the assessment on a valuation basis under which a smaller amount would have been assessed against these lands. *Seattle* v. *Kelleher*, 351.

See CONSTITUTIONAL LAW, 1, 5, 7;
POLICE POWER.

4. *Fourteenth Amendment—Validity of Wisconsin Anti-combination and conspiracy law.*

Malicious mischief is a familiar and proper subject for legislative repression as are also combinations for the purpose of inflicting it, and liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, is not among the rights which the Fourteenth Amendment was intended to protect. Section 4466*a*, Wisconsin Statutes of 1898, prohibiting combinations for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession,

is not in conflict with the Fourteenth Amendment so far as the section applies to such a combination made from solely malevolent motives. *Aikens* v. *Wisconsin*, 194.

See COMMERCE, 3.

Former Jeopardy. See CRIMINAL LAW.

5. *Full faith and credit—Judgment entered in proceeding wanting in due process of law may be collaterally attacked.*

A warrant of attorney executed by the maker of a note and authorizing, in case of nonpayment, an attorney to appear, waive process, confess judgment, waive error and right of appeal in favor of the "holder" of the note must be construed strictly in favor of the maker, and does not, in the absence of express terms, authorize the confession of judgment in favor of the original payee after it ceases to be the owner of the note even though he may have the note in his possession. A judgment so entered would be a personal judgment without service of process or appearance, and the court would have no authority or jurisdiction to enter it, and the proceedings would be wanting in due process of law. Such a judgment can be attacked collaterally without violating the full faith and credit clause of the Federal Constitution in an action thereon in a State, other than that in which it was entered, on the ground that the party in whose favor it was rendered was not in fact the holder because not the owner of the note and that, therefore, the court entering the judgment was without jurisdiction. *National Exchange Bank* v. *Wiley*, 257.

6. *Jury trial—Waiver by defendant affecting judgment.*

A written waiver of a jury by a defendant in an action brought by the United States to recover a penalty of fifty dollars under § 11 of the act of 1886 as amended by the act of May 9, 1902, is not in conflict with the laws and Constitution of the United States, and does not invalidate the judgment. *Schick* v. *United States*, 65.

Powers of Congress. See CONGRESS, POWERS OF.

7. *Taxation—Powers of Congress to tax not taken away by Fifth and Tenth Amendments—Constitutionality of Oleomargarine Act.*

While both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in either of them operates to take away the grant of power to tax conferred by the Constitution upon Congress, and that power being unrestrained except as limited by the Constitution, Congress may select the objects upon which the tax shall be levied, and in exerting the power no want of due process of law can possibly result, and the judiciary cannot usurp the functions of the legislature in order to control that branch of the Government in exercising its lawful functions. The Oleomargarine Act of 1886, 24 Stat. 209, as amended by the act of 1902, 32 Stat. 93, imposing a tax of one quarter of one per cent on oleomargarine not

artificially colored any shade of yellow so as to look like butter, and ten cents a pound if so colored, levies an excise tax and is not unconstitutional as outside of the powers of Congress, and interferes with the powers reserved to the State, nor can the judiciary declare the tax void because it is too high nor because it amounts to a destruction of the business of manufacturing oleomargarine, nor because it discriminates against oleomargarine and in favor of butter. *McCray* v. *United States*, 27; *Schick* v. *United States*, 65.

8. *Territories—Power of Congress to govern—Right to jury trial dependent upon legislation.*

The power to govern territory implied in the right to acquire it, and given to Congress in Article IV, § 3 of the Constitution, to whatever other limitations it may be subject, does not require Congress to exact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and the Constitution does not, without legislation and of its own force, carry such right to territory so situated. *Dorr* v. *United States*, 138.

9. *Treaty-making power of United States; acquisition of territory under.*

While it is settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government, it is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effective terms of peace and for that purpose has the powers of other sovereign nations. *Dorr* v. *United States*, 138.

10. *Construction of Constitution.* *See* BILL OF RIGHTS.

CONSTRUCTION OF STATUTES.

See ACTION;
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CONTRACTS.

Performance—Character of money constituting medium of payment—Satisfaction of larger amount by payment of smaller amount.

Under both the common and the civil law, in the absence of a stipulation to the contrary, the character of the money current at the time fixed for performance of, and not at the time of making, a contract is the medium in which payment may be made. Where there has been a *bona fide* dispute as to the medium of payment under a contract and an agreement is finally reached that a payment in one medium shall extinguish a larger amount in another medium, the payment is a com-

plete accord and satisfaction and the rule that a less sum, although accepted in full satisfaction of a larger liquidated amount, is not binding as to the excess for want of consideration is inapplicable. *City of San Juan* v. *St. Johns Gas Co.*, 510.

See CARRIERS;
CONSTITUTIONAL LAW, 1, 2.

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See BANKRUPTCY, 7;
FEDERAL QUESTION, 2.

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See CARRIERS; EMINENT DOMAIN, 3;
CITIZENSHIP; JURISDICTION, C 2, 3.
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COURTS.

Want of authority to avoid act of Congress and to inquire into motive or purpose of exercise of constitutional power.

The judiciary is without authority to avoid an act of Congress lawfully exerting the taxing power, even in a case where to the judicial mind it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress, nor can the judiciary inquire into the motive or purpose of Congress in adopting a statute levying an excise tax within its constitutional power. *McCray* v. *United States*, 27.

See ACTION; JURISDICTION;
APPEAL AND ERROR; POLICE POWER;
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CRIMINAL LAW.

Former jeopardy defined.

At common law protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense; and it is the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The second jeopardy is not against the peril of second judgment, but against being again tried for the same offense. *Kepner* v. *United States*, 100.

See APPEAL AND ERROR; LIBEL;
JURISDICTION, A 4; PHILIPPINE ISLANDS, 2.

DELEGATION OF POWERS.
See EMINENT DOMAIN, 3.

DISTRICT OF COLUMBIA.
See JURISDICTION, A 3 (*Met. R. R. Co.* v. *District of Columbia*, 323).

DIVERSE CITIZENSHIP.
See JURISDICTION, C;
PLEADING, 4.

DUE PROCESS OF LAW.
See CONSTITUTIONAL LAW, 2, 3, 5, 7.
POLICE POWER, 4.

EMINENT DOMAIN.

1. *Telegraph companies not granted right, by act of July* 24, 1866.

This court has already held in *Pensacola Telegraph Co.* v. *Western Union Tel Co.*, 96 U. S. 1, and *Western Union Tel. Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239, and now follows those decisions that the act of July 24, 1866, does not confer upon telegraph companies the right to enter upon private property without the consent of the owner or grant them the right of eminent domain. *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 540, 594.

2. *Railroad's right of way private property to be taken only under power of eminent domain—Condition precedent to exercise of power.*

A railroad's right of way is property devoted to a public use and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control but it is so far private property as to be entitled to the protection of the Constitution so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of the power of eminent domain is that the statute conferring it make provision for compensating the owner. *Ib.*

3. *Power cannot be delegated.*

Eminent domain cannot be delegated, and the lessee of a corporation cannot exercise the power of condemnation conferred by legislature on the lessor. *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 594.

EQUITY.

Remedy against parties wrongfully in possession of mine.

Where the defendants are in possession of a mine, having obtained title thereto from the Government through fraud and connivance with one who was legally bound to take the title for the plaintiff, and the plaintiff cannot maintain ejectment, never having had the legal title, his remedy is by action in equity to have the defendants declared trustees *ex maleficio* for his benefit, and if it also appears that some of them are insolvent the defendants will be restrained from further mining *pendente lite*. *Lockhart* v. *Leeds*, 427.

See LACHES; POLICE POWER, 5;
PLEADING 3; PUBLIC LANDS, 3.

EQUITY OF REDEMPTION.

See MORTGAGE.

ESTATES.

See TAXATION, 1.

EVIDENCE.

See RES JUDICATA.

EXEMPTIONS.

See COMMERCE, 2.
LOCAL LAW (Ga.).

EXPORTS.

See CARRIERS.

FACTOR.

See BANKRUPTCY.

FEDERAL QUESTION.

1. *Federal question not involved in refusal of state court to cancel judgment after discharge of bankrupt.*

On writ of error to a state court reviewing its refusal to cancel a judgment after discharge of the debtor in bankruptcy on the ground that the judgment was in an action for fraud, the Federal question is not whether the complaint sufficiently charged fraud to warrant the judgment but whether the action was for fraud. *Bullis* v. *O'Beirne*, 606.

2. *State and not Federal—Question as to nature of deed given by bankrupt a year prior to adjudication.*

Whether a deed given by a bankrupt a year prior to the adjudication is fraudulent, or whether it was absolute or merely by way of mortgage, leaving him an equity of redemption, are not Federal questions and the decision of the state court is conclusive and cannot be reviewed by this court. *Cramer* v. *Wilson*, 408.

3. *State and not Federal—Separability of legal and illegal portions of state statute.*

Whether illegal provisions in a pilotage statute granting discriminatory exemptions to vessels of that State can be eliminated without destroying the other provisions of the statute, is a State and not a Federal question. *Olsen* v. *Smith*, 332.

See JURISDICTION.

FIDUCIARIES.

See BANKRUPTCY, 5, 6.

FRAUD.

See BANKRUPTCY, 1.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 5.

GOVERNMENT PROPERTY.
See TAXATION, 2.

GRANTS.
See PUBLIC LANDS.

HIGHWAYS.
See EMINENT DOMAIN;
LOCAL LAW (N. J.).

IMPAIRMENT OF CONTRACT.
See CONSTITUTIONAL LAW, 1.

INDIANS.
See STATUTE OF LIMITATIONS.

INDIAN DEPREDATION ACT.
See STATUTE OF LIMITATIONS.

INJUNCTION.
See EQUITY.

INTEREST.
See BANKRUPTCY, 3;
JUDGMENTS AND DECREES;
NATIONAL BANKS.

JEOPARDY.
See CRIMINAL LAW;
PHILIPPINE ISLANDS, 2.

JUDGMENT AND DECREES.

Decree in Colombia v. *Cauca Co.*, 190 *U. S.* 524, *construed.*
Nothing in the decree of this court in *Colombia* v. *Cauca Co.*, 190 U. S. 524, prohibits the Circuit Court from allowing interest on the amount of the items allowed. *Ex parte Republic of Colombia*, 604.

See BANKRUPTCY, 1;
CONSTITUTIONAL LAW, 5;
RES JUDICATA.

JURISDICTION.
A. OF THIS COURT.

1. *Direct appeal from District Court sitting in bankruptcy.*
Where the question is whether a District Court sitting in bankruptcy could proceed in a summary way in the particular instance the jurisdiction of

the United States court as such is not in question and section 5 of the judiciary act of March 3, 1891, has no application. *Schweer* v. *Brown*, 171.

2. *Direct appeal from Circuit Court—Application of Constitution held involved.*

Where the appellant's contention is that the Circuit Court, by giving unwarranted effect to a judgment of a state court and accepting that judgment, which contained no finding of one of the fundamental facts as a conclusive determination of that fact, deprived him of his property without due process of law, and that contention is made in good faith, and under the circumstances, upon reasonable grounds, the application of the Constitution is involved and this court has jurisdiction of a direct appeal from the Circuit Court. *Fayerweather* v. *Ritch*, 276.

3. *Review of judgment of Court of Appeals of D. C. in condemnation proceedings—Bill of exceptions necessary.*

A condemnation proceeding initiated before a court in the District of Columbia, conducted under its supervision, with power to review and set aside the verdict of a jury, and with the right of review in an appellate tribunal is in its nature an action at law. The jurisdiction of this court in reviewing the judgment of the Court of Appeals of the District in such a proceeding is not by appeal, but only by writ of error, and this court cannot pass upon errors assigned unless the record contains a bill of exceptions allowed and authenticated by the judge. Parties cannot by affidavits or agreements cause that to become a bill of exceptions which is not such in a legal sense. *Met. R. R. Co.* v. *District of Columbia*, 323.

4. *Review of final judgment of District Court of United States for Porto Rico.*

The review of the final judgment of the District Court of the United States for Porto Rico by this court is not restricted to cases in which the Constitution or a treaty of the United States or an act of Congress is brought in question and the right claimed under it is denied. There may be cases, certainly civil cases, which if determined in a supreme court of one of the Territories of the United States could be reviewed although not involving any right of a distinctly Federal nature. But a criminal case like this one arising under § 3082 R. S., could not be reviewed by this court in virtue of the words, in § 35 of the Porto Rico act of April 12, 1900, "in the same cases as from the Supreme Courts of the Territories of the United States." Nor will the words in the same act, "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," authorize this court to review a judgment of conviction in a criminal case in the court below under § 3082 R. S., when the only claim at the trial was that the indictment did not charge "an offense under the statutes of the United States." Such an objection was too indefinite. Unless a judgment in the United States District Court for Porto Rico can be reviewed here, then it is final; for

no case determined in that court can be carried to a Circuit Court of Appeals. *Amado* v. *United States*, 172.

5. *Writ of error affecting nature of case.*

A case does not necessarily arise under the Constitution or laws of the United States every time a writ of error would lie to the judgment of the state court. *Bradley* v. *Lightcap*, 25.

B. Of Circuit Court of Appeals.

1. *Finality of decree.*

The Circuit Courts do not possess original jurisdiction over controversies between citizens of different States claiming lands under grants of different States by reason of the subject matter, and the decree of a Circuit Court of Appeals in such a case is final and an appeal to this court does not lie. *Stevenson* v. *Fain*, 165.

C. Of Circuit Court.

1. *Jurisdiction must appear affirmatively—Consent of parties insufficient—Defect in showing of diverse citizenship cannot be waived.*

Jurisdiction of a Circuit Court of the United States must appear affirmatively from distinct allegations, or facts clearly proven, and is not to be established argumentatively or by mere inference and when jurisdiction depends upon diverse citizenship, absence of sufficient averments, or of facts in the record, showing such diversity is fatal and the defect cannot be waived by the parties, nor can consent confer jurisdiction. *Thomas* v. *Board of Trustees*, 207.

2. *Diverse citizenship—Sufficiency of allegations.*

An averment that a Board of Trustees of a state institution was created by and exists under the laws of a State, other than that of complainant, and is a citizen of that State, without alleging that it is a corporation of the State, or that each individual member of the Board is a citizen of that State, and where the highest court of the State has decided that the Board, although possessing some of the attributes of a corporation is not a corporation of such State, and *held*, insufficient to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship.

3. Where a Board of Trustees of an institution can by the legislative act creating it, sue and be sued collectively and is bound by the judgment, a citizen of another State can sue it as such Board collectively, without bringing in all the members thereof, in a Circuit Court of the United States provided it affirmatively appears that each member of the Board is a citizen of a state other than that of complainant. *Ib.*

D. Of District Court.

1. *As a bankruptcy court—Summary proceeding.*

Mueller v. *Nugent*, 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, 184

U. S. 18, approved on the point that the bankruptcy court has jurisdiction to determine in the first instance whether a summary proceeding can be maintained. If it errs in so proceeding the remedy is under section 24*b* of the bankruptcy law. *Schweer* v. *Brown*, 171.

See JURISDICTION, A 1.

E. ADMIRALTY.

Admiralty has jurisdiction of a libel *in rem* against a vessel for the damages caused by its negligently running into a beacon in a channel, although the beacon is attached to the bottom. *The Blackheath*, 361.

F. GENERALLY.

See FEDERAL QUESTION.

JURY TRIAL.

See CONSTITUTIONAL LAW, 6, 8.

LACHES.

In action in equity to enforce claims to mining property.

The owners of a mining claim in New Mexico transferred their interests to one of their number as trustee, who was to retransfer to each one contributing his share of development expenses for a year, a one-eighth interest. Plaintiff, one of the parties, contributed his share and demanded a deed which the trustee refused to give. Plaintiff made no further demand and did not contribute any more to the expenses, but the trustee and some of the other owners continued to develop the claim, and finally succeeded in finding a valuable body of ore. Eight years after the former demand plaintiff commenced an action in equity to enforce the original trust. There is a statute in New Mexico to the effect that no action for the recovery of lands shall be commenced after a lapse of ten years, etc. *Held:*

(*a*) That persons having claims to mining property in the course of development are bound to the utmost diligence in enforcing them, and in such cases the doctrine of laches is relentlessly enforced.

(*b*) That while in actions at law, courts are bound by the literalism of statutes, in equity the question of unreasonable delay within the statutory limitation is still open, and that even where a statute of limitations exists and has been made applicable in general terms to suits in equity, defendant may avail of the laches of complainant, notwithstanding the time fixed by the statute has not expired.

(*c*) That the refusal by a trustee of a demand to execute a deed in alleged pursuance of a trust agreement is a repudiation of the trust and opens the door to the defense of laches.

(*d*) That a delay of eight years during which large sums of money have been spent in developing a mining property is inexcusable laches. *Patterson* v. *Hewitt*, 309.

LAND DEPARTMENT.

See PUBLIC LANDS, 3.

LAND GRANTS.

See PUBLIC LANDS, 2, 3.

LIBEL.

Libel law enacted by Philippine Commission.

Under §§ 7 and 8 of the libel law enacted by the Philippine Commission, permitting a fair and true report of judicial, legislative and public official proceedings as privileged communications but excluding libelous remarks or comments from the privilege, the headlines "Traitor, Seducer, Perjurer—Wife would have killed him," over the report of a trial, although in quotation marks, are not within the privilege given by the act, and, if proved to be without basis, are libelous. *Dorr* v. *United States*, 138.

See ADMIRALTY.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LOCAL LAW.

Georgia. Taxation of shares of stock of foreign corporation held by domestic corporation. The constitution and laws of Georgia do not exempt from taxation shares of stock of a railroad corporation of another State held by a Georgia railroad corporation. *Wright* v. *Louisville & Nashville R. R. Co.*, 219.

Illinois. Mortgages (see Mortgage). *Bradley* v. *Lightcap*, 1.

Missouri. Usury (see National Banks). *Citizens' National Bank* v. *Donnell*, 369.

Montana. Contracts (see Constitutional Law, 2). *Helena Water Works Co.* v. *Helena*, 383.

New Jersey. Highways—Railroad right of way. No statute of New Jersey makes railroad property subject to occupation by telegraph companies under the act of Congress of 1866. *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 540.

New Mexico. Statute of limitations (see Laches). *Patterson* v. *Hewitt*, 309.

Philippine Islands. Libel (see Libel). *Dorr* v. *United States*, 138.

Texas. Pilotage (see Commerce). *Olsen* v. *Smith*, 332.

Wisconsin. Anti-Combination and Conspiracy Law (see Constitutional Law, 4). *Aikens* v. *Wisconsin*, 194.

MALICIOUS MISCHIEF.

See CONSTITUTIONAL LAW, 4.

MINES AND MINING.

See EQUITY.
LACHES.

MONEY.

See CONTRACTS.

MONOPOLY.

See COMMERCE, 3.

MORTGAGE.

Rights of mortgagee under Illinois law.

1. By the law of Illinois in respect of mortgages the legal title passes to the mortgagee, who is entitled to possession, at least after condition broken. The mortgagor has an equity of redemption, and, in case of foreclosure by sale, has by statute twelve months within which to redeem by payment. *Bradley* v. *Lightcap*, 1.
2. Where a mortgagee has rightfully taken possession of the mortgaged premises on condition broken, the filing of a bill to foreclose is in aid of the legal title, and not inconsistent with it. *Ib.*
3. Prior to the passage of a certain statute, where at the sale on foreclosure, the mortgagee bid in the property conveyed by the mortgage at less than the amount due, and the mortgagor did not redeem, failure by the mortgagee to take out a deed had no effect so far as the mortgagor was concerned on the original title of the mortgagee as against the mortgagor, though it might let in the right of redemption. *Ib.*

See CONSTITUTIONAL LAW, 1.

MUNICIPAL REGULATIONS.

See POLICE POWER.

NATIONAL BANKS.

Effect of compounding interest, under Missouri law.

Under §§ 5197, 5198, U. S. Rev. Stat., a national bank which compounds interest in a manner prohibited by the State forfeits all interest even though the total interest amounts to less than the maximum rate permitted by the State. A national bank, met in an action by the plea of usury, may not avoid the forfeiture of all interest by then declaring an election to remit the excessive interest. *Citizens' National Bank* v. *Donnell*, 369.

NAVY PERSONNEL ACT.

Construction, as to rank and pay of Naval officers—Right to additional pay for services in foreign waters—Service not considered sea duty.

While the intention of Congress in the Navy Personnel Act of March 3, 1899, was to put officers of corresponding rank in the Army and Navy on the same general footing with respect to their general pay, and to make the act prospective in its application to any future legislation by which the general pay of army officers might be increased, Congress may increase the pay of army officers for services in particular places and under special circumstances without thereby intending such in-

crease to apply to naval officers. A captain in the Navy is not entitled to the ten per cent additional pay given to army officers under the acts of May 26, 1900, and March 2, 1901, for services in Philippine and Chinese waters or for service beyond the limits of the States comprising the Union. The term "vessel employed by authority of law" within the meaning of § 1571, Rev. Stat., is restricted to vessels owned or chartered by, or otherwise engaged in the service of, the Government and while an officer is traveling on land or on a vessel other than one so employed by authority of law he is not entitled to pay for sea duty. *United States* v. *Thomas*, 418.

NEGOTIABLE INSTRUMENTS.

See CONSTITUTIONAL LAW, 5.

NEW PARTY.

See STATUTE OF LIMITATIONS.

NORTHERN PACIFIC RAILROAD.

See PUBLIC LANDS, 3.

NOTICE.

See BANKRUPTCY;
PUBLIC LANDS, 2.

OKLAHOMA.

See APPEAL AND ERROR.

OLEOMARGARINE ACT.

1. *Construction of law of* 1902—*Artificial coloration.*

In enumerating the ingredients of oleomargarine in section 2 of the act of 1886, as amended in 1902, Congress included not only those substances which, entering into its composition make it suitable to food and form its body, but also other ingredients used only for coloring, the purpose being to prevent excluding from the operation of the statute anything in its nature oleomargarine by reason of the addition of a substance not really an ingredient, but serving substantially only for coloring the product yellow. Under sections 2 and 8 of the act as amended, oleomargarine colored yellow by a small amount of palm oil serving no purpose other than coloration is artificially colored and is subject to the tax of ten cents a pound and does not come within the proviso to section 8 making the tax a quarter of a cent a pound when the oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow. One claiming that his oleomargarine is not subject to the higher tax prescribed by section 8 of the Oleomargarine Act must make it clear that his product is clearly within the scope of the exception stated in the proviso. *Cliff* v. *United States*, 159.

2. *Governmental right of prohibition—Arbitrariness of legislative act—Constitutional powers of Congress to enact—Artificial coloration.*

The manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights. There is such a distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter that the taxing of the latter and not the former cannot be avoided as an arbitrary exertion of the taxing power of Congress without any basis of classification, taxing one article and excluding another of the same class. The Oleomargarine Act of 1886, 24 Stat. 209, as amended by the act of 1902, 32 Stat. 93, imposing a tax of one quarter of one per cent on oleomargarine not artificially colored any shade of yellow so as to look like butter and ten cents a pound if so colored, levies an excise tax and is not unconstitutional as outside of the powers of Congress, and interferes with the powers reserved to the States, nor can the judiciary declare the tax void because it is too high nor because it amounts to a destruction of the business of manufacturing oleomargarine, nor because it discriminates against oleomargarine and in favor of butter. Where a manufacturer of oleomargarine uses as an ingredient butter artificially colored he thereby gives to the manufactured product artificial coloration within the meaning of the Oleomargarine Act as amended in 1902 and the product is subject to taxation at the rate of ten cents per pound. *McCray* v. *United States*, 27.

See CONSTITUTIONAL LAW, 6, 7.

PARTIES.

See JURISDICTION, C 2, 3;
STATUTE OF LIMITATIONS.

PAYMENT.

See CONTRACTS.

PHILIPPINE ISLANDS.

1. *Section* 1891, *Rev. Stat., not applicable.*

Congress has not up to the present time incorporated the Philippine Islands into the United States, and by an express provision of the act of July 1, 1902, § 1891, Rev. Stat., by which force and effect is given to the Constitution and laws of the United States in the Territories, does not apply to the Philippine Islands. *Dorr* v. *United States*, 138.

2. *Extension of principles of Government by Military Order No.* 58.

The expressed declarations of the President in Military Order, No. 58, of April 23, 1900, and in the act of July 1, 1902, establishing a civil government in the Philippine Islands, both adopting with little alteration the provisions of the Bill of Rights, show that it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, and those expressions were used in the sense

which has been placed upon them in construing the instrument from which they were taken. Although a right of appeal was given to the Government by Military Order, No. 58, in criminal cases in the Philippine Islands, § 5 of the act of July 1, 1902, establishing a civil government in the Islands, specifically provided that no person should be put twice in jeopardy for the same offense, thereby repealing the provision in the military order and nothing in § 9 of the act of 1902 can be construed as intending to prevail over the specific guaranty contained in § 5. *Kepner* v. *United States*, 100.

See CONGRESS, POWERS OF, 3; CONSTITUTIONAL LAW, 9; LIBEL; TREATIES.

PILOTAGE.

See COMMERCE.

PLEADING.

1. *Plea puis darrien continuance.*

A plea *puis darrien continuance* waives all prior pleas and amounts to an admission of the plaintiff's cause of action. *Crawford* v. *Burke*, 176.

2. *Construction should be reasonable and natural—Sufficiency of averments.*

Pleadings must be construed reasonably and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments actually made. *Lockhart* v. *Leeds*, 427.

3. *Equity—Prayers, general and special.*

There is nothing in the intricacy of equity pleading that prevents plaintiff from obtaining the relief under the general prayer to which he may be entitled upon the facts plainly stated in the bill; and the court will not deny the relief if plaintiff is otherwise entitled thereto because it is asked under the general relief prayer on a different theory from that which is advanced under one of the special prayers. *Ib.*

4. *Sufficiency of averment of diverse citizenship.*

An averment that a Board of Trustees of a state institution was created by and exists under the laws of a State, other than that of complainant, and is a citizen of that State, without alleging that it is a corporation of the State, or that each individual member of the Board is a citizen of that State, and where the highest court of the State has decided that the Board although possessing some of the attributes of a corporation is not a corporation of such State, and *held*, insufficient to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship. *Thomas* v. *Board of Trustees*, 207.

See JURISDICTION, A 3; C 1; OLEOMARGARINE ACT, 1; STATUTE OF LIMITATIONS.

POLICE POWER.

Judicial review—Power of courts to determine the lawfulness of exercise—Void exercise of power—Control by court of equity of unlawful exercise affecting property rights.

1. While every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health, municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with constitutional rights to carry on a lawful business, make contracts, or use and enjoy property. *Dobbins* v. *Los Angeles*, 223.
2. While the right to exercise the police power is a continuing one and a business lawful today may in the future become a menace to the public welfare and be required to yield to the public good, the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment. *Ib.*
3. Although an ordinance may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of a community for no lawful reason, such exercise of power will be invalidated by the courts. (*Yick Wo* v. *Hopkins*, 118 U. S. 356.) *Ib.*
4. A municipal ordinance was adopted in September fixing the limits within which gasworks might be erected. Thereafter a permit was granted for the erection of a plant; in November another ordinance was adopted amending the September ordinance and by which ordinance the territory on which the works were in course of erection and purchased in reliance upon the September ordinance was excluded. There had been no change in the neighborhood or conditions. *Held* to be void as against the holder of the permit as an arbitrary and discriminatory exercise of the police power which amounted to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment. *Ib.*
5. Where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity. *Ib.*

PORTO RICO.

See JURISDICTION, A 4.

POSTAL SERVICE.

See CONGRESS, POWERS OF, 1.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF.

PRACTICE.

1. *Conclusiveness on appeal of finding of lower court on question of fact.*

The finding of a court upon a question of fact is as conclusive as the verdict of a jury and when supported by testimony admitted without objection will not be disturbed by this court. *Cliff* v. *United States*, 159.

2. *Binding effect on Federal Supreme Court, of decision of state court.*

While this court is not conclusively bound by the judgment of the highest court of a State as to what is and is not a corporation of that State within the jurisdictional rule, it will accept such judgment unless a contrary view is demanded by most cogent reasons. *Thomas* v. *Board of Trustees*, 207.

3. *Following state court's interpretation of state statute.*

For the purpose of determining the validity of state statutes in their Federal aspect this court accepts the interpretation given to the statute by the state court and tests their validity accordingly. *Olsen* v. *Smith*, 332.

See JURISDICTION, A 3; C 1;
STATUTE OF LIMITATIONS.

PREFERENCES.

See BANKRUPTCY, 3.

PRESUMPTION.

See CITIZENSHIP;
STATUTES, A 2, 4.

PUBLIC IMPROVEMENTS.

See CONSTITUTIONAL LAW, 3;
TAXATION, 3.

PUBLIC LANDS.

1. *Entry—Confirmation of premature commutation entry.*

Where a commutation entry made in good faith after the passage of the act of March 3, 1891, 26 Stat, 1098, was rightful, save for the fact that it was premature, the act of June 3, 1896, 29 Stat, 197, does away with that objection and confirms the entry, and the right to such confirmation is not destroyed by anything that the entryman may have done in subsequent efforts to protect his title. *Hill* v. *McCord*, 395.

2. *Entry held insufficient—Bona fide purchaser not affected by constructive notice of grantor's defective title—Unappropriated land.*

Where it does not appear that one claiming to have entered land prior to its withdrawal under a land grant act had done all that was possible to perfect his entry and had either taken possession or otherwise not acquiesced in the decision, the attempted entry is not sufficient to take the land from jurisdiction of the Secretary of the Interior so as to prevent him from certifying it under the grant as unappropriated lands of the United States. Under the acts of 1887, 24 Stat. 556, and

1896, 29 Stat. 42, the title of one who holds under the railway company as a *bona fide* purchaser and is in actual ignorance of any defect in the company's title, will not be affected by any constructive notice of such defect with which a purchaser might be chargeable. Where an entry had been abandoned prior to certification of indemnity lands by the Secretary of the Interior to a State for the benefit of a railroad company under a land grant, the land is unappropriated land of the United States and can be certified under the grant, and the certification will not be set aside in favor of one who attempts to enter the land as a homesteader after the lands have been selected by the railroad company to make up a deficiency in place lands. *United States* v. *Chicago, M. & St. P. Ry.*, 524.

3. *Northern Pacific land grant act of July* 1, 1898, *construed.*

The act of Congress of July 1, 1898, 30 Stat. 597, 620, c. 546, relating to the land grant to the Northern Pacific Railroad Company, construed: *Held,*

(*a*) That the act embraces land patented as well as unpatented, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, and which has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department.

(*b*) The words in that act providing that the railroad grantee or its successor in interest "shall not be bound to relinquish lands sold or contracted by it or lands it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal,"—do not apply to any lands sold or contracted by the railroad grantee or its successor in interest after the acceptance of the provisions of the act by the Northern Pacific Railway Company; no sale or contracting away of any of the lands embraced by the act, and in dispute, after the acceptance of the grant could withdraw such lands from the operation of the act.

(*c*) Whatever vested rights were acquired by the railroad company in virtue of the definite location of its route, as to any lands in dispute and embraced by the act of 1898, became subject to the power conferred upon the Land Department by that act.

(*d*) The general doctrine reaffirmed that the courts will not interfere with the discharge of their duties by the officers of the Land Department by mandamus or injunction in reference to any lands, so long as the title thereto remains in the United States.

(*e*) The selection of lands in indemnity limits, after definite location, to supply deficiencies in place of granted limits, does not invest any title in the railroad grantee to such lands until the selections are approved by the Secretary of the Interior. The railroad grantee does not become entitled, by reason of such unapproved selections, to ask a court of equity to intervene as between it or its successors in interest and individual claimants, so as to have the court declare that the latter could not, by any entry or purchase, acquire an interest in the lands so selected after the acceptance of the railroad's map of definite location. *Humbird* v. *Avery*, 480.

PUNCTUATION.

See STATUTES, A 3.

RAILROADS.

See CARRIERS; EMINENT DOMAIN, 2; LOCAL LAW (GA.). (N. J.); PUBLIC LANDS, 3.

REMEDIES.

See EQUITY.

RES JUDICATA.

Conclusiveness upon parties of adjudication of question put in issue—Scope of judgment entered without special findings—Testimony on plea of res judicata.

Where it appears that a question was distinctly put in issue and the parties presented, or had an opportunity to present, their evidence, and the question was decided by a court of competent jurisdiction, private right and public welfare both demand that the question so adjudicated shall, except in direct proceedings for review be considered as finally settled and conclusive upon the parties. The ordinary rule in cases tried by the court without a jury is that a judgment entered without any special findings is, like a general verdict in a jury case, tantamount to a finding in favor of the successful party of all the facts necessary to sustain the judgment. While in some cases on a plea of *res judicata* evidence *aliunde* the record is proper to show what particular questions were tried and determined in the former case, it is not competent to introduce the testimony of the trial judge as to the matters then considered and passed on by him. Where in an action in a court of competent jurisdiction the validity of certain releases is put in issue by the pleadings and no judgment can properly be rendered without determining that question, and judgment is rendered against the parties executing the releases and who were before the trial court, the judgment in effect determines that the releases are valid and the question of their validity is *res judicata* notwithstanding no special findings in regard thereto were made by the trial judge. *Fayerweather* v. *Ritch*, 276.

SEA DUTY.

See NAVY PERSONNEL ACT.

SET-OFF.

See BANKRUPTCY, 3.

SHIPPING.

See CARRIERS:
COMMERCE.

STATES.

See COMMERCE;
POLICE POWER;
TAXATION.

STATUTES.

A. CONSTRUCTION OF.

1. *Controlling force of specific terms.*

It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. *Kepner* v. *United States*, 100.

2. *Effect of change in phraseology of statute reënacted.*

A change in phraseology of a statute reënacted creates a presumption of change of intent of the legislative body from that expressed in the former statute. *Crawford* v. *Burke*, 176.

3. *Punctuation affecting construction.*

While punctuation may shed some light on the construction of statutes, so little is it a part thereof that courts will read the statute with such stops as will give effect to the whole. *Ib.*

4. *Presumption as to sense in which language is used by legislature.*

It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *Kepner* v. *United States*, 100.

See ACTION;
BANKRUPTCY;
LACHES;
NAVY PERSONNEL ACT;
OLEOMARGARINE ACT;
PHILIPPINE ISLANDS, 2;
PRACTICE, 3;
STATUTE OF LIMITATIONS.

B. OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STATUTE OF LIMITATIONS.

Period within which new party can be brought into action under Indian Depredation Act.

In an action brought under the Indian Depredation Act of March 3, 1891, 26 Stat. 851, a tribe of Indians not originally named in the petition cannot be brought into the action by amended petition after the expiration of three years from the filing of the original petition in the Court of Claims. *United States* v. *Martinez*, 469.

See LACHES.

TAXATION.

1. *Power of State to tax different estates in land.*

A State may tax different estates in land to the different parties thereto and sell only the interest of the party making default. *Baltimore Shipbuilding Co.* v. *Baltimore*, 375.

2. *State taxation of property in which United States has conditional reversionary interest and right to use.*

A State may tax the interest of a company owning a dry dock in land conveyed to it by the United States notwithstanding there is a condition subsequent, the nonfulfillment whereof would result in forfeiture and reversion to the United States, and the United States has a continuing right to use the dry dock for certain purposes. *Ib.*

3. *For public improvement—Enforcement against purchaser after improvement made—Duty of purchaser.*

Taxation, whether general or special, is not subject to the rules applicable to a vendor's lien and its enforcement against a *bona fide* purchaser for value, and it is for one purchasing lands after a public improvement has been completed to inquire whether it has been paid for, and the same rules as to the enforcement of the assessment applicable to the former owners are applicable to him. *Seattle* v. *Kelleher*, 351.

See COMMERCE; COURTS;
CONSTITUTIONAL LAW, 3, 7; LOCAL LAW (GA.);
OLEOMARGARINE ACT.

TELEGRAPH COMPANIES.

See CONGRESS, POWERS OF, 1;
EMINENT DOMAIN;
LOCAL LAW (N. J.).

TERRITORIAL COURTS.

See APPEAL AND ERROR.

TERRITORIES.

See APPEAL AND ERROR; CONSTITUTIONAL LAW, 8, 9.
CONGRESS, POWERS OF, 2, 3; JURISDICTION, A 4;
PHILIPPINE ISLANDS.

TITLE.

See BANKRUPTCY, 7;
PUBLIC LANDS, 1, 2.

TREATIES.

Treaty with Spain—Intention as to powers of Congress over Philippine Islands.

It is evident, from Article IX of the treaty with Spain, ceding the Philippine Islands, that the intention of the framers of the treaty was to reserve to Congress, so far as it could constitutionally be done, a free hand in

dealing with the territory ceded by the treaty. *Dorr* v. *United States*, 138.

See COMMERCE, 2;
CONSTITUTIONAL LAW, 9.

TRIAL BY JURY.

See CONSTITUTIONAL LAW, 6, 8.

TRUSTS AND TRUSTEES.

See BANKRUPTCY, 7;
EQUITY;
LACHES.

UNAPPROPRIATED LANDS.

See PUBLIC LANDS, 2.

UNLAWFUL COMBINATIONS.

See CONSTITUTIONAL LAW, 4.

USURY.

See NATIONAL BANKS.

VESSELS.

See ADMIRALTY;
COMMERCE;
NAVY PERSONNEL ACT.

WAIVER.

See CONSTITUTIONAL LAW, 6;
JURISDICTION, C 1.

WARRANT OF ATTORNEY.

See CONSTITUTIONAL LAW, 5.