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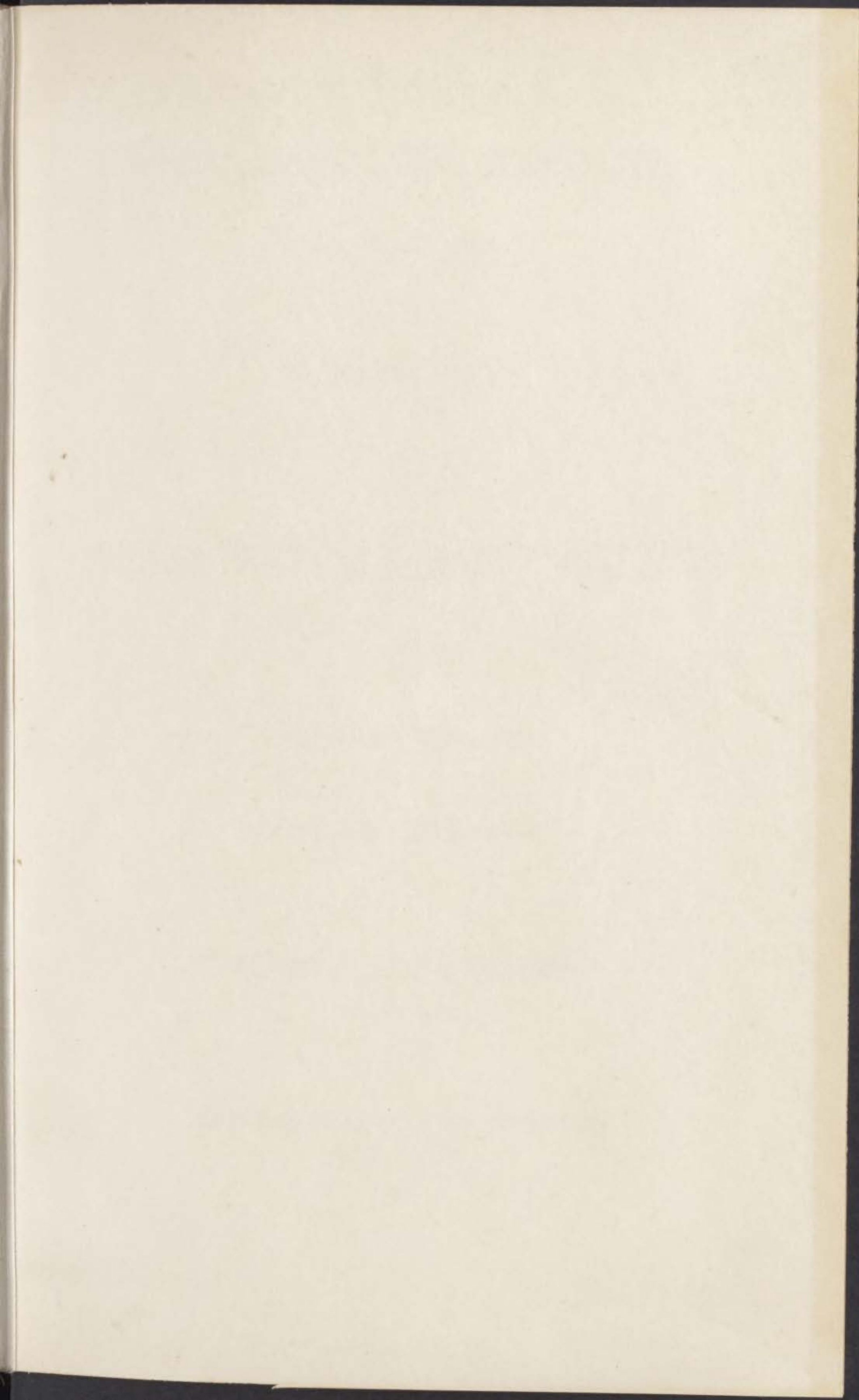

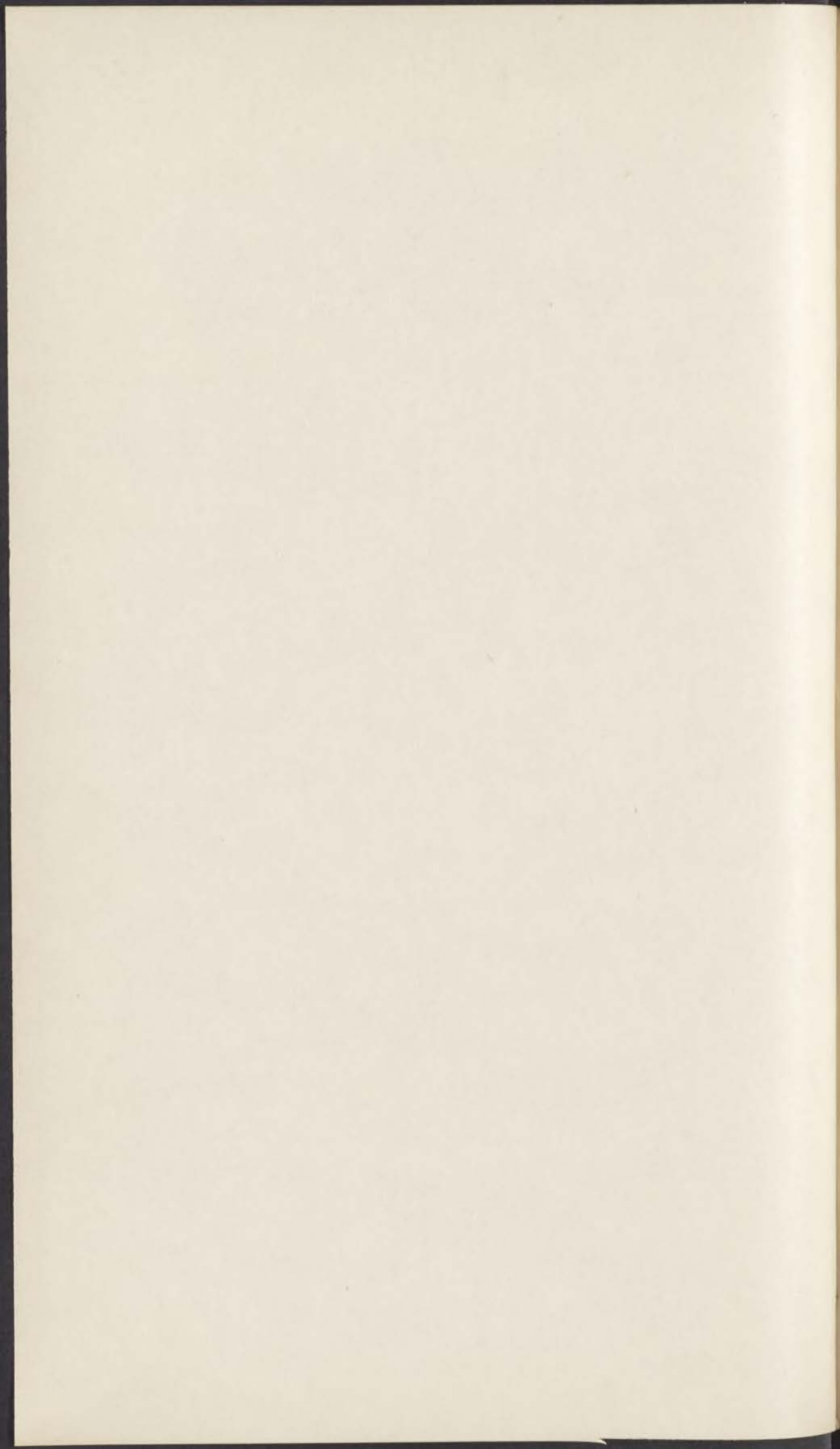

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UNITED STATES REPORTS

VOLUME 203

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1905

AND

OCTOBER TERM, 1906

CHARLES HENRY BUTLER

REPORTER

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1907

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JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
[2] 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.
[3] WILLIAM HENRY MOODY, Associate Justice.

---

[4] WILLIAM HENRY MOODY, Attorney General.
[5] CHARLES J. BONAPARTE, Attorney General.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[1] For allotment of the Chief Justice and Associate Justices among the several circuits see next page.

[2] Retired May 28, 1906. See 202 U. S. v. Did not take part in any of the decisions reported in this volume except *Hodges* v. *United States*.

[3] Appointed in place of Henry Billings Brown, Associate Justice, retired, took his seat December 17, 1906; took no part in any of the decisions reported in this volume submitted prior to that date.

[4] Resigned December 17, 1906.

[5] Appointed December 17, 1906.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, DECEMBER 24, 1906.[1]

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

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, William H. Moody, Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, William R. Day, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

[1] For the last preceding allotment see 202 U. S. vii.

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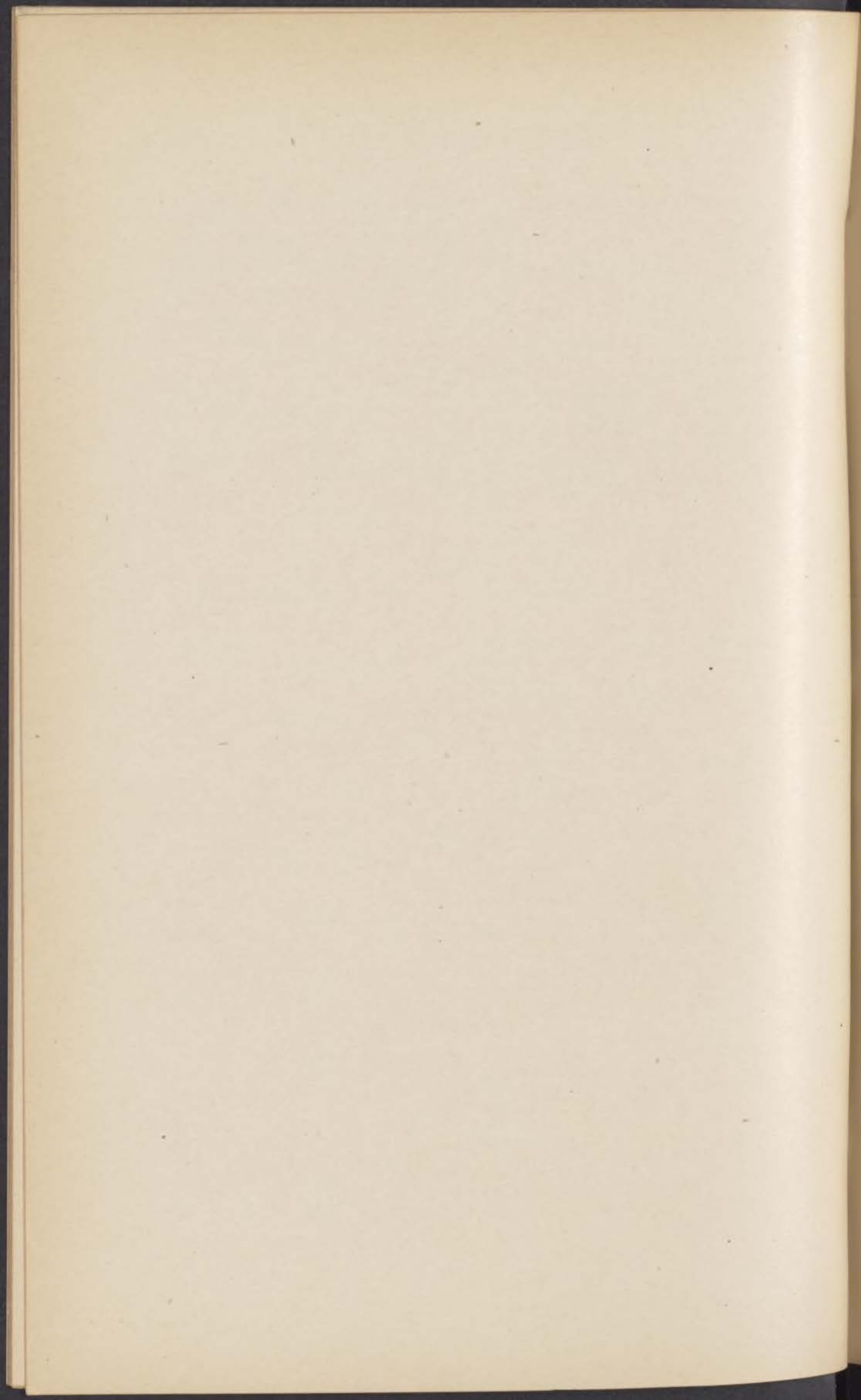

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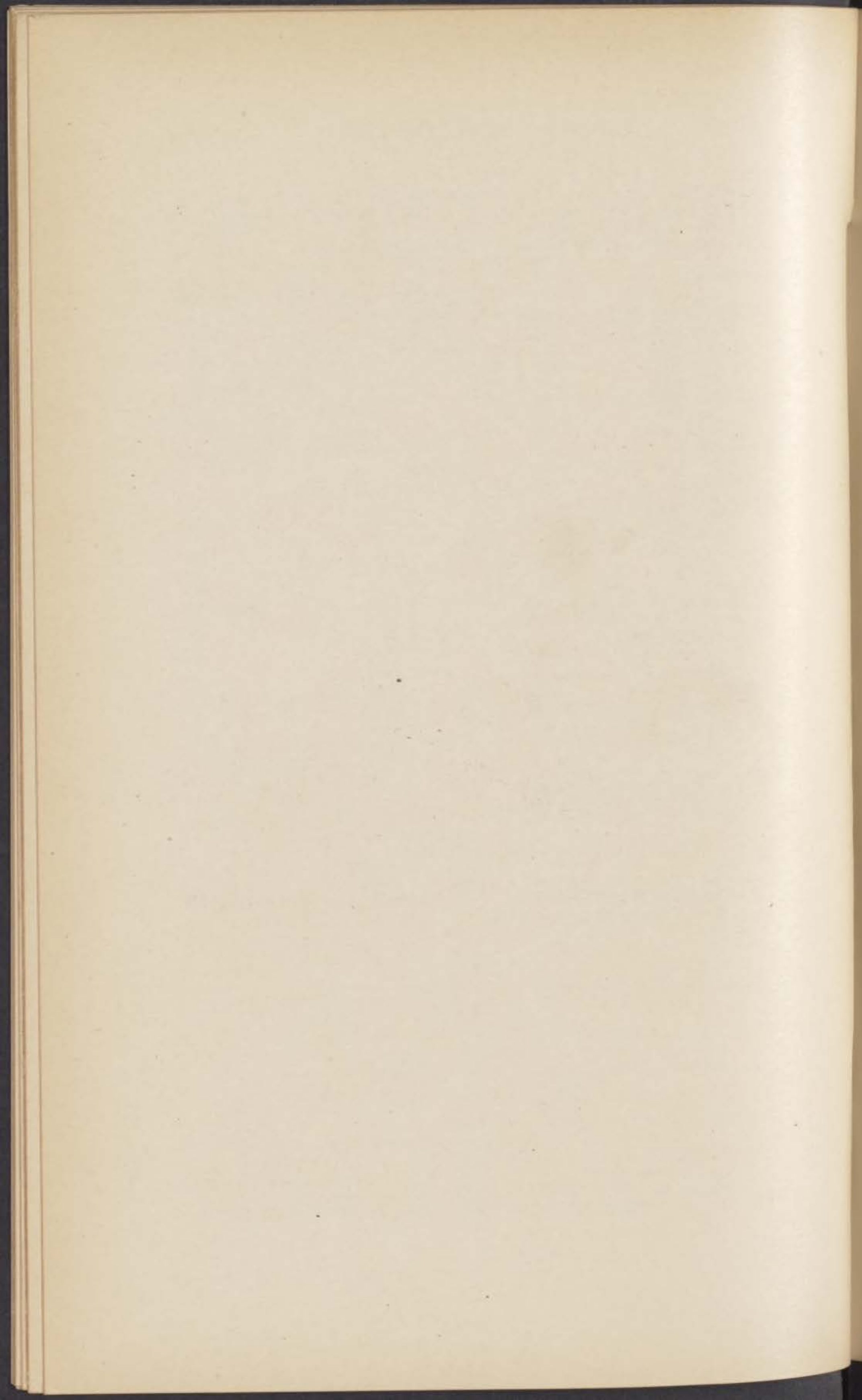

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERMS, 1905-1906.

HODGES *v.* UNITED STATES.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 14 of October Term, 1905.—Submitted October 19, 1905.—Restored to the docket, for oral argument, November 6, 1905.—Argued April 23, 1906.—Decided May 28, 1906.—Opinion withheld until dissent filed, October 24, 1906.

The Fourteenth and Fifteenth Amendments operate solely on state action and not on individual action. Unless the Thirteenth Amendment vests jurisdiction in the National Government, the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases.

Notwithstanding the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment is not shorn of its vitality.

Slavery and involuntary servitude as denounced by the Thirteenth Amendment mean a condition of enforced compulsory service of one to another; and while the cause inciting that amendment was the emancipation of the colored race, it reaches every race and every individual.

The result of the Amendments to the Constitution adopted after the Civil War was to abolish slavery, and to make the emancipated slaves citizens

and not wards of the Nation over whom Congress retained jurisdiction. This decision of the people is binding upon the courts, and they cannot attempt to determine whether it was the wiser course.

The United States court has no jurisdiction under the Thirteenth Amendment or sections 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a State to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor.

On October 8, 1903, the grand jury returned into the District Court of the United States for the Eastern District of Arkansas an indictment charging that the defendants, (now plaintiffs in error,) with others, "did knowingly, willfully and unlawfully conspire to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States and because of their having exercised the same, to wit: The said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent and citizens of the United States and of the State of Arkansas, had then and there made and entered into contracts and agreements with James A. Davis and James S. Hodges,[1] persons then and there doing business under the name of Davis & Hodges as copartners, carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton were on their part to perform labor and services at

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[1] Not the plaintiff in error.

said manufactory and were to receive, on the other hand, for their labor and services, compensation, the same being a right and privilege conferred upon them by the Thirteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said State by the white citizens thereof, and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were in the enjoyment of said right and privilege the said defendants did knowingly, willfully, and unlawfully conspire as aforesaid to injure, oppress, threaten, and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same and because they were citizens of African descent, enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening in case they did not so abandon said work to injure them, and by thereafter then and there willfully and unlawfully marching and moving in a body to and against the place of business of the said firm while the said Berry Winn, Dave Hinton Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were engaged thereat and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them by violence and threats and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, and by then and there willfully, deliberately, and unlawfully compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton to quit said work and

abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

A demurrer to this indictment, on the ground that the offense created by sections 1977 and 5508, Rev. Stat., under which it was found, was not within the jurisdiction of the courts of the United States, but was judicially cognizable by state tribunals only, was overruled, a trial had, and the three plaintiffs in error found guilty, sentenced separately to imprisonment for different terms and to fine, and to be thereafter ineligible to any office of profit or trust created by the Constitution or laws of the United States. Sections 1977, 1978, 1979, 5508 and 5510 read as follows:

"Sec. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"Sec. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

"Sec. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

"SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

There being constitutional questions involved, the judgment was brought directly to this court on writ of error.

Mr. James P. Clarke, Mr. L. C. Going and *Mr. J. F. Gautney*, for plaintiffs in error, submitted:

Plaintiffs in error demurred and contended below and contend here that—

The matters, things and allegations therein contained do not constitute a public offense against the laws of the United States; section 1977 of the Revised Statutes of the United

States, upon which the indictment is founded, is unconstitutional; section 1977 of the Revised Statutes, when taken and construed with section 5508 of the same, in so far as it creates offenses and imposes penalties, is in violation of the Constitution; the offenses created by the said sections are not within the jurisdiction of the United States, and are cognizable before state tribunals only.

The court below overruled the demurrer and sustained the position of the Government on the ground that the right enjoyed by the African citizens set out in the indictment was a right secured to them under the Constitution and the laws of the United States. But see where in *United States* v. *Cruikshank*, 92 U. S. 542, this court held all rights are not so granted or secured. Whether one is so or not is a question of law to be determined by the court, not the prosecutor.

This case is resolved into a simple question: Is the right to contract one guaranteed or secured by the Constitution or laws of the United States? Or, is the right of a citizen of African descent to make or enforce a contract a right granted or secured to him by the Constitution or laws of the United States?

The court below failed to recognize the distinction between rights declared and recognized, but not granted or secured by the Constitution and laws. Such a distinction exists and has been noticed by this court. *Logan* v. *United States*, 144 U. S. 263, 286.

Citizenship under the laws of the various States of this Union is not essential to the right to contract. Aliens are permitted to contract, and to have and enforce the same rights in reference thereto as citizens. The right to contract existed long prior to the Declaration of Independence, or the adoption of the Constitution of the United States. The Thirteenth Amendment did nothing more than to create or make a freeman of a slave. Since he became a freeman the municipal laws of the land give to him the right to contract, to sue and be sued in the State or municipality in which he resides.

The right to pursue or follow any of the ordinary vocations of life are not created by the Constitution or laws of the United States, but are among the inherent and inalienable rights of man, and are, therefore, not dependent for their existence upon the Constitution. *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746; *Civil Rights Cases*, 109 U. S. 3, 13.

Admitting the facts alleged in the indictment to be true, it does not follow that the conspiracy upon a part of certain individuals to intimidate or interfere with a Negro citizen in the performance of his contract fastens upon the Negro any badge of slavery any more than it would be held to fasten a badge of slavery upon a white man if his right to contract should be interfered with by intimidations or threats.

The most that can be said of the acts alleged in the indictment is that they are a violation or in violation of the criminal laws of the State of Arkansas. The Thirteenth Amendment has respect not to distinction of race or class or color, but to slavery.

The Constitution prohibits a State from passing a law impairing the obligation of a contract. This did not give Congress power to provide laws for general enforcement of contracts, nor power to invest the courts of the United States with power over contracts so as to enable parties to sue upon them in these courts. *Civil Rights Cases*, 109 U. S. 3.

Examples of some of the rights guaranteed or secured by the Constitution and laws of the United States are those such as patents, trade-marks, right to homestead public lands, to vote in Federal elections, etc. *United States* v. *Waddell*, 112 U. S. 76.

But a conspiracy to intimidate and compel officers of a mining company to discharge their employés, or to compel the employés to leave the service of the company, is not an offense against the laws of the United States. *Pettibone* v. *United States*, 149 U. S. 202.

The Emancipation Proclamation by removing the disability of slavery made the Negro a citizen and placed him upon

the same plane before the law as the white race. *United States* v. *Rhodes*, 1 Abb. (U. S.) 28; 1 Kent Com., 298 and note; *State* v. *Manuel*, 4 Dev. & Batt. (N. C.) 28.

In the last-mentioned authority will be found an unanswerable argument upon that proposition. In discussing the question of a free Negro, Judge Gaston, speaking for the court, said: "Under the laws of this State, all human beings within it who are not slaves fall within one of two classes, aliens or citizens. Slaves manumitted here become free men, and all free persons born within the State are citizens."

This case was cited and approved in *State* v. *Newsom*, 5 Ired. (N. C.) 250.

If, on the other hand, the African citizen acquired his rights of life, liberty and pursuit of happiness, which include the right to contract, from the statutes under consideration or the Thirteenth Amendment, he has acquired rights, privileges and protection by virtue of that instrument which the white man, by whom it was made, did not and could not secure to himself.

According to the theory of the Government in this case, when the *color* is changed and the white man becomes the conspirator, and the citizen of African descent the victim, the strong arm of the Government can and will be stretched forth to protect the citizen of African descent. It cannot be possible that the Thirteenth Amendment can give to the Congress of the United States the right to enact a code of municipal laws merely for the purpose of protecting citizens of African descent in their right to contract.

If individuals should undertake to enforce upon citizens of African descent or upon any other persons any form or badge of slavery, it cannot be doubted that this would make a cause of action cognizable in the United States courts.

The *Peonage Cases*, 197 U. S. 207, are all illustrations of the applicability of the laws under discussion. As to the constitutionality of section 5519 of the Revised Statutes, see *United States* v. *Harris*, 106 U. S. 626.

The Attorney General, with whom *Mr. Milton D. Purdy*, Assistant to the Attorney General, and *Mr. Otis J. Carlton*, Special Assistant to the Attorney General, were on the brief for the United States.

The question of law is:

Has a colored citizen of the United States of African descent a right secured to him by the Constitution or laws of the United States to work at any particular occupation or calling—as, for example, in the capacity of a common laborer in the manufacture of lumber—and, therefore, free from injury, oppression, or interference on the part of individual citizens, when the motive for such injury, oppression, or interference arises solely from the fact that such laborer is a colored person of African descent?

This question does not involve the constitutionality of § 5508, Rev. Stat., which is not open to doubt, *Motes* v. *United States*, 178 U. S. 458, but simply whether the phrase "any right or privilege secured to him by the Constitution or laws of the United States," includes the right charged in this indictment as having been secured to the colored citizens who were driven away from work by the unlawful acts of individuals. In view of *United States* v. *Cruikshank*, 92 U. S. 545, and *Logan* v. *United States*, 144 U. S. 263, 293, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens. Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

Unless, therefore, the additional element of infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws. In what may be called the old Constitution—the Constitution as it

stood before the war amendments—there were no provisions which could be invoked to support § 1977. Art. IV, section 2, provided: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If this section were not inapplicable on other grounds, it could not be invoked here, for it is prohibitive only of state action. *Paul* v. *Virginia*, 8 Wall. 168; *Ward* v. *Maryland*, 12 Wall. 418; *Slaughter House Cases*, 16 Wall. 36; *United States* v. *Harris*, 106 U. S. 629, 643; *Blake* v. *McClung*, 172 U. S. 236.

And for a similar reason the power can not be sought in the Fourteenth Amendment. *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Civil Rights Cases*, 109 U. S. 3; *United States* v. *Harris*, 106 U. S. 629; *James* v. *Bowman*, 190 U. S. 127.

Under the Thirteenth Amendment, however, Congress may enact laws operating primarily upon individuals, *United States* v. *Clyatt*, 197 U. S. 207, and if § 1977 can not be sustained under that Amendment the Government's case must fail. The Thirteenth Amendment was intended to secure to the colored race practical freedom. For its history, and history of the Civil Rights Bill, see Cong. Globe, Vol. 69, pp. 474, 503; speeches of Mr. Howard, Mr. Trumbull, Chairman of the Judiciary Committee, and Mr. Cowan.

And as to the scope of the Amendment and the legislation under it see *Slaughter House Cases*, 16 Wall. 36; *United States* v. *Harris*, 106 U. S. 629, 641; *Clyatt* v. *United States*, 97 U. S. 207.

The Civil Rights Act of 1875, provided that the Negro, equally with the white man, should have accommodation in public places of amusement, hotels, and public conveyances, but this court held in the *Civil Rights Cases*, 109 U. S. 3, that the denial of the *social* rights attempted to be secured by the act of 1875, as distinguished from the *fundamental* rights secured by the act of 1866, did not amount to the imposition of a badge of slavery.

The Thirteenth Amendment has been considered in some

other cases in this court, but an examination of them is not material to the discussion of this case. *Plessy* v. *Ferguson*, 163 U. S. 537; *Robertson* v. *Baldwin*, 165 U. S. 275.

This court has never held that the Thirteenth Amendment was not broad enough to permit of legislation such as is contained in § 1977, Rev. Stat. We have seen, on the contrary, that Mr. Justice Field and Mr. Justice Harlan have given the support of their opinions to the validity of the parent enactment. *Slaughter House Cases*, 16 Wall. 36, 90, 91; *Civil Rights Cases*, 109 U. S. 3, 35.

The validity of the act of April 9, 1866, was sustained in several cases in the lower courts of the United States, and in the state courts. *United States* v. *Rhodes*, 1 Abb. (U. S.) 28; *Matter of Elizabeth Turner*, 1 Abb. (U. S.) 84; *Smith* v. *Moody*, 26 Indiana, 299, 306; *People* v. *Washington*, 36 California, 658; *United States* v. *Cruikshank*, 1 Woods, 308, 319.

The act of 1866, was held to be unconstitutional in a dissenting opinion in *People* v. *Washington*, *supra*, and in *Bowlin* v. *Commonwealth*, 2 Bush (Ky.), 5.

From the above authorities and extracts from speeches in Congress, the Government contends that the people, having clear notions of the status of the colored race and of what attempts would be made to return it to its servile condition, intended by the Thirteenth Amendment to grant and secure practical freedom. It outrages our feelings of humanity to believe that the men who had fought to free the slaves merely intended to sever the legal ligament which bound the slave to his master, leaving the latter at liberty to cut him off from the fundamental rights which white men enjoyed. Such a narrow construction leaves the black race in a state made worse by their emancipation by the breaking of the cord of self-interest which bound the slaveholder to take care of his property. That motive would disappear with the adoption of the Amendment, and the people must have foreseen that the former slaveholders would strive, by individual action and through the reconstructed legislatures

in the late rebellious States, to prevent the freedmen from acquiring property, suing in the courts, giving evidence, and in a great variety of ways endeavor to prevent those whom they regarded as intended by the Almighty to be bondsmen from enjoying the practical rights of freemen.

For this purpose the people used in the Amendment language which this court has said permits Congress to enact legislation operating directly to punish the acts of individuals, not sanctioned by any color of state authority. *Clyatt* v. *United States*, 197 U. S. 207.

The framers of that Amendment were familiar with the provisions of the Constitution, and with that which gave Congress power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

As to what is appropriate legislation, see cases upholding the fugitive slave laws, *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Ableman* v. *Booth*, 21 How. 506. And legislation, like § 1977, which declares that the black and white races shall be upon an equality in the enjoyment of these rights, is apt and appropriate.

The intent of Congress, expressed in sections 1977 and 5508, is to make it an offense for individuals, acting in combination, to injure or oppress the Negro, solely because of his color, in his right to make and enforce contracts.

If rights are granted and secured by constitutional enactments, Congress may legislate to protect those rights against individual action. *United States* v. *Reese*, 92 U. S. 214; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76; *Baldwin* v. *Franks*, 120 U. S. 678; *Logan* v. *United States*, 144 U. S. 263; *Motes* v. *United States*, 178 U. S. 458.

In *Clyatt* v. *United States*, 197 U. S. 207, it was held that

the Thirteenth Amendment, unlike the Fourteenth and Fifteenth, gives Congress authority to enact legislation operating upon individuals, and that the Fourteenth Amendment did not take away from Congress the power to pass legislation operating on individuals.

Scott v. *Sandford*, 19 How. 393, held that slaves were not citizens. The Emancipation Proclamation made them free, and it may be admitted, made them citizens of the United States, but it did not secure to them practical freedom. That was done by the Thirteenth Amendment, and because, under that Amendment Congress may enact legislation acting primarily upon individuals, it may punish those who attempt by concerted action to deprive the Negro of his right to contract solely for the reason that he is a Negro. If a conspiracy should be entered into by blacks to hinder a white man, solely on account of his color, from making and enforcing contracts, Congress could legislate for such a case. That question, however, does not arise in this case.

If there be doubt whether the legislation of Congress, § 1977, Rev. Stat., be constitutional, the doubt should be resolved in favor of its validity according to the rule expressed in *Ogden* v. *Saunders*, 12 Wheat. 213.

The *Civil Rights Cases*, 109 U. S. 3,—and see statement of effect of opinion on p. 35—not only sustains this case, but it is sustained on the broad ground that there inheres in and belongs to every man of every race everywhere within the jurisdiction of the United States, all of the essential rights and privileges of a free man, and that the National Government has the right by direct legislation to protect him in the enjoyment of his freedom.

This case was originally submitted on briefs. By the court's direction, it has also been orally argued by the Government. Exigencies of the public welfare have little place in a court of justice in the interpretation of the laws and the Constitution. And yet they have some place. They admonish us to search well all the sources of National power.

It is not legally important that in this or any other State the remedy under the state laws is useless. If that be true, that consideration can not control the interpretation of the law and the interpretation of the Constitution. The war of races is no longer a sectional war; it is as bitter in the State of Chase and Giddings as it is in the State of Arkansas. If the Negro who is in our midst can be denied the right to work, and must live on the outskirts of civilization, he will become more dangerous than the wild beasts, because he has a higher intelligence than the most intelligent beast. He will become an outcast lurking about the borders and living by depredation.

There is but one refuge from that condition, and that is to put himself back under some chosen master in the condition of slavery itself. If the Nation has not the power at the very threshold to say to those who declare against this or other races, that as a race it shall not have one of the most essential rights of a free man, it is powerless indeed. The Government submits that it has that power. It was given to the Nation by the Thirteenth Amendment, and this case is brought within it.

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

While the indictment was founded on sections 1977 and 5508, we have quoted other sections to show the scope of the legislation of Congress on the general question involved.

That prior to the three *post bellum* Amendments to the Constitution the National Government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of. Unless, therefore, the Thirteenth Amendment vests in the Nation the jurisdiction claimed the remedy must be sought through

state action and in state tribunals subject to the supervision of this court by writ of error in proper cases.

In the *Slaughter House Cases*, 16 Wall. 36, 76, in defining the privileges and immunities of citizens of the several States, this is quoted from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. Cir. Ct. 371, 380.

"'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several States which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.'"

And after referring to other cases this court added (p. 77):

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments no claim or pretence was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government."

Notwithstanding the adoption of these three Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment, which reads "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," is not shorn of its vitality. True the Thirteenth Amendment grants certain specified and additional power to Congress, but any Congressional legislation directed against individual action which was not warranted before the Thirteenth Amendment must find authority in it. And in interpreting the scope of that Amendment it is well to bear in mind the words of Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, which, though spoken more than four score years ago, are still the rule of construction of constitutional provisions:

"As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

The Thirteenth Amendment reads:

"Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a decla-

ration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African. Of this Amendment it was said by Mr. Justice Miller in *Slaughter House Cases*, 16 Wall. 36, 69, "Its two short sections seem hardly to admit of construction." And again: "To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government . . . requires an effort, to say the least of it."

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster "slavery" is defined as "the state of entire subjection of one person to the will of another." Even the secondary meaning given recognizes the fact of subjection, as "one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition," and "servitude" is by the same authority declared to be "the state of voluntary or compulsory subjection to a master."

It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from tres-

pass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. Indeed, this is conceded by counsel for the Government, for in their brief (after referring to certain decisions of this court) it is said:

"With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens."

"Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

"Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

The logic of this concession points irresistibly to the contention that the Thirteenth Amendment operates only to protect the African race. This is evident from the fact that nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves. They took no more from the Amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction solely of the States, would by virtue of that Amendment be transferred to the Nation, and subject to the legislation of Congress.

But that it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation, consider the legislation in respect to the Chinese. In slave times in the slave States not infrequently every free Negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery. By the act of May 5, 1892, Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who after one year from the passage of the act should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In *Fong Yue Ting* v. *United States*, 149 U. S. 698, the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery or prohibited by the Thirteenth Amendment.

One thing more: At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the Fifteenth it prohibited any State from denying the right of suffrage on account of race, color or previous condition of servitude, and by the Thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to

consider. It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.

For these reasons we think the United States court had no jurisdiction of the wrong charged in the indictment.

The judgments are reversed, and the case remanded with instructions to sustain the demurrer to the indictment.

MR. JUSTICE BROWN concurs in the judgments.

MR. JUSTICE HARLAN, with whom concurs MR. JUSTICE DAY, dissenting.[1]

The plaintiffs in error were indicted with eleven others in the District Court of the United States, Eastern District of Arkansas, for the crime of having knowingly, wilfully and unlawfully conspired to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, persons of African descent and citizens of the United States and of Arkansas, in the free exercise and enjoyment of the right and privilege—alleged to be secured to them respectively by the Constitution and laws of the United States—of disposing of their labor and services by contract and of performing the terms of such contract without discrimination against them, because of their race or color, and without illegal interference or by violent means.[2]

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[1] Dissent announced May 28, 1906, but not filed until October 24, 1906.

[2] The indictment charged that "the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent, and citizens of the United States and of the State of Arkansas, had then and there

The indictment was based primarily upon section 5508 of the Revised Statutes, which provides: "SEC. 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the

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made and entered into contracts and agreements with James A. Davis and James S. Hodges, persons then and there doing business under the name of Davis & Hodges, as copartners carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were on their part to perform labor and services at said manufactory and were to receive on the other hand for their labor and services compensation, the same being a right and privilege conferred upon them by the Thirteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said State by the white citizens thereof; and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were in the enjoyment of said right and privilege the said defendants did knowingly, wilfully and unlawfully conspire as aforesaid to injure, oppress, threaten and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same and because they were citizens of African descent enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening in case they did not so abandon said work to injure them, and by thereafter then and there wilfully and unlawfully marching and moving in a body to and against the places of business of the said firm while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were engaged thereat and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them by violence and threats, and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, and by then and there wilfully, deliberately and unlawfully

same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States."

Other sections of the statutes relating to civil rights, and referred to in the discussion at the bar, although not, perhaps, vital to the decision of the present case, are as follows: "SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." "SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." "SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Consti-

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compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, to quit said work and abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

tution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." "SEC. 5510. Every person who, under color of any law statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

A demurrer to the indictment was overruled, and the defendants having pleaded not guilty, they were tried before a jury, and some of them—the present plaintiffs in error—were convicted of the crime charged, were each fined one hundred dollars and ordered to be imprisoned for one year and a day. A motion for a new trial having been denied, they have brought the case to this court.

In our consideration of the questions now raised it must be taken, upon this record, as conclusively established by the verdict and judgment—

That certain persons—the said Berry Winn and others above named with him—citizens of the United States, and of Arkansas, and of African descent, entered into a contract, whereby they agreed to perform for compensation service and labor in and about the manufacturing business in that State of a private individual;

That those persons, in execution of their contract, entered upon and were actually engaged in performing the work they agreed to do, when the defendants—the present plaintiffs in error—knowingly and wilfully conspired to injure, oppress, threaten and intimidate such laborers, solely because of their having made that contract and *because of their race and color*, in the free exercise of their right to dispose of their labor, and

prevent them from carrying out their contract to render such service and labor;

That, in the prosecution of such conspiracy, the defendants, by violent means, compelled those laborers, simply "*because they were colored men and citizens of African descent*," to quit their work and abandon the place at which they were performing labor in execution of their contract; and,

That, in consequence of those acts of the defendant conspirators, the laborers referred to were hindered and prevented, *solely because of their race and color*, from enjoying the right by contract to dispose of their labor upon such terms and to such persons as to them seemed best.

Was the right or privilege of these laborers thus to dispose of their labor secured to them "by the Constitution or laws of the United States"? If so, then this case is within the very letter of section 5508 of the Revised Statutes, and the judgment should be affirmed if that section be not unconstitutional.

But I need not stop to discuss the constitutionality of section 5508. It is no longer open to question, in this court, that Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution or laws of the United States. That is what that section does. It purports to do nothing more. In *Ex parte Yarbrough*, 110 U. S. 651, it was distinctly adjudged that section 5508 was a valid exercise of power by Congress. In *Logan* v. *United States*, 144 U. S. 263, 286, 293, this court stated that the validity of section 5508 had been sustained in the *Yarbrough case*, and, speaking by Mr. Justice Gray, said: "In *United States* v. *Reese*, 92 U. S. 214, 217, decided at October term, 1875, this court, speaking by Chief Justice Waite, said: 'Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be

protected.' " After referring to prior adjudications the court in the *Logan case* also unanimously declared: "The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that *every* right *created by, arising under or dependent upon, the Constitution of the United States* may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

In *Motes* v. *United States*, 178 U. S. 458, 462, the language of the court was: "We have seen that by section 5508, of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States—the punishment prescribed being a fine of not more than $5,000, imprisonment not more than ten years, and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. And by section 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed. No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions. *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76. Referring to those provisions and to the clause of the Constitution giving Congress authority to pass all laws

necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested in the Government of the United States, or in any department or officer thereof, this court has said: 'In the exercise of this general power of legislation, Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and spirit of the Constitution.' *Logan* v. *United States*, 144 U. S. 263, 283."

In view of these decisions it is unnecessary to examine the grounds upon which the constitutionality of section 5508 rests; and I may assume that the power of the National Government, by appropriate legislation, to protect a right created by, derived from or dependent in any degree upon, the Constitution of the United States cannot be disputed.

I come now to the main question—whether a conspiracy or combination to forcibly prevent citizens of African descent, *solely because of their race and color*, from disposing of their labor by contract upon such terms as they deem proper and from carrying out such contract, infringes or violates a right or privilege created by, derived from or dependent upon the Constitution of the United States.

Before the Thirteenth Amendment was adopted the existence of freedom or slavery within any State depended wholly upon the constitution and laws of such State. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the States could be given by the United States in virtue of any power it possessed prior to the adoption of the Thirteenth Amendment. That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land and as such binding upon all the States and all the people, as well as upon every branch of government, Federal and state. By the Amendment it was ordained that "neither slavery nor involuntary servitude, except as a punishment for

crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction"; and "Congress shall have power to enforce this article by appropriate legislation." Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom. It went further, however, and, by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the rëestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any State or Territory of the United States. It therefore became competent for Congress, under the Thirteenth Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery *offenses against the United States*, punishable by fine or imprisonment, or both. And legislation of that character would certainly be appropriate for the protection of whatever rights were given or created by the Amendment. So, legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the Constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment. "A right or immunity, whether created by the Constitution or only guaranteed by it, may be protected by Congress." This court so adjudged in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, as it had previously adjudged in *Prigg* v. *Pennsylvania*, 16 Pet. 539, and in *United States* v. *Reese*, 92 U. S. 214. The colored laborers against whom the conspiracy in question was directed

owe their freedom as well as their exemption from the incidents and badges of slavery alone to the Constitution of the United States. Yet it is said that their right to enjoy freedom and to be protected against the badges and incidents of slavery is not secured by the Constitution or laws of the United States.

It may be also observed that the freedom created and established by the Thirteenth Amendment was further protected against assault when the Fourteenth Amendment became a part of the supreme law of the land; for that Amendment provided that no State shall deprive any person of life, liberty or property, without due process of law. To deprive any person of a privilege inhering in the freedom ordained and established by the Thirteenth Amendment is to deprive him of a privilege inhering in the liberty recognized by the Fourteenth Amendment. It is true that the present case is not one of deprivation by the constitution or laws of the *State* of the privilege of disposing of one's labor as he deems proper. But it is one of a combination and conspiracy by individuals acting in hostility to rights conferred by the Amendment that ordained and established freedom and conferred upon every person within the jurisdiction of the United States (not held lawfully in custody for crime) the privileges that are fundamental in a state of freedom, and which were violently taken from the laborers in question solely because of their race and color.

Let us see whether these principles do not find abundant support in adjudged cases.

One of the earliest cases arising under the Thirteenth Amendment was that of *United States* v. *Cruikshank, &c.*, 1 Woods, 308, 318, 320. It became necessary in that case for Mr. Justice Bradley, holding the Circuit Court, to consider the scope and effect of the Thirteenth Amendment and the extent of the power of Congress to enforce its provisions. Referring to the Thirteenth Amendment, that eminent jurist said that "this is not merely a prohibition against the passage

or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that *slavery shall not exist.* . . . So, undoubtedly, by the Thirteenth Amendment, Congress has power to legislate for the entire eradication of slavery in the United States. This Amendment had an affirmative operation the moment it was adopted. It enfranchised four millions of slaves, if, indeed, they had not previously been enfranchised by the operation of the civil war. Congress, therefore, acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the Civil Rights Bill, passed April 9, 1866, 14 Stat. 27, by which it was declared that all persons born in the United States, and not subject to a foreign power (except Indians, not taxed), should be citizens of the United States; and that such citizens, of every race and color, without any regard to any previous condition of slavery or involuntary servitude, should have *the same right* in every State and Territory *to make and enforce contracts,* to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and should be subject to like punishment, pains, and penalties, and to none other, any law, etc., to the contrary notwithstanding. It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that Congress had the power, under the Amendment, to declare and effectuate these objects. . . . Conceding this to be true (which I think it is), Congress then had the right to go further and to enforce its declaration by passing laws *for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon them.* Without having this power,

Congress could not enforce the Amendment. *It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the Thirteenth Amendment and the laws thus passed in pursuance thereof.* But this power does not authorize Congress to pass laws for punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts and offenses whatsoever are cognizable only in the state courts, unless, indeed, the State should deny to the class of persons referred to equal protection of the laws. . . . To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the Amendment, should propose to lease and cultivate a farm, *and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress.* It would be a case of interference with the person's exercise of his equal rights as a citizen *because of his race.* But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only."

This was followed by the *Civil Rights Cases*, 109 U. S. 3, 20, 22, in which the court passed upon the constitutionality of an act of Congress providing for the full and equal enjoyment by every race, equally, of the accommodations, advantages and facilities of theatres and public conveyances, and other places of public amusement; and in which the court also considered the scope and effect of the Thirteenth Amendment. In that case the court, speaking by Mr. Justice Brad-

ley—who, as we have seen, delivered the judgment in the case just cited—said: "*By its own unaided force and effect* it abolished slavery, and *established universal freedom.* Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation *may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws* establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law; and, therefore, the Thirteenth Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation clothes Congress with power to pass all laws *necessary and proper for abolishing all badges and incidents of slavery in the United States.* . . . The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, *to make contracts,* to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, *were the inseparable incidents of the institution.* Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. . . . We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and

from denying to any the equal protection of the laws. The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment it has only to do with slavery and its incidents. Under the Fourteenth Amendment it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate *all forms and incidents of slavery* and involuntary servitude, *may be direct and primary,* operating upon the acts of *individuals, whether sanctioned by state legislation or not;* under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings."

I participated in the decision of the *Civil Rights Cases,* but was not able to concur with my brethren in holding the act there involved to be beyond the power of Congress. But I stood with the court in the declaration that the Thirteenth Amendment not only established and decreed universal civil and political freedom throughout this land, but abolished the incidents or badges of slavery, among which, as the court declared, was the disability, based merely on race discrimination, to hold property, to make contracts, to have a standing in court, and to be a witness against a white person.

One of the important aspects in the present discussion of the *Civil Rights Cases,* is that the court there proceeded distinctly upon the ground that although the constitution and statutes of a State may not be repugnant to the Thirteenth Amendment, nevertheless, Congress, by legislation of a direct and primary character, may, in order to enforce the Amendment, reach and punish individuals whose acts are in hos-

tility to rights and privileges derived from or secured by or dependent upon that Amendment.

These views were explicitly referred to and reaffirmed in the recent case of *Clyatt* v. *United States*, 197 U. S. 207. That was an indictment against a single individual for having unlawfully and knowingly returned, forcibly and against their will, two persons from Florida to Georgia, to be held in the latter State in a condition of peonage, in violation of the statutes of the United States, (Rev. Stat. 1900, 5526). A person arbitrarily or forcibly held against his will for the purpose of compelling him to render personal services in discharge of a debt, is in a condition of peonage. It was not claimed in that case that peonage was sanctioned by or could be maintained under the constitution or laws either of Florida or Georgia. The argument there on behalf of the accused was, in part, that the Thirteenth Amendment was directed solely against the States and their laws, and that its provisions could not be made applicable to individuals whose illegal conduct was not authorized, permitted or sanctioned by some act, resolution, order, regulation or usage of the State. That argument was rejected by every member of this court, and we all agreed that Congress had power, under the Thirteenth Amendment, not only to forbid the existence of peonage, but to make it an offense against the United States for any *person* to hold, arrest, return or cause to be held, arrested or returned, or who in any manner aided in the arrest or return of another person, to a condition of peonage. After quoting the above sentences from the opinion in the *Civil Rights Cases*, Mr. Justice Brewer, speaking for the court, said (p. 218): "Other authorities to the same effect might be cited. It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or involuntary servitude, except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude.

This legislation is not limited to the Territories or other parts of the strictly National domain, but is operative in the States and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or *its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the republic, wherever his residence may be.*" The *Clyatt case* proceeded upon the ground that, although the Constitution and laws of the State might be in perfect harmony with the Thirteenth Amendment, yet the compulsory holding of one individual by another individual for the purpose of compelling the former by personal service to discharge his indebtedness to the latter created a condition of involuntary servitude or peonage, was in derogation of the freedom established by that Amendment, and, therefore, could be reached and punished by the Nation. Is it consistent with the principle upon which that case rests to say that an organized body of individuals who forcibly prevent free citizens, solely because of their race, from making a living in a legitimate way, do not infringe any right secured by the National Constitution, and may not be reached or punished by the Nation? One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best. It would seem impossible, under former decisions, to sustain the view that a combination or conspiracy of individuals, albeit acting without the sanction of the State, may not be reached and punished by the United States, if the combination and conspiracy has for its object, by force, to prevent or burden the free exercise or enjoyment

of a right or privilege created or secured by the Constitution or laws of the United States.

The only way in which the present case can be taken out of section 5508 is to hold that a combination or conspiracy of individuals to prevent citizens of African descent, because of their race, from freely disposing of their labor by contract, does not infringe or violate any right or privilege secured by the Constitution or laws of the United States. But such a proposition, I submit, is inadmissible, if regard be had to former decisions. As we have seen, this court has held that the Thirteenth Amendment, by its own force, without the aid of legislation, not only conferred freedom upon every person (not legally held in custody for crime) within the jurisdiction of the United States, but the right and privilege of being free from the badges or incidents of slavery. And it has declared that one of the insuperable incidents of slavery, as it existed at the time of the adoption of the Thirteenth Amendment, was the disability of those in slavery to make contracts. It has also adjudged—no member of this court holding to the contrary—that any attempt to subject citizens to the incidents or badges of slavery could be made an offense against the United States. If the Thirteenth Amendment established freedom, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the Thirteenth Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the Constitution?

I have already said that the liberty protected by the Fourteenth Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the Thirteenth Amendment. This, I think, cannot be doubted. In *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589,

we said that such liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment *of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to the carrying out to a successful conclusion the purposes above mentioned.*" All these rights, as this court adjudged in the *Allgeyer case*, are embraced in the liberty which the Fourteenth Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the Thirteenth Amendment. If, for instance, a person is prevented, because of his race, from living and working where and for whom he will, or from earning his livelihood by any lawful calling that he may elect to pursue, then he is hindered in the exercise of rights and privileges secured to freemen by the Constitution of the United States. If secured by the Constitution of the United States, then, unquestionably, rights of that class are embraced by such legislation as that found in section 5508.

The opinion of the court, it may be observed, does not, in words, adjudge section 5508 to be unconstitutional. But if its scope and effect are not wholly misapprehended by me, the court does adjudge that Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent, even by force, citizens of African descent, solely because of their race, from earning a living. Such is the import and practical effect of the present decision, although the court has heretofore unanimously held that the right to earn one's living in all legal ways, and to make lawful contracts in reference thereto, is a vital point of the freedom *established by the Constitution*, and although it has been held, time and again, that Congress may, by appropriate

legislation, grant, protect and enforce *any* right, derived from, secured or created by, or dependent upon that instrument. These general principles, it is to be regretted, are now modified, so as to deny to millions of citizen-laborers of African descent, deriving their freedom from the Nation, the right to appeal for National protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States, so far as that freedom involves the right of such citizens, without discrimination against them because of their race, to earn a living in all lawful ways, and to dispose of their labor by contract. I cannot assent to an interpretation of the Constitution which denies National protection to vast numbers of our people in respect of rights derived by them from the Nation. The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow and is hostile to the freedom established by the supreme law of the land. It goes far towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom. *United States* v. *Reese*, 92 U. S. 214, 217; *United States* v. *Cruikshank*, 92 U. S. 542, 555; *Ex parte Virginia*, 100 U. S. 339, 345; *Strauder* v. *West Virginia*, 100 U. S. 303, 306; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Civil Rights Cases*, 109 U. S. 3, 23.

The objections urged to the view taken by the court are not met by the suggestion that this court may revise the final judgment of the state court, if it should deny to the complaining party a right secured by the Federal Constitution; for the revisory power of this court would be of no avail to the complaining party if it be true, as seems now to be adjudged, that a conspiracy to deprive colored citizens, solely because of

their race, of the right to earn a living in a lawful way, infringes no right secured to them by the Federal Constitution.

As the Nation has destroyed both slavery and involuntary servitude everywhere within the jurisdiction of the United States and invested Congress with power, by appropriate legislation, to protect the freedom thus established against all the badges and incidents of slavery as it once existed; as the disability to make valid contracts for one's services was, as this court has said, an inseparable incident of the institution of slavery which the Thirteenth Amendment destroyed; and as a combination or conspiracy to prevent citizens of African descent, solely because of their race, from making and performing such contracts, is thus in hostility to the rights and privileges that inhere in the freedom established by that Amendment, I am of opinion that the case is within section 5508, and that the judgment should be affirmed.

For these reasons, I dissent from the opinion and judgment of the court.

NEW MEXICO *ex rel.* E. J. McLEAN & COMPANY *v.* DENVER & RIO GRANDE RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 18. Argued March 14, 15, 1906.—Decided October 15, 1906.

The right to legislate in the Territories being conferred under constitutional authority, by Congress, the passage of a territorial law is the exertion of an authority exercised under the United States, and the validity of such authority is involved where the right of the legislature to pass an act is challenged; and, in such a case, if any sum or value is in dispute, an appeal lies to this court from the Supreme Court of a Territory under § 2 of the act of March 3, 1885, 23 Stat. 443, even though the sum or value be less than $5,000.

The right of a shipper to have his goods transported by a common carrier is a valuable right measurable in money, and an appeal involving such a right of which this court otherwise has jurisdiction under § 2 of the act of March 3, 1885, will not be dismissed because no sum or value is involved.

The provision in section 10, Article I, of the Constitution of the United States, that States shall not lay imposts and duties on imports and exports is not contravened by a state inspection law applicable only to goods shipped to other States, and not to goods directly shipped to foreign countries.

A State or Territory has the right to legislate for the safety and welfare of its people, which is not taken from it because of the exclusive right of Congress to regulate interstate commerce; and an inspection law affecting interstate commerce is not for that reason invalid unless it is in conflict with an act of Congress or an attempt to regulate interstate commerce. *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345, followed.

The law of March 19, 1901, of the Territory of New Mexico, making it an offense for any railroad company to receive, for shipment beyond the limits of the Territory, hides, which had not been inspected as required by the law, is not unconstitutional as an unwarranted regulation of, or burden on, interstate commerce.

This court will take judicial notice of the fact that cattle run at large in the great stretches of country in the West, identified only as to ownership by brands, and of the necessity for, and use of, branding of such cattle, and will not strike down state or territorial legislation, essential for prevention of crime, requiring the inspection of hides to be shipped without the State, although the act does not require such inspection of hides not to be so shipped.

The exercise of the police power may and should have reference to the peculiar situation and needs of the community, and is not necessarily invalid because it may have the effect of levying a tax upon the property affected if its main purpose is to protect the people against fraud and wrong.

The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and will only present a valid objection if so unreasonable and disproportionate to the services rendered as to attack the good faith of the law.

78 Pac. Rep. 74, affirmed.

THE facts are stated in the opinion.

Mr. W. B. Childers, with whom *Mr. T. B. Catron* was on the brief, for appellants:

Appellants agree with the Supreme Court of New Mexico

that all legislation upon the subject of hide inspection in New Mexico, and the organization and existence of the Cattle Sanitary Board, should be looked into and construed together with this enactment, so far as the same may appear to be *in pari materia.*

The statutes touching hide inspection directly or indirectly, are: Act of 1889, Comp. Laws, New Mexico, 1897, §§ 181-206, creating Cattle Sanitary Board, and see preamble creating it "for sanitary purposes only"; act of 1891, Comp. Stat., §§ 207–219, giving the board additional powers; act of 1893, Comp. Laws, §§ 220–225, concerning raising funds for the board, and providing in § 221, that it might fix a fee for inspection of hides under provisions of act: acts of 1899, Session Laws, ch. 44, p. 99, and ch. 53, p. 106, fixing fee of three cents; act of 1901, requiring inspection of hides to be exported and the tagging thereof, and fixing fee of ten cents; §§ 84, 85, Comp. Laws of 1897, requiring butchers to give bonds and keep records.

These laws prescribe no inspection except for slaughter-house hides and for a distinct purpose of detecting violations of § 84, of the Compiled Laws, which requires keeping hides for thirty days.

This is the construction of the New Mexico Supreme Court upon the laws in question; and it is conclusively fixed that hides, out of a slaughter-house or in a slaughter-house after thirty days' age, were under no disability as articles of commerce, except for the period of thirty days after the killing. *Expressio unius est exclusio alterius;* and the requirement to withhold hides from trafficking for thirty days, qualifies them for commerce and traffic after that time. Hides, therefore, are after thirty days' age free articles of commerce in New Mexico, with all power to inspect the same or to charge a fee thereon or to withhold the same from commerce, absolutely determined. While being free in every sense, the law of 1901, attacked herein, was passed, taxing their exportation.

The law of 1901, is not an inspection law within the mean-

ing of the exception found in Art. I, § 10, par. 2, of the Constitution of the United States, prohibiting States, without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws.

As to what is an inspection law, see *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Harden*, 135 U. S. 112; *Bowman* v. *Chicago Ry. Co.*, 125 U. S. 465.

The law of 1901, cannot be construed as an inspection law because the inspection might lead to prevention and detection of crime. That is not the legitimate purpose of an inspection law. *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 61.

For other definitions of inspection see Burrill's and Bouvier's Law Dictionaries; *Christman* v. *Northrup*, 8 Cow. (N. Y.) 45; 16 Am. and Eng. Ency. of Law, 808; *Mugler* v. *Kansas*, 124 U. S. 623.

Does any general danger, any popular apprehension of danger, from the stealing of hides, appear in New Mexico? Clearly not, for there is no vigilant inspection law, for the tracing of hides intended for local commerce, local tanneries, or local manufacture. The exercise of police power, for the detection of crime, is only thought necessary when exportation, or commerce between the States is set in motion. A hide thirty days old is exempt from inspection when sold in the Territory; but, even though already inspected, it has to undergo another inspection when offered for export.

Exports cannot be taxed as such. See *Coe* v. *Errol*, 116 U. S. 525; *Turpin* v. *Burgess*, 117 U. S. 506; *Cornell* v. *Coyne*, 192 U. S. 426.

It is apparent that this ten cent tax is an unusual tax not levied upon all property in the same class, but levied only on that portion of the hides of New Mexico which are offered for exportation by a common carrier; and although the law does not say, on its face, that it is taxing these hides simply

because of their exportation, still it is apparent that that is the only purpose or reason for the taxation. It cannot be said that the object is to detect crime, when the legislature discriminates in favor of local commerce and shows no disposition to detect crime at the expense of local industry. *Turner* v. *Maryland,* 107 U. S. 36, is inapplicable, as in that case there was a benefit to the property on which the fee was charged.

As the law imposes a discriminating and special tax on the property of one class of citizens, as upon butchers, or hide dealers, or upon one kind of property, as upon hides, to protect the property of another class of citizens, as cattle-raisers, or another kind of property, as cattle, it is in violation of fundamental principles of government and natural right. It takes private property for private use without compensation. It deprives the despoiled citizen of the equal protection of the laws. 1 Tucker on Const., 77; *Loan Association* v. *Topeka,* 20 Wall. 665.

The statute is not a reasonable law, properly devised for preventing the evil at which it may be aimed, if it is aimed at any evil; and not so devised as to no more than effectuate that purpose. *Mugler* v. *Kansas,* 123 U. S. 623; *Lawton* v. *Steele,* 152 U. S. 137, and cases cited; *Lake Shore R. R. Co.* v. *Ohio,* 173 U. S. 300.

Even if the law is valid on its face, if the tax is enforcible in an unusual way on an honest and legitimate article of interstate commerce, it may be invalid, and under the allegations of the petition, admitted by the demurrer, the law is improperly enforced.

A statute may be void by reason of its operation, although valid on its face. *Virginia Coupon Cases,* 114 U. S. 295. And as to reasonableness of such laws, both in language and operation, see *Brimmer* v. *Rebman,* 138 U. S. 78; *In re Rebman,* 41 Fed. Rep. 867; *Walling* v. *Michigan,* 116 U. S. 446.

The law in charging a fee of ten cents per hide, for an inspection made as at the port of shipment, where hides must be assumed to be in existence in shipping quantities, or car-

load lots, imposes a charge which is apparently largely in excess of the cost of such inspection. *Am. Fertilizer Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Neilson* v. *Garza*, 2 Woods, 287, distinguished.

The statute imposes the burden of inspection, and the payment of ten cents per hide, only upon hides offered to a common carrier for shipment to a market without the Territory, and is void therefore as a clear discrimination between hides to be retained and used in the Territory and hides to be shipped out. Hides may also be shipped out of the Territory by any other means of transportation than a common carrier. As to effect of such discrimination see *McCullough* v. *Maryland*, 4 Wheat. 316; *Voight* v. *Wright*, 141 U. S. 65.

This court has jurisdiction of the appeal without regard to the value in dispute, as an authority exercised under the United States is involved. Sec. 2, act of March 3, 1885, 23 Stat. 443; *Clayton* v. *Utah*, 132 U. S. 632; *Clough* v. *Curtis*, 134 U. S. 361; *United States* v. *Lynch*, 137 U. S. 286; *Railroad Co.* v. *Arizona*, 156 U. S. 350; *Linford* v. *Ellison*, 155 U. S. 503, distinguished.

Mr. Charles A. Spiess and *Mr. A. C. Campbell*, with whom *Mr. D. J. Leahey* was on the brief, for appellee:

This court has not jurisdiction of the appeal. The matter in dispute is less than $5,000, and an authority exercised under the United States is not involved. The statute, the validity whereof is attacked, is of New Mexico and not of the United States. *Snow* v. *United States*, 118 U. S. 346; *Balt. & Pot. R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Lynch* v. *United States*, 137 U. S. 280; *Cameron* v. *United States*, 146 U. S. 533; *Seymour* v. *South Carolina*, 152 U. S. 353; *Linford* v. *Ellison*, 155 U. S. 503.

In order to sustain appellate jurisdiction of this court under either section of the act of Congress of March 3, 1885, the matter in dispute must have been money or something, the

value of which can be estimated in money. *Perrine* v. *Slack*, 164 U. S. 452; *Durham* v. *Seymour*, 161 U. S. 235; *Kurtz* v. *Moffitt*, 115 U. S. 487, 495; *Caffrey* v. *Oklahoma*, 177 U. S. 346; *De Kraft* v. *Barney*, 2 Black, 704; *In re Chapman*, 156 U. S. 211; *Cross* v. *Burke*, 146 U. S. 82; *In re Heath*, 144 U. S. 92; *Farnsworth* v. *Montana*, 129 U. S. 104; *Sinclair* v. *District of Columbia*, 192 U. S. 16; *Elgin* v. *Marshall*, 106 U. S. 578; *Bruce* v. *Railroad Co.*, 117 U. S. 514.

The matter in dispute in this case was not money, and the remaining inquiry is whether it is a right the value of which can be ascertained in money.

The collateral effect of the judgment cannot be inquired into in this inquiry for the purpose of determining whether this court has jurisdiction. The judgment itself must carry with it the elements which confer jurisdiction. *Re Belt*, 159 U. S. 95, 100; *Railroad Co.* v. *District of Columbia*, 146 U. S. 227, 231; *Chapman* v. *United States*, 164 U. S. 436; *Farnsworth* v. *Montana*, 129 U. S. 104; *Cross* v. *Burke*, 146 U. S. 82.

This court in determining the validity of legislation is limited to question of power, and cannot pass on expediency. Congress gave the legislature of New Mexico power to pass this legislation as fully as a State would have it. Sec. 1851, Rev. Stat.; *Walker* v. *Southern Pacific R. R. Co.*, 165 U. S. 593.

The act was a valid inspection law, and that notwithstanding it operated on articles of interstate commerce. *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345.

The law was passed to meet the peculiar conditions in New Mexico in regard to the vast herds of grazing cattle, which can only be identified and property rights therein protected by the system of branding in force in the Territory. The law falls under the class sustained in *Turner* v. *Maryland*, 107 U. S. 38. The law is an inspection law, and it operates on the hides before they begin to move in interstate commerce, and therefore is not an export tax. *Coe* v. *Errol*, 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Kidd* v. *Pearson*, 128 U. S. 1; and see also *United States* v. *Boyer*, 85 Fed.

Rep. 425; *United States* v. *E. C. Knight Co.*, 156 U. S. 13; *Cornell* v. *Coyne*, 192 U. S. 418; *In re Greene*, 52 Fed. Rep. 113; see *People* v. *Bishop*, 94 N. Y. Supp. 74, sustaining New York veal law providing for tagging calves killed, with age and name of raiser and shipper.

The act is a legitimate exercise of the police power and is not dependent in any manner upon the exception contained in the article of the Constitution which provides that States may levy imposts for the execution of their inspection laws. The inspection fee is not levied upon interstate commerce.

Even if the hides in question should be considered interstate commerce at the time the law acts upon them, still the act is not in collision with the commerce clause of the Constitution and is valid, being a legitimate inspection law. See case below, 78 Pac. Rep. 75, and concurring separate opinion of Justice Pope, 79 Pac. Rep. 295; *City of New York* v. *Miln*, 11 Pet. 102; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17.

The act answers all essential requirements of a valid inspection law, in that necessity existed for its enactment; it provides a reasonable fee; it intended and is well calculated to eradicate or at least lessen the evil of cattle stealing; it does no violence to the rights secured to the citizens of any other State or Territory; it operates upon property and not upon persons; it can be executed without taking testimony or evidence.

The legislature and courts of New Mexico must be presumed to be perfectly familiar with conditions there existing, and to understand the necessities in regard to legislation for protecting the property of its citizens. Whether such a law as the one now in question is necessary should be referred to the legislative department of the Territory. And the legislature having enacted it, this court will hesitate to deny its validity. *Clark* v. *Nash*, 198 U. S. 361.

The scope of inspection laws can no more be defined or limited than can the scope of police power of which it is a branch. *Barton* v. *Railroad Co.*, 32 Fed. Rep. 722; *Voight* v.

Wright, 141 U. S. 62; *Slaughter House Cases*, 16 Wall. 36, 62. As to whether inspection laws can be resorted to for detection of crime see *Railroad Co.* v. *Husen*, 95 U. S. 465, 471.

The constitutional prohibition as to exports refers to foreign commerce and not to interstate commerce. *Woodruff* v. *Parham*, 8 Wall. 123, and the States may make inspection laws operating on interstate commerce. *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Neilson* v. *Garza*, 2 Woods, 287.

The fees charged in this case are reasonable, but that is a matter for the legislature to determine. Cases cited, *supra*. *Chester* v. *Telegraph Co.*, 154 Pa. St. 464; *West. Un. Tel. Co.* v. *New Hope*, 187 U. S. 425. See *Phœnix Meat Co.* v. *Moss*, 64 Pac. Rep. 442, as to Arizona hide inspection law.

The law does not discriminate between different classes of citizens. It acts upon hides, not persons, and upon hides whosesoever they may be. Whenever a law operates alike upon all persons and property similarly situated, equal protection is not denied. All that is required is that all persons subject to a law shall be treated alike. *Mo. Pac. R. R.* v. *Mackey*, 127 U. S. 205; *Duncan* v. *Missouri*, 152 U. S. 377; *Giozza* v. *Tiernan*, 148 U. S. 657.

In *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62, state laws were under consideration which discriminated against products of other States, and were for that reason condemned. In this case there is no such discrimination.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from the judgment of the Supreme Court of New Mexico, affirming the judgment of the District Court of Santa Fé County, sustaining a motion to quash an alternative writ of mandamus issued on the relation of E. J. McLean & Company against the Denver and Rio Grande Railroad Company.

From the allegations of the writ it appears that the relators, the appellants here, had delivered to the railroad company at Santa Fé, New Mexico, a bale of hides consigned to Denver, Colorado, a point on the line of the defendant's railroad. The railroad company refused to receive and ship the hides for the reason that they did not bear the evidence of inspection required by the act of the legislature of New Mexico, approved March 19, 1901, which act, to be more fully noticed hereafter, made it an offense for any railroad company to receive hides for shipment beyond the limits of the Territory which had not been inspected within the requirements of the law.

An objection is made to the jurisdiction of this court upon the ground that the case is not appealable under the act of Congress of March 3, 1885. 23 Stat. 443.

Section 1 of the act provides, in substance, that no appeal or writ of error shall be allowed from any judgment or decree of the Supreme Court of a Territory unless the matter in dispute, exclusive of costs, exceeds the sum of $5,000. Section 2 of the act makes exception to the application of section 1 as to the sum in dispute, in cases wherein is involved the validity of a treaty or statute of, or authority exercised under, the United States, and in all such cases an appeal or writ of error will lie without regard to the sum or value in dispute.

Confessedly, $5,000 is not involved; and in order to be appealable to this court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This court, in the case of *Lynch* v. *United States*, 137 U. S. 280, 285, laid down the test of the right to appeal under the statute in the following terms:

"The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

The right to legislate in the Territories is conferred, under

constitutional authority, by the Congress of the United States and the passage of a territorial law is the exertion of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the territorial legislature, it is contended by the relators below, appellants here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the Territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the Territory. In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the Territory, as was the fact in *Snow* v. *United States*, 118 U. S. 346. The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject-matter in controversy, and brings the case in this aspect within the second section of the act.

Is there any sum or value in dispute in this case? While the act does not prescribe the amount, some sum or value must be in dispute. *Albright* v. *Territory of New Mexico*, 200 U. S. 9. The matter in dispute is the right to have the goods which were tendered for shipment transported to their destination. As a common carrier, the railroad was bound to receive and transport the goods. Its refusal so to do was based upon the statute in question because of the non-inspection of the goods tendered. The relators claimed the right to have their goods transported because the statute was null and void, being an unconstitutional enactment. The controversy, therefore, relates to the right of the appellants to have their goods transported by the railroad company to the place of destination. We think this was a valuable right, measurable

in money. At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily, the measure of damages in such case is the difference between the value of the goods at the point of tender and their value at their proposed destination, less the cost of carriage. We are of the opinion that this controversy involves a money value within the meaning of the statute, and the motion to dismiss the appeal will be overruled.

Passing to the merits of the controversy, Congress has conferred legislative power upon the Territory to an extent not inconsistent with the Constitution and laws of the United States. Rev. Stat. § 1851. It is contended that the act under consideration contravenes that part of Article one, Section ten, of the Constitution of the United States, which reads: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." And also that part of the eighth section of Article one of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, and among the States and with the Indian tribes.

As to the objection predicated on Section ten of Article one, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345, 350, and cases cited. Moreover, that paragraph of the Constitution expressly reserves the right of the States to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution.

The question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution, because it undertakes to regulate interstate commerce and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this court to require the restatement

of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and that other laws which undertake to regulate such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321; *McNiell* v. *Southern Railway Co.*, 202 U. S. 543. While this is true, it is equally well settled that a State or a Territory, for the same reasons, in the exercise of the police power, may make rules and regulations not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of legislatures having for their object the protection, welfare and safety of the people, although such laws may have an effect upon interstate commerce. *M., K. & T. R. R. Co.* v. *Haber*, 169 U. S. 613, 635; *Chicago, Milwaukee &c. R. R. Co.* v. *Solan*, 169 U. S. 133; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477. The principle decided in these cases is that a State or Territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345, it was directly recognized that the State might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in *Neilson* v. *Garza*, 2 Woods, 287, a case decided by Mr. Justice Bradley on the circuit and quoted from at length with approval by Mr. Chief Justice Fuller in the *Patapsco case*.

Applying the principles recognized in these cases to the

case at bar, does the act in question do violence to the exclusive right of Congress to regulate interstate commerce? We take judicial notice of the fact that in the Territory of New Mexico, and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country with no other means of determining their separate ownership than by the brands or marks upon them. In view of these considerations, and for the purpose of protecting the owners of cattle against fraud and criminal seizures of their property, the Territory of New Mexico has made provision, by means of a system of laws enacted for the purpose, for the protection of the ownership of cattle and the prevention of fraudulent appropriations of this kind of property. The legislation upon the subject in the Territory is thus summarized in the opinion, in this case, of the Supreme Court of New Mexico, 78 Pac. Rep. 74:

"The first act relating to inspection of hides was passed in 1884, and provided that all butchers should keep a record of all animals slaughtered, and keep the hides and horns of such animals for thirty days after slaughter, free to the inspection of all persons (Compiled Laws, section 84), and provided a penalty for failure to keep the record and the hides and horns, (sect. 86,) and a penalty for refusal of inspection of the record or hides, (sect. 87). In 1891 all persons were required to keep hides for thirty days for the inspection of any sheriff, deputy sheriff, or any constable, or any board or inspector, or any officer authorized to inspect hides (sect. 89), and provided a penalty, (sect. 90). In 1889, amended in 1895, (p. 70, c. 29, § 4), a cattle sanitary board was created, (sect. 183,) with power to adopt and enforce quarantine regulations and regulations for the inspection of cattle for sale and slaughter, (sect. 184,) and pay to inspectors not to exceed $2.50 per day and their expenses, (sect. 190). In 1891, the cattle sanitary board was authorized and required to make regulations concerning inspection of cattle for shipment, and hides and slaughter-houses, (sect. 208,) and there was pro-

vided the details of arrangement for the inspection of cattle, (sect. 212), and the duties of cattle inspectors were enlarged by providing: 'Every slaughter-house in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughter-houses shall be carefully compared with the records of such slaughter-houses, and a report in writing setting forth the number of cattle killed at any such slaughter-house since the last inspection, the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughter-houses, or any other person, of the provisions of an act entitled, An act for the protection of stock, and for other purposes, approved April 1, 1884. For the purpose of making the inspection authorized by this act, any inspector employed by the said sanitary board shall have the right to enter, in the day or night time, any slaughter-house or other place where cattle are killed in this Territory, and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records,' (sect. 213). In 1893, it was provided that the cattle sanitary board might fix fees for the inspection of cattle and hides, (sect. 221, repealed in 1889,) and that such fees shall be paid to the secretary of the board and placed to the credit of the cattle sanitary board, (sect. 222,) and shall be used, together with funds realized from taxes levied and assessed, or to be levied and assessed, upon cattle only, to defray the expenses of the board, (sect. 220). Chapter 44 of the Laws of 1889 makes no changes in the law material to the consideration of this case. Chapter 53 of the Laws of 1889 provides a fee of three cents for the inspection of cattle."

In *pari materia* with this legislation the act of 1901, now under consideration, was passed. Sections three and four of that act are as follows:

"Sec 3. Hereafter it shall be unlawful for any person, firm

or corporation to offer, or any railroad company or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof a fee or charge of ten cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office.

"SEC. 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any provision of this act, or refusing to permit the inspection of any hides as herein provided, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

The purpose of these provisions is apparent, and it is to prevent the criminal or fraudulent appropriation of cattle by requiring the inspection of hides and registration by a record which preserves the name of the shipper and purchaser of the hides, as well as the brands thereon, and by which is afforded some evidence, at least, tending to identify the ownership of the cattle. It is evident that the provision as to the shipment of the hides beyond the limits of the Territory is essential to this purpose, for if the hides can be surreptitiously or criminally obtained and shipped beyond such limits, without inspection or registration, a very convenient door is open to the perpetration of fraud and the prevention of discovery.

It is argued that this act lays a special burden upon interstate commerce, because under the law hides not offered for transportation are not required to be inspected after thirty days in slaughter-houses and not at all outside of slaughter-houses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the Territory where possibly it may be found and identified. When shipped beyond the limits of the Territory the means of reaching it are beyond local control, and it is the purpose of sections 3 and 4 of the act of 1901, to preserve within the Territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the Territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic.

It is urged further that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the Territory. It is true that inspection laws ordinarily have for their object the improvement of quality and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the *Patapsco case, supra,* it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in *Neilson* v. *Garza, supra,* decided on the circuit. We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the Territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. The exercise of the police power

may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the Territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong.

It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection, which goes into the treasury of the sanitary board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of day's wages in the work of inspecting hides under the provisions of this act. The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345.

We are of the opinion that the allegations of the relator as to the cost of inspection, compared with the fees authorized to be charged, and the profit which might accrue to the inspector, in view of other and necessary incidental expense connected with the inspection and registration, do not bring the case within that class which holds that under the guise of inspection other and different purposes are to be subserved, thus rendering the legislation invalid.

Upon the whole case, we are of the opinion that, in the absence of Congressional legislation covering the subject, and making a different provision, the act in controversy is a valid exercise of the police power of the Territory, and not in violation of the Constitution giving exclusive power to Congress in the regulation of interstate commerce.

Affirmed.

LANDRAM *v.* JORDAN.

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

No. 179. Argued October 9, 1906.—Decided October 22, 1906.

Testator created a trust for his children including therein all of his property except one parcel, the income whereof was to go to a niece for life, the trustees to make such income up to a specified sum from the property in the general trust. The general trust was declared void as creating a perpetuity but not the trust for the niece. The children appealed claiming that the trust for the niece was also void. *Held* that

One not appealing cannot, in this court, go beyond supporting the judgment and opposing every assignment of error, and therefore the niece could not endeavor to sustain the validity of the trust as a whole.

The trust for the niece was not illegal, and was not so intimately connected with the failing trust as to fail with it; but the decree was modified so that the income could only be made up to the specified sum from income from property in the jurisdiction.

An objection that a person should have been made a party to a bill of review comes too late when the existence of that person does not appear of record.

25 App. D. C., 291, modified and affirmed.

THE facts are stated in the opinion.

Mr. John J. Hemphill, with whom *Mr. James Hemphill* was on the brief, for appellants:

The testator violated the law of this jurisdiction in placing the title to Washington real estate in the hands of trustees without power to alienate prior to 1928. *Ould* v. *Washington Hospital*, 95 U. S. 303, 312. See also Code of the District, and as to rule in other jurisdictions see *Jones* v. *Habersham*, 107 U. S. 174; *McArthur* v. *Scott*, 113 U. S. 340, 381. The rule applies to the possibility of non-vesting. *Proprietors* v. *Grant*, 3 Gray, 142, 153; 1 Perry on Trusts, § 380; *Sears* v. *Putnam*,

102 Massachusetts, 5; *Barnum* v. *Barnum*, 26 Maryland, 119. It applies to equitable estates and trusts. 1 Perry on Trusts, § 382; *Bigelow* v. *Cady*, 171 Illinois, 209; *Andrews* v. *Lincoln*, 95 Maine, 541. If the suspension be for a fixed period without reference to a life or lives, such period cannot exceed twenty-one years flat. Page on Wills, § 632; *Andrews* v. *Lincoln*, 95 Maine, 541; *Kimball* v. *Crocker*, 53 Maine, 263.

Under the New York statute limiting the suspension to two lives in being, as well as under similar statutes of other States, it is held that if a gross or absolute term of years instead of lives is taken as the measure of suspension, the statute is violated however short the term may be. *Beekman* v. *Bonsor*, 23 N. Y. 298, 316; *Rice* v. *Barrett*, 102 N. Y. 161; *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337. See also *Re Walkerley Estate*, 108 California, 627; *DeWalf* v. *Lawson*, 61 Wisconsin, 473.

The rule is one of law and not of construction. Gray on Perpetuities, § 629; *Pearles* v. *Moseley*, 5 App. Cas. (H. of L.) 714, 719; *Hasman* v. *Pearse*, L. R., 7 Ch. App. 275, 283.

For cases where provisions similar to those in suit were held bad, see *Fidelity Trust Co.* v. *Lloyd*, 78 S. W. Rep. (Ky.) 898; *Andrews* v. *Lincoln*, 95 Maine, 541; *Coleman* v. *Coleman*, 65 S. W. Rep. (Ky.) 832; *Phillips* v. *Heldt*, 71 N. E. Rep. (Ind.) 320; *Speakman* v. *Speakman*, 8 Hare, 180; *Kimball* v. *Crocker*, 53 Maine, 263.

The trust covering the Washington realty being void, the provision for the appellee falls within it. *Knox* v. *Jones*, 47 N. Y. 393, 398; *Pitsel* v. *Schneider*, 216 Illinois, 17; *Lawrence* v. *Smith*, 163 Illinois, 149; *Harris* v. *Clark*, 7 N. Y. 242, 257; *Barnum* v. *Barnum*, 26 Maryland, 19; *Coster* v. *Lorillard*, 14 Wend. (N. Y.) 265; *Re Christie*, 133 N. Y. 473; *Amory* v. *Lord*, 9 N. Y. 403; 28 Am. & Eng. Ency. Law, 2d ed., 866.

The trust created by the testator is not merely a part of the machinery for accomplishing a subsequent intention towards any objects of his bounty, but was primarily created and intended for the purpose of conserving this property and holding it together for a fixed period without reference to

consequences. The disposition of the income was not a necessary element of the trust. It was an incident and an outgrowth, and of course, dependent upon it.

As the attempted trust embodies the general scheme or plan of the testator as to his Washington real estate, the direction to his trustees to pay appellee forty dollars per month—being a part of the monthly income of the trust property—rests upon the void trust, so that it cannot be established without reliance upon the void trust.

The cases cited by the court below, and in the appellee's brief can be distinguished.

Mary B. Kearney who is a necessary party has not been brought into court.

Any person, not a party to the original suit, who becomes interested in the subject-matter in controversy by operation of law, or under a distinct claim not derived from one of the parties, must be made a party to the bill of review, and is not bound by the proceedings under it, unless he be made a party. *Debell* v. *Foxworthy's Heirs*, 9 B. Mon. (Ky.) 228, 231. All whose interests are to be affected by a decree should be made parties to a bill of review to reverse it. *Turner* v. *Berry*, 3 Gilman (Ill.), 541, 543, citing *Bank of U. S.* v. *White*, 8 Peters, 262, 268; Story's Eq. Pleading, 420; Daniel Chan. Pl. and Pr., 6th ed., § 1580; *Singleton* v. *Singleton*, 8 B. Mon. 349.

Mrs. Kearney became entitled to dower in an undivided one-half of the real estate in the District of Columbia upon the filing of the decree of June 27, 1900, declaring the will invalid as to the real estate in the District, and was a necessary party to the proceeding in the lower court. 2 Am. & Eng. Enc. Law, 1st ed., 264; Story's Equity Pl. § 240; *Turner* v. *Berry, supra; Creed* v. *Lancaster Bank*, 1 Ohio St. 1.

Appellee's contention that the court below was without jurisdiction to entertain the original suit can not be raised by a bill of review. 16 Cyc. 529; *Friley* v. *Hendricks*, 27 Mississippi, 412, 418; *Donaldson* v. *Nellis*, 108 Tennessee, 638; *Berdanatti* v. *Sexton*, 22 Tenn. Chan. 699, 703.

Mr. Charles F. Wilson, with whom *Mr. Frank W. Hackett* was on the brief, for appellee:

As to the validity of the annuity for Miss Jordan, the trust is valid; it is separate from the other trusts and can be upheld even if they are invalid; it is not essential to the general scheme. *Manice* v. *Manice,* 43 N. Y. 307; *Oxley* v. *Lane,* 35 N. Y. 349; *Harrison* v. *Harrison,* 36 N. Y. 54; *Tiers* v. *Tiers,* 98 N. Y. 568; *Van Schuyer* v. *Mulford,* 59 N. Y. 432. The trust itself is valid; there was no intention to create a perpetuity. A will need not in express terms provide that the particular trust for each beneficiary shall cease upon his or her death. It is enough that a necessary implication exists that such was the testator's intention. *Montignani* v. *Blade,* 145 N. Y. 111; *Estate of Hendy,* 118 California, 659; Gray on Perpetuities, § 201.

Mr. Frank Sprigg Perry on behalf of Mary B. Kearney, petitioner:

On a bill of review all parties interested should be made parties defendant. *Friley* v. *Hendricks,* 27 Mississippi, 412; *Ralston* v. *Sharon,* 51 Fed. Rep. 714; *Shields* v. *Barrow,* 17 How. 130, 140; *Mallow* v. *Hinde,* 12 Wheat. 193, 198; *Cameron* v. *McRoberts,* 3 Wheat. 591; *Williams* v. *Bankhead,* 19 Wall. 563.

Affirmance of decree in this case would reduce petitioner's dower interest in the property in the District of Columbia, and, therefore, she is an indispensable party. *Shepard* v. *Manhattan Ry. Co.,* 117 N. Y. 446; *Sykes* v. *Chadwick,* 18 Wall. 145; *Rogers* v. *Potter,* 32 N. J. L. 78.

Under the laws of Maryland in force in this District at testator's death, the trust was a perpetuity and void. 2 Kilty's Laws of Maryland, Ch. 101, subch. 1; Abert's Digest Dist. of Col. Laws, Ch. 70, § 2; see § 1023 D. C. Code; *Ould* v. *Hospital,* 95 U. S. 304, 312; *Hopkins* v. *Grimshaw,* 165 U. S. 342, 355; *Barnitz, lessee,* v. *Casey,* 7 Cr. 456, 469.

The invalidity of this trust is not affected by the clause which provides that the devisees shall receive the net rents arising from the respective houses and lots herein devised to them respectively upon the happening of certain events. Were this simply a passive trust from and after the happening of the event therein named, it might be contended that the rule against perpetuities did not apply. This contention would be based on the ground that the estates would coalesce. The word "net" takes the case out of the domain of passive trusts and makes it clearly an active trust. The word "net" means obtained after deducting all expenses. Standard Dictionary; Bouvier's Law Dict., Rawle's Revision; *St. John* v. *Erie Railway Co.*, 22 Wall. 137, 148. As to what is an active trust see *Stambaugh's Estate*, 135 Pa. St. 597; *Meacham* v. *Steel*, 93 Illinois, 145; Perry on Trusts, § 305; *Girard Life Ins. Co.* v. *Chambers*, 46 Pa. St. 486; 26 Am. & Eng. Ency. Law, 143; *Slater* v. *Rudderforth*, 25 App. D. C. 497; *MacCarthy* v. *Tichenor*, 29 Wash. L. R. 442.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court upon a bill of review brought by Gabriella K. Jordan, the appellee. The decree under review was rendered in a suit for the construction of the will of Thomas Kearney and for the determination of the validity of a trust created by it, so far as the same concerned land in the District of Columbia. That decree declared the trust bad as attempting to create a perpetuity. Under the bill of review the decree was modified, on demurrer, to the extent of the interest of Gabriella K. Jordan, and the trust was declared valid as to her. 25 App. D. C. 291. The executors of the testator's heir and a daughter of the said heir appealed to this court.

Thomas Kearney died on July 5, 1896. The will disposes of land in various places. In item 3 it enumerates the tes-

tator's property in Washington. In item 5, it devises this and other property upon a trust to be continued until January 1, 1928, and there and elsewhere, with the following exception, makes a fund from the Washington rents and profits to be disposed of as directed in the will. Item 6 is as follows:

"I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' Street, N. W., Washington, D. C.; but, in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said amount of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same shall be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month she shall have the whole thereof."

Item 7 directs the trustee to let all the Washington property, except 611 M street, and out of the rents to pay ninety dollars a month to the testator's daughter, Constance K. Vertner, as ordered in item 5; the residue, so far as necessary, to be applied to the support and education of her three children, named, with further provisions. Item 8 gives the remainder in fee of 611 M street to the testator's grandson, provided that if Gabriella Jordan dies before January 1, 1928, he shall only receive the rents and profits, and if she dies before the grandson reaches the age of twenty-two the rents shall be disposed of as provided in item 7 as to other Washington property. In item 21 the testator, "for fear that there may be some difficulty in construing the different provisions" of the will, states his intention that all the money

arising from the Washington rents, "except that which is to go to Gabriella K. Jordan, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2) of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years, respectively."

The persons in whose favor were made the provisions which were adjudged bad were one of the testator's heirs, his daughter, Constance K. Vertner, and the children of Constance. The daughter pleaded that the other heir, Edmund Kearney, also provided for in the will, died, leaving her his heir, that the trust was bad, and, by implication, that she was entitled to the property which it embraced. She now is dead. By the original decree the whole trust fund, including that given to Gabriella Jordan, went to the testator's heirs as property undisposed of by the will. The only person dissatisfied with that decree was Gabriella Jordan, and on the other hand the executor and children of Constance are the only appellants from the decree on review. According to the rule that has been laid down in this court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527; *The Stephen Morgan*, 94 U. S. 599; *Chittenden* v. *Brewster*, 2 Wall. 191, 196; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 621. We assume this rule to be correct. Although her counsel attempted to argue the validity of the trust as a whole, and other questions, we assume, without deciding, the decree to be unimpeachable and right except so far as appealed from. Therefore we shall confine ourselves to considering whether the gift to Gabriella is so intimately connected with the failing scheme as to fail with it.

It would be a strong thing to say that we gather from this will an intent that, if the trust so far as it concerns the testator's descendants should fail because they prefer to take the property by intestacy free from the limitations of the will, therefore the one gift outside his family should be defeated also. The trust is not a metaphysical entity or a Prince Rupert's drop which flies to pieces if broken in any part. It is a provision to benefit descendants and a niece. There is no general principle by which the benefits must stand or fall together. It is true that all the Washington property was given to the trustees in one clause and that a part of the scheme in favor of the testator's grandchildren was the creation of a fund from the rents. But, as is stated in item 21, 611 M street was excepted from the scheme, and the whole income of this lot, or in other words an equitable estate in the specified land, is given to Gabriella Jordan for life by item 6. If that were all we see no reason for a doubt that that gift would be good, whether the gifts to the other beneficiaries were good or not. The fact that the testator's daughter takes all the rest of the property instead of her children getting a postponed interest in a part, is no ground for denying to the niece the life estate given to her in an identified and excepted piece of land. It does not make the case any worse that a part of the property thus going to the testator's daughter is the remainder in the estate given to his niece.

The appellants lay hold of the instructions to the trustees to add to the rents enough to make Gabriella's income up to forty dollars a month, and argue as if the gift were in substance only a gift of forty dollars a month from a fund that cannot be established. Such is not the fact. The gift is primarily and in any event a gift of the income of 611 M street. But whatever may be the fate of the rest of the trust we see nothing to hinder the trustees from keeping the income up to forty dollars from the other property devised to them. Of course they could not derive income from property not included in the trust, and only the property included is charged with

the liability. The decree may be modified by inserting after the words "against his entire estate" the words "in the District of Columbia."

It is objected in argument, although not in the pleadings, that the widow of Edmund Kearney has a right of dower in the Washington estate which descended to him, and that she should have been made party to the bill of review. The fact of the widow's existence does not appear of record as against the appellee, and we agree with the Court of Appeals that the objection is made too late.

Decree affirmed.

FIDELITY MUTUAL LIFE INSURANCE COMPANY *v.* CLARK.

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

No. 25. Argued October 15, 16, 1906.—Decided October 29, 1906.

A man and his sister conspired to defraud an insurance company; the former having insured his life disappeared and the latter as beneficiary filed proof of death, brought suit, and recovered judgment after verdict by a jury; the company defended on ground that insured was alive and claim was fraudulent. The judgment was affirmed and the company paid the money into court. In order to have the suit prosecuted the beneficiary had made contingent fee contracts with attorneys which had been filed and the money was distributed from the registry of the court to her and the various parties holding assignments of interests therein. The insurance company, having afterwards found the insured was alive, sued in equity the beneficiary and also her counsel and their assignees to recover the money received by them respectively. No charge of fraud was made against anyone except the beneficiary, but notice of the fraud was charged against all by virtue of the company's defense. The defendants claimed that under the Seventh Amendment the question of death of person insured could not again be litigated. The bill was dismissed as to all except the beneficiary.

Held, as to the defendants other than the beneficiary, that as the action was prosecuted in good faith, whatever notice they may have had by virtue of the company's defense was purged by the verdict, and although they had received their respective shares from the proceeds paid into court it was the same in law as though they had been paid in money directly by the judgment creditor and it could not be recovered.

Whether in view of the Seventh Amendment a Federal court sitting in equity may inquire into whether a judgment based on a verdict was obtained by fraud and, if so found, set the verdict aside, argued, but not decided.

The facts are stated in the opinion.

Mr. Maurice E. Locke and *Mr. Eugene P. Locke* for appellant:

The Circuit Court and this court are not deprived of jurisdiction to entertain plaintiff's bill by the provision in the Seventh Amendment that no fact tried by a jury shall be otherwise reëxamined by any court of the United States than according to the rules of the common law, as under the common law, as it was understood in England at the time of the adoption of the Constitution, equity could examine into whether a judgment, based on a verdict, had been fraudulently obtained. 3 Blackstone's Comm. *53; Hallam's Con. Hist. of England, Chap. 6, p. 247; 1 Campbell's Lives of the Chief Justices, 332; 2 Campbell's Lives of the Chancellors, 362; 3 Pomeroy's Eq. Jurisp., § 1360; 1 Story's Eq. Jurisp., § 51; 1 High on Injunctions, § 112; Lord Ellesmere's pamphlet, "The Privileges and Prerogatives of the High Court of Chancery."

There are no American cases, state or Federal, where the right of a court of equity to reëxamine for fraud a judgment or a verdict at law was the matter under consideration, which hold that courts of the United States sitting in equity had not that power.

It has been held that the first clause of the Seventh Amendment, correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that

which they have exercised as concurrent with courts of law. *Shields* v. *Thomas*, 18 How. 253; *Waring* v. *Clarke*, 5 How. 441; *Barton* v. *Barbour*, 104 U. S. 126. See also *Home Life Ins. Co.* v. *Dunn*, 19 Wall. 214; *Ocean Ins. Co.* v. *Fields*, 2 Story, 59.

In a case in a Federal court, the judge may call in a jury to find upon issues, or may have a jury empaneled upon the law side of the court and its verdict certified to him, and in either case the verdict is not binding on him but advisory only. This accords with the long established practice of courts of chancery, but is apparently contrary to the letter of the Seventh Amendment, and justified only by historic interpretation. See *Prout* v. *Roby*, 15 Wall. 472; *Garsed* v. *Beall*, 92 U. S. 684;.*Wilson* v. *Riddle*, 123 U. S. 608; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509; and as to effect of jury trials in admiralty cases see *Boyd* v. *Clark*, 13 Fed. Rep. 908.

For other cases in which a verdict was reviewed for fraud see *Young* v. *Sigler*, 48 Fed. Rep. 182; *Crim* v. *Handley*, 94 U. S. 652; *Stanton* v. *Embry*, 93 U. S. 548; *S. C.*, 46 Connecticut, 65 and 595; *Embry* v. *Palmer*, 107 U. S. 3; *Phillips* v. *Negley*, 117 U. S. 665.

The fraud of the original conspirators is not the same fraud which is the basis of this suit, and this distinguishes the case from *United States* v. *Throckmorton*, 98 U. S. 61, and *United States* v. *Flint*, 4 Sawyer, 42. See also *Marshall* v. *Holmes*, 141 U. S. 589; *Graver* v. *Fawrot*, 64 Fed. Rep. 241; 73 Fed. Rep. 1022; 76 Fed. Rep. 267; 162 U. S. 435; *Maddox* v. *Apperson*, 14 Lea, 596, 615; *Marine Ins. Co.* v. *Hodgson*, 7 Cr. 332; *N. Y. Life Ins. Co.* v. *Bangs*, 103 U. S. 780. A court of equity can and will grant relief under the circumstances of this case. *Coddrington* v. *Webb*, 2 Vernon, 240; *Wonderly* v. *Lafayette Co.*, 150 Missouri, 635; *Guild* v. *Phillips*, 44 Fed. Rep. 461; *Trefz* v. *Knickerbocker Life Ins. Co.*, 8 Fed. Rep. 177; *Stowell* v. *Eldred*, 26 Wisconsin, 504; *State* v. *Fraker*, 148 Missouri, 143.

The bill does not come too late, and the situation demands equitable relief.

If one person gets possession of another's money by fraud, the law raises a promise to return it, and upon such implied promise an action may be maintained. Bishop on Contracts, § 226; *Moses* v. *Macferlan*, 2 Burrows, 1005; *Buller* v. *Harrison*, 2 Cowper, 565; *N. W. Mutual Life Ins. Co.* v. *Elliott*, 5 Fed. Rep. 225; *National Life Ins. Co.* v. *Minch*, 53 N. Y. 144; *Gaines* v. *Miller*, 111 U. S. 395; *Merryfield* v. *Wilson*, 14 Texas, 224; *Michigan* v. *Phœnix Bank*, 33 N. Y. 9.

The fraud in this case consisted in obtaining by wrongful means a judgment that William A. Hunter had died, thereby rendering the plaintiff liable to Mrs. Smythe. Whether he had so died was the question directly in issue in the action at law, and the verdict and judgment therein are conclusive between the parties and privies, save upon such direct or collateral attack as may be permissible under the circumstances. Bigelow on Estoppel, 90; *Outram* v. *Morewood*, 3 East, 346; *Hazen* v. *Reed*, 30 Michigan, 331; *Monks* v. *McGrady*, 71 Texas, 134; *McGrady* v. *Monks*, 20 S. W. Rep. 959.

The Federal courts and the courts of all the States in which the various defendants reside agree in holding that a judgment cannot be collaterally attacked for fraud. *Christmas* v. *Russell*, 5 Wall. 290; *Peninsular Iron Co.* v. *Eells*, 68 Fed. Rep. 24; *K. C., Ft. S. & M. K. Co.* v. *Morgan*, 76 Fed. Rep. 429; *Lake County* v. *Platt*, 79 Fed. Rep. 567; *Maddox* v. *Summerlin*, 92 Texas, 483; *Anderson* v. *Anderson*, 8 Ohio St. 109; *State* v. *Ross*, 118 Missouri, 23.

The defendants Clark, Culberson, Spoonts and Phillips Investment Company are all privies to the judgment by assignment of interests in its subject-matter, and are protected by it to the same extent as Mrs. Smythe. Bigelow on Estoppel, 142–149; 2 Black on Judgments, §§ 549–550; *Lake Co.* v. *Platt*, 79 Fed. Rep. 567; *Porter* v. *Bagby*, 50 Kansas, 412.

Therefore as to all the defendants equitable relief is necessary and proper in the case, if the facts are sufficient, as they are, to warrant interfering with the judgment.

When property has been obtained by fraud, its true owner

may recover it from any person except a *bona fide* purchaser for value, without notice. *Buller* v. *Harrison*, 2 Cowper, 565; *Thurston* v. *Blanchard*, 22 Pickering, 18; *Devoe* v. *Brandt*, 53 N. Y. 462.

The exception relates only to those kinds of property whose purchasers for value are protected by the policy of the law from equities outstanding against their vendors of which they had no notice. A judgment is not such property. The assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same or not, and regardless of the consideration paid therefor. 2 Black on Judgments, §§ 953 and 955; 1 High on Injunctions, § 190; *Taylor* v. *Nash. & Chat. R. Co.*, 86 Tennessee, 228; *Blakesley* v. *Johnson*, 13 Wisconsin, 592; *Rock Rapids* v. *Schreiner*, 46 Iowa, 172; *Rea* v. *Forrest*, 88 Illinois, 275; *Northam* v. *Gordon*, 23 California, 255; *Weber* v. *Tschetter*, 1 S. D. 205; *Ellis* v. *Kerr* (Tex. Civ. App.), 23 S. W. Rep. 1050 and 32 S. W. Rep. 444; *Wright* v. *Treadwell*, 14 Texas, 255; *Thresher Mfg. Co.* v. *Holz*, 10 N. D. 16; *Brisbin* v. *Newhall*, 5 Minnesota, 273; *McJilton* v. *Love*, 13 Illinois, 486; *Wright* v. *Levy*, 12 California, 257; *Jeffries* v. *Evans*, 6 B. Mon. 119; *Devoll* v. *Scales*, 49 Maine, 320; *Padfield* v. *Green*, 85 Illinois, 529; *Mulford* v. *Stratton*, 41 N. J. Law, 466; *Magin* v. *Pitts*, 43 Minnesota, 80; *Brewing Co.* v. *Hansen*, 104 Iowa, 307; *Ricaud* v. *Alderman*, 132 N. Car. 62; *Frankel* v. *Garrard*, 160 Indiana, 209.

As to policies of insurance and orders drawn against specific funds see 1 May on Ins., § 386; Joyce on Ins., § 2326; 7 Cyc. 578; 3 Pomeroy's Eq. Jurisp., § 1280 *et seq; Bank* v. *Yardley*, 165 U. S. 634; *Brill* v. *Tuttle*, 81 N. Y. 454.

The appellees hold under assignments.

Appellees' position that the assignments can be ignored, and the case be dealt with as if the facts were that Mrs. Mettler collected the amount of the judgment obtained by her against the insurance company, and then paid to her attorneys the fees owing by her to them for their professional services cannot be maintained. No portion of the avails of the judg-

ment ever passed through Mrs. Mettler's hands, save the net sum of $11,160.50, sent to her by Mr. Clark. Each of the appellees received his part of the fund directly from the court, in the form of a non-negotiable order in his own favor, drawn on the United States depository in which the fund was deposited, and payable out of that specific fund. The clerk and the judge, who respectively signed and countersigned the orders, were in no sense the agents of Mrs. Mettler. They were acting only in their official capacity, receiving and holding the fund in the name of the court, and distributing it among its apparent owners.

None of the appellees knew at the time of acquiring his interest that Hunter was not dead. But they all knew that the insurance company claimed that he was living and that it denied liability. The notice which the lawyers had was not in the nature of hearsay. They were dealing directly with, and were seeking to overthrow, the company's contention that Hunter was still alive.

A statement by one person or his representative to another that the former has or claims a certain right is actual notice to the latter of that right. Notice and knowledge are two very different things; and a man may have actual notice sufficient for all legal purposes of something which he does not know and which even in the best of faith he wholly disbelieves.

As a general proposition the rendition of professional services by a lawyer, or his contract to render such services, may form a valuable consideration for property conveyed to him as compensation therefor. But more than this is needed to block the pursuit of the real owner of the property seeking to recover it.

Mr. F. M. Etheridge, with whom *Mr. W. M. Alexander*, *Mr. Lauch McLaurin*, *Mr. George Thompson* and *Mr. Rhodes S. Baker* were on the briefs, for appellees:

A Circuit Court of the United States sitting in equity and

deriving its powers from the laws of the United States will not reëxamine an issue of fact, which has been already finally determined at law after a plenary hearing before a jury, constituted in accordance with the guaranties of the Constitution of the United States, and upon such reëxamination annul such decision at law, on the ground that an improper conclusion was reached, and substitute its own judgment for that of the law tribunal. *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *United States* v. *Throckmorton*, 98 U. S. 61, 68; *Green* v. *Green*, 2 Gray, 361.

The fraud complained of is, as matter of necessity, intrinsic. The insurance company was not misled nor deceived; it was not kept from court; its attorneys were incapable of lack of fidelity to its interests, and displayed conspicuous zeal in their defense of the case. It knew that the issue was to be tried before the action was even commenced. This differentiates this case from the cases cited by appellant.

Appellants now claiming that the appellees are liable for wrongful conversion cannot recover under any theory of trusteeship or notice. *Bank of U. S.* v. *Bank of Washington*, 6 Peters, 8; *Holly* v. *Missionary Society*, 180 U. S. 284; *Merchants Ins. Co.* v. *Abbott*, 131 Massachusetts, 397; *Walker* v. *Conant*, 69 Michigan, 321; *Langley* v. *Warner*, 3 N. Y. 327; *Stephens* v. *Board of Education*, 79 N. Y. 183; *Justh* v. *National Bank*, 56 N. Y. 483; *Webb* v. *Burney*, 70 Texas, 322; *Rector* v. *Fitzgerald*, 59 Fed. Rep. 808; *Eylar* v. *Eylar*, 60 Texas, 315; *McCausland* v. *Pundt*, 1 Nebraska, 211; *Steele* v. *Renn*, 50 Texas, 467; *Wadhams* v. *Gay*, 73 Illinois, 415; *Glover* v. *Coit*, 36 Texas Civ. App. 104; *Gould* v. *McFall*, 118 Pa. St. 455; *Macklin* v. *Allenberg*, 100 Missouri, 337.

Wrongful conduct of the party sued is an essential element of his liability, and without such showing he cannot be held. 2 Pomeroy's Equity, § 1051. *United States* v. *Detroit Timber &c. Co.*, 200 U. S. 321; *Schneider* v. *Sellers*, 98 Texas, 380, 390.

The facts here show that the claim of the insurance company that Hunter was alive, and that Mrs. Mettler was guilty

of fraud, were settled by the judgment of this court adverse to such contentions, before the insurance company paid the amount of the judgment, and that the respondents here obtained none of the company's funds until the alleged duty of inquiry imputed to them had been prosecuted to the very highest source and exploded.

The right of one who has paid funds under a judgment to an order of restitution on annulment of the judgment is restricted to parties to the record.

Where the funds have once become lawfully titled in an outsider, the party injured cannot follow them, and by his action make illegal that which had a lawful inception. *Winston* v. *Masterson,* 87 Texas, 200; *McDonald* v. *Napier,* 14 Georgia, 89; *Little* v. *Bunce,* 7 N. H. 485; *Wright* v. *Aldrich,* 60 N. H. 161; *Florida Railway Co.* v. *Bisbee,* 18 Florida, 66; *Kalmbach* v. *Foote,* 49 N. W. Rep. 132; *Gray* v. *Alexander,* 7 Humph. 16; *Wright* v. *Aldrich,* 60 N. H. 485; *Costigan* v. *Newlands,* 12 Barlows, 456; *Butcher* v. *Henning,* 35 N. Y. Supp. 1006.

In this case it was a voluntary payment, made not under duress, or under mistake of law or fact, and the plea of duress could not prevail in this proceeding, even if the equities of these respondents did not so greatly preponderate. *Gould* v. *McFall,* 118 Pa. St. 455; *Dickerson* v. *Lord,* 21 Louisiana, 338; *McDonald* v. *Napier,* 14 Georgia, 89; *Kalmbach* v. *Foote,* 49 N. W. Rep. (Mich.) 132; *Butcher* v. *Henning,* 35 N. Y. Supp. 1006; *Radich* v. *Hutchins,* 95 U. S. 210; *Elston* v. *Chicago,* 40 Illinois, 514; *Groves* v. *Sentell,* 66 Fed. Rep. 179.

The cases applicable to choses in action do not apply. The payment was made not by transfer of interest in the cause of action, but by money which is property of the highest negotiability. Appellants seek to reopen the payment and recover, not the judgment which has been discharged, but money which was paid. *People's Bank* v. *Bates,* 120 U. S. 556; *Youngs* v. *Lee,* 12 N. Y. 551; *Meades* v. *Bank,* 25 N. Y. 143; *Padgett* v. *Lawrence,* 10 Paige, 170;

Struthers v. *Kendall*, 47 Pa. St. 214; *Goodman* v. *Simon*, 20 Howard, 343.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity, brought in the Circuit Court to enjoin the setting up of a judgment at law recovered in the same Circuit Court upon three policies of life insurance, on the ground that the judgment was obtained by fraud. It also seeks to compel the plaintiff in the action at law, and other parties to whom interests in the policies were assigned, to repay the sums which they received upon them. The judgment was rendered in a case which came before this court, and the dramatic circumstances of the alleged death are set forth in the report. *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308. The appellant is the plaintiff in error in that case, having changed its name. After the date of the judgment the appellant discovered that Hunter, the party whose life was insured, was alive, and that the recovery was the result of a deliberate plot. Thereupon it forthwith brought this bill. One of the defenses set up and argued below and here was that by the Seventh Amendment to the Constitution no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law. On the facts alleged and proved the Circuit Court entered a decree against the plaintiff at law, Mettler, now Smythe, but dismissed the bill as against the assignees of partial interests in the policies. The insurance company appealed to this court.

The material facts are these. By way of a contingent fee for the services in collecting the insurance, Mrs. Mettler assigned to the present defendant Clark and his partners one-third interest in the policies, with an additional sum in case statutory damages and attorney's fees were recovered. This afterwards came to Clark alone. Clark and Mrs. Mettler assigned five hundred dollars each, from their respective

interests to the defendant Culberson, as a contingent fee for argument and services in this court. Clark also employed the defendant Spoonts, it would seem on a contingent fee. Finally he mortgaged his right to the Phillips Investment Company. When the judgment was recovered, before execution, the insurance company paid the amount ($24,028.25) into court. Out of this the clerk paid to Mrs. Mettler $11,616; to Clark, $8,346; to Spoonts on Clark's order, $1,500; to Culberson, $1,026, and to the Phillips Investment Company, $1,540.24. It is these sums, other than that paid to Mrs. Mettler, that are in question here.

It will not be necessary to consider the constitutional question under the Seventh Amendment, to which we have referred, or some other questions which were raised, because we are of opinion that the appellees are entitled to keep their money, even if the judgment can be impeached for fraud. They all got the legal title to the money which was paid to them, or, what is the same thing, got the legal title transferred to their order. That being so, the appellant must show some equity before their legal title can be disturbed. It founds its claim to such an equity on the mode in which the judgment which induced it to part with the title to its money was obtained. But fraud, of course, gives rise only to a personal claim. It goes to the motives, not to the formal constituents of a legal transfer, *Rodliff* v. *Dallinger*, 141 Massachusetts, 1, 6, and the rule is familiar that it can affect a title only when the owner takes with notice or without having given value. *Fletcher* v. *Peck*, 6 Cranch, 87, 133; 2 Williams, Vendor & Purchaser, 674. See *The Eliza Lines*, 199 U. S. 119, 131. The question is whether the appellant can make out such a case as that.

It is said that the title of the appellees stands on the judgment, and that if the judgment fails the title fails. But that mode of statement is not sufficiently precise. The judgment hardly can be said to be part of the appellee's title. It simply afforded the appellant a motive for its payment into court.

The appellees derive their title immediately from Mrs. Mettler, and remotely from the act of the appellant. They stand exactly as if the appellant had handed over the twenty-four thousand dollars in gold to her and she thereupon had handed their proportion to them. We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler. We are insisting only that the title had passed to them. But we repeat that, as the title had passed, the appellant must find some equity before it can disturb it, and we now add that, as there is no question that the appellees took for value, that is in payment for their services, or, if it be preferred, in performance of Mrs. Mettler's contingent promise, the equity must be founded upon notice.

The notice to be shown is notice of the fact that the judgment which induced the appellant's payment was obtained by fraud. But notice cannot be established by the mere fact that while the appellees held an interest in the policies only they were assignees of choses in action, and took them subject to the equities. That is due to a chose in action not being negotiable. It does not stand on notice. The general proposition was decided in *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 333, 334, and *United States* v. *Clark*, 200 U. S. 601, 607, 608, and earlier in *Judson* v. *Corcoran*, 17 How. 612, 615, and, we have no doubt, is the law of England. Of course the assignee of an ordinary contract can only stand in the shoes of the party with whom the contract was made. In the discussions of the rule which we have seen, we have found no other reason offered, as no other is necessary. But the assumption of the good faith of the assignee occurs in more cases than one.

The principle which we apply is further illustrated by the priority given to the later of two equitable titles, if the legal title be added to it, 2 Pomeroy, Eq. 3d ed., §§ 727, 768, by the doctrine of tacking, and, in some degree, by the great dis-

tinction recognized in other respects between the holder of title under an executed contract and a party to a contract merely executory. See 1 Williams V. & P. 540, and cases cited. We may add further that, even if we were wrong, the equities to which an assignee takes subject are equities existing at the time of the assignment, 1 Williams V. & P. 584, and that the notice with which he is supposed to be charged as an assignee can be of nothing more. Therefore merely as assignees the appellees had not notice of the as yet unaccomplished fraud in obtaining the judgment. The policies were honest contracts and it was an interest in the policies which was assigned, at least to Clark.

The appellant is driven, therefore, to contend, as it did contend at the argument, that notice of the denial that Hunter was dead, in the suit on the policy, was notice of the fraud. But it is admitted that the appellees all acted in good faith; that they believed the plaintiff's case. In such circumstances, even if the answer had gone further, and had charged the plaintiff with all that the present bill charges against her, when a jury had decided that the charges were groundless, a judgment had been entered on the verdict, and the insurance company had accepted the result by paying the money into court without waiting for an execution, it would be impossible to say that the supposed notice was not purged. The appellees were not bound to contemplate future discoveries of what they honestly believed untrue, and a bill to impeach the final act of the law. See *Bank of the United States* v. *Bank of Washington*, 6 Peters, 8, 19.

Decree affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

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

CHEROKEE INTERMARRIAGE CASES.

RED BIRD *et al.*, CITIZENS OF THE CHEROKEE NATION BY BLOOD, *v.* UNITED STATES.

CHEROKEE NATION *v.* UNITED STATES.

FITE *et al.*, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, *v.* UNITED STATES.

PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 125, 126, 127 and 128. Argued February 19, 20, 1906.—Decided November 5, 1906.

Judgment of the Court of Claims affirmed to effect that all those white persons who married Cherokee Indians by blood subsequently to the enactment of the Cherokee law, which became effective November 1, 1875, acquired no rights of soil or interest in the lands and vested funds of the Nation as citizens; and that those white persons who married Cherokee citizens by blood prior to said date did acquire rights as citizens in the lands belonging to the Nation, and held and owned as national lands, except such of them as lost their rights as Cherokee citizens by abandoning their Cherokee wives or by marrying other white or non-tribal men or women having no rights of citizenship by blood in said Cherokee Nation.

The rule that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and that the words used may be qualified by their surroundings and connections, applied to the construction of the acts of Congress relating to citizenship in, and distribution of tribal property of the Cherokee Nation.

It is a settled rule of construction that as between the whites and the Indians the laws are to be construed most favorably to the latter.

40 C. Cl. 411, affirmed.

THE subject matter of this suit consists of 4,420,406 acres of land in the Cherokee country about to be allotted among the Cherokee people entitled to participate in the distribution of the common property of the Cherokee Nation. The case was transmitted to the Court of Claims by the Secretary of the Interior on the twenty-fourth of February, 1903, the nature of the controversy being thus stated:

"A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens, and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood against the enrollment of intermarried persons, 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character.' It is asserted, on the one hand, that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the Nation, and, on the other hand, that the Cherokee laws as well as the laws of Congress recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such Nation entitled to share equally with full blooded citizens in the property of the tribe."

Thereafter, Congress, by the act of March 3, 1905 (33 Stat. 1048, 1071, c. 1479), provided as follows:

"That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, departmental, numbered seventy-six,' now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing."

The Court of Claims filed its opinion May 15, 1905, and on May 18 findings of fact and conclusions of law, and on that day entered its decree as follows (p. 446):

"This case having been transmitted to this court by the Secretary of the Interior by letter dated February 24, 1903, for the findings and opinion of the court in accordance with the provisions of section 2 of the act of Congress of March 3, 1883, entitled 'An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government' (22 Stat. 485), and Congress, by the act of March 3, 1905, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1906, and for other purposes,' having made the following enactment:

" 'That in the case entitled "In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, departmental, numbered seventy-six," now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing;'

"And the cause coming on to be heard upon the petition answers, agreed facts, proofs, and arguments submitted by the attorneys of the parties to the cause, respectively, and the court having heard and fully considered the same;

"And it appearing to the court that all those white persons who married Cherokee Indians by blood subsequently to the enactment of the Cherokee law, which became effective November 1, 1875, and which declared that such persons by intermarriage acquired no rights of soil or interest in the

vested funds of the Nation, had due notice of the limitations set upon their rights and privileges as citizens; and that those white persons who married Cherokee citizens by blood prior to said date acquired rights as citizens in the lands belonging to the Nation, and held and owned as national lands, except such of these intermarried persons as lost their rights as Cherokee citizens by abandoning their Cherokee wives or by marrying other white or non-tribal men or women having no rights of citizenship by blood in said Cherokee Nation:

"It is by the court ordered, adjudged, and decreed that such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the first day of November, 1875, are equally interested in and have equal *per capita* rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale, or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; and that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the first day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation, and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said Nation, and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1, 1875, and those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and those white men who have married Cherokee women and subsequently aban-

doned their Cherokee wives have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people, and are not entitled to be enrolled for such purpose."

Cherokee citizens by blood took an appeal to this court from so much of that decree as adjudged that persons intermarrying with Cherokee citizens prior to November 1, 1875, were entitled to share in the Cherokee property, which appeal is numbered in this court 125; and the Cherokee Nation prosecuted a similar appeal, numbered 126. Then certain intermarried whites appealed from the decree except that portion which held that the whites who intermarried prior to November 1, 1875, were entitled to share, numbered 127. And thereafter other intermarried whites appealed generally, numbered 128.

The case is reported in 40 Court of Claims, 411, where will be found an elaborate statement of the facts, including the acts of the Cherokee National Council, etc., bearing on the subject matter.

Mr. John J. Hemphill, with whom *Mr. K. S. Murcheson* was on the brief, for Cherokees by blood.

Mr. Edgar Smith for the Cherokee Nation.

Mr. William T. Hutchins and *Mr. James S. Davenport* for persons claiming rights in the Cherokee Nation by intermarriage.

Mr. William Henry White, with whom *Mr. A. E. L. Leckie* was on the brief, for intermarried whites.

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

Article 1 of the treaty of 1846 declared "that the lands now occupied by the Cherokee Nation shall be secured to the

whole Cherokee people for their common use and benefit," and article 4, that these lands "shall be and remain the common property of the whole Cherokee people."

Section 2 of article 1 of the Cherokee constitution (1839) provided that "the lands of the Cherokee Nation shall remain common property."

The amendments of 1866 (Art. 1, sec. 2) declared that the lands of the Cherokee Nation "shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of article 20 of the treaty of the nineteenth of July, 1866, between the United States and the Cherokee Nation." This request was subsequently duly made and an allotment is taking place accordingly.

The intermarried whites have not acquired the right to share in the lands or funds of the Cherokee Nation by grant in express terms, but that right is claimed in virtue of an alleged citizenship in the Cherokee Nation derived from intermarriage under Cherokee laws.

The Nation, under the treaties, possessed the right of local self government with authority to make such laws as it deemed necessary for the government and protection of persons and property within the country, belonging to its people, "or such persons as have connected themselves with them." Art. 5, treaty of Dec. 29, 1835, 7 Stat. 478. And section 14 of article 3 of the Cherokee constitution provided: "The National Council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the Nation, which shall not be contrary to this Constitution."

Prior to 1855 certain white persons had married Cherokees, which had given rise to serious questions respecting the status of these persons and the jurisdiction of the Nation over them. The act of Congress of June 30, 1834 (carried forward into sections 2134, 2135, 2147 and 2148 of the Revised Statutes), provided that a citizen of the United States should not go

into the Indian country without a passport, and that he might be removed therefrom as an intruder. The promise of the United States to remove unauthorized citizens from the Nation appears in the treaties, and even as late as 1893 in the convention by which the Cherokee outlet was ceded to the United States. But the Council could permit certain white persons to reside in the Nation, subject to its laws, though free from the laws relating to intruders.

In these circumstances the Cherokee act of 1855 "regulating intermarriage with white men" was passed. Its purpose is plain and is disclosed by the preamble in these words: "Whereas the peace and prosperity of the Cherokee people required that in the enforcement of the laws the jurisdiction should be exercised over all persons whatever who may from time to time be privileged to reside within the territorial limits of this Nation, therefore," etc. The act was administrative and aimed at subjecting the intermarried whites to the control and dominion of the Cherokee laws instead of leaving them responsible solely to the laws and authorities of the Government of the United States. It contains nothing indicating the intention to confer property rights on intermarried whites. But in respect of the public domain, the Court of Claims, in the present case, because of the opinion in *Journeycake's case*, 155 U. S. 196, assumed that the acquisition of citizenship under Cherokee laws carried the right to share therein, unless forbidden by such legislation. And Mr. Chief Justice Nott, speaking for the court, said: "In 1874 the rapidly growing value of the Cherokee lands was becoming perceptible. On the one hand there were white men who desired to marry into the tribe, and, marrying and residing in the Nation, desired the rights and privileges of citizens; on the other hand there were white adventurers desiring to share in the wealth of the Nation, soon, it was believed, to become available to individual citizens. The public welfare might be benefited by allowing the one, and most certainly would be conserved by excluding the

other. No restriction appeared to exist in the constitution which would forbid the National Council from admitting white men to citizenship upon the condition that they should not acquire an estate or interest in the communal or common property of the Nation."

Accordingly, in 1874 the Cherokee National Council adopted a new code containing sections relating to intermarriage, which became effective November 1, 1875, and carried a provision in article XV, section 75, reading as follows:

"*Provided, also*, That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation, unless such admitted citizen shall pay into the general funds of the national treasury, a sum of money to be ascertained and fixed by the National Council equal to the '*pro rata*' share of each native Cherokee, in the lands and vested wealth of the Nation, estimated at five hundred dollars, and thereafter conform to the constitution of the Nation, and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to all the rights of other Cherokees."

On November 28, 1877, the Council amended this proviso by striking out all after the words "this Nation" in the second line thereof, so that the proviso read:

"*Provided, also*, That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation."

The Court of Claims found that the Cherokee law remained unchanged, in this particular, from 1877 to the date of the decree. Something is said about certain compilations of the Cherokee laws of 1880 and 1892, which omitted this part of section 75, but we agree that this omission did not operate to change the existing law, as the acts providing for the compilations did not provide that they should be effective as laws of the Nation, and where an error was committed by the compiler the original law as duly passed and approved must prevail.

Thus it is seen that the privilege of paying $500 into the Cherokee treasury and becoming thereby entitled to "all the rights of other Cherokees" existed only from November 1, 1875, to November 28, 1877. Assuming that the National Council had authority under the Cherokee constitution of 1839 and the amendments of 1866 to confer on white intermarried citizens the privilege of purchasing a right in the soil and funds of the Nation, that privilege was withdrawn in two years and, according to the facts found, was only availed of by two persons, neither of whom was an individual party to the suit. No right in the Nation's property flowed from the Cherokee citizenship act, which merely subjected the white man to the jurisdiction of the Nation, but that right resulted from express grant and the payment of a price. As to the Delawares and Shawnees, their participation was specifically provided for by convention, approved by the United States, and depended upon payments made. As to the Freedmen, their participation in property distribution was secured by the terms of the treaty of 1866 (the result of the civil war), and of the constitutional amendments thereupon adopted. The Court of Claims referred to them thus (p. 441): "These constitutional amendments were brought about by the action of the United States at the close of the civil war in dictating that the slaves or freed persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens. But, be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States, whereby their former slaves were made their political equals and the common property of the Cherokees was to be shared in with their servants and dependants, was in effect a revolution. The constitutional amendment quoted was simply declaratory of the new order

of things. It is not necessarily prospective, and does not impose limitations upon the legislative power with regard to the naturalization or future adoption of aliens as citizens. Under the policy of the Cherokees citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund or never so much as thought of receiving it, formed a concrete object lesson in constitutional law not easily effaced from the common mind."

Section 5 of the constitution of 1839 was as follows:

"Sec. 5. No person shall be eligible to a seat in the National Council, but a free Cherokee male citizen, who shall have attained the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs of this Nation, shall be entitled to all the rights and privileges of this Nation, as well as the posterity of the Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

"Sec. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

The amendment of section 5, in 1866, reads:

"Sec. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, and all freedmen

who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the nineteenth day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the National Council in respect of the readmission of former members of the Nation.

The amendment (found in that part of the Constitution in respect to officers and elections) must be taken as a whole, and related to eligibility to a seat in the National Council and not to property rights. The contention that the words "citizens of the Cherokee Nation" should be construed as relating to the constitutional provision of 1839 that the lands of the Nation should be common property, is without merit in view of the provisions themselves.

By section 2 of article 1 of the constitution of 1839 it was provided that "whenever any citizen shall remove with his effects out of the limits of this Nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *provided, nevertheless,* that the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission." By its terms this referred to those who had been citizens, and their readmission gave no rights not originally possessed, and this was true under the amendments of 1866. Many special Cherokee laws demonstrate that the Council did not venture to assume nor desire to assume the power to impart to the white adopted citizen other than civil and political rights.

For instance, the acts of 1878, readmitting Greenway and his children, and Allen and his family "to all the rights and

privileges of citizens of the Cherokee Nation" specifically provided that no rights should be acquired except such as attach to white men, "adopted citizens of the Cherokee Nation."

The acts relating to intermarriage with whites contained many restrictions, but by the act in respect of the intermarriage of Cherokees with other Indians no such restrictions were imposed. Cherokee act of Nov. 27, 1880. That act provided that the marriage should be contracted according to the law regulating marriages between "our own citizens," and declared that such Indian "shall be and is hereby deemed a Cherokee to all intents and purposes and entitled to the rights of other Cherokees." There is no such language in the acts relating to intermarried whites.

The treaty of 1866, between the United States and the Cherokee Nation, provided as to the former slaves, that they should be free and they "and their descendants shall have all the rights of native Cherokees."

Article 15 of the same treaty, after providing for the settlement of friendly Indians amongst the Cherokees and the manner in which the latter shall be paid therefor, then stipulates "that they shall be incorporated into and thereafter remain a part of the Cherokee Nation on *equal terms* in every respect with *native Cherokees.*" When the Delawares were about to be moved into the Cherokee country as friendly Indians, it was stipulated in the agreement that "on the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become *members* of the Cherokee Nation, with the *same rights and immunities* and the same participation (and no other) in the national funds as *native Cherokees* . . . and the children thereafter born of such Delawares so incorporated into the Cherokee Nation shall *in all respects be regarded as native Cherokees.*" Later when an agreement was made with the Shawnees, after the amount of money to be paid was provided for, the rights of Shawnees were defined as follows: "and that

the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms *in every respect* and with all the privileges and immunities of native citizens of said Nation."

These intermarried whites show no grant of equal rights as members of the Cherokee Nation by treaty or otherwise, nor have they (excepting the two individuals heretofore referred to) paid any sum into the Nation's treasury for a *pro rata* share of its money and lands.

The Delawares, the Shawnees and the Freedmen acquired their property rights by the express words of treaties, but the intermarried whites cannot point out any such in their favor. Doubtless because of this they have heretofore asserted no claim, although the Cherokee courts were open to them to do so, and have allowed repeated payments of money to be made to every other citizen without question.

The distinction between different classes of citizens was recognized by the Cherokees in the differences in their intermarriage law, as applicable to the whites and to the Indians of other tribes; by the provision in the intermarriage law that a white man intermarried with an Indian by blood acquires certain rights as a citizen, but no provision that if he marries a Cherokee citizen not of Indian blood he shall be regarded as a citizen at all; and by the provision that if, once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen. And the same distinction between citizens as such and citizens with property rights has also been recognized by Congress in enactments relating to other Indians than the Five Civilized Tribes. Act August 9, 1888, 25 Stat. 392, c. 818; act May 2, 1890, 26 Stat. 96, c. 182; act June 7, 1897, 30 Stat. 90, c. 3.

In *Whitmire* v. *Cherokee Nation*, 30 C. Cl. 138, 152, the Court of Claims said: "Here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country—white men who became

citizens by intermarriage." And, after quoting the proviso to section 75, art. 15, of the Cherokee Code of 1874, the court added: "The idea, therefore, existed both in the minds and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed the 'common property,' 'the lands of the Cherokee Nation.' "

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488, this court, in respect of certain acts of Congress, observed:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

Referring to this, the Court of Claims said in its opinion in the present case, 40 C. Cl. 411, 442:

"It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs or to confer upon white citizens property which they were not legally entitled to have. The term 'citizens' in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands."

The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections.

In accepting the conclusion of the Court of Claims in this regard we, nevertheless, deem it proper to somewhat consider the congressional legislation relied on by the claimants.

The act of Congress of July 1, 1902, 32 Stat. 716, c. 1375, ratified by the Cherokee Nation, August 7, 1902, and often called the Cherokee agreement, contained these sections:

"SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

"SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

"SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

"SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

"SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the

Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

"SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

"SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony and the penalty for this offense shall be confinement at hard

labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained."

It thus appears that the roll of citizens of the Cherokee Nation was to be made up as of September 1, 1902, of the persons then living and entitled to enrollment on that date; that all such persons should be placed upon the roll, and that (section 29) on the lists to be finally approved by the Secretary of the Interior there should be placed only the names of those persons found to be entitled to enrollment. In all other respects the roll was to be made in compliance with section 21 of the act of Congress of June 28, 1898, and of the act of Congress of May 31, 1900.

Section 21 provided: "That in making rolls of citizenship of several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, . . . with such intermarried white persons as may be entitled to citizenship under Cherokee laws." The roll of 1880, made by the Cherokees, was a census roll, and its confirmation was not intended to create any rights which citizens of the Cherokee Nation had not before enjoyed, but merely to furnish the basis for making up the roll of citizens. Section 21 was in reality a statement that no previous act of Congress was intended to confirm any other roll of the Cherokee Nation.

The act of May 31, 1900, 31 Stat. c. 598, pp. 221, 236, provided: "That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal

of such applications shall be final when approved by the Secretary of the Interior." Section 31 of the act of July 1, 1902, says that no person whose name does not appear on the roll made by the Commission to the Five Civilized Tribes "shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act." In other words, the roll must be made up of citizens who under the laws of the Cherokee Nation were entitled to participation in the distribution of the common property of the Cherokee tribes.

The concluding words of section 21, "with such intermarried white persons as may be entitled to citizenship under Cherokee laws," emphatically indicate that Congress had the Indian citizen in mind in all that went before and limited enrollment of white persons to such as might be entitled to citizenship under Cherokee laws.

Counsel for claimants speak of the act of 1902 as a "treaty," but it is only an act of Congress and can have no greater effect. It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites. The suggestion is wholly inadmissible that they could vote themselves an interest in the property of the Cherokee people, including a share in the money paid in by the Delawares and the Shawnees, and become thereby wards of this Government.

Referring to section 26 of the act of 1902, which declares that no white person intermarried since December 16, 1895, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation, and to an act of the Cherokee Council to the same effect, approved December 16, 1895, counsel contend that the act of Congress shows that there was a class of persons who, having married prior to December 16, 1895, were to be enrolled, embracing all lawfully married according to the law of the Nation, and were to participate in the distribution of the tribal property.

The doctrine that the denial of a right is the grant of a right is a poor basis for a grant of land. Not a single word of the act intimates that these intermarried persons have or are to have any interest in the property of the Nation, and to hold that because the act of 1902 declares that white persons intermarrying after 1895 should acquire no property rights the Indians in accepting the act conceded property rights to all who intermarried prior thereto, would put a construction on the act utterly inconsistent with the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter.

After the decision in *Journeycake's case*, 155 U. S. 196, and in that of *Whitmire*, 30 C. Cl. 138, 180, the Cherokee National Council passed the act of December 16, 1895, amending certain sections of the compiled laws, from which the provisions of the act of November, 1877, which denied intermarrying whites any right in Cherokee property, had been erroneously omitted, by reënacting the same, but this only evidenced the determination to prevent the encroachment of the whites upon the property rights of the Cherokee people. The act was clearly passed out of abundant caution and was quite unnecessary in view of the fact that the act of 1877 remained in force, as was found by the Court of Claims.

We are dealing with the right of enrollment so as to entitle the persons enrolled to participate in the distribution of the lands and vested funds of the Cherokee Nation, and not with questions arising in respect of improvements on the public domain. As to improvements they seem to have been treated as those of a tenant who had made them under an agreement that they should remain his. Any citizen of the Nation could use the public domain and it is not asserted that the intermarried whites failed to obtain their share of such use, but because they have enjoyed that benefit, free from tax or burden, is no reason for giving them a share in the lands and vested funds, which has never been granted to them and for which they have never paid.

We concur in the conclusions of the Court of Claims, including the disposition of the particular contention presented in appeal No. 128.

This involved certain claimants, before the court, known as "married out and abandoned whites," who alleged that they became citizens of the Cherokee Nation by intermarriage, but conceded that they had since married persons having no rights of Cherokee citizenship by blood, or had abandoned their Cherokee wives. They contended that they could not be deprived of the rights and privileges acquired by intermarriage save by proceedings in the nature of office found. As to this the Court of Claims said (p. 444):

"These intermarried whites are not grantees or devisees seized and in possession of land, occupying the position of defendants. They occupy the contrary position—of plaintiffs seeking to recover money—and it is obligatory upon them to establish their right to it. To say that a white man can share in the property of the Cherokees for the reason that at one time in his life he was the husband of a Cherokee woman, and to say that this court, or the Secretary of the Interior, must hold that he is still the husband of a Cherokee woman because the contrary has not been established in another proceeding, is an appeal to technicality which the court cannot uphold. These claimants, like other plaintiffs, must prove their case; asserting a present right, they must establish present conditions. The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows or widowers) citizenship ceased; that when an intermarried white married a person having no rights of Cherokee citizenship by blood it was conclusive evidence that the tie which bound him to the Cherokee people was severed and the very basis of his citizenship obliterated.

"The Cherokee statute which has been cited (Laws of 1892, section 669) gives a proceeding in the nature of office found, but, nevertheless, is confirmatory of the views hereinbefore expressed. It relates to cases where the Cherokee government takes the initiative to accomplish a purpose; that is to say, where an intermarried white man has forfeited his rights of citizenship in the Nation by acts which declare such forfeiture, 'and the Nation requires his removal beyond the limits of its territory,' this proceeding must be resorted to, to be followed by a call on the United States Indian agent 'to remove such a white man.' It is in principle precisely like the common-law procedure of office found, and exists for the same reason—that the Government may exercise a right dependent upon only the alienage of a person living within its territory presumably a citizen."

Decree affirmed.

MATTER OF MORAN, PETITIONER.

No. 8, Original. Argued October 15, 1906.—Decided November 5, 1906.

Where the order of the court having authority to designate the place of trial for a newly organized county in Oklahoma is as precise as circumstances permit, the fact that it merely names the town, there being no county or court buildings at the time of trial, does not affect the jurisdiction of the court, where it does not appear that the party complaining lost any opportunities by reason of no building being named.

Acts of the legislature of Oklahoma are not laws of the United States within the meaning of § 753, Rev. Stat.

The Fifth Amendment requiring the presentment or indictment of a grand jury does not take up unto itself the local law as to how the grand jury shall be made up, and raise the latter to a constitutional requirement.

Under § 10 of the Organic Act of Oklahoma of May 2, 1890, 26 Stat. 85, the place of trial of a crime committed in territory not embraced in any organized county is in the county to which such territory shall be attached at the time of trial, although it might have been attached to another county when the crime was committed.

Courts of Oklahoma Territory have jurisdiction to try a person for crime although committed in a part of the Territory not then opened for settlement, it appearing from the acts of Congress that title had passed to the Territory, and Congress was only exercising control so far as settlement was concerned.

Whether a person on trial is compelled to be a witness against himself contrary to the Fifth Amendment because compelled to stand up and walk before the jury, or because the jury was stationed during a recess so as to observe his size and walk, not decided, but *held* that it did not affect the jurisdiction of the trial court, and render the judgment void.

THE facts are stated in the opinion.

Mr. Finis E. Riddle, with whom *Mr. William I. Cruce* was on the brief, for petitioner:

The District Court that caused the indictment and trial of the petitioner was not organized as required by the act of Congress creating it. Sec. 69, p. 75, Wilson's Ann. Stat. of Oklahoma.

Both time and place are essential constituents of the organization of a court. *Hobart* v. *Hobart*, 45 Iowa, 503; *Columbus* v. *Woolen Mills Co.*, 30 Indiana, 436; *Greenwood* v. *Bradford*, 128 Massachusetts, 296; *King* v. *King*, 1 P. M. W. 19; *In re Allison*, 13 Colorado, 535; 21 Enc. Pl. & Pr. 608; *Northrup* v. *People*, 37 N. Y. 203.

When it is attempted to hold a term or session at a time and place different from those prescribed, all acts done thereat, other than those properly done in vacation, are as a general rule absolutely void. *Ex parte Cranch*, 63 Alabama, 283; *Boynton* v. *Wilson*, 46 Alabama, 510; *Garland* v. *Dunn*, 63 Alabama, 404; *Wrightnor* v. *Carsner*, 20 Alabama, 446; *Napper* v. *Nolan*, 9 Port. (Ala.) 218; *Nabor* v. *State*, 6 Alabama, 200; *Neal* v. *Shinn*, 49 Arkansas, 227; *State* v. *Williams*, 48 Arkansas, 225; *Grimet* v. *Askew*, 48 Arkansas, 151; *Chapman* v. *Holmes*, 47 Arkansas, 414; *Hamm* v. *State*, 22 Arkansas, 207; *Brumley* v. *State*, 20 Arkansas, 77; *Ex parte Jones*, 27 Arkansas, 349; *Ex parte Osborn*, 24 Arkansas, 379; *Dunn* v. *State*, 2 Arkansas, 229;

Bates v. *Gage*, 40 California, 183; *Clellan* v. *People*, 40 Colorado, 244; *American Fire Ins. Co.* v. *Pappe*, 4 Oklahoma, 110; *Irwin* v. *Irwin*, 2 Oklahoma, 180.

This court can go behind the judgment and conviction of the trial court and release a party imprisoned in case the uncontradicted record shows that his imprisonment is illegal. *Ex parte Neilson*, 131 U. S. 176, 182; *Ex parte Lang*, 18 Wall. 163; *Ex parte Seibold*, 100 U. S. 371; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Virginia*, 100 U. S. 333; *Ex parte Carrol*, 106 U. S. 521; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Bigelow*, 113 U. S. 328; *In re Cuddy*, 131 U. S. 288; *Ex parte Mayfield*, 141 U. S. 107, 116; *Ex parte Bain*, 121 U. S. 1; *In re Swan*, 150 U. S. 648.

Under certain circumstances the record of the trial court may be contradicted. *In re Elmira Steel Co.*, 5 Am. Bank. Rep. 505, and cases decided by this court, cited to support same.

The jurisdiction of any court may be challenged in any other court where its decrees or judgments are relied on, and the record of the judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it is shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that such facts did exist. *Adams* v. *Terrill*, 4 Fed. Rep. 796; *Williamson* v. *Berrn*, 8 Pet. 540; *Elliott* v. *Piersol*, 1 Pet. 328; *United States* v. *Arredondo*, 6 Pet. 591; *Voorhees* v. *Bank of U. S.*, 10 Pet. 475; *Wilcox* v. *Jackson*, 15 Pet. 511; *Thompson* v. *Whiteman*, 18 Wall. 457; *Nooes* v. *Gas Light & Coke Co.*, 19 Wall. 58; Brown on Jurisdiction, 2d ed., §§ 101–103.

It was a prerequisite to a legal conviction of the petitioner that he should have been indicted by a legal grand jury.

If the legislature of the Territory of Oklahoma was without power to provide by law for the conviction of a person charged with a capital or otherwise infamous crime without a legal indictment, then the court is likewise without power and authority to disregard the laws which are in harmony with

the provisions of the Constitution, and by that means deprive one of its citizens of those fundamental rights which the legislature had no power to do.

The Circuit Court of Appeals erred in its decision in holding in effect that the legislature of Oklahoma could have provided by law for the conviction of the petitioner without the intervention and indictment of a grand jury. *Hurtado* v. *California*, 110 U. S. 516; *McNulty* v. *California*, 149 U. S. 645; *Clinton* v. *Englebrecht*, 13 Wall. 434, 448; *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Thompson* v. *Utah*, 170 U. S. 344; *National Bank* v. *Yankton*, 101 U. S. 129; *Webster* v. *Reed*, 11 How. 433, 460; *Am. Pub. Co.* v. *Fisher*, 160 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707.

There was a local law of the Territory in force providing for selecting, empaneling, and organizing a grand jury and prescribing the qualifications of same, which was in conflict with the common law procedure and was exclusive, and the failure of the court to substantially follow its provisions and disregarding it in the manner of organizing a grand jury renders that body and its proceedings void was exclusive. *Sharp* v. *United States*, 138 Fed. Rep. 878; *Clinton* v. *Englebrecht*, 13 Wall. 434, 448; *Crowley* v. *United States*, 194 U. S. 461.

When the common law and the statute differ the common law gives place to the statute. *State* v. *Norton*, 23 N. J. L. 33; *Bent* v. *Thompson*, 5 N. H. 408; *Browning* v. *Browning*, 2 N. Mex. 371; *Leitensdorfer* v. *Webb*, 1 N. Mex. 345; *McKinner* v. *Winn*, 1 Oklahoma, 327; *Utah First Nat'l Bank* v. *Kinner*, 1 Utah, 100; *People* v. *Greene*, 1 Utah, 11; *Luhrs* v. *Hancock*, 181 U. S. 567; *Pyeatt* v. *Powell*, 51 Fed. Rep. 561.

The common law is impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject-matter. 9 Enc. Law & Proc. 376, and cases cited; *Township of Dubuque* v. *City of Dubuque*, 7 Iowa, 262; *In re Hughes*, 1 Bland, 46.

Criminal statutes cannot be extended to cases not included

within the clear and obvious import of their language. *United States* v. *Clayton*, Fed. Case, 14,814; *Territory* v. *Carmody*, 45 Pac. Rep. 881; *McCann* v. *Hamilton* (Conn.), 19 Atl. Rep. 376; *Bannigan* v. *State*, 24 Pac. Rep. 768.

The indictment under consideration, as shown by the record, was not in any sense valid and sufficient to give the court jurisdiction. *Ex parte Bonner*, 151 U. S. 254; *Levy* v. *Wilson*, 69 California, 105; *People* v. *Thurston*, 5 California, 69; *Brunner* v. *Supreme Court*, 92 California, 239; *People* v. *McNamara*, 3 Nevada, 75; *McEvoy* v. *State*, 9 Nebraska, 163; *Stokes* v. *State*, 24 Mississippi, 623; *Rainey* v. *State*, 10 Tex. App. 481; *Finley* v. *State*, 61 Alabama, 201; *Nordan* v. *State* (Ala.), 39 So. Rep. 406; *State* v. *Feizzell* (La.), 38 So. Rep. 444; *State* v. *Mercer*, 61 Alabama, 220; *United States* v. *Reynolds*, 1 Utah, 226; *Burley* v. *State*, 1 Nebraska, 390; *Dutell* v. *State*, 4 Greene (Iowa), 125; *Thorp* v. *People*, 3 Utah, 441; *State* v. *Parks*, 21 Louisiana, 251; *Nichols* v. *State*, 5 N. J. L. 543; *Crouch* v. *State*, 63 Alabama, 161; *Doyle* v. *State*, 17 Ohio, 222, and cases cited; *Lott* v. *State*, 18 Tex. App. 627; *People* v. *Coffman*, 24 California, 294; *McMillan* v. *State*, 19 Tex. App. 48; *Porter* v. *State*, 23 Mississippi, 578; Thompson & Merriam on Juries, §§ 492 *et seq.*; *United States* v. *Autz*, 16 Fed. Rep. 119; *United States* v. *Gale*, 109 U. S. 71.

The law in the Territory of Oklahoma relative to the selection, summoning, and organizing of a grand jury is a complete system and applies to the whole Territory, and it is specific and mandatory. Secs. 2907, 3310, 3313 Wilson's Ann. Stat. of Oklahoma.

The trial court overrode a plain statute and the petitioner did all he was called upon to do in order to protect his rights.

Under the organic act of Oklahoma the condition of that portion of the Territory wherein the alleged crime was committed at the date of its commission fixed the venue and place of trial, instead of the condition of that portion of the Territory at the date of final trial. *Post* v. *United States*, 161 U. S. 583.

The petitioner having been compelled, over his objection, to exhibit himself before the jury and walk in the presence of the jury while stationed outside of the court-room and out of the presence of the jury was compelled to give evidence against himself. 16 Am. & Eng. Ency. of Law, 2d ed., 818; *Agnew* v. *Jobson*, 13 Cox C. C. 621; *Blackwell* v. *State* (Ga.), 3 Crim. L. Mag. 393; *People* v. *McCoy*, 45 How. (N. Y.) 216; *State* v. *Jacobs*, 5 Jones (50 N. Car.), 259; *Day* v. *State*, 63 Georgia, 667; *People* v. *Mead*, 50 Michigan, 228; *Stokes* v. *State*, 5 Baxter (Tenn.),619; 30 Am. & Eng. Ency. of Law, 2d ed., 1160; *Cooper* v. *State*, 86 Alabama, 610; *Davis* v. *State*, 131 Alabama, 10; *State* v. *Garrett*, 71 N. Car. 85; *State* v. *Graham*, 74 N. Car. 626; *Walker* v. *State*, 7 Texas App. 245; *State* v. *Nordstrom*, 7 Washington, 506; Underhill on Criminal Evidence, 65 *et seq.*; *Rice* v. *Rice*, 47 N. J. Eq. 559; *People* v. *Walcott*, 51 Michigan, 612; *Emery* v. *Case*, 117 Massachusetts, 181; *Boyd* v. *United States*, 116 U. S. 616, 641; *Councilman* v. *Hitchcock*, 142 U. S. 547, 566, 586.

The Federal court will interfere in the administration of a territorial court, and even a state court, in *habeas corpus* proceedings when said court, in the administration of the law of said Territory or State, disregards and denies a citizen his fundamental and constitutional rights, especially if said citizen has exhausted the ordinary modes of review by appeal or writ of error. *Ex parte Reggel*, 114 U. S. 642; *Re Converse*, 137 U. S. 624; *Hodgson* v. *Vermont*, 168 U. S. 262; *Brown* v. *New Jersey*, 175 U. S. 172; *Re Frederick*, 149 U. S. 70.

Mr. Don C. Smith, with whom *Mr. W. O. Cromwell*, Attorney General of the Territory of Oklahoma, was on the brief, for respondent:

Excepting in cases affecting ambassadors, other public ministers and consuls and those in which a State is a party, this court can issue the writ of *habeas corpus* only in aid of its appellate jurisdiction. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 202;

Ex parte Wells, 18 How. 307, 328; *Ableman* v. *Booth,* 21 How. 506; *Ex parte Yerger,* 8 Wall. 85.

The jurisdiction of this court remains almost as originally conferred by the Judiciary Act of 1789. We contend that it is not and that the matter of the legality or illegality of the grand jury which returned the indictment goes only to the regularity of the proceedings had and not to the jurisdiction of the court. *Ex parte Harding,* 120 U. S. 782.

It is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted under the color of lawful authority. *People* v. *Petria,* 92 N. Y. 128; *People* v. *Dolan,* 6 Hun, 232; *Dolan* v. *People,* 6 Hun, 493; *S. C.,* 64 N. Y. 485; *Carpenter* v. *People,* 64 N. Y. 483; *Thompson* v. *People,* 6 Hun, 135; *People* v. *Jewett,* 3 Wend. 314; *Cox* v. *People,* 80 N. Y. 500; *Friery* v. *People,* 2 Keyes, 450; *Ferris* v. *People,* 31 How. Pr. 145. See also *Griffin's case,* Chase's Dec., 364; *Ex parte Ward,* 173 U. S. 452; *Shehan's case,* 122 Massachusetts, 445; *Fowler* v. *Bebee,* 9 Massachusetts, 231, 235; *People* v. *Bangs,* 24 Illinois, 184, 187; *In re Manning,* 76 Wisconsin, 357; *S. C.,* 139 U. S. 504; Church on Habeas Corpus Transactions, 256, 257, 259; *Ex parte Watkins,* 3 Peters, 193; *Ex parte Parks,* 93 U. S. 18, 23; *Ex parte Yarbrough,* 110 U. S. 651; *Ex parte Crouch,* 112 U. S. 178; *Ex parte Wilson,* 114 U. S. 421.

The principle which authorized the action of the court in obtaining petit jurors in this case, after the statutory measures had been exhausted, is sanctioned by authority. *Clawson* v. *United States,* 114 U. S. 477.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of *habeas corpus* and a writ of certiorari, brought by a person imprisoned on a conviction for murder, alleging that the judgment under which he is held is void. A rule to show cause was issued and the case

was heard on the petition and answer. The various grounds upon which the petition is supported are alleged to go to the jurisdiction of the trial court. *Ex parte Harding*, 120 U. S. 782. See *New* v. *Oklahoma*, 195 U. S. 252. A writ of *habeas corpus* for the same causes was heard by the Circuit Court of Appeals and discharged. *Ex parte Moran*, 144 Fed. Rep. 594. The judgment also was affirmed by the Supreme Court of the Territory in which the petitioner was tried. *Moran* v. *Territory*, 14 Oklahoma, 544; *S. C.*, 78 Pac. Rep. 111.

The petitioner was tried in the District Court for Comanche County in the Territory of Oklahoma. The first ground now relied upon is that the court was not duly organized under the act of Congress requiring the Supreme Court to define the judicial districts, and to fix the times and places at each county seat where the District Court shall be held. The order of the Supreme Court went no further in the way of fixing the place than to specify Lawton for the county of Comanche. This order was made on January 15, 1902, about six months after the land, which had been Indian territory, was opened for settlement and the county created. At that time and at the time of the trial there were no county or court buildings in the county. The order of the Supreme Court was as precise as the circumstances permitted it to be, and the failure to specify a building did not go to the jurisdiction of the trial court. There is no pretense that the petitioner lost any opportunities by reason of no building being named.

The next ground argued is that the laws of the Territory were not followed in the selection of the grand jury, because the persons selected were not electors of the Territory and some of them were nonresidents, with other subordinate matters. The order for the summons stated the reason, which was that there had been no election held in the county, and there were no names of jurors in the jury-box; whereupon the presiding judge ordered the sheriff to summon twenty persons from the body of the county. We have heard no answer to the material portion of the reasoning of the Circuit Court of Appeals

upon this point. If the legislature of Oklahoma had prescribed the method of selection followed, that method would not have violated the Constitution or any law or treaty of the United States. If it did prescribe a different one, a departure from that was a violation of the territorial enactment alone. The acts of the legislature of Oklahoma are not laws of the United States within the meaning of Rev. Stat. § 753. If any laws have been violated it is the latter one. Therefore the petitioner is not entitled to release on this ground under Rev. Stat. § 753. The Fifth Amendment, requiring the presentment or indictment of a grand jury, does not take up unto itself the local law as to how the grand jury should be made up, and raise the latter to a constitutional requirement. See *Rawlins* v. *Georgia*, 201 U. S. 638. It is unnecessary to consider whether the judge went beyond his powers under the circumstances. See *Clawson* v. *United States*, 114 U. S. 477. But it is proper to add that while the reason which we have given is logically the first to be considered by this court, we do not mean to give any countenance to the notion that if the law was disobeyed it affected the jurisdiction of the court. *Ex parte Harding*, 120 U. S. 782. *In re Wilson*, 140 U. S. 575.

The third ground on which the jurisdiction of the trial court is denied is, that, on August 4, 1901, the date of the commission of the crime, the place was within territory not embraced in any organized county, and was attached for judicial purposes to Canadian County. By the Oklahoma Organic Act, May 2, 1890, c. 182, § 9, 26 Stat. 85, 86, this is provided for, and by § 10 such offenses shall be tried in the county to which the territory "shall be attached." It is argued that there had been no law passed changing the place of trial or affecting the order of the Supreme Court attaching the territory to Canadian County. But the very words quoted from § 10 look to the state of things at the time of trial. At that time Comanche County had been organized, and a term of court fixed for it by the order of the Supreme Court dated January 15, 1902. The meaning of this order, so far as the

power of the Supreme Court went, is plain. The statute gave the petitioner no vested right to be tried in Canadian County, and his trial in Comanche County conformed to its intent. See *Post* v. *United States*, 161 U. S. 583.

The fourth ground is, that, as the crime was committed on August 4, 1901, two days before the opening of the land for settlement, the place was still under the exclusive jurisdiction of the United States, and therefore the crime was punishable under Rev. Stat. § 5339 alone. The order of the President with regard to the conditions of settlement and entry are referred to as confirming the argument. But those orders were intended merely to carry out the acts of Congress governing the matter. There is no doubt that Congress was exercising control so far as settlement was concerned. But there is equally little doubt that the title to the territory had passed, that it had become part of the Territory of Oklahoma, and, as such, no longer under the exclusive jurisdiction of the United States within Rev. Stat. § 5339. Act of May 2, 1890, c. 182, §§ 1, 4, 6, 26 Stat. 81; act of June 6, 1900, c. 813, 31 Stat. 677; act of March 3, 1901, c. 846, 31 Stat. 1093. See *Bates* v. *Clark*, 95 U. S. 204; *Buster* v. *Wright*, 135 Fed. Rep. 947, 952; *Ex parte Moran*, 144 Fed. Rep. 594, 602. Therefore the application of the territorial statute was not excluded and the murder was a violation of the territorial law.

Finally it is contended that the petitioner was compelled to be a witness against himself, contrary to the Fifth Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the court. *Felts* v. *Murphy*, 201 U. S. 123.

Rule discharged. Writs denied.

NORTHERN ASSURANCE COMPANY OF LONDON *v.* GRAND VIEW BUILDING ASSOCIATION.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 40. Argued October 18, 19, 1906.—Decided November 5, 1906.

An adjudication in an action at law on a policy of insurance that the insured cannot recover on the policy as it then stood is not an adjudication that the contract cannot be reformed; and a court of another State does not fail to give full faith and credit to such a judgment because in an equity action it reforms the policy and gives judgment to the insured thereon as reformed.

Whether the obligation of the contract was impaired by a statute as construed is not open in this court if that objection was not taken below.

102 N. W. Rep. 246, affirmed.

THE facts are stated in the opinion.

Mr. Charles J. Greene, with whom *Mr. Ralph W. Breckenridge* was on the brief, for plaintiff in error.

Mr. Joseph R. Webster, with whom *Mr. Halleck F. Rose* and *Mr. Wilmer B. Comstock* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to reform a policy and to recover upon it as reformed. An action at law upon the same instrument, between the same parties, has come before this court heretofore. 183 U. S. 308. In that case it was held that the plaintiff could not recover. The question before us at the present time is whether the Supreme Court of Nebraska failed to give full faith and credit to the judgment in the former case by holding that it was no bar to the relief now sought. 102 N. W. Rep. 246.

The policy was conditioned to be void in case of other

insurance, unless otherwise provided by agreement indorsed or added; and it stated, in substance, that no officer or agent had power to waive the condition except by such indorsement or addition. There was other insurance and there was no indorsement. The plaintiff alleged a waiver and an estoppel. The jury found that the agent who issued the policy had been informed on behalf of the insured and knew of the outstanding insurance. But this court held that the attempt to establish a waiver was an attempt to contradict the very words of the written contract, which gave notice that the condition was insisted upon and could be got rid of in only one way, which no agent had power to change. The judgment based upon this decision is what is now relied upon as a bar. *Metcalf* v. *Watertown*, 153 U. S. 671, 676; *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 645.

Whether sufficient grounds were shown for the relief which was granted is a matter with which we have nothing to do. But the state court was right in its answer to the question before us. The former decision of course is not an adjudication that the contract cannot be reformed. It was rendered in an action at law, and only decided that the contract could not be recovered upon as it stood, or be helped out by any doctrine of the common law. If it were to be a bar it would be so, not on the ground of the adjudication as such, but on the ground of election, expressed by the form in which the plaintiff saw fit to sue. As an adjudication it simply establishes one of the propositions on which the plaintiff relies; that it cannot recover upon the contract as it stands. The supposed election is the source of the effect attributed to the judgment. If that depended on matter *in pais* it might be a question at least, as was argued, whether such a case fell within either U. S. Const., Art. IV, § 1, or Rev. Stat. § 905. It may be doubted whether the election must not at least necessarily appear on the face of the record as matter of law in order to give the judgment a standing under Rev. Stat. § 905.

We pass such doubts, because we are of opinion that, however the election be stated, it is not made out. The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in *Washburn* v. *Great Western Insurance Co.*, 114 Massachusetts, 175, where this distinction was stated by Chief Justice Gray. Its choice of law was not an election but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the Supreme Court of Nebraska and the Circuit Court of Appeals for the Circuit. *Home Fire Insurance* v. *Wood,* 50 Nebraska, 381, 386; *Firemen's Fund Insurance Co.* v. *Norwood,* 16 C. C. A. 136. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could affect the same result. It did demand the result, and showed by its pleadings that the path which it did choose was chosen simply because it was supposed to be an open way. *Snow* v. *Alley,* 156 Massachusetts, 193, 195.

A question argued as to the obligation of the contract having been impaired by a statute as construed, was not taken below and is not open here.

Decree affirmed.

COVINGTON AND CINCINNATI BRIDGE COMPANY *v.* HAGER.

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

No. 37. Submitted October 17, 1906.—Decided November 5, 1906.

Circuit Courts of the United States, until Congress shall otherwise provide, have no power to issue a writ of mandamus in an original action for the purpose of securing relief by the writ, although the relief sought concerns an alleged right secured by the Constitution of the United States.

THE facts are stated in the opinion.

Mr. Shelley D. Rouse and *Mr. Charlton B. Thompson* for plaintiff in error:

As to power of the Circuit Court to issue the writ:

There was no way in which the lower court could enforce its jurisdiction except by a writ of mandamus because jurisdiction could not be entertained in a direct suit to recover the money, and so no judgment could have been recovered. Amendment XI to Const.; *Coulter* v. *Weir*, 127 Fed. Rep. 897.

The collection of the tax would not be enjoined by a Federal court purely because of its unconstitutionality, in the absence of a distinct equity. *Arkansas Bldg. Association* v. *Madden*, 175 U. S. 269; *Pittsburg Ry. Co.* v. *Board of Public Works*, 172 U. S. 32.

A writ of mandamus may be issued by a Federal court wherever necessary to enforce its jurisdiction. U. S. Comp. Stat. § 716; *Barber Asphalt Co.* v. *Morris, Judge*, 132 Fed. Rep. 945; *Bath County* v. *Amy*, 13 Wall. 244; *Rosenbaum* v. *Bower*, 120 U. S. 450; *Graham* v. *Norton*, 15 Wall. 166; *Davis* v. *Corbin*, 112 U. S. 36; *Riggs* v. *Johnson County*, 6 Wall. 166; *Heine* v. *Levee Com.*, 19 Wall. 655; *Louisiana* v. *Jumel*, 107 U. S. 711; *Davenport* v. *City of Dodge*, 105 U. S. 237; Curtis on Jurisdiction of U. S. Courts, p. 168.

Mr. N. B. Hays, Attorney General of the State of Kentucky, *Mr. John W. Ray* and *Mr. C. H. Morris*, for defendant in error:

A United States Circuit Court has no power, or original process, to mandamus a state auditor. *Graham, Auditor*, v. *Norton*, 15 Wall. 427.

MR. JUSTICE DAY delivered the opinion of the court.

In this case an original action in mandamus was begun in the Circuit Court of the United States for the Eastern District of Kentucky. It was brought by the Bridge Company to compel the Auditor of Public Accounts for the State to issue his warrant on the state treasury for the amount of a franchise tax collected under authority of sections 4079 and 4080 of the Kentucky Statutes. The return of the tax was asked upon the ground that it levied a burden on the interstate commerce business of the Bridge Company, pertaining exclusively to commerce between Kentucky and Ohio, and was therefore repugnant to the Federal Constitution.

The Auditor appeared by counsel, and, by general demurrer, raised the question of the sufficiency of the allegations of the petition, and by special demurrer challenged the jurisdiction of the court to entertain the action. The Circuit Court, passing the question of jurisdiction, held that levying the tax in question did not violate the commerce clause of the Federal Constitution, as it was a tax upon property and not upon the business of the company, sustained the general demurrer and dismissed the petition.

We are of the opinion that the court below had no jurisdiction of this action. It has been too frequently decided in this court to require the citation of the cases that the Circuit Courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process.

Many of these cases are collected in 4 Federal Statutes Annotated, 503.

The question was before this court recently in *Knapp* v. *Lake Shore & Michigan Southern Railway Co.*, 197 U. S. 536, an action by the Interstate Commerce Commission, by petition for mandamus in the Circuit Court of the United States for the Northern District of Ohio, against the Lake Shore and Michigan Southern Railway Company to compel it to file reports required by the act to regulate interstate commerce. It was argued for the Government that while decisions of this court under the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, and the act of March 3, 1875, 18 Stat. 470, had been construed to confer no original jurisdiction in mandamus in the United States courts, yet the act of March 3, 1887, 24 Stat. 552, c. 373, in view of the modern development in proceedings by mandamus, should be held to confer the jurisdiction upon the Circuit Courts to entertain original suits in mandamus. The contention was rejected and the prior cases adhered to.

We deem it settled beyond controversy, until Congress shall otherwise provide, that Circuit Courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States.

It follows that the Circuit Court should have dismissed the case for want of jurisdiction instead of determining it upon the merits. The judgment dismissing the petition is therefore modified so as to show that the case was dismissed for want of jurisdiction, and, as thus modified, the judgment is

Affirmed.

COMMISSIONERS OF WICOMICO COUNTY *v.* BANCROFT.

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

No. 129. Argued October 9, 1906.—Decided November 5, 1906.

In the absence of a contract protected by the impairment clause of the Federal Constitution, whether a statutory exemption has been repealed by a subsequent statute is a question of state law in which the decisions of the highest court of the State are binding.

It is only where an irrepealable contract exists that it is the duty of this court to decide for itself irrespective of the decisions of the state court whether a subsequent act impairs the obligation of such contract.

Even though Federal courts might exercise independent judgment, in this case the decisions of the Supreme Court of Maryland are followed to the effect that an act directing a new assessment of property in the State and expressly declaring that property of every railroad in the State be valued and assessed, amounted to a repeal of prior exemptions from taxation where there was no irrepealable contract.

A proviso in a state statute taxing all property of railroads that no irrepealable contract of exemption shall be affected construed as expressing the legislative intent to repeal all exemptions not protected by binding contracts beyond legislative control.

135 Fed. Rep. 977, reversed.

THE facts are stated in the opinion.

Mr. James E. Ellegood, for petitioners:

The question has become *res adjudicata* by the courts of Maryland and by this court. The contract must have been impaired by some act of the legislative power of the State and not by the courts. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *Central Land Co.* v. *Laidley*, 159 U. S. 103.

The doctrine of *stare decisis* and *res adjudicata* rests on a broader ground than technical estoppel. It has been called "a rule of rest," and is founded on public policy.

The decisions in the Maryland and Federal courts certainly make the "law of the case," and settle the rights of the county commissioners and the duty of the railroad company, which

became the thing adjudged. *New Orleans* v. *Citizens Bank,* 167 U. S. 398; *Covington* v. *First National Bank,* 198 U. S. 100. This is a clear attempt by a collateral proceeding to bring the Federal court into direct conflict with the state court, and presents the example of one court indirectly interfering with the decision of a court of concurrent jurisdiction and annulling its effect as between the parties. 11 Am. & Eng. Ency. Law, 2d ed., 398; *Crowley* v. *Davis,* 37 California, 269.

For the distinction between *res adjudicata* and *stare decisis,* see 24 Am. & Eng. Ency. Law, 2d ed., 715.

The evils of such a conflict are shown in *Phelps* v. *Mutual Reserve Life Assn.,* 50 C. C. A. 339, affirmed in 190 U. S. 147. See also *Dawson* v. *Columbia Ave. Trust Co.,* 197 U. S. 178.

While the Federal courts are not controlled by the decisions of the state courts in matters of general principles of the law, they deem themselves uniformly bound to follow them when construing their own statutes; and the jurisdiction of the Federal court must rest on other grounds than the mere unconstitutionality of the taxes involved. *Sheldon* v. *Platt,* 139 U. S. 591, 599, reviewing the cases where injunctions were granted, and affirming *Dows* v. *Chicago,* 11 Wall. 108.

But independent of the decisions of the Maryland courts, there was no contract of exemption. An exemption from taxation is not a vested right, a property right, or a positive right. *People* v. *Supervisors,* 67 N. Y. 116; *Pearsall* v. *Great Northern R. R. Co.,* 161 U. S. 662.

The alleged exemption was not a part of the original charter of this corporation, and the grant is a mere gratuity. *Appeal Tax Court* v. *Grand Lodge,* 50 Maryland, 428; *Rector* v. *Philadelphia,* 24 How. 306; *Grand Lodge* v. *New Orleans,* 166 U. S. 148; *People* v. *Commissioners,* 47 N. Y. 504.

Mr. Nicholas P. Bond, Mr. Ralph Robinson and *Mr. Edward Duffy,* for respondent, submitted:

The Federal court is not bound to follow the decisions of the Court of Appeals of Maryland in construing the Mary-

land statutes. *Mercantile Trust and Deposit Co.* v. *Texas and Pacific Ry.*, 51 Fed. Rep. 536. While a state statute construed, or a rule of property established at the time a transaction is entered into, or rights accrued, such construction will bind the parties as fully as though written into the transaction; where no such construction was then in force, the statute should be construed by the independent judgment of this court. *Burgess* v. *Seligman*, 107 U. S. 20; *Carroll Co.* v. *Smith*, 111 U. S. 556; *Anderson* v. *Santa Anna*, 116 U. S. 356.

The language in section 188 of the Code of Maryland is not only broad enough to transfer the exemption from taxation secured to the original railroad by section 2 of the acts of 1886, but this is the very language which has been held apt and technical for this purpose by a line of decisions in both the Federal and state courts. *Trask* v. *Maguire*, 18 Wall. 391; *L. & N. R. R. Co.* v. *Palmes*, 109 U. S. 251; *Phœnix Insurance Company* v. *Tennessee*, 161 U. S. 174; *State Board of Assessors* v. *Morris and Essex R. R. Co.*, 49 N. J. L. 193; *State* v. *Railroad*, 80 Tennessee, 583; *Memphis* v. *Phœnix Insurance Company*, 91 Tennessee, 566.

MR. JUSTICE DAY delivered the opinion of the court.

The respondent, Samuel Bancroft, Jr., began an action in the Circuit Court of the United States for the District of Maryland to enjoin the county commissioners of Wicomico County from levying taxes on the property of the Baltimore, Chesapeake and Atlantic Railway Company, alleging that he was the holder of twenty bonds secured by mortgage upon the company's property, which, under the laws of the State, had been exempted from taxation. Such proceedings were had that a decree was entered enjoining taxation of certain property of the railway company. Upon appeal to the Circuit Court of Appeals, the judgment was affirmed, 135 Fed. Rep. 977, and the case was brought here by writ of certiorari.

The case was tried upon an agreed statement of facts, from which the following, pertinent to the determination of the case, may be extracted: The Baltimore and Eastern Shore Railroad Company, organized to build a line of road from Eastern Bay, in Talbot County, to Salisbury, Wicomico County, in the same State, by act of the legislature of Maryland, was granted certain privileges (chapter 133, Acts of the Assembly, 1886), sections 2, 4 and 5 being as follows:

"SEC. 2. *And be it enacted,* That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all state, county or municipal taxation for the term of thirty years, counting from the date of the completion of said road between the *termini* mentioned in its charter."

"SEC. 4. *And be it enacted,* That the said Baltimore and Eastern Shore Railroad Company aforesaid, shall have power to unite, connect and consolidate with any railroad company or companies, either in or out of this State, so that the capital stock of said companies so united, connected and consolidated (respectively), may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters.

"SEC. 5. *And be it enacted,* That the Baltimore and Eastern Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads either in or out of this State, for the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore and Eastern Shore Railroad Company."

The Baltimore and Eastern Shore Railroad Company accepted the provisions of the act and completed the construction of its road between the *termini* named in August, 1891. In June, 1890, it purchased the property of the

Wicomico and Pocomoke Railroad Company, extending from Salisbury to Ocean City. Afterwards, the Baltimore and Eastern Shore Railroad Company mortgaged the entire property to secure $1,600,000 of mortgage bonds. This mortgage was foreclosed in 1894, and the purchaser proceeded to organize a new corporation, the Baltimore, Chesapeake and Atlantic Railway Company, the respondent becoming the holder of some of its mortgage bonds. This reorganization was under sections 187 and 188 of art. 23, Maryland Code of 1888, which provide as follows:

"SEC. 187, that in case of the sale of any railroad under foreclosure of mortgage, the purchaser may form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors," etc.

"SEC. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed and enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter, and any amendments thereto, and of any other laws of this State," etc.

Under authority of the Maryland statutes the Baltimore, Chesapeake and Atlantic Railway Company issued the mortgage bonds of which respondent is the holder. The county commissioners of Wicomico County have levied and assessed taxes upon the railroad company's property, and threatened to sell the same for non-payment thereof. The Circuit Court held, and the Circuit Court of Appeals affirmed the judgment, that sections 187 and 188 of the Maryland Code extending immunities to the new company, had the effect to exempt from taxation certain property of the reorganized company and that the exemption constituted a contract between the State and the company entitled to protection under the con-

tract clause of the Federal Constitution, against the subsequent attempt of the county commissioners to levy taxes upon the property.

Notwithstanding this decision of the Circuit Court of Appeals, it is now conceded in the brief of the respondent's counsel, so far as this argument is concerned, that there was no binding contract upon the State entitled to protection under the Federal Constitution (Article I, Section 10), against state impairment of the obligation of the contract. In view of the provisions of the Maryland constitution this concession would seem in harmony with the right reserved in that instrument to amend, repeal and alter charters. *Northern Central Railway Co.* v. *Maryland,* 187 U. S. 258. And see *Wisconsin & Michigan Railway Co.* v. *Powers,* 191 U. S. 379. But it is insisted, conceding that the exemption from taxation was merely a bounty or gratuity, it extended to the reorganized company by force of the Maryland statutes above quoted, and has never been repealed nor withdrawn by the State, and, therefore, the bondholder, being directly interested in the property, has a right to be protected by injunction against the levying of such taxes so long as the act remains in force.

The questions arising in this case, as to the construction and force of the acts of the legislature of the State, have been before the Supreme Court of Maryland in three cases: *Baltimore, Chesapeake & Atlantic Railway Co.* v. *Ocean City,* 89 Maryland, 89; *Baltimore, Chesapeake & Atlantic Railway Co.* v. *County Commissioners of Wicomico County,* 93 Maryland, 113; and *Baltimore, Chesapeake & Atlantic Railway Co.* v. *Wicomico County Commissioners,* 63 Atl. Rep. 678. In these cases it was held that the exemption from taxation provided for by the laws above quoted did not extend to the reorganized company, and in the last case, decided March 27, 1906, since the decision in the Circuit Court of Appeals, it was held that the general assessment law of 1896 (Acts of 1896, Chap. 120), declaring that the property of every railroad should be assessed for county and municipal purposes, and providing that noth-

ing in the act should discharge or release any irrepealable contract or obligation existing at the date of the passage of the act, amounted to a recall of the immunity granted by the former law which had at all times been subject to repeal by the State, and that, conceding the immunity extended to the reorganized company under section 187 of the statute, the repeal of the exemption did not violate any contract with the State, entitled to the protection of the Federal Constitution.

As we have said, the argument addressed to this court is rested upon the proposition that the subsequent law of 1896, imposing taxes upon the property of the railroad company in general terms, did not repeal prior legislation, which, properly construed, gives the privilege of exemption from taxation to the property of the reorganized railroad company. We, therefore, are to consider a case wherein there is no contention that a valid and binding contract has been impaired by state action, and the questions are as to the proper construction of the statute, and whether a repealable exemption from taxation has been withdrawn by subsequent legislation of the State.

Previous decisions of this court have settled the proposition that whether such exemption has been in fact repealed by a subsequent state statute is a question of state law in which the decisions of the highest courts of the State, in the absence of a contract, are binding; and that it is only where the exemption is irrepealable, thus constituting a contract, that it becomes the duty of this court to decide for itself whether the subsequent act did or did not impair the obligation of the contract. *Gulf & Ship Island R. R. Co.* v. *Hewes*, 183 U. S. 66, 74; *Northern Central Railway Co.* v. *Maryland*, 187 U. S. 258, 266, 267. It is contended, however, that inasmuch as the respondent acquired his bonds in 1896, which were issued in 1894, at a time when none of the Maryland decisions above referred to had been made, the first of them being in 1899, the construction of the statutes and their continued force are questions for the Federal courts having jurisdiction of the cause and the parties. And further, that while

the Federal tribunals will differ reluctantly from the state courts upon a question of the validity of state statutes, and will "lean towards an agreement of views with the state courts," nevertheless they must in such cases exercise an independent judgment in determining the force and validity of state statutes. *Burgess* v. *Seligman*, 107 U. S. 20, 23; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, and cases cited in the opinion in that case.

If we could concede the soundness of this contention, we are of opinion that the Court of Appeals of Maryland was right in holding that the legislation of 1896 (Acts of 1896, Chap. 120), directing a new assessment of the property of the State and expressly declaring that the property of every railroad in the State should be valued and assessed for county and municipal purposes, had the effect to withdraw the prior exemption from taxation if a proper construction of the legislation of the State would extend it to the property of the reorganized company. The act contains the significant proviso that nothing therein contained shall be held to discharge, release, impair or affect any irrepealable contract or obligation of any kind whatsoever existing at the date of the passage of the act. This proviso evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, if any such existed, and to bring all property within the taxing power of the State. We agree with the reasoning expressed by the Court of Appeals of Maryland upon this branch of the case. 63 Atl. Rep. 683.

From this view it follows that the decree of the Circuit Court of Appeals must be

Reversed and the cause remanded to the Circuit Court with directions to dismiss the bill.

TAYLOR v. BURNS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 28. Submitted October 16, 1906.—Decided November 12, 1906.

The word "sell" in an agreement affecting, but not in terms granting or conveying, real estate will not be given any more effect upon the title than is necessary to accomplish the purpose of the transaction stated in the agreement; and under the circumstances of this case, the agreement held not to be a conveyance, but a power of attorney to sell at the specified price and subject to revocation, not being coupled with an interest.

The phrase "coupled with an interest," in connection with a power of attorney, does not mean an interest in the exercise of the power, but an interest in the property on which the power is to operate. *Hunt* v. *Rousmanier's Administrator*, 8 Wheat. 174.

76 Pac. Rep. 623, affirmed.

On March 26, 1901, Thomas Burns, the owner of three mining claims, as party of the first part, and Charles M. Taylor, as party of the second part, made the following agreement:

"The said party of the first part, in consideration of the sum of one dollar, lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet mining claim, the Comet mining claim and the Victor mining claim, situate in the California mining district, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and consideration following, to wit:

"The said party of the second part shall pay to the party of the first part whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, forty-five thousand dollars ($45,000), and in addition thereto

one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000, and may retain out of the said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims. This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto with reference to said mining claims."

On November 9, 1901, Burns deeded a one-fourth interest in the mining claims to John A. Duncan, and on March 9, 1903, Burns and Duncan conveyed the entire property to S. R. Kauffman as trustee. On February 27, 1903, Thomas Burns executed and filed for record a revocation of all authority given by the agreement to Taylor, and notified him by letter of such revocation. On April 6, 1903, Taylor filed his bill of complaint in the District Court for the county of Cochise, Territory of Arizona, against Burns, Duncan, and Kauffman, alleging that he was the owner of the mining claims, that defendants claimed to have some interest in them, and praying to have his title thereto quieted. The defendants answered, and also filed a cross bill, alleging in substance that plaintiff had no title whatever, and praying that their title be quieted as against him. A trial in the District Court resulted in a decree in favor of the defendants, which was affirmed by the Supreme Court of the Territory, 76 Pac. Rep. 623, and thereupon the case was brought here on appeal.

Mr. Eugene S. Ives, for appellant:

It is not claimed that Taylor did not render full consideration. The document itself expressly precludes the notion that the services to be rendered by Taylor as a consideration for this document were the services of a broker. The consideration of the transfer is plainly expressed without ambiguity. Each was obligated to render such services and could not obtain pay therefor. The agreement establishes conclusively that both sides wanted to sell, and this mutual desire prompted the mutual agreement to render aid in negotiating or effecting a sale.

It was contended before the lower courts, that the granting word in this contract, viz., the word "sell," is not a word of conveyance, but is applicable only to personal property, and is not a word which can be used or can be construed as giving any title or right to a mining claim. But for the Statute of Frauds, § 2708, Rev. Stat. Arizona, 1901, which makes the term "real estate" under the Statute of Frauds to include mines and mining claims, mining claims could be sold orally. Mining claims may be sold by bill of sale so far as that statute is concerned. *Table Mountain T. Co.* v. *Stranahan*, 20 California, 198. And see also *Union Con. M. Co.* v. *Taylor*, 100 U. S. 37; *Lockhart* v. *Rawlins*, 21 Pac. Rep. 413.

Mining rights of a citizen who has complied with the acts of Congress are as complete as though he owned in fee simple, but they are merely a license granted by the Government. They are subject to bargain and sale. They are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited. *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meager*, 104 U. S. 279.

Such a right is transferred by the term "sell." The terms grant and bargain are not necessary, because the term sell implies and carries with it all right of the locator to the possession of the claims. 2 Kent's Com. 468.

Whatever the court may decree this instrument to be it

vested in Taylor a right coupled with an interest, and, therefore, was not revocable at the will of Burns. *Hunt* v. *Rousmanier's Admrs.*, 8 Wheat. 175.

A power of attorney coupled with an interest is irrevocable, and binds the party giving it, and may be executed after his death. *Napp* v. *Alvord*, 10 Paige, 205; 2 Kent Com. 643; *Bony* v. *Smith*, 17 Illinois, 533; *Raymond* v. *Squire*, 11 Johns. 47.

Mr. William Herring and *Mrs. Sarah H. Sorin*, for appellee:

The instrument under which plaintiff claims title is not a deed of conveyance. Though an instrument contains words expressing absolute transfer, it will not be construed as a deed if by taking the whole instrument together it appears that such was not the intention of the parties. Particular words may not be considered as though isolated, but the instrument must be considered as a whole in order to ascertain the intention and obligation of the parties. *Jackson* v. *Meyers*, 3 Johns. 388, 395; *Jackson* v. *Moncrief*, 5 Wend. 26; *Dunnaway* v. *Day*, 63 S. W. Rep. 731; *Stewart* v. *Lang*, 78 Am. Dec. 414; *Sherman's Lessee* v. *Dill*, 2 Am. Dec. 408; *Wallace* v. *Wilcox*, 27 Texas, 60, 67; *Peterson* v. *McCauley*, 25 S. W. Rep. 826; *Ives* v. *Ives*, 13 Johns. 236; *Jackson* v. *Clarke*, 3 Johns. 424; Devlin on Deeds (2d ed.), sec. 7 *et seq; Williams* v. *Paine*, 169 U. S. 76; *O'Brien* v. *Miller*, 168 U. S. 297; *Morrison* v. *Wilson*, 30 California, 344.

To "convey" real estate is, by a proper instrument to transfer the legal title to it from the present owner to another. *Abendroth* v. *Greenwich*, 29 Connecticut, 365; *Cross* v. *Weare Commission Co.*, 153 Illinois, 510.

A mining claim is real estate, and the title thereto can only be conveyed by deed. *Hopkins* v. *Noyes*, 2 Pac. Rep. 280; *St. Louis M. & M. Co.* v. *Montana M. Co.*, 171 U. S. 650; *Manuel* v. *Wulff*, 152 U. S. 505; *Gillis* v. *Downey*, 85 Fed. Rep. 483; *Belk* v. *Meagher*, 104 U. S. 279; *Harris* v. *Equator M. & S. Co.*, 8 Fed. Rep. 863; Rev. Stat., Arizona,

1897, pars. 214, 228, tit. 2, Conveyances, and § 12, par. 2308, Limitations.

The authority conferred upon Taylor by the agreement, was not a power coupled with an interest. The interest is merely in that which is to be produced by the exercise of the power. Such an interest does not make the power irrevocable. *Hunt* v. *Rousmanier's Adm.*, 8 Wheat. 174; *Mansfield* v. *Mansfield*, 6 Connecticut, 559; *Trickey* v. *Crowe*, 71 Pac. Rep. 965; *Hall* v. *Gambrill*, 88 Fed. Rep. 709; *Tinsley* v. *Dowell*, 26 S. W. Rep. 948; *Blackstone* v. *Buttermore*, 53 Pa. St. 266; *Hartley's Appeal*, 53 Pa. St. 212; *Stitt* v. *Huidekoper*, 17 Wall. 385; *Durkee* v. *Gunn*, 21 Pac. Rep. 637; Mechem on Agency, § 207.

It was merely an authorization to Taylor to negotiate a sale of the mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess. No time being fixed for the duration of the contract, either party was at liberty to terminate it at will. *Trickey* v. *Crowe, supra; Coffin* v. *Landis*, 46 Pa. St. 426; *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378, 384; *Rowan & Co.* v. *Hull*, 47 S. E. Rep. 92; Mechem on Agency, § 210; *Cadigan* v. *Crabtree*, 70 N. E. Rep. 1033; *S. C.*, 186 Massachusetts, 7; *Knox* v. *Parker*, 25 Pac. Rep. 909.

Neither in terms nor by the nature of his contract does the principal bind himself not to revoke the authority conferred.

The agent did not have the exclusive right to negotiate a sale, and therefore there was nothing to prevent the principal from making a sale of his own property. *York* v. *Nash*, 71 Pac. Rep. 59; *Baars* v. *Hyland*, 67 N. W. Rep. 1148; *Golden Gate Packing Co.* v. *Farmers' Union*, 55 California, 606.

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

This case turns upon the scope and effect of the agreement of March 26, 1901. It is claimed by plaintiff that it is a con-

veyance, passing title; by defendants, that it is simply a power of attorney, subject to revocation. Its meaning is to be determined by a consideration of all its terms and not by any particular phrase. The first paragraph recites a consideration, and states that for the consideration the first party "sells" the claims to the party of the second part. If this were all it would suggest a purpose to pass title, but the paragraph closes with a reference to further stipulations, its language being "sells to the said party of the second part the said mining claims upon the terms and consideration following, to wit." The next paragraph authorizes the party of the second part to "sell and negotiate" the mines for any sum above $45,000, and to retain out of this purchase price seven-eighths of the excess of $45,000, while in the last paragraph the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims."

Nowhere in the instrument does the party of the second part assume any obligations, except the general one in the third paragraph, by which both parties mutually agree to aid each other in the negotiation and sale of the mining claims. The instrument does not in terms grant or convey. The nearest approach to a word of conveyance is "sells." This is more apt in describing the passing of the title of personal than of real property. Not that this is decisive, for not infrequently it is held to manifest an intent to convey the title to the property named, whether real or personal. But when the purpose of the transaction is stated the word will ordinarily have no more effect upon the title than is necessary to accomplish the purpose. The purpose here named was the giving of authority to make a sale to some third party at not less than a named price, which price would belong to Burns, less the commission on the sale. For this it was not necessary to pass title with the authority. And it is not ordinarily to be expected that an owner will part with title before receipt of purchase price, or security therefor.

Appellant contends that by this instrument he became owner, while Burns was only an equitable mortgagee. But no time is fixed for the sale, and therefore no time for the maturity of the supposed debt, nor is any liability cast upon Taylor for the payment of any portion thereof. Indeed, its amount is uncertain, whether $45,000, or $45,000 plus one-eighth of a price which should or could be realized on a sale. If it were true that title passed then Taylor could immediately convey to a third party, who, by payment of $45,000, would acquire the property. We need not inquire whether there was a breach of contract for which Taylor could recover damages. The question here is the effect of the contract upon the title. While it may be conceded that the meaning and scope of the instrument are not perfectly clear, yet it seems more reasonable to hold that it was simply a grant of authority to Taylor to "sell and negotiate" the mines, and not also a transfer to him of the title to the property.

As such an instrument it was subject to revocation. It was not a power of attorney coupled with an interest. "By the phrase 'coupled with an interest,' is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate." *Hunt* v. *Rousmanier's Administrators*, 8 Wheat. 174. Now as we construe this contract, Taylor was to receive, in case he made a sale, seven-eighths of the price in excess of $45,000—that is, he was to be paid for making the sale. It was an interest in the exercise of the power and not an interest in the property upon which the power was to operate.

We see no error in the ruling of the Supreme Court of the Territory of Arizona, and its judgment is

Affirmed.

ANDREWS v. EASTERN OREGON LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 48. Argued October 19, 1906.—Decided November 12, 1906.

Although the record of a case here on writ of error may fail to show how the facts on which the highest court of a State set aside the findings of the trial court were brought to its attention, this court cannot ignore the recitals of what it considered, if it appears that testimony was in fact taken.

When the conclusions of the highest court of a State reversing the trial court are in harmony with the general rule as to the effect to be given to a patent of the United States, this court is not justified in setting the judgment aside upon a presumption of what might have been the testimony upon which the trial court made its findings.

45 Oregon, 203, affirmed.

THE facts are stated in the opinion.

Mr. S. M. Stockslager, with whom *Mr. George C. Heard* was on the brief, for plaintiff in error.

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton* was on the brief, for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

This case brings before us a judgment of the Supreme Court of the State of Oregon. 45 Oregon, 203. It involves the title to lot 3 and the east ½ of the southwest ¼ of section 7, township 1 north, range 17 east of the Willamette meridian. The plaintiff in error claims title as a preëmptor; the defendant in error under a patent from the United States. The land was patented as a part of the grant made by act of Congress approved February 25, 1867, 14 Stat. 409, of three alternate sections on each side of the road, to the Dalles Military Wagon Road Company, a full account of which is to be found in *Wilcox* v. *Eastern Oregon Land Company*, 176 U. S. 51. If the patent was valid the title to the land was in the defend-

ant, and the judgment of the Supreme Court of Oregon was correct. There being no conflicting land grant the question whether the land was within the territorial limits of that to the road company is apparently one of fact only, and the decision of the Land Department on matters of fact is ordinarily conclusive in the courts.

The difficulty in the case arises from the condition of the record. This shows that by the trial court findings of fact and conclusions of law were made, one of the findings being that the land is situated entirely outside the limits of the grant and more than three miles from the road as actually surveyed, platted and constructed by the company, and certified by the Governor of the State to the Land Department. No testimony is preserved, although it appears that the case was referred to a referee, who took and reported the testimony. The Supreme Court reversed the judgment of the trial court, and, while making no special findings, in its opinion discusses certain matters of evidence, and, after stating that the testimony tends to show that the land was in fact within the limits of the grant, rests its conclusions upon the general proposition that there is no competent proof to impeach the records of the Land Department or overthrow the presumption of validity which attends a patent of the United States. The certificate of the clerk of the Supreme Court states that the transcript is the full and complete record filed in that court and upon which the appeal was heard; while the certificate of the clerk of the trial court to the record sent to the Supreme Court is "that the same is a full, true and correct copy of the complaint, amended answer, demurrer to the amended answer, reply, findings of fact and conclusions of law, undertaking on appeal, notice of appeal filed in my office in the above entitled cause, and of all journal entries made in said cause and of the whole thereof."

From this it is contended that the Supreme Court, without any evidence before it, set aside the findings of fact made by the trial court. But it is the judgment of the Supreme Court

whose validity we are to consider, and while it made no special findings, its statement of what was before it for consideration and its conclusions therefrom are sufficient to sustain its judgment. True the record fails to show how the facts were brought to its knowledge, but it is the highest court of the State, and we may not ignore its recital of what it considered, especially as it appears that testimony was in fact taken. *Egan* v. *Hart*, 165 U. S. 188. And when its conclusions are in harmony with the general rule of the effect to be given to a patent of the United States we are not justified in setting aside the judgment upon any presumption of what might have been the testimony upon which the trial court made its findings.

The judgment of the Supreme Court of the State of Oregon is

Affirmed.

BURT v. SMITH.

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

No. 67. Argued October 29, 1906.—Decided November 12, 1906.

A mistaken view of the law may constitute probable cause in some instances—probable cause does mean sufficient cause—so *held* as to a suit for infringement of registered trade-mark.

Although the opinion of the highest court of a State may be resorted to for the purpose of showing that the court actually dealt with a Federal question presented by the record, or that a right asserted in general terms was maintained and dealt with on Federal grounds, where the record discloses no Federal question until the assignment of errors in this court, it comes too late and the writ will be dismissed.

Writ of error to review 181 N. Y. 1, dismissed.

The facts are stated in the opinion.

Mr. Norris Morey, with whom *Mr. Joseph H. Morey* was on the brief, for plaintiffs in error:

Neither the order nor the opinion of the Circuit Court of

Appeals reversing the temporary injunction, nor the judgment upon the merits in the injunction suit in favor of these plaintiffs, have any tendency to support the decision stated in the opinion of the Court of Appeals. That decision is directly contrary to both.

The decision *could* not have been rested on oral evidence, because there was no evidence in the case tending to support the decision. All the oral evidence tended to show want of probable cause and want of good faith, and the opinion refers to it, but refuses it any weight.

The defense of probable cause is only made out when defendant shows that he began his action or proceeding in good faith with the honest belief that he was entitled to maintain it, and with reasonable grounds for such belief. Add. on Torts (Wood's ed.), §§ 852, 853, 880; *Heyne* v. *Blair*, 62 N. Y. 19; *Fagnan* v. *Knox*, 66 N. Y. 527; *Hazzard* v. *Flury*, 120 N. Y. 223; *Long Island Bottlers' Union* v. *Seitz*, 180 N. Y. 243; *Burt* v. *Smith*, 181 N. Y. 1.

There was no allegation or proof of advice of counsel. Such evidence would not have been material on the question of probable cause, but only on the question of malice. *Scott* v. *D. S. C. Co.*, 51 App. Div. 321; *Wass* v. *Stephens*, 128 N. Y. 123, 127; *Wills* v. *Noyes*, 12 Pick. 324; *Stone* v. *Stevens*, 12 Connecticut, 219; *Wicks* v. *Fentham*, 4 Durnf. & E. 248; *Thompson* v. *Lumley*, 1 Abb. N. C. 254, 261; *S. C.*, 64 N. Y. 631.

A Federal question is presented by the record which authorizes a writ of error to this court. *Crescent City L. S. Co.* v. *Butchers' Union &c. Co.*, 120 U. S. 141; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 515, 520; *Nat. Foundry and Pipe Works* v. *Oconto City W. S. Co.*, 183 U. S. 217, 233; *Tullock* v. *Mulvane*, 184 U. S. 497, 507; Taylor on Supreme Court, § 209.

There is a Federal question because the plaintiffs alleged and were required to prove as an essential of their cause of action, the former judgment between the same parties in the United States Circuit Court. *Com. Pub. Co.* v. *Beckwith*, 188 U. S. 567, 569.

All the proceedings in the United States Circuit Court in the injunction suit, including the judgments and orders, and opinions, were pleaded and in evidence, and a part of the record. They were before the Court of Appeals. *Green Bay Co.* v. *Patton Co.*, 172 U. S. 58, 66; *Huntington* v. *Attrill*, 146 U. S. 657.

A failure or refusal to consider the Federal question is equivalent to a decision against the Federal right involved therein. *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Missouri, K. & T. Ry. Co.* v. *Elliott*, 184 U. S. 531.

If a Federal question appears in the record and was actually decided, or was necessarily involved in the decision as made by the state court, this court has jurisdiction. *Brown* v. *Atwell*, 92 U. S. 327; *Power Co.* v. *Electric Co.*, 172 U. S. 475, 488; *Wedding* v. *Meyler*, 192 U. S. 573; *Powell* v. *Brunswick Co.*, 150 U. S. 440; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 231; *Kaukanna W. P. Co.* v. *Green Bay S. & Miss. Canal Co.*, 142 U. S. 254.

In the case at bar the previous judgment of the Federal court, between the same parties, was alleged in the complaint herein and alleged to have been a judgment upon the merits.

Mr. Milton A. Fowler for defendant in error:

This court has no jurisdiction; there is no suggestion in the pleadings that any Federal question is involved; neither was there any claim presented in the state courts by exception or otherwise which involved any such question.

Did the defendant have probable cause for believing that the plaintiffs were infringing, arising from his long use of his peculiar design, and the frequent adjudication of the courts, both state and Federal in his favor thereupon. Letters alone may be and frequently are a legal trade-mark. Brown on Trade-marks, §§ 39, 234; *Hall* v. *Burrows*, 4 De G., J. & S. 150; *Giron* v. *Gartner*, 47 Fed. Rep. 467.

The imitation which will be restrained by injunction need not be exact or nearly so, but must only be such as to deceive the purchaser who uses ordinary observation and makes his

purchase under ordinary conditions. *Godillott* v. *Am. Grocery Co.*, 71 Fed. Rep. 873, "A. & G." in monogram infringement on "A. G. & Co."; *Godillott* v. *Harris*, 81 N. Y. 263, "F. G." infringes "A. G."; *Frank* v. *Sleeper*, 150 Massachusetts, 583, "N. S." infringed by "N. & S."; *Cardiere* v. *Carlysle*, 3 Beaver, 292, "C. B." is infringed by "C. S."; *Singer Mfg. Co.* v. *Bent*, 163 U. S. 205, "N. Y. S. M. Mfg. Co." imitation of "Singer Mfg. Co."; *Welsbach Light Co.* v. *Adam*, 107 Fed. Rep. 463, "U. C. A." infringes "Yusea"; *National Biscuit Co.* v. *Furst*, 94 Fed. Rep. 150, "Iwanta" infringes "Uneeda."

The uniform decisions of the courts in favor of the defendant could have left no reasonable doubt in his mind that the plaintiffs herein were infringers.

The facts being undisputed and resting upon plaintiff's own evidence, the question as to whether plaintiff in the injunction action had probable cause for bringing the same is one of law. Lord Mansfield, 1 Term Reports, 544; *Humphries* v. *Parker*, 52 Maine, 502; *Ash* v. *Marlowe*, 20 Ohio, 119; *Stewart* v. *Sonneborn*, 98 U. S. 187; *Staunton* v. *Gashon*, 94 Fed. Rep. 52; 14 Am. & Eng. Ency. of Law, 1st ed., 5.

The Court of Appeals did not err in deciding as a matter of law, that the defendant had probable cause to commence the action and procure the injunction, because the packages and drops of the plaintiff resembled his own so closely as to be calculated to deceive the careless and unwary, and that the average purchaser would not know the difference. *Coleman* v. *Crump*, 70 N. Y. 573; *Carl* v. *Ayres*, 53 N. Y. 14, 17.

Actions for malicious prosecution of civil actions are not favored by the courts; hence to sustain such an action the proof must clearly establish that there was no reasonable ground for supposing that the action brought could be sustained. 14 Am. & Eng. Ency. of Law, 1st ed., 32; *Willard* v. *Holmes*, 142 N. Y. 492, 496; *Daniels* v. *Fielding*, 16 M. & W. 201; *Palmer* v. *Foley*, 71 N. Y. 106, 109; *Marks* v. *Townsend*, 97 N. Y. 597.

The decree of the Circuit Court of the United States, that

there was an infringement upon the registered trade-mark and unfair competition, is sufficient evidence of probable cause for the prosecution of the suit to make due and complete defense to this action for malicious prosecution. The fact that the Circuit Court of Appeals reached a different conclusion does not in any degree lessen the effect of the decision of Judge Coxe as evidence of probable cause. *Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 158; *Spring* v. *Besore*, 12 B. Mon. 551, 555; *Short & Co.* v. *Spriggins & Co.*, 104 Georgia, 628; *Clements* v. *Odorless Excavating Co.*, 69 Maryland, 461; *Hartshorn* v. *Smith*, 104 Georgia, 235.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for malicious prosecution brought by the plaintiffs in error, in which the New York Court of Appeals ordered judgment for the defendant in error. 181 N. Y. 1. The suit complained of was a bill brought by the defendant in error in the United States Circuit Court to restrain the infringement of a registered trade-mark. A preliminary injunction was granted in that suit. An appeal was taken to the Circuit Court of Appeals, where the injunction was dissolved, and, the plaintiff making default at the final hearing, a decree was entered by the Circuit Court, expressed to be upon the merits, and dismissing the bill. The special damage alleged in the present action is the interruption of the plaintiff's business by the injunction while it was in force.

In the case at bar the trial court ordered a nonsuit on the ground that the granting of the injunction by the Circuit Court established probable cause. The principle of the decision in *Crescent City Live-Stock Landing & Slaughter-House Co.* v. *Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U. S. 141, that a final decree of the Circuit Court has that effect, even if subsequently reversed, was thought to extend to a preliminary decree. See also *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 511. The decision of the trial court

was reversed by the Appellate Division. The defendant then took the case to the Court of Appeals, assenting, as required, that, if the order should be affirmed, judgment absolute should be rendered against him. As we have said, the order was reversed. The ground on which a review is asked here is that the Court of Appeals by its reasoning implies that it finds probable cause in its own opinion that the decree in the former case was wrong, whereas not to assume it to be correct is to fail to give it the faith and credit required by Rev. Stats. § 905.

It is unnecessary to consider whether a court bound by a previous judgment would not be warranted in saying that if the question had come before it in the first instance it would have decided the case the other way, and therefore that there was probable cause for a mistake of law into which it would have fallen itself. A mistaken view of the law may constitute probable cause in some instances, as is shown by the case cited above. Probable cause does not mean sufficient cause. But this last proposition shows that the former decree could not have decided the question now before the court, and therefore that the case is not properly here. The former decree was conclusive on the merits of the suit in which it was rendered, of course, *Lyon* v. *Perin & Goff Manuf. Co.*, 125 U. S. 698, but it only decided that that suit was brought without sufficient cause. It decided nothing as to whether the plaintiff had probable cause for expecting to prevail. If the Court of Appeals had affirmed the judgment of the trial court for the reason that a preliminary injunction fairly obtained from any court conclusively established probable cause, or that there was no evidence of a want of it, there would have been nothing to bring here, whether that reason was right or wrong. The only ground on which our jurisdiction is maintained is that the opinion of the Court of Appeals shows that it gave a different and inadmissible reason for the result to which it came.

No doubt an opinion may be resorted to for the purpose of

showing that a court actually dealt with a question presented by the record, or that a right asserted in general terms was maintained and dealt with on Federal grounds. *Missouri, Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 530, 534; *San José Land & Water Co.* v. *San José Ranch Co.*, 189 U. S. 177, 179, 180; *German Savings & Loan Society* v. *Dormitzer*, 192 U. S. 125. But it would be going further than we are prepared to go if we took jurisdiction upon the ground stated in this case. *Howard* v. *Fleming*, 191 U. S. 126, 137. The record discloses no question under the Constitution or laws of the United States until we come to the assignment of errors in this court. Then it was too late. *Hulbert* v. *Chicago*, 202 U. S. 275, 280. It is true that the complainant alleged the decree, but that was merely to show that the litigation complained of was ended, as was required by the law of New York, *Marks* v. *Townsend*, 97 N. Y. 590, 595, not to suggest a Federal question, which at that moment probably was not dreamed of. Even the opinion of the Court of Appeals, which is not part of the record in New York, does not disclose that there had been presented to it any argument or claim of right based upon the effect due to the previous final decree under the Revised Statutes, or indeed, in a specific way, upon the effect of the decree in any light. Furthermore, notwithstanding a few broad words relied upon by the plaintiff in error, we doubt if the Court of Appeals meant to lay down the proposition which we have said that we would not discuss, or to go further than to decide that the whole evidence was not sufficient to entitle the plaintiffs to go to the jury in an action for malicious prosecution, as that action is limited in New York.

It is argued that the Court of Appeals exceeded its functions under the constitution of the State, and in that way denied the plaintiffs due process of law. We see no reason to think so, but with that question we have nothing to do. *French* v. *Taylor*, 199 U. S. 274; *Rawlins* v. *Georgia*, 201 U. S. 638.

Writ dismissed.

UNITED STATES *v.* RIGGS.

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

No. 167. Argued October 23, 1906.—Decided November 12, 1906.

Under par. 313, as construed in connection with pars. 306, 307 of the Tariff Act of July 24, 1897, figured cotton cloth is subject not only to the specific duties imposed by par. 313, but also to the *ad valorem* duty imposed by pars. 306, 307.

The evident purpose of these paragraphs precludes the application of the rule that any doubt as to the construction of a tariff statute should be resolved in favor of the importer.

136 Fed. Rep. 583, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds, for the United States:

The history of tariff legislation and the connection in which it appears make the meaning of par. 313 sufficiently clear. Act 1865, 13 Stat. 208; act 1883, 22 Stat. 505, 506; act 1890, 26 Stat. 591, pars. 344, 348; act 1894, 28 Stat. 527, pars. 252-257; *Hedden* v. *Robertson*, 151 U. S. 520, 526; *United States* v. *Albert*, 60 Fed. Rep. 1012; *Claflin* v. *United States*, 109 Fed. Rep. 562; *S. C.*, 114 Fed. Rep. 257.

The amount and character of the duty imposed is made sufficiently manifest by the language of par. 313; the use of the word "value" was unnecessary.

The protective character of tariff laws and the policy of Congress to impose higher duties upon finer articles and to increase the same as additional processes enter into their manufacture, have been frequently recognized. *Arnold* v. *United States*, 147 U. S. 497; *Tidewater Oil Co.* v. *United States*, 171 U. S. 219; *Bensusan* v. *Murphy*, 10 Blatchf. 580; Fed. Cas., 1329, distinguished.

The construction of par. 313 advocated by respondents

would subject high-priced figured cottons to less duty than cheaper plain goods—an absurd result which should be avoided.

A result so preposterous plainly indicates the unsoundness of the construction which would occasion it. *Bate R'f'g Co.* v. *Sulzberger,* 157 U. S. 1, 37; *Knowlton* v. *Moore,* 178 U. S. 41, 77.

The rule that duties should not be imposed upon vague or doubtful interpretations is inapplicable.

The intention of Congress being clear, any ambiguity of language should have been resolved in harmony therewith. Little doubts do not justify conclusions nullifying the manifest purpose of the lawmakers. The intent of the lawmaker is the law. *Jones* v. *Guaranty and Indemnity Co.,* 101 U. S. 626. Where the intent is plain the law should be construed in harmony therewith. Every doubt or dispute is not to be resolved in favor of the importer. *Newman* v. *Arthur,* 109 U. S. 132; *Hedden* v. *Robertson,* 151 U. S. 520; *United States* v. *Wetherell,* 65 Fed. Rep. 987, 990.

Mr. W. Wickham Smith, with whom *Mr. John K. Maxwell* was on the brief, for respondent:

Where the language of a statute is plain and unambiguous, it is the duty of the court to enforce it according to the obvious meaning of the words, without attempting to change it by adopting a different construction based upon some supposed policy of Congress in regard to the subject of legislation. *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1.

If there be any doubt at all as to the construction of the statute (and we submit there is not), that doubt cannot be resolved in favor of the imposition of a higher tax. *United States* v. *Wigglesworth,* 2 Story, 369; *Rice* v. *United States,* 53 Fed. Rep. 910; *Hartranft* v. *Wiegmann,* 121 U. S. 609; *Matheson* v. *United States,* 71 Fed. Rep. 394; *United States* v. *Davis,* 54 Fed. Rep. 147; *Adams* v. *Bancroft,* 3 Sum. 384; *McCoy* v. *Hedden,* 38 Fed. Rep. 89.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here on a certiorari granted to bring up a decision of the Circuit Court of Appeals affirming the decision of the Circuit Court and reversing that of a Board of United States General Appraisers. The respondents imported "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure," to quote the words of paragraph 313 of the Tariff Act of July 24, 1897, c. 11, 30 Stat. 175, 178. The Collector and Board of General Appraisers decided this cloth was liable to a duty of two cents per square yard under that paragraph and also, the different items being valued at over eleven, twelve and twelve and a half cents per square yard, to the *ad valorem* tax imposed by paragraphs 306 and 307 upon similar plain cloth above those values. The Circuit Court of Appeals, while admitting its belief that Congress intended to place an extra duty on figured cloth, felt bound to decide, upon the language of paragraph 313, that the tax placed by it upon figured cloth was to be added only to specific taxes imposed on less valuable cloths by paragraphs 306 and 307.

To explain: By paragraph 306 cotton cloth not bleached, etc., exceeding one hundred and not exceeding one hundred and fifty threads to the square inch, etc., and not exceeding four square yards to the pound, pays one and a half cents per square yard, with an increasing rate as the number of yards to the pound increases. But a proviso substitutes for the foregoing a different set of duties on all cotton cloth with the same count of threads, not bleached, etc., if valued above a certain sum, for instance, if over nine cents per square yard, thirty per centum *ad valorem*, if over eleven, thirty-five, etc. Paragraph 307 is similar in form for cloths with between one hundred and fifty and two hundred threads.

By paragraph 313 figured cloth "shall pay, in addition to the duty herein provided for other cotton cloth of the same

description, or condition, weight, and count of thread to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard." In the judgment appealed from it is assumed that the cloth in question, as figured cloth, is liable to this duty, and that, in deciding what such cloth shall pay, the collector must start from this paragraph. This paragraph must decide to what other duty the one here levied shall be added. If it stopped with the words "other cotton cloth of the same description, or condition," no doubt the tax might be added to an *ad valorem* tax when that would be required by paragraph 306 or 307. Those words might be taken to indicate cloth of similar value in cases within the provisos as well as goods of similar weight taxed under the first part of paragraphs 306 and 307. But as general words they would include weight as readily as value; and the mention of weight and count shows that they are used in a narrower sense, for instance, to indicate quality, as bleached or otherwise. Hence the criteria for the duty to which that under 313 is to be added all point to a specific duty alone; and these criteria therefore must determine for figured cloths the duty to which they are liable under paragraphs 306 and 307. You must not alter words in the interest of the imagined intent, and the importers are entitled to the benefit of even a doubt.

In spite of this reasoning, no one, we take it, has any serious doubt that paragraph 313 was not intended to affect or cut down duties already imposed in clear though general terms. The provisos of the earlier paragraphs are made applicable to "all cotton cloths" of the sorts described, in so many words. The qualified reading is due to scruples that hardly would occur except to the professional mind. As against those scruples, it is to be observed, in the first place, that the clauses to which we have referred and their neighbors, to go no further into the general scheme of the Tariff Act, consistently raise the amount of the tax on cotton cloth

as the cloth becomes more expensive, and that it would reverse the tendency and go counter to the intent expressed everywhere else, if in this instance the more valuable goods were withdrawn from the general tax imposed upon their class. It is said that, in some cases, the construction contended for even would make the duty on figured cotton of a high price less than that on cheap cloth.

In the next place, if the language of paragraph 313 is not broad enough to apply to both classes of duty previously imposed, the easier contention would seem to be that the additional duty created by it was put only upon the first class, that of the cheaper goods taxed by weight, rather than that it cut down what already had been made clear. Such a notion would be disposed of by the fact that paragraph 313 applies to all cotton cloth and to all values, higher as well as lower than seven cents, and by other considerations not necessary to state. But if anything had to yield it would be paragraph 313.

The artificial doubt is raised by assuming that the collector must start with the first part of paragraph 313 and find out what his assessments are to be from that alone. That is a mistake. He has before him the whole act. He has been told in the earlier paragraphs in unmistakable language that all cotton cloth with this number of threads and above a certain value must pay thirty or thirty-five cents *ad valorem*. Then comes this paragraph, which on its face purports to make an addition to some tax which it assumes to have been imposed by the earlier ones. It is intended to hit all cotton cloths and all values, and it is intended to be added to a tax already imposed. But this would not be the case if the presence of a figure in the cloth changed the rate established by the preceding scheme.

The truth is, as pointed out in the argument for the Government, that the element of value is woven through the whole tissue of the act. The collector does not know what duty to assess, even under 313, without a valuation. It can-

not be found out what "the duty herein provided" is, or whether it is specific or *ad valorem*, without making a valuation under the previous paragraphs, just as if 313 did not exist. Paragraphs 306 and 307 tell the collector to make it on all cotton and to assess a duty on all cotton above a certain value after the valuation is made. Paragraph 313 assumes the duty imposed by 306 and 307 to have been assessed. As against these plain directions, coupled with the manifest intent of the act, the failure to mention value along with weight raises no serious doubt in our minds.

Decree reversed.

CONBOY v. FIRST NATIONAL BANK OF JERSEY CITY.

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

No. 54. Argued October 23, 1906.—Decided November 19, 1906.

Congress having provided by section 25*b* of the Bankruptcy Act that appeals may be had under such rules and within such time as may be prescribed by this court, the thirty day limitations in General Order in Bankruptcy XXXVI has the same effect as if written in the statute and the allowance of an appeal taken thereafter on certificate by a justice of this court from the Circuit Court of Appeals cannot operate as an adjudication that it is taken in time.

The time within which an appeal may be taken under section 25*b* of the Bankruptcy Act and General Order in Bankruptcy XXXVI runs from the entry of the original judgment or decree and when expired is not revived by a petition for rehearing. Appeals do not lie from orders denying petitions for rehearing which are addressed to the discretion of the court to afford it an opportunity to correct its own errors.

The time for appeal cannot after it has expired be extended by an application for rehearing or arrested by an order of the court, even though the application be made during the same term at which judgment was entered.

Appeal from 135 Fed. Rep. 77, dismissed.

THE facts are stated in the opinion.

Mr. Martin Conboy for appellant:

The appeal was properly taken; the petition for rehearing was addressed to the discretion of the court and extended the time, as all judgments are under the control of the court during the term at which they are rendered. *Brockett* v. *Brockett*, 2 How. 238; *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135; *Slaughter-House Cases*, 10 Wall. 273, 289; *Railroad Co.* v. *Bradleys*, 7 Wall. 575; *Memphis* v. *Brown*, 94 U. S. 715; *Tex. & Pac. Ry.* v. *Murphy*, 111 U. S. 488; *Sage* v. *Central R. R. Co.*, 93 U. S. 412, 418; *Cambuston* v. *United States*, 95 U. S. 285; *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675, and cases cited, p. 678.

A possible rehearing is a necessary incident to every judgment or decree, the right to which cannot be cut off during the term except by express statute or rule of court.

A judgment or decree must be properly entered, in order to start the statute of limitation of the time to appeal. *Polleys* v. *Black River Imp. Co.*, 113 U. S. 81; *Rubber Co.* v. *Goodyear*, 6 Wall. 153; *Yznaga Del Valle* v. *Harrison*, 93 U. S. 233; *United States* v. *Gomez*, 1 Wall. 690.

Where an appeal to this court is permitted by the Bankrupt Act from a determination of the Circuit Court of Appeals, the judgment is not properly entered until the mandatory provision of subd. 3 of General Order XXXVI has been complied with. The "making and filing" of the findings of fact and conclusions of law referred to therein is a necessary prerequisite to the proper entry of the judgment. See *Insurance Co.* v. *Boon*, 95 U. S. 117.

Mr. William G. Wilson, for appellee.

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

This is an appeal from a final order of the Circuit Court of

Appeals for the Second Circuit affirming an order of the District Court of the United States for the Southern District of New York, filed June 7, 1904, affirming an order of a referee in bankruptcy, "In the matter of Phillip Semmer Glass Company, Limited, Bankrupt," dated May 7, 1904, allowing the claim of the First National Bank of Jersey City against the bankrupt's estate.

The final order of the Circuit Court of Appeals was entered January 23, 1905. The trustee petitioned that court, April 25, to recall its mandate and vacate the order therefor, and the application was denied. On May 8, a petition for rehearing was filed, which was denied May 17, and an order to that effect entered May 24. A petition, dated the same day, was thereupon presented to a justice of this court, praying an appeal "from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the twenty-third day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the twenty-fifth day of April, 1905, denying the motion of your petitioner to recall the mandate of said court and cancel the order for same, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the twenty-fourth day of May, 1905, denying the petition of the said trustee for a rehearing;" and for the reversal of "said orders and decrees, &c., and every part thereof."

Appeal was allowed and certificate granted under § 25*b*, par. 2, of the Bankruptcy Act, May 27, 1905. Thereafter and on June 14, 1905, findings of fact and conclusions of law were filed by the Circuit Court of Appeals, "*nunc pro tunc*, as though the same were made and filed at the time of entry of the judgment of this court on the twenty-third day of January, 1905."

The following provisions of the Bankruptcy Act are applicable:

"SEC. 25*b*. From any final decision of a Court of Appeals,

allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * * * *

"2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

Paragraphs 2 and 3 of General Orders in Bankruptcy, XXXVI, read:

"2. Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a Justice of the Supreme Court of the United States.

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The law provides that appeals shall be taken "within such time as may be prescribed by the Supreme Court of the United States," and by General Order XXXVI this court prescribed the time and limited it to thirty days, in harmony with the policy of the Bankruptcy Act, requiring prompt action and the avoidance of delay.

The limitation has the same effect as if written in the stat-

ute, and the allowance of an appeal on certificate cannot operate as an adjudication that it is taken in time.

The present appeal was allowed four months "after the judgment or decree" appealed from and three months after the time to appeal had expired.

But it is said that the limitation should be referred to the date of the order denying the petition for rehearing, and the trustee prayed an appeal from that order as well as from the judgment of January 23.

No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett* v. *Brockett*, 2 How. 238; *Wylie* v. *Coxe*, 14 How. 1. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Company, Limited,* v. *Arkansas Central Railway Company,* 128 U. S. 258, 261.

In the circumstances, the suggestion that there is but one term of the Circuit Court of Appeals for the Second Circuit, and that, by the rules of practice of that court, petitions for rehearing may be presented at any time during the term, and therefore that this petition operated to enlarge the limitation of the Bankruptcy Act, is without merit.

The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss.

Appeal dismissed.

GOUDY *v.* MEATH.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 53. Submitted October 23, 1906.—Decided November 19, 1906.

Where a State by statute makes the allotted lands of Indians alienable the same as lands of citizens, and Congress by statute postpones the operation of the state statute for a definite period, when that period has expired all restriction upon alienation both voluntary and involuntary by operation of law, such as taxation and levy and sale thereunder, ceases.

Although Congress may by statute give Indians a right of voluntary alienation of allotted lands but exempt such lands from levy, sale and forfeiture, such an exemption cannot exist by implication but must be clearly manifested.

By the act of February 8, 1887, allottee Indians became citizens and their property, unless clearly exempted by statute, is subject to taxation in the same manner as that of other citizens.

38 Washington, 126, affirmed.

This case is before us on error to the Supreme Court of Washington. 38 Washington, 126. It was submitted to the state courts on an agreed statement of facts and involves the question of the liability of the land of the plaintiff, now plaintiff in error, to taxation for the year 1904. He is a Puyallup Indian, and claims exemption under and by virtue of the treaty of December 26, 1854. 10 Stat. 1132. That treaty provided for an allotment of land in severalty to such members of the tribe as were willing to avail themselves of the privilege, on the same terms and subject to the same regulations as were named in the treaty with the Omahas.

The latter treaty, March 16, 1854, 10 Stat. 1043, authorized the President to issue a patent for any allotted land, "conditioned that the tract shall not be aliened, or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until the state constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. . . . No state legislature shall remove the restrictions herein provided for, without the consent of Congress." Under this treaty, on January 30, 1886, a patent to the plaintiff was issued. One of the facts agreed upon is the following:

"That since the issuance of said patent, and by an act of Congress passed and approved on the eighth day of February, 1887, plaintiff became and now is a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizens. Said act is found in the United States Statutes at Large, vol. 24, chapter 119, at page 388."

In 1889, Washington was admitted as a State. Its first legislature enacted:

"SECTION. 1. That the said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this State, by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this State, and all restrictions in reference thereto are hereby removed." Laws 1889–90, p. 362.

In 1893, Congress passed an act, 27 Stat. 612, 633, authorizing the appointment of a commission with power to superintend the sale of the allotted lands, with this proviso:

"That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act."

Construing these several acts, the Secretary of the Interior,

on February 14, 1903, wrote to the Commissioner of Indian Affairs, summing up his conclusions in these words:

"I am of the opinion that the requirements of the treaties with respect to these lands have been fully met, and that the provisions of the act of the legislature of the State of Washington of March 22, 1890, and the Indian appropriation act of March 3, 1893, referred to above, together operate to remove all restrictions upon the alienation or sale thereof by the allottees. I have therefore to direct that the Puyallup commissioner be instructed to continue the selection and appraisement of such portions of the Puyallup allotted lands, *but only with the consent of the Indians*, as provided in the act of March 3, 1893—until the expiration of the ten-year period mentioned, to wit, March 3, 1903, after which date, in my judgment, the Puyallup Indian allottees will 'have power to lease, incumber, grant, and alien the same in like manner and like effect as any other person may do under the laws of the United States, and of' the State of Washington.

"You are further directed to instruct the commissioner to take the necessary steps to complete and close up the business of his office as soon as practicable after March 3, next."

Mr. Walter Christian for plaintiff in error.

Mr. Charles O. Bates and *Mr. Walter M. Harvey* for defendant in error.

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

In the brief filed by the plaintiff in error no question is made of his right to sell and convey the land. The Supreme Court of the State, in its opinion, says: "It is conceded that the Indians may now sell their lands voluntarily and convey a title in fee, and that thereupon the lands so sold are subject to taxation in the hands of parties not Indians." But the contention is that although he has the power of voluntary sale

and conveyance, yet until he has exercised that power the land is not subject to taxation or forced sale. His argument rests mainly upon the contention that there is no express repeal of the exemption, provided in the original treaty, "from levy, sale or forfeiture." That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. For illustration, see treaty of January 31, 1855, with the Wyandotts, 10 Stat. 1159, 1161. But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation. In other words, that the officers of a State enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted.

But further, by the act of February 8, 1887, plaintiff became and is a citizen of the United States. That act, in addition to the grant of citizenship, provided that "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Matter of Heff*, 197 U. S. 488.

Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens—that is, that no exemption exists by implication but must be clearly manifested. No exemption is clearly shown by the legislation in respect to these Indian lands. The original treaty provided that they should be exempt from levy, sale or forfeiture until the legislature of the State should, with the consent of Congress, remove the restriction. This, of course,

meant involuntary as well as voluntary alienation. When the State was admitted and its constitution formed, its legislature granted the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this State, and all restrictions in reference thereto are hereby removed." What restrictions? Evidently those upon alienation. The Indian may not only voluntarily convey his land (authority to do that is provided by the use of the word "grant"), but he may also permit its alienation by any action or omission which in due course of law results in forced sale. Congress postponed the operation of this statute for ten years. When the ten years expired (and they had expired before this tax was attempted to be levied) all restriction upon alienation ceased. It requires a technical and narrow construction to hold that involuntary alienation continues to be forbidden while the power of voluntary alienation is granted; and it is disregarding the act of Congress to hold that the Indian, having property, is not subject to taxation when he is subject to all the laws, civil and criminal, of the State.

We see no error in the ruling of the Supreme Court of the State of Washington, and its judgment is

Affirmed.

NATIONAL COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE UNITED STATES *v.* STATE COUNCIL OF VIRGINIA, JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 89. Argued November 7, 8, 1906.—Decided November 19, 1906.

A benefit association incorporated under a state law and styling itself a National Council granted charters to various voluntary organizations in other States, styled State Councils, for similar purposes under conditions expressed in the charters. A dominant portion of the members of a State Council procured a charter from the state legislature granting the corporation so formed under the same name, powers, in some respects exclusive in that State, to carry on a similar work, but saving any rights of property possessed by the National Council. In a suit, brought by the latter, *held* that:

Whatever relations may have existed between the National Council and the voluntary State Council there was no contract between the former and the incorporated State Council which was impaired, and the act of incorporation was not void within the impairment clause of the Federal Constitution.

A State has the right to exclude a foreign corporation and forbid it from constituting branches within its boundaries, and this power extends to a corporation already within its jurisdiction. A single foreign corporation may be expelled from a State by a special act if the act does not deprive it of property without due process of law.

The property of which a corporation cannot be deprived without due process of law under the Fourteenth Amendment does not include the mere right of a foreign corporation to extend its business and membership in a State which otherwise may exclude it from its boundaries.

104 Virginia, 197, affirmed.

THE facts are stated in the opinion.

Mr. C. V. Meredith, with whom *Mr. Smith Bennett* and *Mr. Ellis G. Kinkead* were on the brief, for plaintiff in error:

The legislature of Virginia had no power to take away the right of the National Council to continue to control and to use, through its subordinate body, the Virginia voluntary associa-

tion, the title or name "State Council of Virginia, Junior Order United American Mechanics." This is true, whether the Virginia corporation is within or without the jurisdiction of Virginia.

A foreign corporation is entitled to come into the courts of Virginia to protect its right to its name, *Bank of Augusta* v. *Earle*, 13 Pet. 519, 590, although not a commercial corporation, but created for intellectual and moral purposes, especially where there is a benevolent fund. *Knights of Honor* v. *Oeters*, 95 Virginia, 610, 615; *State* v. *Dunn*, 134 N. Car. 663, 667; *Gorman* v. *Russell*, 14 California, 532; *Otto* v. *Tailors, P. & P. Union*, 75 California, 308, 313; *Bauer* v. *Samson Lodge*, 102 Indiana, 262; *Dolan* v. *Court Good Samaritan*, 128 Massachusetts, 437; *Lavalle* v. *Societe &c.*, 17 R. I. 680; *Blair* v. *Supreme Council*, 208 Pa. St. 262; *Ludowiski* v. *Benevolent Society*, 29 Mo. App. 337, 341; *State* v. *Georgia Med. Society*, 38 Georgia, 608, 626; *Dartmouth College case*, 4 Wheat. 699; *Lahiff* v. *St. Joseph Society*, 76 Connecticut, 648; *Baird* v. *Wells*, L. R., 44 Ch. Div. 661, 676; *O'Brien* v. *Protective Assn.*, 56 Atl. Rep. 151.

Even the wrongful use of the ritual, seal and paraphernalia of a secret society has been held to justify the intervention of a court of equity. *Maccabees &c.* v. *Maccabees &c.*, 97 N. W. Rep. (Mich.) 779, 783; *State* v. *Julow*, 129 Missouri, 173. See *Y. W. C. A.* v. *Y. W. C. A.*, 194 Illinois, 194, in which it was held that the object, work, sources of support and field of labor of each being the same substantially, and the name of the appellee having been adopted and in use by it many years prior to the incorporation of the appellant, the appellant has no right to adopt as its corporate name one so similar to that of the appellee, or to incorporate in its name words which would indicate to the public that it was the representative of appellee and the conference with which appellee is affiliated. See also *Grand Lodge* v. *Graham*, 31 L. R. A. 138; *McFadden* v. *Murphy*, 149 Massachusetts, 341, approved in *Kane* v. *Shields*, 167 Massachusetts, 392; *Altman* v. *Benz*, 27

N. J. Eq. 331; *Gorman* v. *O'Connor*, 155 Pa.St. 239; *Niblack Ben. Soc.* v. *O'Connor*, 3 Desaus. 581; *Y. M. C. A.* v. *St. Louis Y. M. C. A.*, 91 S. W. Rep. 171; *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 149 Massachusetts, 436, 442; *Spiritual Temple* v. *Vincent*, 105 N. W. Rep. 1026; *In re First Presbyterian Church*, 2 Grant's Cases (Pa.), 240; *Edison Co.* v. *Edison Automobile Co.*, 56 Atl. Rep. 861, 865; *Hendricks* v. *Montague*, L. R., 17 Ch. Div. 638.

It cannot be claimed that a foreign corporation might obtain protection in the Virginia courts against a wrongful use of its name by persons merely arbitrarily using the same, yet that in this case no protection can be had because the legislature of Virginia has chartered the defendant in error under the name in controversy; that the legislature having so declared the courts can give no protection.

If such contention were sound, the property rights of every corporation in the United States would be in danger, for every State in the Union could charter its home corporations by the names of those chartered in some other State, and thus wrongfully appropriate to the home corporations the good will belonging to the foreign companies. Such power for evil cannot legitimately reside in the several state legislatures. It cannot be regarded as a local question. *Blake* v. *McClung*, 172 U. S. 260. To hold otherwise would be to hold that state legislatures have inherently the right to commit what by common law and law of nations would be manifest fraud. *Peck Bros. & Co.* v. *Peck Bros. Co.*, 51 C. C. A. 257; *Ottoman Cahvey Co.* v. *Dane*, 95 Illinois, 203; *Investor Pub. Co.* v. *Dobinson*, 72 Fed. Rep. 603; *Goodyear Rubber Co.* v. *Goodyear India Rubber Glove Co.*, 22 Blatchf. 421.

The act of assembly creating defendant in error is void as beyond the power of the legislature of Virginia although no specific clause of the constitution of the State may have been violated.

The theory of our government, state and National, is opposed to the deposit of unlimited power anywhere. The

executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There exist implied reservations of individual rights, without which the social compact would not exist, and which are respected by all governments entitled to the name. *Farmville* v. *Walker*, 101 Virginia, 330; *Loan Assn.* v. *Topeka*, 20 Wall. 663; see also *State* v. *Addington*, 12 Mo. App. 221; *Dibree* v. *Lanier* (Tenn.), 12 L. R. A. 73; *McCullough* v. *Brown* (So. Car.), 23 L. R. A. 410; Cooley Con. Lim. (7th ed.), 559; *Lewis* v. *Webb*, 3 Maine, 326; *Willighein* v. *Kennedy*, 2 Georgia, 556; *State* v. *Duffy*, 7 Nevada, 349; *Budd* v. *State*, 3 Humph. 483, 492; *Vanzant* v. *Waddel*, 2 Yerg., 260, 269, cited with approval in *Gulf Ry. Co.* v. *Ellis*, 165 U. S. 156, and in *Cutting* v. *Kansas City Co.*, 183 U. S. 79, 105; *Commonwealth* v. *Perry*, 139 Massachusetts, 198; *Page* v. *Allen*, 58 Pa. St. 338; § 21, art. I, § 20, art. V, Const. Virginia, 1869; *Griffin* v. *Cunningham*, 20 Gratt. 31; *Ratcliffe* v. *Anderson*, 31 Gratt. 105.

The charter granted by the National Council to the State Council was a contract, and the existence of the State Council was necessary for the proper management of the National Council. This contract was impaired by the act creating defendant in error. *Knights of Honor* v. *Oeters*, 95 Virginia, 610, 615; *Kain* v. *Arbeiter &c.*, 102 N. W. Rep. 746, 750; *Kuhl* v. *Mayer*, 42 Mo. App. 474; *Supreme Lodge* v. *Malta*, 30 L. R. A. 838; *Baldwin* v. *Hosmer*, 25 L. R. A. 743; Bacon on Ben. Society, § 37; *Knights* v. *Nitsch*, 95 N. W. Rep. 326; *Union Ben. Soc.* v. *Martin*, 67 S. W. Rep. 49.

The statute creating the defendant in error, making it an independent organization and releasing it from all its duties and obligations to the National Council, was the authorization of a breach of contract. *McGahey* v. *Virginia*, 135 U. S. 693.

The word contract as used in the Constitution will not be given a narrow construction. *Dartmouth College Case*, 4 Wheat. 518, 630, 645; *Bryan* v. *Board of Education*, 151 U. S.

650; *Fuller* v. *Trustees,* 6 Connecticut, 532; *Pulford* v. *Fire Department,* 31 Michigan, 458.

There are many rights of enjoyment, privileges and personal benefits growing out of agreement or contract, which, though having no actual market value, the courts will enforce because of the mutual obligations contained in such agreement or contract, provided they are not of governmental nature, like marriage and divorce, or similar rights. *Med. Soc.* v. *Weatherly,* 75 Alabama, 248; *Commonwealth* v. *St. Patrick Soc.,* 2 Binney, 441; *Evans* v. *Philadelphia Club,* 50 Pa. St. 107; *Society* v. *Commonwealth,* 52 Pa. St. 125; *People* v. *Musical Union,* 118 N. Y. 101; *Sibley* v. *Club,* 40 N. J. L. 295; *Otto* v. *Tailors' Union,* 75 California, 308; *Savannah Cotton Exchange* v. *State,* 54 Georgia, 668; *Fisher* v. *Keane,* L. R., 11 Ch. Div. 353; *Lambert* v. *Wadhams,* 46 L. T. Report, 20; *Huber* v. *Martin,* 105 N. W. Rep. 1031; *Stone* v. *Mississippi,* 101 U. S. 820.

Constitutional protections should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. *Boyd* v. *United States,* 116 U. S. 616, 635; *Gulf &c. R. R. Co.* v. *Ellis,* 165 U. S. 150, 154.

The statute is also violative of § 1 of the Fourteenth Amendment, which prohibits any State from depriving any person of life, liberty or property without due process of law. The statute is a flagrant effort to take, so far as the National Council is concerned, the property of the citizen of another State without due process of law. *Wally's Heirs* v. *Kennedy,* 2 Yerg. (Tenn.) 556; *State* v. *Duffy,* 7 Nevada, 349; *Budd* v. *State,* 3 Humph. 483, 492; *Millett* v. *People,* 117 Illinois, 301; *Holden* v. *James,* 11 Massachusetts, 396, 405; *State* v. *Pennoyer,* 18 Atl. Rep. 878; Cooley Const. Lim. 556.

The statute is void, because it also violates the provisions of § 1, Fourteenth Amendment, forbidding any State to deny to any person within its jurisdiction the equal protection of

its laws. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559; *State* v. *Odd Fellows*, 8 Mo. App. 148, 155.

As to what is discrimination, see *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366; *Atchison R. R. Co.* v. *Matthews*, 174 U. S. 105.

No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. *Relfe* v. *Rundle*, 103 U. S. 222.

Being thus within the jurisdiction of the State at the time of the adoption of the statute complained of, and not having been driven without its jurisdiction by said statute, as declared by the Supreme Court of Virginia, in construing the same, the National Council was entitled to the equal protection of the laws. *Marchant* v. *Penn. R. R. Co.*, 153 U. S. 380, 389; *Duncan* v. *Missouri*, 152 U. S. 382; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 410; *Cotting* v. *Kansas City*, 183 U. S. 105; *Railway* v. *Ellis*, 165 U. S. 150; *Connolly* v. *Union &c. Co.*, 184 U. S. 540, 558.

The denial to the National Council, plaintiff in error, of the right to operate in Virginia, is, in effect, an unwarranted abridgment of the privileges of the members, citizens of the United States.

No State can say that an organization of another State, whether incorporated or voluntary, cannot enter the limits of a State for the spread of religious, educational, or governmental principles, unless those doctrines be shocking to decency or manifestly dangerous to the body politic, or that such an organization cannot enter its limits to solicit adherents and form them into local bodies or associations. The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. *United States* v. *Cruikshank*, 92 U. S. 542; *Watson* v. *Jones*,

13 Wall. 679, 729; *Franklin* v. *Commonwealth*, 10 Barr, 357; *Society* v. *Commonwealth*, 52 Pa. St. 125, 132. Especially is this true where the questions partake of a national nature.

The rights to be protected by these proceedings are not only those of the plaintiff in error, the National Council, but also those of the State Council, a voluntary association, composed of the citizens of Virginia, those of the Lovettsville Council, a domestic corporation of Virginia, and those of each of the other subordinate councils in the State, voluntary associations composed of the citizens of Virginia, as well as those of individual members of subordinate councils who are citizens of Virginia.

Mr. Samuel A. Anderson and *Mr. Frank W. Christian*, for defendant in error:

The National Council being a corporation of Pennsylvania, had no right to exist or carry on any operations in Virginia except at the mere pleasure of the latter State, and persons acting under its authority as agents and representatives had no larger power than the corporation they represented. No contract has been pointed out or can be pointed out by the plaintiffs in error, the obligation of which has been impaired by the act of February 17, 1900. Said act does not deprive the National Council and the other defendants, its agents and representatives, of liberty or property without due process of law, nor deny to the said council equal protection of the law. The State has the power to terminate the right of a foreign corporation to do business at any time, so long as it does not deprive that corporation of its actual property. The provision of the Federal Constitution in respect to state legislation impairing the obligation of contracts has always been limited, and applied to only cases of contracts creating some right in respect to property or subjects of pecuniary value. *Butler* v. *Pennsylvania*, 10 How. 402, 416.

No contract is involved which is within the protection of the Federal Constitution. Even if there were a contract of that

nature, it was made subject to the inherent reserved power of the State of Virginia at any time to pass an act of the nature of that of February 17, 1900, excluding the National Council from further operation, through its agents, within the State. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Pembina Silver Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Hooper* v. *California*, 155 U. S. 648; *Missouri* v. *Dockery*, 191 U. S. 165; *Travellers' Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Lehigh Valley Co.* v. *Hamlin*, 23 Fed. Rep. 225; *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt. 614; *Slaughter's Case*, 13 Gratt. 767.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to reverse a decree in favor of the defendant in error, the original plaintiff, and hereinafter called the plaintiff. 104 Virginia, 197. The plaintiffs in error will be called the defendants. The plaintiff is a Virginia corporation. The principal defendant is a Pennsylvania corporation. The other defendants are alleged to be officers of a voluntary association, calling itself by the plaintiff's name, and are acting under a charter from the Pennsylvania corporation. The latter was incorporated in 1893, the articles of association reciting that the associates comprise the National Council, the supreme head of the order in the United States (where it previously had existed as a voluntary association). Its objects were to promote the interests of Americans and shield them from foreign competition, to assist them in obtaining employment, to encourage them in business, to establish a sick and funeral fund, and to maintain the public school system, prevent sectarian interference with the same, and uphold the reading of the Holy Bible in the schools. As the result of internal dissensions the Virginia corporation was chartered in 1900, with closely similar objects, omitting those relating to the public schools. It seems to have consisted of the dominant portion of a former

voluntary State Council of the same name, from which a charter issued by the Pennsylvania corporation had been withdrawn. The act of incorporation declared that the new body "shall be the supreme head of the Junior Order of the United American Mechanics in the State of Virginia," and provides that it "shall have full and exclusive authority to grant Charters to subordinate Councils, Junior Order United American Mechanics, in the State of Virginia, with power to revoke the same for cause." The plaintiff and the voluntary organization of the defendants both have granted and intend to grant charters to subordinate councils in Virginia, and are obtaining members and fees which each would obtain but for the other, and are holding themselves out as the only true and lawful State Council of the Virginia Junior Order of United American Mechanics.

The plaintiff sued for an injunction, and the defendants, in their answer, asked cross relief. The plaintiff obtained a decree enjoining the defendant corporation and the other defendants (declared to be shown by their answers to be its agents and representatives), as officers of the Virginia voluntary association, from continuing within the State the use of the plaintiff's name or any other name likely to be taken for it; from using the plaintiff's seal; from carrying out under such name the objects for which the plaintiff and the Virginia voluntary association were organized; from granting charters to subordinate councils in the State as the head of the order in the State; from interfering in any way with the pursuit of its objects by the plaintiff within the State; and from designating their officers within the State by appellations set forth as used by the plaintiff. On appeal the decree was affirmed, with a modification, merely by way of caution, providing that nothing therein contained should, in anywise, interfere with any personal or property rights that might have accrued before the date of the Virginia charter. The defendants had set up in their answer and insisted that the charter impaired the obligation of the contract existing between the plaintiff

and the principal defendant, contrary to Article I, section 10, of the Constitution, and also violated section 1 of the Fourteenth Amendment, and they took a writ of error from this court.

The bill and answer state the two sides of the difference which led to the split, at length. But those details have no bearing that needs to be considered here. The only question before us is the constitutionality of the act of the Virginia legislature granting the charter. The elements of that question are the appropriation of the names of the previously existing voluntary society and the exclusive right of granting subcharters in Virginia conferred by the words that we have quoted. Whether the persons who were using that name when they got themselves incorporated were using it rightly or wrongly does not matter if the legislature had the right to grant the name to them in either case. On the other hand, we do not consider the question stated to be disposed of by the limitation put upon the decree by the Supreme Court of Appeals. Unless the saving of personal and property rights existing at the date of the charter be read as a construction of the charter, it does not affect the scope or validity of the act. And if so read, still it cannot be taken to empty the specific prohibitions in the decree of all definite meaning and to leave only an indeterminate injunction to obey the law at the defendant's peril. That injunction remains, and imports what the words of the charter import, that the plaintiff has been granted certain defined exclusive rights which the court will enforce.

The decree, however, goes beyond the rights which we have mentioned as given by the charter. In that respect the discussion here must be limited again. Whether the plaintiff is using paraphernalia, or a ritual, or a seal, which it should not be allowed to use, is not before us here. The charter says nothing about them, and its validity is not affected by any abuse of rights of property or of confidence which the plaintiff or its members may have practiced. This court, we re-

peat, cannot go beyond a decision upon the constitutionality of the charter granted, and we address ourselves to that.

The contract of which the obligation is alleged to have been violated is a contract between the plaintiff and the principal defendant. What that contract is supposed to have been is not stated, but manifestly there was none. It would have had to be a contract not to come into existence, at least with the plaintiff's present functions and name. There have been cases where administration was taken out on a prematurely born child and a suit brought for causing it to be born *per quod* it died but they have failed. *Dietrich* v. *Northampton*, 138 Massachusetts, 14. See *Walker* v. *Great Northern Ry. Co. of Ireland*, 28 L. R. Ir. 69. An antenatal contract presents greater difficulties still. Even if we should substitute an allegation of a contract with the members of the plaintiff, the contention would fail. The contract, if any there was, was not that they would not become incorporated, but must be supposed to be that they would retain their subordination to the National Council, or something of that sort. It is going very far to say that they contracted not to secede, but whether they did so or not, it was a matter outside the purview of the charter. There was nothing in that to hinder their returning to their allegiance. Whether any, and, if any, what contract was made (*National Council, Junior Order United American Mechanics* v. *State Council*, 64 N. J. Eq. 470, 473; *S. C.*, 66 N. J. Eq. 429), and whether, if made, it must not be taken to have been made subject to the powers of the State, with which we are about to deal, are questions which we may pass. See *Pennsylvania College cases*, 13 Wall. 190, 218; *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227.

The most serious aspect of the defense is presented by the matter of the plaintiff's name. If the legislation of a State undertook to appropriate to the use of its own creature a trade name of known commercial value, of course the argument would be very strong that an act of incorporation could not interfere with existing property rights. And no doubt

within proper limits the argument would be as good for a foreign corporation as for a foreign person. But that is not what has been done in this case.

The name in question is not the name of the principal defendant, but distinguished from that name as State and National Councils no doubt generally are distinguished by members of similar institutions. It is the name of a voluntary association of which the officers are defendants. But it is not used even by that association in its own right, but only under a charter from, and in the right of, the Pennsylvania corporation. Furthermore, the name is not associated with a product of any kind. Its only value to the defendants, in a property sense, is as tending to invite membership in a club which professes to derive its existence and its powers from the Pennsylvania company. It does not seem likely that any one would join the plaintiff, and certainly no member could be retained, in ignorance of its alienation from the National Council. As the National Council has its branches elsewhere, and as the plaintiff is on its face a state organization, competition outside the State appears improbable. So that the claim of the defendants comes down to a claim of right to compete within the State, and a right, as we have said, of or in behalf of the Pennsylvania corporation, which controls the existence of its subordinate Virginia councils. Thus the question as to the grant of the name passes over into the question as to the exclusive right of the plaintiff to issue charters which was the other legislative grant.

The Supreme Court of Appeals was right, therefore, in treating the constitutional question as depending on the power of the State with regard to foreign corporations. That must decide the case. Now it is true, of course, that an unconstitutional law no more binds foreign corporations than it binds others. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 409. And no doubt a law specially directed against a foreign corporation might be unconstitutional, for instance, as depriving it of its property without due process of law. See *Blake* v.

McClung, 172 U. S. 239, 260. But when the so-called property consists merely in the value that there might be in extending its business or membership into a State, that property, it hardly needs to be said, depends upon the consent of the State to let the corporation come into the State. The State of Virginia had the undoubted right to exclude the Pennsylvania corporation and to forbid its constituting branches within the Virginia boundaries. As it had that right before the corporation got in, so it had the right to turn it out after it got in. *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246. It follows that the State could impose the more limited restriction that simply forbade the granting of charters to "subordinate Councils, Junior Order United American Mechanics, in the State of Virginia."

It is argued that the power of the State in this case was less than it otherwise might have been because it did not turn the Pennsylvania corporation out. The Supreme Court of Appeals says that the plaintiff's charter leaves the whole order of things as it existed unaffected except by the exclusive right of the plaintiff to issue subordinate charters. It is said that the general statutes recognized the defendant and authorized such associations to continue within the State. A subordinate Council of the order had been granted a special charter which is not revoked. The conclusion is drawn that the restrictions upon the defendant which flow from the charter to the plaintiff amount to a denial of the equal protection of the laws of Virginia to a person within its jurisdiction. But the power of the State as to foreign corporations does not depend upon their being outside of its jurisdiction. Those within the jurisdiction, in such sense as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws. A single foreign corporation, especially one unique in character, like the National Council, might be expelled by a special act. It equally could be restricted in the more limited way.

There were many difficult questions presented to the state

court which cannot be reviewed here. As to the constitutionality of the plaintiff's charter we are of opinion that the court was right.

Decree affirmed.

CLARK *v.* WELLS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 42. Submitted October 18, 1906.—Decided November 19, 1906.

No valid judgment *in personam* can be rendered against a defendant without personal service or waiver of summons and voluntary appearance; an appearance, for the sole purpose of obtaining a removal to a Federal court, of a defendant, not personally served but whose property has been attached in a suit in a state court, does not submit the defendant to the general jurisdiction or deprive him of the right to object, after the removal of the case, to the manner of service.

After a case has been removed from the state court to the Federal court the latter has full control of the case as it was when the state court was deprived of its jurisdiction, and property properly attached in the state court is still held to answer any judgment rendered against the defendant, and publication of the summons in conformity with the state practice is sufficient as against the property attached. But a judgment entered on such service by publication can be enforced only against property attached.

Where a judgment collectible only from property attached is absolute on its face, the court so entering it exceeds its jurisdiction and the judgment will be modified and made collectible only from such property.

136 Fed. Rep. 462, modified and affirmed.

THE facts are stated in the opinion.

Mr. Walter M. Bickford, Mr. George F. Shelton and *Mr. William A. Clark, Jr.*, for plaintiff in error:

The Circuit Court was wholly without jurisdiction to proceed in said cause either against the person or property of plaintiff in error, and the judgment against him was void.

The attachment of his property in the State of Montana did not give the state court jurisdiction to proceed to render a judg-

ment against the plaintiff in error without personal service of process upon him within the State of Montana. *Pennoyer* v. *Neff*, 95 U. S. 714; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 445; *Goldey* v. *Morning News*, 156 U. S. 518, 521; *Mexican Cent. Ry. Co.* v. *Pinkney*, 149 U. S. 209; *Kendall* v. *United States*, 12 Pet. 623; *Harris* v. *Hardeman*, 14 How. 334.

Nor did the state court have jurisdiction to render a judgment collectible out of the property attached alone without publication of summons or substituted service in the manner required by the Code of Civil Procedure of the State of Montana. Sec. 890, Code of Civ. Pro., Montana; *Low* v. *Adams*, 6 California, 281; *Barber* v. *Morris*, 37 Minnesota, 194; *Heffner* v. *Gunz*, 29 Minnesota, 108; *Walker* v. *Cottrell*, 6 Baxt. (Tenn.) 267; *Cooper* v. *Reynolds*, 10 Wall. 308.

When the case was removed to the United States court the only way in which summons could be served so as to give that court jurisdiction is the method prescribed by the laws of the United States. And this was not done. Service of process by publication under a state law in a case pending in the United States court does not confer jurisdiction on that court.

The filing of the petition and bond for removal in the state court did not constitute an appearance on the part of the plaintiff in error, and he was at liberty to assert in the Circuit Court of the United States the want of jurisdiction over his person on the ground that process had not been served upon him at all.

The appearance of the plaintiff in error in the state court for the purpose of removing the case to the Federal court was a special appearance for that purpose alone, and in express terms reserved the right to object to the jurisdiction of the court over his person or property. *Goldey* v. *Morning News*, 156 U. S. 518; *Wabash Western Ry.* v. *Brow*, 164 U. S. 271, 279; *National Accident Society* v. *Spiro*, 164 U. S. 281; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 411; *Courtney* v. *Pradt*, 196 U. S. 89, 92.

After removal into the Circuit Court the cause must proceed in the same manner as if it had been originally commenced in the said Circuit Court, and the fact that property had been attached while the cause was pending in the state court prior to removal did not give the Circuit Court jurisdiction to proceed to a judgment without personal service of process upon the defendant within the State and District of Montana. Sec. 8, act of March 3, 1875, 18 Stat. 472.

The service of process must have been personal upon the defendant within the State and District of Montana in order to enforce the attachment lien. *Perkins* v. *Hendryx*, 40 Fed. Rep. 657; *Toland* v. *Sprague*, 12 Pet. 300.

Under the act of March 3, 1875, as amended by the acts of 1887 and 1888, § 3, after the case has been removed from the state court to the Federal court, it proceeds in the same manner as if it had been originally commenced in the said Circuit Court. 18 Stat. 470, 1 Comp. Stat. 510; *Levy* v. *Fitzpatrick*, 15 Pet. 167; *Herndon* v. *Ridgeway*, 17 How. 424; *Chaffee* v. *Hayward*, 20 How. 208; *Harland* v. *United Lines Tel. Co.*, 40 Fed. Rep. 308; § 915, Rev. Stat.; *Nazro* v. *Cragin*, 3 Dill. 474; *Chittenden* v. *Darden*, 2 Woods, 437; *Central Trust Co.* v. *Chattanooga Co.*, 68 Fed. Rep. 685, 695.

The act does not confer upon the United States courts jurisdiction to entertain suits by the process of foreign attachment, and the statute and any rule adopting the state laws do not give a Circuit or District Court power thus to acquire jurisdiction over a person not a resident of the district, nor served with process therein. *Day* v. *Rubber Co.*, 1 Blatchf. 630; *S. C.*, Fed. Cas., 3,685; *Atkins* v. *Fibre Co.*, 7 Blatchf. 566; *S. C.*, Fed. Cas., 602; *Saddler* v. *Hudson*, 2 Curt. 7; *S. C.*, Fed. Cas., 12,206; *Anderson* v. *Shaffer*, 10 Fed. Rep. 267; *Noyes* v. *Canada*, 30 Fed. Rep. 666; *Treadwell* v. *Seymour*, 41 Fed. Rep. 581; *Ex parte Railway Co.*, 103 U. S. 794.

If the attachment proceedings constituted a legal or equitable lien upon the property of the plaintiff in error, within the meaning of § 8 of act of March 3, 1875, the publication of

summons or other substituted service provided for by the Montana Code did not apply; and the proceedings taken under the Montana statute were ineffectual to confer upon the United States Circuit Court jurisdiction over the person or property of the defendant. Cases cited *supra* and *Roller* v. *Holly*, 176 U. S. 398.

The provision in the act of 1875 expressly provides a method by which an absent defendant may be brought into the United States court, when a suit is there pending to enforce any legal or equitable lien upon real or personal property, and the method is outlined in the act. It is different in essential respects from the method provided by the Code of Montana, and which was followed by the defendant in error. If Congress has legislated upon a given subject and prescribed a definite rule for the government of the Federal courts, it is exclusive of any legislation of the States on the same subject. *Ex parte Fisk*, 113 U. S. 713; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 209; *Whitford* v. *Clark County*, 199 U. S. 522.

Mr. N. W. McConnell for defendant in error:

Under §§ 914, 915, Rev. Stat., in common-law cases in the Circuit and District Courts, the plaintiff shall be entitled to similar remedies by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such state laws as may be in force in the States where they are held in relation to attachments and other process, provided that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy. *Harland* v. *United Lines Telegraph Co.*, 40 Fed. Rep. 308; *Boston Electric Co.* v. *Electric Gas Lighting Co.*, 23 Fed. Rep. 838; *Anderson* v. *Shaffer*, 10 Fed. Rep. 266;

Toland v. *Sprague*, 12 Pet. 729; *Lackett* v. *Rumbaugh*, 45 Fed. Rep. 23.

There is a broad distinction between an action commenced properly in the state court and removed by the defendant to the United States Circuit Court and a case brought in the United States court. *Perkins* v. *Hendryx*, 40 Fed. Rep. 657; *Crocker Nat'l Bank* v. *Pagenstecher*, 44 Fed. Rep. 705; *Richmond* v. *Brookings*, 48 Fed. Rep. 241; *Purdy* v. *Wallace*, 81 Fed. Rep. 513.

Under § 914, Rev. Stat., the practice in the state courts in regard to notice should be the same in the United States Circuit Court. It is not a question of jurisdiction, but one purely of practice. Jurisdiction has been acquired by the attachment. *United States* v. *Ottman*, 1 Hughes, 313; *Pollard* v. *Dwight*, 4 Cranch, 421; *Toland* v. *Sprague*, 12 Pet. 330; *Levy* v. *Fitzgerald*, 15 Pet. 171; *Day* v. *Hayward*, 20 How. 214; *Barney* v. *Globe Bank*, 5 Blatchf. 107; *Sayler* v. *Northwestern Ins. Co.*, 2 Curtis, 212.

Congress has full constitutional power to give the United States courts jurisdiction over defendants non-resident in the district in which the actions against them are brought, and it has, in §§ 2 and 4 of the act of 1875, given this power in the single instance of suits commenced by attachment in state courts, and removed into United States courts. See 11 Myers, Fed. Dec., §§ 1638–43; *Tootle* v. *Coleman*, 107 Fed. Rep. 45.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon a question of jurisdiction of the Circuit Court, duly certified under the act of March 3, 1891, 26 Stat. 826.

The action below was commenced by Wells against Clark, September 20, 1904, in the District Court of the First Judicial District of Montana, in and for Lewis and Clark County, to recover on a promissory note in the sum of $2,500, with interest and costs. The summons in the action was returned

September 22, 1904, with the indorsement by the sheriff that Clark could not be found in his county.

An attachment was sued out under the statutes of Montana (Code of Civil Procedure, section 890 *et seq.*), and, on September 22, 1904, was levied upon all the right, title and interest of the defendant Clark in certain lots in Butte, Silver Bow County, Montana.

On October 18, 1904, Clark, appearing for the purpose of obtaining an order of removal, and no other, and reciting that he waived no right to object to the jurisdiction of the court over his person or property, filed his petition in the District Court of Lewis and Clark County for the removal of the cause to the Circuit Court of the United States for the District of Montana, upon the ground that he was a resident of San Mateo, California, and a citizen of that State, plaintiff being a citizen of Montana.

Upon bond filed such proceedings were had that the cause was ordered, on October 18, 1904, to be removed to the United States Circuit Court for the District of Montana.

After the filing of the record in the United States court an affidavit was filed on November 3, 1904, in the office of the clerk of the United States Circuit Court for an order for service by publication upon Clark as a non-resident, absent from the State, who could not be found therein. An order was thereupon made by the clerk of the United States court for service upon Clark by publication in a newspaper in the city of Helena, Lewis and Clark County, and the mailing of a notice to San Mateo, California, the alleged place of residence of the defendant. This method of procedure is in conformity with the Code of Civil Procedure of Montana, sections 637, 638. Publication was made, and a copy of the summons and complaint was served upon Clark at San Mateo, California, by the United States marshal in and for the Northern District of California. Secs. 637, 638, Civil Code of Procedure of Montana.

On December 6, 1904, Clark, appearing solely for that pur-

pose, filed a motion to quash the service of summons upon two grounds:

"1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the State and District of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

"2. That the publication of service herein, wherein and whereby the said summons has been published in a newspaper does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States court, nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and absolutely void under the laws of the United States."

The court overruled the motion and proceeded to render a judgment *in personam* against Clark for the amount of the note and costs.

It is contended by the plaintiff in error that inasmuch as the removal was made to the Federal court before service of a summons upon the defendant, and, as there was no personal service after the removal, there could be no valid personal judgment in that court for want of service upon the defendant. And it is insisted that the service by publication, if proper in such cases, could not be made under the state statute, but under the act of March 3, 1875, 18 Stat., 472, 1 Comp. Stat. 513, permitting the court to make an order for publication upon non-resident defendants in suits begun in the Circuit Court of the United States to enforce any legal or equitable lien upon a claim to real or personal property within the district where suit is brought.

It must be taken at the outset as settled that no valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction or waiver of summons and voluntary appearance therein.

Pennoyer v. *Neff*, 95 U. S. 714; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444, and cases cited.

Nor did the petition for removal in the form used in this case have the effect to submit the person of the defendant to the jurisdiction of the state court, or, upon removal to the Federal court deprive him of the right to object to the manner of service upon him, *Goldey* v. *The Morning News*, 156 U. S. 518, and the exercise of the right of removal did not have the effect of entering the general appearance of the defendant, but a special appearance only for the purpose of removal. *Wabash Western Ry.* v. *Brow*, 164 U. S. 271, 279.

But we cannot agree with the contention of counsel for plaintiff in error, that as a personal judgment can only be rendered upon personal service, and service by publication under the state statutes cannot be made in the Federal court, and that the United States statute (Act of March 3, 1875, 18 Stat. 470, 472), is inapplicable to the case, the effect of the removal is to render nugatory the attachment proceedings in the state court.

The purpose not to interfere with the lien of the attachment in the state court is recognized and declared in the statute (sec. 4 of the Removal Act, 24 Stat. 552), providing that when any suit is removed from a state court to the Circuit Court of the United States an attachment of the goods or estate of the defendant, had in the suit in the state court, shall hold the goods or estate attached to answer the final judgment or decree in the same manner as by law it would have been held to answer the final judgment or decree had it been rendered by the court in which the suit was commenced, and preserving the validity of all bonds or security given in the state court.

The transfer of the cause to the United States court gave the latter court control of the case as it was when the state court was deprived of its jurisdiction. The lands were still held by the attachment to answer such judgment as might be rendered against the defendant.

The defendant had a right to remove to the Federal court,

but it is neither reasonable nor consonant with the Federal statute preserving the lien of the attachment, that the effect of such removal shall simply be to dismiss the action wherein the state court had acquired jurisdiction by the lawful seizure of the defendant's property within the State.

When the jurisdiction of the state court was terminated by the removal that court had seized upon the attached property with the right to hold it to answer such judgment as might be rendered. In the absence of personal service the state statute provided for publication of notice of the pendency of the suit. If the defendant failed to appear the court might proceed to render a judgment, which would permit the attached property to be sold for its satisfaction. To render such a judgment in the absence of an appearance and defense the state court had only to require the statutory notice to the defendant when its proceedings were interrupted by the removal to the Federal court on the application of the defendant.

The Federal court thus acquired jurisdiction of a cause of which the defendant had notice, as appears by his petition for removal and the action of the state court invoked by him. The defendant, it is true, had not been personally served with process or submitted his person to the jurisdiction of either the state or Federal court. But he did not attack the validity of the attachment proceedings, which appear to be regular and in conformity to the law of the State. There was no necessity of publication of notice in the Federal court in order to warn the defendant of the proceeding; he knew of it, and to a qualified extent had appeared in it.

Without further notice to him, the court had jurisdiction to enter a judgment enforceable against the attached property. The judgment purported to be rendered as upon personal service and after a finding by the court "that the so-called special appearance for the removal hereinbefore recited was an absolute and unqualified submission to the jurisdiction of this [the Federal] court."

There are expressions in the opinion of the learned judge of the Circuit Court to the effect that the judgment rendered was intended to be effectual only to subject the attached property (136 Fed. Rep. 462), and it seems to be in the form used in some jurisdictions, which recognize that the property attached is all that is reached by the judgment rendered. But the judgment is absolute upon its face, and entered after a finding of full jurisdiction over the person of the defendant. It is in such form as can be sued upon elsewhere and be pleaded as a final adjudication of the cause of action set forth in the petition, and be executed against other property of the defendant, whereas the court had only jurisdiction to render a judgment valid against the property seized in attachment.

We hold that, to the extent that it rendered a personal judgment absolute in terms, the court exceeded its jurisdiction in the case, not having by service or waiver personal jurisdiction of the defendant.

The judgment to that extent is therefore modified and made collectible only from the attached property. So modified, the judgment is

Affirmed.

FISHER, ON BEHALF OF BARCELON, *v.* BAKER.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 214. Argued October 9, 10.—Decided December 3, 1906.

When an application on *habeas corpus* is denied because the writ had been suspended, and thereafter, and before appeal taken is allowed, the suspension is revoked, the question of power of the authorities to suspend the writ becomes a moot one not calling for determination by this court.

A proceeding in *habeas corpus* is a civil, and not a criminal, proceeding, and as final orders of Circuit or District Courts of the United States in such a proceeding can only be reviewed in this court by appeal, under § 10 of the Act of July 1, 1902, 32 Stat., 1369, a final order of the Supreme Court of the Philippine Islands in *habeas corpus* is governed by the same rules and can only be reviewed by appeal and not by writ of error.

THE facts are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Howard Thayer Kingsbury* was on the brief, for plaintiffs in error:

It was proper to determine this proceeding on the merits upon the return of the order to show cause. *Ex parte Yarbrough*, 110 U. S. 651, at 653; *Ex parte Milligan*, 4 Wall. 2, at 110. Under the Philippine Civil Government Act, the power of the Governor and Commission to suspend the privilege of the writ of *habeas corpus* is limited to cases in which "rebellion, insurrection, or invasion" actually exists. The language of the act is similar to that of the Constitution, and should be construed with reference thereto. Civil Gov't Act, sec. 5; U. S. Const. Art. 1, sec. 9; Doc. Hist. U. S. Const., vol. III, pp. 565, 628–726, vol. IV, pp. 824–825. History shows that a discretionary power of suspension is not a safeguard of the State, but an engine of tyranny. May's Const. History of England, vol. 2, pp. 252–259. The only suspensions in the United States have been authorized by Congress in particular

emergencies. *Merryman's case*, 17 Fed. Cas. No. 9487; 12 U. S. Stat. 755; 17 U. S. Stat. 13; Burgess on "Reconstruction and the Constitution," pp. 257–261.

The existence of a state of "rebellion, insurrection, or invasion" is a question of fact to be judicially determined by the courts. The test is the same as the test of peace or war; that is, whether the courts are open and performing their functions unhindered. *Milligan Case*, 4 Wall. 2, 121, 127; Dicey "The Law of the Constitution," 6th ed., p. 509; Pollock, "What is Martial Law," Law Quarterly Review, vol. 18, p. 152.

In re Boyle, 45 L. R. A. 832, is not applicable. Idaho Constitution, Art. I, sec. 5, Art. IV, sec. 4, Penal Code, secs. 5164, 5166. If the suspending authority is the sole judge of the facts, then the power is in effect discretionary and unlimited. The suspension of the writ is not analogous to executive acts to be performed by an officer acting within his usual sphere, but is the one instance in which the executive or legislative department is allowed to interfere with the usual processes of the judicial department.

It is only in questions of foreign war or peace that the decision of the political department is conclusive. *Aliter* of domestic war or insurrection. *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176; *Lincoln* v. *United States*, 197 U. S. 419.

There was no "rebellion, insurrection, or invasion" in the Province of Batangas at the time of the application herein. Philippine Commission Report, 1905, Part I, pp. 56, 58, 173, 216; Part 3, pp. 8, 133. "Insurrection" is necessarily political; ladronism is mere common law crime (Acts of Philippine Commission, Nos. 518, 1121, vol. 9, p. 235; vol. 15, p. 99). The Governments of the United States and of the Philippine Islands had expressly recognized the existence of peace (Phil. Comm. Report, 1905, vol. I, pp. 26, 801).

The prisoner is restrained of his liberty without due process of law, contrary to the Constitution and the Philippine Civil

Government Act (Sec. 5). He is in custody, and this court can relieve him.

Under the Constitution, the power to suspend the privilege of the writ of *habeas corpus* rests in Congress, and cannot be delegated to the Philippine Governor and Commission. This constitutional provision is applicable to the Philippines, and hence is controlling. *Rassmussen* v. *United States*, 197 U. S. 516; *Dorr* v. *United States*, 195 U. S. 138. The attempted inclusion of "insurrection," as a ground of suspension, is unconstitutional and void. "Insurrection" is not synonymous with rebellion. Birkheimer, Military Gov'm't and Martial Law, p. 485, quoting Lieber's Code.

Habeas Corpus, though procedural in form, is a substantive right of the most sacred character. It is the constitutional guarantee of the liberty of the individual.

The Solicitor General for defendant in error:

The writ must be dismissed for lack of jurisdiction. Petitioner's remedy was by appeal and not by writ of error. Sec. 10 of the Act of July 1, 1902, 32 Stat., 691, 695, provides that final judgments of the Supreme Court of the Philippines may be reviewed by the Supreme Court of the United States in the same manner and under the same regulations as the final judgments of the Circuit Courts of the United States. It is well settled that an order of a Circuit or District Court of the United States upon application for *habeas corpus* is reviewable only by appeal. *In re Morrissey*, 137 U. S. 157; *Rice* v. *Ames*, 180 U. S. 371, and cases cited. *Habeas corpus* is a civil and not a criminal proceeding, although instituted to arrest a criminal prosecution. *Ex parte Tom Tong*, 108 U. S. 556; *Farnsworth* v. *Montana*, 129 U. S. 104; *Cross* v. *Burke*, 146 U. S. 82.

The proclamation of the Philippine Governor suspending the writ was revoked October 19, 1905. If the application for *habeas corpus* had been renewed after that date, or if the writ had been granted and then dismissed, that determination

would necessarily have proceeded on other grounds than the suspension of the writ. There is, therefore, a mere moot question here, which the court will decline to consider under well settled precedents. *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308; *Mills* v. *Green*, 159 U. S. 651; *Kimball* v. *Kimball*, 174 U. S. 158; *Codlin* v. *Kohlhausen*, 181 U. S. 151.

The record contains significant evidence of the necessity for the Governor's action in suspending the writ. The intent of sec. 5, Act of July 1, 1902, was to commit to the executive the necessary determination of the fact that an exigency exists requiring suspension. Congress gave the power specifically, not leaving it to the doubtful question whether or not the provision of the Constitution, Art. I, sec. 9, cl. 2, applies to the Philippines. The precise limitation of the Constitution does not control. *Kepner* v. *United States*, 195 U. S. 100, 117; *Downes* v. *Bidwell*, 182 U. S. 279; and see *Dorr* v. *United States*, 195 U. S. 138. It is well settled that the executive determination in kindred matters is beyond judicial review. *Martin* v. *Mott*, 12 Wheat. 19; *Luther* v. *Borden*, 7 How. 1, 42, 45; Pomeroy's Constitutional Law, sec. 476; Tucker on the Constitution, p. 581. There is no illegal delegation of legislative power. *In re Oliver*, 17 Wisconsin, 703; *Railroad* v. *Commissioners*, 1 Ohio St. 88; *Field* v. *Clark*, 143 U. S. 649; *Locke's Appeal*, 72 Pa. St. 491; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Slack* v. *Railroad*, 13 B. Mon. 1, 23, 24; *Blanding* v. *Burr*, 13 California, 343, 357; *Moers* v. *City of Reading*, 21 Pa. St. 188, 202; Cooley, Const. Lim., 6th ed., pp. 137, 138, 142; *Dorr* v. *United States*, 195 U. S. 138, 143, 149, 153.

As to the Civil War situation. The question of a broad and inherent power in the executive alone was before the courts in connection with President Lincoln's orders and proclamations suspending the writ of *habeas corpus* during the Civil War, and it is conceded that the weight of authority is that under the Constitution the power to suspend the writ or to authorize its suspension belongs to Congress and not to the President. *Ex parte Merryman*, Taney, 1246; *Ex parte Benedict*, Fed. Cas.

No. 1292; *McCall* v. *McDowell*, 1 Abb. 212; *Ex parte Field*, 5 Blatchf. 63; *In re Kemp*, 16 Wisconsin, 359; *In re Oliver*, 17 Wisconsin, 703. But here the case is entirely different. The executive is not assuming to act alone, but under the specific authority of Congress, and the question of an inherent power in the executive is not involved. *Ex parte Milligan*, 4 Wall. 2, is not against our contentions. The only point adjudged there was that a resident of a loyal State, where the Federal courts were meeting and peacefully transacting their business, could not constitutionally be tried and punished by a military commission; that the *habeas corpus* act of 1863 forbade this and gave the Circuit Court complete jurisdiction, and that, therefore, the writ was properly issued. As to later cases, see the constitution of Idaho, art. I, sec. 5; *In re Boyle*, 45 L. R. A. 832; *Ex parte Moore*, 64 N. C. 802.

It has been declared and held that the President may not suspend the privileges of the writ of *habeas corpus* without the authority of an act of Congress. It has been decided that, so authorized, he may determine at his discretion whether the public safety requires suspension and suspend the writ accordingly. It has not been decided that, so authorized, he may not determine whether the exigency of invasion or rebellion has arisen. There can be no doubt of the intent of the act for the Philippines, and it is not subject to the precise limitations of the constitutional provision.

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

Application for the writ of *habeas corpus* was made to the Supreme Court of the Philippine Islands August 2, 1905, on behalf of one Barcelon, seeking to be discharged from alleged illegal detention in the province of Batangas. An order to show cause was granted, returnable August 4, to which return was made, the cause heard and the application denied on the ground that the writ of *habeas corpus* had been suspended and

that the action of the Philippine authorities in that regard was not open to judicial review.

Petition for the allowance of a writ of error from this court, dated October 19, and service of copy thereof acknowledged by respondents the same day, was filed January 3, 1906, and the writ of error thereupon allowed and issued on that day.

The second clause of sec. 9 of art. I of the Constitution of the United States provides: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The seventh paragraph of sec. 5 of the act of Congress of July 1, 1902, 32 Stat., c. 1369, pp. 691, 692, reads: "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, wherever during such period the necessity for such suspension shall exist."

The record discloses that on January 31, 1905, the Philippine Commission adopted the following resolution:

"Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them under compulsion to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas these bands have in several instances attacked police and constabulary detachments and are in open insurrection against the constituted authorities; and

"Whereas it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary

investigations before justices of the peace and other judicial officers:

"Now, therefore, be it resolved, That, the public safety requiring it, the Civil Governor is hereby authorized and requested to suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas."

Whereupon, on the same day, the Civil Governor issued the following proclamation:

"Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them under compulsion to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas these bands have in several instances attacked police and constabulary detachments and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

"In the interest of the public safety, it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the provinces of Cavite and Batangas."

But we must take notice of the fact that on October 19, 1905, the Civil Governor issued a proclamation revoking that of January 31, 1905, as follows:

"Whereas the ladrone bands which up to a recent date infested the provinces of Cavite and Batangas have been practically destroyed and the members thereof killed or captured or have surrendered, so that the necessity for the continuance of the suspension of the writ of *habeas corpus* in the

aforesaid provinces which was made necessary by the conditions therein prevailing on the thirty-first day of January last no longer exists:

"Now, therefore, I, Luke E. Wright, Governor General of the Philippine Islands, being duly authorized and empowered thereto by the Philippine Commission, do hereby proclaim the revocation of the suspension of the writ of *habeas corpus* in the provinces of Cavite and Batangas which was made by me on the thirty-first day of January last."

This proclamation wiped out the basis of the decision sought to be reviewed on the day when the copy of the petition for writ of error was served on opposing counsel, and more than two months before the writ of error was issued. The question ruled by the court below and solely argued before us became in effect a moot question, not calling for determination here. *Mills* v. *Green*, 159 U. S. 651.

But the disposition of this writ of error must be rested on another ground.

The proceeding is in *habeas corpus*, and is a civil and not a criminal proceeding. *Cross* v. *Burke*, 146 U. S. 82, 88. Sec. 10 of the Philippine Act of July 1, 1902, 32 Stat. c. 1369, pp. 691, 695, provides:

"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."

Final orders of the Circuit Courts or District Courts of the United States in *habeas corpus* can only be reviewed by appeal and not by writ of error. *In re Morrisey*, 137 U. S. 157, 158; *Rice* v. *Ames*, 180 U. S. 371, 373. In the latter case the court said:

"Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the Court of Appeals Act of 1891, provision was made for an appeal to the Circuit Court in *habeas corpus* cases 'from the final decision of any court, justice or judge inferior to the Circuit Court,' Rev. Stat. sec. 763; and from the final decision of such Circuit Court an appeal might be taken to this court. Rev. Stat. sec. 764, as amended March 3, 1885, c. 353, 23 Stat. 437.

"The law remained in this condition until the Court of Appeals Act of March, 1891, was passed, the fifth section of which permits an appeal directly from the District Court to this court 'in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.' In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of *Bucklin* v. *United States*, 159 U. S. 680, in which the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an *appeal* was allowed in *habeas corpus* cases. The observation made in the *Bucklin* case that 'there was no purpose by that act to

abolish the general distinction, at common law, between an appeal and a writ of error,' may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued. *In re Lennon,* 150 U. S. 393; *Ekiu* v. *United States,* 142 U. S. 651; *Gonzales* v. *Cunningham,* 164 U. S. 612."

Writ of error dismissed.

ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY *v.* WEST VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 98. Submitted November 5, 1906.—Decided December 3, 1906.

A State has power to regulate its own creations and, *a fortiori,* foreign corporations permitted to transact business within its borders. The act of West Virginia, putting all non-resident domestic corporations having their places of business and works outside the State, and all foreign corporations coming into the State, on the same footing in respect to service of process, and making the state auditor their attorney in fact to accept process, is a reasonable classification and not unconstitutional as denying equal protection of the laws, because that provision does not apply to all corporations; nor does it deprive such corporations, without due process of law, of their liberty of contract; nor does the requirement that they pay such auditor an annual fee of ten dollars for services as such attorney amount to a taking of property without due process of law.

This is a writ of error to review a judgment of the Supreme Court of Appeals of West Virginia awarding a peremptory writ of mandamus, commanding the St. Mary's Franco-American Petroleum Company, by power of attorney, duly executed, acknowledged and filed in the office of the Auditor for the State of West Virginia, "to appoint said auditor and his successors in office, attorney in fact to accept service of process and notice in this State for said St. Mary's Franco-American Petroleum

Company, and by the same instrument to declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon the said St. Mary's Franco-American Petroleum Company, and that the petitioner recover from the respondent, her costs about the prosecution of her petition in this court in this behalf expended."

It was agreed by the parties that no rule to show cause need be issued on the petition for mandamus, nor any alternative writ, but that the petition might stand as such writ and the case be determined on demurrer thereto, which was filed.

The petition, among other things, averred that the St. Mary's Company was "a nonresident domestic corporation, organized, chartered, existing and carrying on its corporate business under and by virtue of the laws of the State of West Virginia, but having its principal office and place of business and chief works in the city of Lima, in the State of Ohio;" that the corporation "was organized, and now exists by virtue of a charter issued to it by the Secretary of State of the State of West Virginia on the 18th day of January, 1902;" and that "on the 17th day of February, 1902, the said defendant corporation, by power of attorney, duly and legally executed, filed and recorded, appointed one Wm. M. O. Dawson, a resident of the county of Kanawha in the State of West Virginia, to accept service on behalf of said corporation, and as a person upon whom service may be had of any process or notice, and to make returns of its property for taxation."

At the time the company was incorporated, sec. 8 of chap. 53 of the state code read:

"Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or

certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests."

And sec. 24 of chap. 54:

"Every such corporation having its principal office or place of business in this State shall, within thirty days after organization, by power of attorney duly executed, appoint some person residing in the county in this State wherein its business is conducted, to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make such return for and on behalf of said corporation to the assessor of the county or district wherein its business is carried on, as is required by the forty-first section of the twenty-ninth chapter of the code. Every such corporation having its principal office or place of business outside this State shall, within thirty days after organizing, by power of attorney duly executed, appoint some person residing in this State to accept service on behalf of said corporation, and upon whom service may he had of any process or notice, and to make return of its property in this State for taxation as aforesaid. The said power of attorney shall be recorded in the office of the clerk of the county court of the county, in which the attorney resides, and filed and recorded in the office of the Secretary of State, and the admission to record of such power of attorney shall be deemed evidence of compliance with the requirements of this section. Corporations heretofore organized may comply with said requirements at any time within three months after the passage of this act. Any corporation failing to comply with said requirements within six months after the passage of this act, shall forfeit not less than two hundred nor more

than five hundred dollars, and shall, moreover, during the continuance of such failure, be deemed a nonresident of this State, and its property, real and personal, shall be liable to attachment in like manner as the property of nonresident defendants; any corporation failing so to comply within twelve months after the passage of this act shall, by reason of such failure, forfeit its charter to the State, and the provisions of section eight, chapter twenty, acts one thousand eight hundred and eighty-five, relative to notice and publication, shall apply thereto."

On the 22d day of February, 1905, the legislature of West Virginia passed an act, chap. 39 of the Acts of 1905, which is as follows:

"Sec. 1. The auditor of this State shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this State, and of every nonresident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged and filed in the auditor's office of this State, appoint said auditor, and his successors in office, attorney in fact to accept service of process and notice in this State for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation.

"Sec. 2. Such foreign or nonresident domestic corporation shall at the time of taking out its charter, or procuring its authority to do business in this State, as the case may be, pay to the auditor as its said attorney ten dollars for his services as such for the then current year ending on the 30th day of April next ensuing; and on or before the first day of May, for each year, such corporation shall pay to said auditor the like sum of ten dollars for his services as such attorney. And all such corporations as have heretofore taken out charters, or procured authority to do business in this State, shall for the fiscal year

commencing on the first day of May, nineteen hundred and five, pay the sum of ten dollars to the auditor as the fee for such attorney to receive service of process, and annually thereafter a like sum, and such corporation shall not be required to pay any fee to the person who may have been heretofore appointed its attorney to receive service of process. All moneys received by the auditor under this chapter shall belong to the State, and be by him immediately paid into the state treasury. The auditor shall keep in a well bound book in his office a true and accurate account of all moneys so received and paid over to him.

"SEC. 3. The post office address of such corporation shall be filed with the power of attorney, and there shall be filed with the auditor from time to time statements of any changes of address of said corporation. Immediately after being served with, or accepting, any such process or notice, the auditor shall make and file with said power of attorney a copy of such process or notice with a note thereon indorsed of the time of service, or acceptance, as the case may be, and transmit such process or notice by registered mail to such corporation at the address last furnished as aforesaid. But no such process or notice shall be served on the auditor or accepted by him less than ten days before the return thereof.

"SEC. 4. In addition to the auditor, any such company may designate any other person in this State as its attorney in fact, upon whom service of process or notice may be made or who may accept such service. And, when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the auditor.

"SEC. 5. Failure to pay the attorney's fee as hereinbefore required shall have all the force and effect, and subject such corporation to the same penalties and forfeitures, as are or may be prescribed by law for failure to pay the license tax required to be paid by such corporation.

"SEC. 6. Any corporation failing to comply with the pro-

visions of this act in so far as it relates to the appointment of the auditor as its statutory attorney, within ninety days from its incorporation, shall forfeit one hundred dollars as a penalty for such failure, and upon failure to pay such penalty, the charter of such corporation shall thereby be forfeited and void."

The company refused to comply with the act, and, thereupon, this proceeding was instituted.

Mr. W. E. Chilton, for plaintiff in error:

Corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara* v. *Southern Pac. R. R.*, 118 U. S. 394; 4 Thompson Corp. § 5448. The act deprives this corporation of the equal protection of the laws. It is a foreign domestic corporation and subjected to the law, while resident domestic corporations, which have chief works in the State, are not affected. No statute, except this one, has ever undertaken arbitrarily to take away from a corporation its right to provide against accident, surprise, mistake and fraud, in an alleged attempt to secure to all persons having controversies with it, a fair and reasonable way to secure service of process upon it. See *State* v. *Goodwill*, 33 W. Va. 179, as to limiting right of contract.

The attempt to put this legislation upon the ground of public safety or any other specious public aspect is, with all respect, the merest pretense. It is paternal legislation. *Mugler* v. *Kansas*, 123 U. S. 661; *Williams* v. *Fears*, 179 U. S. 274; *People* v. *Gilson*, 109 N. Y. 389; *People* v. *Warden*, 157 N. Y. 116.

The constitutionality of the statute is to be determined not by what has been done in any particular instance, but what may be done under and by virtue of its authority. It is for the courts to determine what is due process of law, or what is the equal protection of the laws, and not for the legislature. *Lawton* v. *Steele*, 152 U. S. 133; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Yick Wo* v. *Hopkins*, 118 U. S. 356; Cooley's Const. Lim., 6th ed., 484.

This act is unjust and unfair for another reason. It allows the auditor to *accept* service of process for a given class of corporations.

The act is justified by the Supreme Court of Appeals of West Virginia, solely upon the ground that the reserved power to alter or amend gives the State the right to pass this law, and the opinion proceeds upon the theory that there is no limit to this power of the legislature. But this position is controverted by *Shields* v. *Ohio*, 95 U. S. 319, and see Code W. Va., ch. 53, § 53; Const. W. Va., Art. XI, § 4, as to the right to select agents.

This act takes away, not only a fundamental right, but one granted in the original charter, and without which the corporation could not transact business. *Lothrop* v. *Stedeman*, 13 Blatchf. 134; Brannon, Fourteenth Amendment, 365; *Holyoke* v. *Lyman*, 15 Wall. 500, 519. *Bank* v. *Owensboro*, 173 U. S. 636, distinguished.

The statute fixes a tax upon this corporation for a private purpose and not for a public purpose, and in so doing, it deprives this corporation of its property without due process of law.

The act requires every corporation to pay to the auditor as its said attorney ten dollars for his services as such for the then current year. All taxation shall be for public purposes. Brannon, Fourteenth Amendment, 160; *Cole* v. *LaGrange*, 113 U. S. 1; *Loan Ass'n* v. *Topeka*, 20 Wall. 665.

This is an arbitrary exercise of power, imposing a tax for private services, whether performed or not, whether needed or not. One corporation may require services worth many hundred dollars; another may require no service. Yet both are required to pay the same. If the law charged so much for each process served or transmitted, there would be some attempt at fairness, and some grounds for likening the case to that where fees are charged and covered into the treasury. *Charlotte* v. *Gibbs*, 142 U. S. 385, and *People* v. *Budd*, 145 U. S. 175, are not determining upon this case.

Mr. Clarke W. May, Attorney General of the State of West Virginia, for defendant in error:

The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation. *Pembina* v. *Pennsylvania*, 125 U. S. 181; Brannon's Fourteenth Amendment, 323. But see *Kentucky Tax Cases*, 115 U. S. 321; *McGoon* v. *Illinois*, 170 U. S. 283; it only requires that the same means and methods shall apply to all constituents of a class so that law may operate equally on all similarly situated. With the impotency of the law, the Constitution has no concern. *Mobile* v. *Kimball*, 102 U. S. 691.

In the case at bar, having the clear right to regulate and control its own creations, the State put all non-resident domestic corporations, which elected to have their places of business and works outside of the State, and all foreign corporations coming into the State, on an equal footing. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 43.

Plaintiff in error, having accepted the charter subject to the legislative right to amend or repeal it, cannot now complain of such amendment. *Hooper* v. *California*, 155 U. S. 648, 652; *Railway Co.* v. *Mackey*, 127 U. S. 205; *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *Louisville & Nashville* v. *Kentucky*, 183 U. S. 503; *Allgeyer* v. *Louisiana*, 165 U. S. 579.

For other statutes held not to be discriminatory, see *Tullis* v. *Earle*, 175 U. S. 348; *Railway Co.* v. *Hume*, 115 U. S. 348; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Blake* v. *McClung*, 172 U. S. 242; *McGoun* v. *Trust Co.*, 170 U. S. 283; *Clark* v. *Titusville*, 184 U. S. 329; Brannon, Fourteenth Amendment, ch. 16; *Narron* v. *Wilmington &c. R. R. Co.*, 122 N. Car. 856.

The imposition of a tax requiring the payment of ten dollars to the auditor for acting as attorney for a non-resident domestic corporation or a foreign corporation doing business in the State, which money goes to the State, is not a denial of the equal protection of the laws, nor does it deprive the company of its

property without due process of law. *Central Trust Co.* v. *Campbell,* 173 U. S. 84. And see *Barbier* v. *Connolly,* 113 U. S. 27 and *Soon Hing* v. *Crowley,* 113 U. S., 703, as to the distinction between what is and what is not invalid.

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

It is argued that the act of February 22, 1905, is invalid under the Fourteenth Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But in view of repeated decisions of this court, the contention is without merit. The State had the clear right to regulate its own creations, and, *a fortiori,* foreign corporations permitted to transact business within its borders.

In this instance it put all non-resident domestic corporations, which elected to have their places of business and works outside of the State, and all foreign corporations coming into the State, on the same footing in respect of the service of process, and the law operated on all these alike.

Such a classification was reasonable and not open to constitutional objection. *Orient Insurance Company* v. *Daggs,* 172 U. S. 557, 563; *Waters-Pierce Oil Company* v. *Texas,* 177 U. S. 43; *Central Loan and Trust Company* v. *Campbell,* 173 U. S. 84; *National Council* v. *State Council,* decided November 19, 1906, *ante,* p. 151; *Northwestern Life Insurance Company* v. *Riggs, post,* p. 243; Brannon on Fourteenth Amendment, Chap. 16.

It is true that the prior law left it to the corporation to appoint an attorney to represent it, and that the act of February, 1905, changed this so as to make the auditor such attorney, but this at the most was no more than an amendment as to the appointment of an agent, and when the St. Mary's Company accepted its charter it did so subject to the right of amendment. And we agree with the state court that the

requirement of the payment of ten dollars to the auditor for the use of the State does not amount to a taking of property without due process or an unjust discrimination. *Charlotte Railroad* v. *Gibbs,* 142 U. S. 386; *People* v. *Squire,* 145 U. S. 175. If the act is valid, that is.

The objections going to the expediency or the hardships and injustice of the act, and its alleged inconsistency with the state constitution and laws, are matters with which we have nothing to do on this writ of error, and the question whether the provision that the corporation shall not be required to pay any fee to any one theretofore appointed an attorney is invalid or not, requires no consideration on this record.

Judgment affirmed.

PETTIBONE *v.* NICHOLS.

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

No. 249. Argued October 10, 11, 1906.—Decided December 3, 1906.

The duty of a Federal court, to interfere, on *habeas corpus*, for the protection of one alleged to be restrained of his liberty in violation of the Constitution or laws of the United States must often be controlled by the special circumstances of the case, and except in an emergency demanding prompt action, the party held in custody by a State, charged with crime against its laws, will be left to stand his trial in the state court, which, it will be assumed, will enforce, as it has the power to do equally with a Federal court, any right asserted under and secured by the supreme law of the land.

Even if the arrest and deportation of one alleged to be a fugitive from justice may have been effected by fraud and connivance arranged between the executive authorities of the demanding and surrendering States so as to deprive him of any opportunity to apply before deportation to a court in the surrendering State for his discharge, and even if on such application to any court, state or Federal, he would have been discharged, he cannot, so far as the Constitution or the laws of the United States are concerned—when actually in the demanding State, in the custody of its authorities for trial, and subject to the jurisdiction thereof —be discharged on *habeas corpus* by the Federal court. It would be

improper and inappropriate in the Circuit Court to inquire as to the motives guiding or controlling the action of the Governors of the demanding and surrendering States.

No obligation is imposed by the Constitution or laws of the United States on the agent of a demanding State to so time the arrest of one alleged to be a fugitive from justice and so conduct his deportation from the surrendering State as to afford him a convenient opportunity, before some judicial tribunal, sitting in the latter State, upon *habeas corpus* or otherwise, to test the question whether he was a fugitive from justice and as such liable, under the act of Congress, to be conveyed to the demanding State for trial there.

This is an appeal from a judgment of the Circuit Court of the United States for the District of Idaho refusing, upon *habeas corpus*, to discharge appellant who alleged that he was held in custody by the Sheriff of Canyon County, in that State, in violation of the Constitution and laws of the United States.

It appears that on the twelfth day of February, 1906 a criminal complaint verified by the oath of the Prosecuting Attorney of that county, and charging Pettibone with having murdered Frank Steunenberg at Caldwell, Idaho, on the thirtieth day of December, 1905, was filed in the office of the Probate Judge. Thereupon, a warrant of arrest based upon that complaint having been issued application was made to the Governor of Idaho for a requisition upon the Governor of Colorado (in which State the accused was alleged then to be) for the arrest of Pettibone and his delivery to the agent of Idaho, to be conveyed to the latter State and there dealt with in accordance with law. The papers on which the Governor of Idaho based his requisition distinctly charged that Pettibone was in that State at the time Steunenberg was murdered and was a fugitive from its justice.

A requisition by the Governor of Idaho was accordingly issued and was duly honored by the Governor of Colorado, who issued a warrant commanding the arrest of Pettibone and his delivery to the authorized agent of Idaho, to be conveyed to the latter State. Pettibone was arrested under that warrant and carried to Idaho by its agent, and was there delivered by order of the Probate Judge into the custody of the Warden

of the state penitentiary, the jail of the county being deemed at that time an unfit place.

On the twenty-third day of February, 1906, Pettibone sued out a writ of *habeas corpus* from the Supreme Court of Idaho. The Warden made a return, stating the circumstances under which the accused came into his custody, and also that the charge against Pettibone was then under investigation by the grand jury. To this return the accused made an answer embodying the same matters as were alleged in the application for the writ of *habeas corpus*, and charging, in substance, that his presence in Idaho had been procured by connivance, conspiracy, and fraud on the part of the executive officers of Idaho, and that his detention was in violation of the provisions of the Constitution of the United States and of the act of Congress relating to fugitives from justice.

Subsequently, March 7, 1906, the grand jury returned an indictment against Pettibone, William D. Haywood, Charles H. Moyer, and John L. Simpkins, charging them with the murder of Steunenberg on the thirtieth of December, 1905, at Caldwell, Idaho. Having been arrested and being in custody under that indictment, the officer holding Pettibone made an amended return stating the fact of the above indictment and that he was then held under a bench warrant based thereon.

At the hearing before the Supreme Court of the State the officers having Pettibone in custody moved to strike from the answer of the accused all allegations relating to the manner and method of obtaining his presence within the State. That motion was sustained March 12, 1906, and the prisoner was remanded to await his trial under the above indictment. The Supreme Court of Idaho held the action of the Governor of Colorado to be at least *quasi* judicial and, in effect, a determination that Pettibone was charged with the commission of a crime in the latter State and was a fugitive from its justice; that after the prisoner came within the jurisdiction of the demanding State he could not raise in its courts the question whether he was or had been as a matter of fact a fugitive from

the justice of that State; that the courts of Idaho had no jurisdiction to inquire into the acts or motives of the executive of the State delivering the prisoner; that "one who commits a crime against the laws of a State, whether committed by him while in person on its soil or *absent in a foreign jurisdiction and acting through some other agency or medium*, has no vested right of asylum in a sister State," and the fact "that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining State, and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not answer the charge against him when brought before the proper tribunal." *Ex parte Pettibone*, 85 Pac. Rep. 902; *Ex parte Moyer*, 85 Pac. Rep. 897.

From the judgment of the Supreme Court of Idaho a writ of error was prosecuted to this court. That case is No. 265 on the docket of the present term, but the record has not been printed. But the parties agree that the same questions are presented on this appeal as arise in that case, and as this case is one of urgency in the affairs of a State, we have acceded to the request that they may be argued and determined on this appeal.

On the fifteenth of March, 1906, after the final judgment in the Supreme Court of Idaho, Pettibone made application to the Circuit Court of the United States, sitting in Idaho, for a writ of *habeas corpus*, alleging that he was restrained of his liberty by the Sheriff of Canyon County in violation of the Constitution and laws of the United States. As was done in the Supreme Court of Idaho, the accused set out numerous facts and circumstances which, he contended, showed that his personal presence in Idaho was secured by fraud and connivance on the part of the executive officers and agents of both Idaho and Colorado, in violation of the constitutional and statutory provisions relating to fugitives from justice. Consequently, it was argued, the court in Idaho did not acquire jurisdiction over his person. The officer having Pettibone in

custody made return to the writ that he then held the accused under the bench warrant issued against him. It was stipulated that the application for the writ of *habeas corpus* might be taken as his answer to the return. Subsequently, on motion, that answer was stricken out by the Circuit Court as immaterial, the writ of *habeas corpus* was quashed, and Pettibone was remanded to the custody of the State.

Mr. Edmund F. Richardson and *Mr. Clarence S. Darrow*, with whom *Mr. John H. Murphy* was on the brief for appellant:

These cases are *sui generis*. The facts show that the Governor of the State, upon whom the demand was made, had full knowledge of the falsity of the proceedings, and with such knowledge of that falsity, actually engaged in a conspiracy to remove citizens of his own State to another State, and actually furnished the military forces of his State to aid in the accomplishment of that purpose. This is not a case of actual fugitives from justice. If one has committed a crime within a State, and has fled therefrom, the law is not particular as to the means or the method by which his return to that State is insured. The law, however, will never wink at a fraud foisted upon itself, and especially is that true where that fraud is practiced by a sworn prosecuting officer and the chief executive of a State. No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. *United States* v. *Lee*, 106 U. S. 196, 220; *Burton* v. *United States*, 202 U. S. 344.

Jurisdiction of the subject matter in a court is one thing; jurisdiction of a person in any wise related to that subject matter is quite another. *Pennoyer* v. *Neff*, 95 U. S. 714, 724.

The jurisdiction of the persons of the defendants was acquired by the District Court of Canyon County, through the wrongs and the frauds of the prosecuting officer of that county, aided and abetted by the Governors of the States of Idaho and Colorado, through a conspiracy formed for that purpose. 2 Bishop on Crim. Law, 171.

Constitutional guaranties have been violated by the arrest of appellants. The Fourth Amendment provides that the right of the people to be secure in their persons against unreasonable seizures shall not be violated. *Ex parte Sawyer*, 124 U. S. 200.

No provision exists for extraditing one charged to have constructively committed an offense in a State in which he was not present. The Constitution and the law guards even an offender in such a case as that against extradition. *State* v. *Hall*, 115 N. C. 811.

It would be without due process of law. For definitions of due process of law see 3 Words and Phrases, 2227; *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 519; *Holden* v. *Hardy*, 169 U. S. 366; *State* v. *Ashbrook*, 154 Missouri, 375.

As protecting against arbitrary executive or judicial action see *People* v. *Adirondack Ry. Co.*, 160 N. Y. 225, 238; *State* v. *Hammer*, 116 Iowa, 284, 288; *Jenkins* v. *Ballantyne*, 8 Utah, 245.

The arrest and detention of these prisoners is in direct violation of cl. 2, § 2, Art. 4, of the Constitution, and § 5278, Rev. Stats. They were not fugitives from justice, never having been in Idaho. *Kentucky* v. *Dennison*, 24 How. 66, 110; *People* v. *Hyatt*, 172 N. Y. 176, reversed in *Hyatt* v. *Corkran*, 188 U. S. 691, 713; *Munsey* v. *Clough*, 196 U. S. 364; *Tennessee* v. *Jackson*, 36 Fed. Rep. 258; *Re Cook*, 49 Fed. Rep. 833; *S. C.*, 146 U. S. 183; *Ker* v. *Illinois*, 119 U. S. 436; *Mahon* v. *Justice*, 127 U. S. 700; *Re Moore*, 75 Fed. Rep. 821.

The foundation of jurisdiction of the court of Idaho over the persons of appellants is based upon a false affidavit by the District Attorney of Canyon County, and no lawful thing, founded upon a wrongful act, can be supported. *Ilsley* v. *Nichols*, 12 Pick. (Mass.) 270; *Luttin* v. *Benin*, 11 Mod. 50; *Smith* v. *Meyer*, 1 T. & C. (N. Y.) 665; *Re Largrave*, 45 How. Prac. 301; 2 Wharton, Conflict of Laws, § 849; *Re Allen*, 13 Blatchf. 271; *Hooper* v. *Lane*, 6 H. L. Cas. 443; *Hill* v. *Good-*

rich, 32 Connecticut, 588; *Re Robinson*, 8 L. R. A. (Neb.) 398; *Re Walker*, 61 Nebraska, 803; *Compton* v. *Wilder*, 40 Ohio St. 130; *Adriance* v. *Largrave*, 59 N. Y. 110; *Browning* v. *Abrahams*, 51 How. Prac. 173; *Kendall* v. *Ailshire*, 28 Nebraska, 707; *Lascelles* v. *Georgia*, 148 U. S. 537; *Adams* v. *People*, 1 N. Y. 173; *Ex parte Reggel*, 114 U. S. 642.

The Fourteenth Amendment forbids any arbitrary deprivation of liberty. *Re Converse*, 137 U. S. 624; *Hodgson* v. *Vermont*, 168 U. S. 262. And it is the duty of the Federal court to exercise its jurisdiction to protect appellant.

Federal courts have sometimes required the prisoner to await the action of the state courts upon the theory that the state courts were as likely to administer the law as were the courts of the United States, and they have sometimes withheld relief on writs of *habeas corpus*, and required defendants, who were convicted, to sue out writs of error, but they have never denied the authority of the Federal courts in the premises. *Robb* v. *Connolly*, 111 U. S. 624; *Roberts* v. *Riley*, 116 U. S. 80; *Bruce* v. *Runyan*, 124 Fed. Rep. 481; *Ex parte Hart*, 63 Fed. Rep. 249; *Re Roberts*, 24 Fed. Rep. 132; *Ex parte Brown*, 28 Fed. Rep. 653; *Ex parte Morgan*, 20 Fed. Rep. 298; *Ex parte Robb*, 19 Fed. Rep. 26; *Re Doo Woon*, 18 Fed. Rep. 898; *Ex parte McKean*, 16 Fed. Cas. No. 8848.

If this court will not act, appellant is without relief, and the circumstances warrant its intervention. *Allen* v. *Georgia*, 166 U. S. 138. Everything has been done before invoking the aid of this court which is required. *Whitten* v. *Tomlinson*, 160 U. S. 231.

While *habeas corpus* cannot usurp the functions of a writ of error, it is preëminently the writ on which to test jurisdiction, not error within jurisdiction. A fatal defect in jurisdiction itself is the question presented by this record. *Felts* v. *Murphy*, 201 U. S. 223; *Valentina* v. *Mercer*, 201 U. S. 131; *Whitney* v. *Dick*, 202 U. S. 232; *Wood* v. *Brush*, 140 U. S. 278; but whatever the usual rule may be, special circumstances authorize a departure from it. *Re Lincoln*, 202 U. S. 178.

Mr. James H. Hawley, with whom *Mr. W. E. Borah* was on the brief, for appellees:

There was no conspiracy and the proceedings were regular. Appellants were accessories to the crime, and can be tried as such. Sec. 7697 *et seq.* Rev. Stat. Idaho; *Territory* v. *Guthrie*, 2 Idaho, 432.

Even if, as is denied, the procedure was unlawful there is no right of asylum in a sister State by one who commits a crime against the laws of a State either while personally on its soil or while in a foreign jurisdiction and acting through some other agency or medium. *Mahon* v. *Justice*, 127 U. S. 715; *Lascelles* v. *Georgia*, 148 U. S. 543; *Ker* v. *Illinois*, 119 U. S. 436; *Re Moore*, 75 Fed. Rep. 824; *Re Cook*, 49 Fed. Rep. 833; *Cook* v. *Hart*, 146 U. S. 183.

How the accused person has come within the State wherein the crime was committed cannot be inquired into by the courts of such State. It is not a cause of exemption from prosecution for a crime that the accused was illegally arrested or unlawfully brought within the jurisdiction. 13 Cyc. Law & Pro. 99; 12 Ency. of Law, 607; Church on Hab. Cor., 461; *Ex parte Baker*, 13 Am. St. Rep. 17; *State* v. *Smith*, 19 Am. Dec. 679; *State* v. *Ross*, 21 Iowa, 467; *Dow's Case*, 18 Pa. St. 37.

There is no limitation or restriction upon the crime for which a man may be extradited in interstate extradition; that duty is equally imperative as to all crimes, and no right of return is provided for or necessarily implied. 2 Moore, Extradition, § 643; *Re Noyes*, 17 Alb. L. J. 407; *Ham* v. *State*, 4 Texas App. 645; *Harland* v. *Washington*, 3 Wash. Terr. 153; *State* v. *Stewart*, 60 Wisconsin, 587; *Ex parte Barker*, 87 Alabama, 4; *William* v. *Weber*, 1 Colo. App. 191; *State* v. *Brewster*, 7 Vermont, 120; *Adriance* v. *Lagrave*, 59 N. Y. 110; *United States* v. *Caldwell*, 8 Blatchf. 133; *United States* v. *Lawrence*, 13 Blatchf. 299, 307; *People* v. *Rowe*, 4 Park. Crim. Rep. 253; *Re Miles*, 52 Vermont, 609; *Mahon* v. *Justice*, 127 U. S. 700.

The court will not inquire into the legality of arrest. That the accused is in court is sufficient to require him to answer

the indictment against him. 12 Am. & Eng. Ency. of Law, 598; *Ex parte Scott*, 9 B. & C. 446; *State* v. *Kealy*, 89 Iowa, 94; *State* v. *Patterson*, 110 Missouri, 505; *State* v. *Smith*, 1 Bailey L. (S. Car.) 283.

There is no difference between cases of kidnaping by unauthorized persons and cases wherein the extradition is conducted under the forms of law but through mistake or intentionally the Governor of either the demanding or surrendering State has failed in his duty. The Governor upon whom the demand is made must determine for himself, in the first instance, whether the demanded person is a fugitive from justice. *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilley*, 116 U. S. 80; *People* v. *Pratt*, 78 California, 349; *Hyatt* v. *Corkran*, 188 U. S. 691, distinguished.

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

As the application for the writ of *habeas corpus* was, by stipulation of the parties, taken as the answer of the accused to the return of the officer holding him in custody, and as that answer was stricken out by the court below as immaterial, we must, on this appeal, regard as true all the facts sufficiently alleged in the application which, in a legal sense, bear upon the question whether the detention of the accused by the state authorities was in violation of the Constitution or laws of the United States.

That application is too lengthy to be incorporated at large in this opinion. It is sufficient to say that its allegations present the case of a conspiracy between the Governors of Idaho and Colorado, and the respective officers and agents of those States, to have the accused taken from Colorado to Idaho under such circumstances and in such way as would deprive him, while in Colorado, of the privilege of invoking the jurisdiction of the courts there for his protection against wrongful deportation from the State—it being alleged that the Governor

of Idaho, the Prosecuting Attorney of Canyon County, and the private counsel who advised them well knew all the time that "he was not in the State of Idaho on the thirtieth day of December, 1905, nor at any time near that date." The application also alleged that the accused "is not and was not a fugitive from justice; that he was not present in the State of Idaho when the alleged crime was alleged to have been committed, nor for months prior thereto, nor thereafter, until brought into the State as aforesaid."

In the forefront of this case is the fact that the appellant is held in actual custody for trial under an indictment in one of the courts of Idaho for the crime of murder charged to have been committed in that State against its laws, and it is the purpose of the State to try the question of his guilt or innocence of that charge.

Undoubtedly, the Circuit Court had jurisdiction to discharge the appellant from the custody of the state authorities if their exercise of jurisdiction over his person would be in violation of any rights secured to him by the Constitution or laws of the United States. But that court had a discretion as to the time and mode in which, by the exercise of such power, it would by its process obstruct or delay a criminal prosecution in the state court. The duty of a Federal court to interfere, on *habeas corpus*, for the protection of one alleged to be restrained of his liberty in violation of the Constitution or laws of the United States, must often be controlled by the special circumstances of the case, and unless in some emergency demanding prompt action the party held in custody by a State and seeking to be enlarged will be left to stand his trial in the state court, which, it will be assumed, will enforce—as it has the power to do equally with a court of the United States; *Robb* v. *Connolly*, 111 U. S. 624, 637—any right secured by the Supreme law of the land. "When the state court," this court has said, "shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be

put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." *Ex parte Royall*, 117 U. S. 241, 251, 253. To the same effect are numerous cases in this court, among which may be named *Ex parte Fonda*, 117 U. S. 516; *New York* v. *Eno*, 155 U. S. 89, 93; *Cook* v. *Hart*, 146 U. S. 183, 192; *Minnesota* v. *Brundage*, 180 U. S. 499, 501; *Reid* v. *Jones*, 187 U. S. 153; *Riggins* v. *United States*, 199 U. S. 547, 549. This rule firmly established for the guidance of the courts of the United States is applicable here, although it appears that the Supreme Court of Idaho has already decided some of the questions now raised. But the question of Pettibone's guilt of the crime of having murdered Steunenberg has not, however, been finally determined and cannot be except by a trial under the laws and in the courts of Idaho. If he should be acquitted by the jury, then no question will remain as to a violation of the Constitution and laws of the United States by the methods adopted to secure his personal presence within the State of Idaho.

The appellant, however, contends that the principle settled in *Ex parte Royall* and other like cases can have application only where the State has legally acquired jurisdiction over the person of the accused, and cannot apply when, as is alleged to be the case here, his presence in Idaho was obtained by fraud and by a violation of rights guaranteed by the Constitution and laws of the United States. Under such circumstances, it is contended, no jurisdiction could legally attach for the purpose of trying the accused under the indictment for murder.

In support of this view we have been referred to that clause of the Constitution of the United States providing that if "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." Art. 4, § 2;

also, to sec. 5278 of the Revised Statutes, in which it is provided that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory."

Looking, first, at what was alleged to have occurred in the State of Colorado touching the arrest of the petitioner and his deportation from that State, we do not perceive that anything done there, however hastily or inconsiderately done, can be adjudged to be in violation of the Constitution or laws of the United States. We pass by, both as immaterial and inappropriate, any consideration of the motives that induced the action of the Governor of Colorado. This court will not inquire as to the motives which guided the Chief Magistrate of a State when executing the functions of his office. Manifestly, whatever authority may have been conferred upon the Governor of Colorado by the constitution or laws of his State, he was not required, indeed, was not authorized by the Constitution or laws of the United States to have the petitioner arrested, unless within the meaning of such Consti-

tution and laws he was a fugitive from the justice of Idaho. Therefore he would not have violated his duty if it had been made a condition of surrendering the petitioner that evidence be furnished that he was a fugitive from justice within the meaning of the Constitution of the United States. Upon the Governor of Colorado rested the responsibility of determining, in some proper mode, what the fact was. But he was not obliged to demand proof of such fact by evidence apart from the requisition papers. As those papers showed that the accused was regularly charged by indictment with the crime of murder committed in Idaho and was a fugitive from its justice, the Governor of Colorado was entitled to accept such papers, coming as they did from the Governor of another State, as *prima facie* sufficient for a warrant of arrest. His failure to require independent proof of the fact that petitioner was a fugitive from justice cannot be regarded as an infringement of any right of the petitioner under the Constitution or laws of the United States. *Ex parte Reggel*, 114 U. S. 642, 652, 653. In *Munsey* v. *Clough*, 196 U. S. 364, 372, this court said that the issuing of a warrant of arrest by the Governor of the surrendering State, "with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the removal, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the Governor. *Roberts* v. *Reilly, supra; Hyatt* v. *Cockran*, 188 U. S. 691." See also *In re Keller*, 28 Fed. Rep. 681, 686.

But the petitioner contends that his arrest and deportation from Colorado was, by fraud and connivance, so arranged and carried out as to deprive him of an opportunity to prove, before the Governor of that State, that he was not a fugitive from justice, as well as opportunity to appeal to some court in Colorado to prevent his illegal deportation from its territory. If we should assume, upon the present record, that the facts are as alleged, it is not perceived that they make a case of the

violation of the Constitution or laws of the United States. It is true, as contended by the petitioner, that if he was not a fugitive from justice, within the meaning of the Constitution, no warrant for his arrest could have been properly or legally issued by the Governor of Colorado. It is equally true that, even after the issuing of such a warrant, before his deportation from Colorado, it was competent for a court, Federal or state, sitting in that State, to inquire whether he was, in fact, a fugitive from justice, and if found not to be, to discharge him from the custody of the Idaho agent and prevent his deportation from Colorado. *Robb* v. *Connolly,* 111 U. S. 624, 639; *Ex parte Reggel, supra; Hyatt* v. *Corkran,* 188 U. S. 691, 719; *Munsey* v. *Clough,* 196 U. S. 364, 374. But it was not shown by proof before the Governor of Colorado that the petitioner, alleged in the requisition papers to be a fugitive from justice, was not one, nor was the jurisdiction of any court sitting in that State invoked to prevent his being taken out of the State and carried to Idaho. That he had no reasonable opportunity to present these facts before being taken from Colorado constitutes no legal reason why he should be discharged from the custody of the Idaho authorities. No obligation was imposed *by the Constitution or laws of the United States* upon the agent of Idaho to so time the arrest of the petitioner and so conduct his deportation from Colorado, as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice and as such liable, under the act of Congress, to be conveyed to Idaho for trial there. In England, in the case of one arrested for the purpose of deporting him to another country, it is provided that there shall be no surrender of the accused to the demanding country until after the expiration of a specified time from the arrest, during which period the prisoner has an opportunity to institute *habeas corpus* proceedings. *Extradition Act of* 1870, 33 and 34 Vict. c. 52, § 11; 2 Butler on the Treaty-Making Power, § 436; 1 Moore on Extradition, 741, 742. There is no similar act of Congress in respect of a person

arrested in one of the States of the Union as a fugitive from the justice of another State. The speediness, therefore, with which the Idaho agent removed the accused from Colorado cannot be urged as a violation of a constitutional right and constitutes no legal reason for discharging him from the custody of the State of Idaho.

We come now to inquire whether the petitioner was entitled to his discharge upon making proof in the Circuit Court of the United States, sitting in Idaho, that he was brought into that State as a fugitive from justice when he was not, in fact, such a fugitive. Of course, it cannot be contended that the Circuit Court, sitting in Idaho, could rightfully discharge the petitioner upon proof simply that he did not commit the crime of murder charged against him. His guilt or innocence of that charge is within the exclusive jurisdiction of the Idaho state court. The constitutional and statutory provisions referred to were based upon the theory that, as between the States, the proper place for the inquiry into the question of the guilt or innocence of an alleged fugitive from justice is in the courts of the State where the offense is charged to have been committed. The question, therefore, in the court below was not whether the accused was guilty or innocent, but whether the Idaho court could properly be prevented from proceeding in the trial of that issue, upon proof being made in the Circuit Court of the United States, sitting in that State, that the petitioner was not a fugitive from justice and not liable, in virtue of the Constitution and laws of the United States, to arrest in Colorado under the warrant of its Governor and carried into Idaho. As the petitioner is within the jurisdiction of Idaho, and is held by its authorities for trial, are the particular methods by which he was brought within her limits at all material in the proceeding by *habeas corpus?*

It is contended by the State that this question was determined in its favor by the former decisions of this court. This is controverted by the petitioner, and we must, therefore, and particularly because of the unusual character of this case and

the importance of the questions involved, see what this court has heretofore adjudged.

In *Ker* v. *Illinois*, 119 U. S. 436, it appeared that at the trial in an Illinois court of a person charged with having committed a crime against the laws of that State, the accused sought by plea in abatement to defeat the jurisdiction of the court upon the ground that, in violation of law, he had been seized in Peru and forcibly brought against his will into the United States and delivered to the authorities of Illinois; all of which the accused contended was in violation not only of due process of law as guaranteed by the Fourteenth Amendment, but of the treaty between the United States and Peru negotiated in 1870 and proclaimed in 1874. One of the articles of that treaty bound the contracting countries, upon a requisition by either country, to deliver up to justice persons who, being accused or convicted of certain named crimes committed within the jurisdiction of the requiring party, should seek an asylum or should be found within the territories of the other, the fact of the commission being so established "as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." 18 Stat. 719, 720. The plea stated, among other things, that the defendant protested against his arrest and was refused opportunity, from the time of his being seized in Peru until he was delivered to the authorities of Illinois, of communicating with any person or seeking any advice or assistance in regard to procuring his release by legal process or otherwise.

The court overruled the plea of abatement, and the trial in the state court proceeded, resulting in a verdict of guilty. The judgment was affirmed by the Supreme Court of Illinois, and this court affirmed, upon writ of error, the judgment of the latter court. It was held by the unanimous judgment of this court that, so far as any question of Federal right was involved, no error was committed by the state court; and that, notwithstanding the illegal methods pursued in bringing

the accused within the jurisdiction of Illinois, his trial in the state court did not involve a violation of the due process clause of the Constitution, nor any article in the treaty with Peru, although the case was a clear one "of kidnapping within the dominion of Peru, without any pretense of authority under the treaty or from the Government of the United States." The principle upon which the judgment rested was that, when a criminal is brought or is in fact within the jurisdiction and custody of a State, charged with a crime against its laws, the State may, *so far as the Constitution and laws of the United States are concerned,* proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the State. "The case," the court said, "does not stand, when the party is in court, and required to plead to an indictment, as it would have stood upon a writ of *habeas corpus* in California, or in any States through which he was carried in the progress of the extradition, to test the authority by which he was held." In meeting the contention that the accused, Ker, by virtue of the treaty with Peru, acquired by his residence a right of asylum, this court said: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. . . . It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to

be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom. . . . We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right."

If Ker, by virtue of the treaty with Peru, and because of his forcible and illegal abduction from that country, did not acquire an exemption from the criminal process of the courts of Illinois, whose laws he had violated, it is difficult to see how Pettibone acquired, by virtue of the Constitution and laws of the United States, an exemption from prosecution by the State of Idaho, which has custody of his person.

An instructive case on this subject is *Mahon* v. *Justice*, 127 U. S. 700. The Governor of Kentucky made a requisition upon the Governor of West Virginia for Mahon, who was charged with the crime of murder in Kentucky, and was alleged to have fled from its jurisdiction and taken refuge in West Virginia. While the two Governors were in correspondence on the subject a body of armed men, without warrant or other legal process, arrested Mahon in West Virginia, and by force and against his will conveyed him out of West Virginia, and delivered him to the jailor of Pike County, Kentucky, in the courts of which he stood indicted for murder. Thereupon the Governor of West Virginia, on behalf of that State, applied to the District Court of the United States for the Kentucky District for a writ of *habeas corpus* and his return to the jurisdiction of West Virginia. This court, after observing that the States of the Union were not absolutely sovereign and could not declare war or authorize reprisals on other States, and that their ability to prevent the forcible abduction of persons from

their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by citizens of other States, said: "If such violators have escaped from the jurisdiction of the State invaded, their surrender can be secured upon proper demand on the executive of the State to which they have fled. The surrender of the fugitives in such cases to the State whose laws have been violated, is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one State by intruders and lawless bands from another State. The offenses committed by such parties are against the State; and the laws of the United States merely provide the means by which their presence can be secured in case they have fled from its justice. No mode is provided by which a person unlawfully abducted from one State to another can be restored to the State from which he was taken, if held upon any process of law for offenses against the State to which he has been carried. If not thus held he can, like any other person wrongfully deprived of his liberty, obtain his release on *habeas corpus*. Whether Congress might not provide for the compulsory restoration to the State of parties wrongfully abducted from its territory upon application of the parties, or of the State, and whether such provision would not greatly tend to the public peace along the borders of the several States, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided. The abduction of Mahon by Phillips and his aids was made, as appears from the return of the respondent to the writ, and from the findings of the court below, without any warrant or authority from the Governor of West Virginia. It is true that Phillips was appointed by the Governor of Kentucky as agent of the State to receive Mahon upon his surrender on the requisition; but no surrender having been made, the arrest of Mahon and his abduction from the State were lawless and indefensible acts, for which Phillips and his aids may be justly

punished under the laws of West Virginia. The process emanating from the Governor of Kentucky furnished no ground for charging any complicity on the part of that State in the wrong done to the State of West Virginia." Again: "It is true, also, that the accused had the right while in West Virginia of insisting that he should not be surrendered to the Governor of Kentucky by the Governor of West Virginia, except in pursuance of the acts of Congress, and that he was entitled to release from any arrest in that State not made in accordance with them; but having subsequently been arrested in Kentucky under the writs issued on the indictments against him, the question is not as to the validity of the proceeding in West Virginia, but as to the legality of his detention in Kentucky. There is no comity between the States by which a person held upon an indictment for a criminal offense in one State can be turned over to the authorities of another, though abducted from the latter. If there were any such comity, its enforcement would not be a matter within the jurisdiction of the courts of the United States. By comity nothing more is meant than that courtesy on the part of one State, by which within her territory the laws of another State are recognized and enforced, or another State is assisted in the execution of her laws. From its nature the courts of the United States cannot compel its exercise when it is refused; it is admissible only upon the consent of the State, and when consistent with her own interests and policy. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; Story's Conflict of Laws, § 30. The only question, therefore, presented for our determination is whether a person indicted for a felony in one State, forcibly abducted from another State and brought to the State where he was indicted by parties acting without warrant or authority of law, is entitled under the Constitution or laws of the United States to release from detention under the indictment by reason of such forcible and unlawful abduction."

After a review of the authorities, including the case of *Ker* v. *Illinois*, above cited, the court concluded: "So in this case,

it is contended that, because under the Constitution and laws of the United States a fugitive from justice from one State to another can be surrendered to the State where the crime was committed, upon proper proceedings taken, he has the right of asylum in the State to which he has fled, unless removed in conformity with such proceedings, and that this right can be enforced in the courts of the United States. But the plain answer to this contention is, that the laws of the United States do not recognize any such right of asylum, as is here claimed, on the part of a fugitive from justice in any State to which he has fled; nor have they, as already stated, made any provision for the return of parties who, by violence and without lawful authority, have been abducted from a State. There is, therefore, no authority in the courts of the United States to act upon any such alleged right. In *Ker* v. *Illinois*, the court said that the question of how far the forcible seizure of the defendant in another country, and his conveyance by violence, force, or fraud to this country, could be made available to resist trial in the state court for the offense charged upon him, was one which it did not feel called upon to decide, for in that transaction it did not see that the Constitution, or laws, or treaties of the United States guaranteed to him any protection. So in this case we say that, whatever effect may be given by the state court to the illegal mode in which the defendant was brought from another State, no right, secured under the Constitution or laws of the United States, was violated by his arrest in Kentucky, and imprisonment there, upon the indictments found against him for murder in that State."

These principles determine the present case and require an affirmance of the judgment of the Circuit Court. It is true the decision in the *Mahon* case was by a divided court, but its authority is none the less controlling. The principle upon which it rests has been several times recognized and reaffirmed by this court, and is no longer to be questioned. It was held in *Cook* v. *Hart*, 146 U. S. 183, 192, that the cases of *Ker* v. *Illinois* and *Mahon* v. *Justice* established these propositions:

"1. That this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State. 2. That the question of the applicability of this doctrine to a particular case is as much within the province of a state court, as a question of common law or of the law of nations, as it is of the courts of the United States;" in *Lascelles* v. *Georgia,* 148 U. S. 537, 543, that it was settled in the *Ker* and *Mahon* cases that, "except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process;" and in *Adams* v. *New York,* 192 U. S. 585, 596 (the same cases being referred to), that "if a person is brought within the jurisdiction of one State from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the State wherein he had committed an offense." See, also, *In re Johnson,* 167 U. S. 120, 127, in which the court recognized the principle that when a party in a civil suit has, by some trick or device, been brought within the jurisdiction of a court, he may have the process served upon him set aside, but that a different rule prevails in criminal cases involving the public interests.

To the above citations we may add *In re Moore,* 75 Fed. Rep. 821, in which it appeared or was alleged that one accused of crime against the laws of a State and in the custody of its authorities for trial, was brought back from another State as a fugitive from justice by means of an extradition warrant procured by false affidavits. In his application to the Circuit Court of the United States for a writ of *habeas corpus* the peti-

tioner stated facts and circumstances tending to show that he was not a fugitive from justice. The application was dismissed. After stating that the executive warrant issued by the surrendering State had performed its office and that the petitioner was not held in virtue of it, the court said: "His imprisonment is not illegal unless his extradition makes it so, and an illegal extradition is no greater violation of his rights of person than his forcible abduction. If a forcible abduction from another State and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged, as held in *Mahon* v. *Justice,* 127 U. S. 712, and in *Ker* v. *Illinois,* 119 U. S. 437, no more is the objection allowed if the abduction has been accomplished under the forms of law. The conclusion is the same in each case. The act complained of does not relate to the restraint from which the petitioner seeks to be relieved, but to the means by which he was brought within the jurisdiction of the court under whose process he is held. It is settled that a party is not excused from answering to the State whose laws he has violated because violence has been done him in bringing him within the State. Moreover, if any injury was done in this case in issuing the requisition upon the State of Washington without grounds therefor, the injury was not to the petitioner but to that State whose jurisdiction was imposed upon by what was done. The United States do not recognize any right of asylum in the State where a party charged with a crime committed in another State is found; nor have they made any provision for the return of parties who, by violence and without lawful authority, have been abducted from a State; and, whatever effect may be given by a state court to the illegal mode in which a defendant is brought from another State no right secured under the Constitution and laws of the United States is violated by his arrest and imprisonment for crimes committed in the State into which he is brought. *Mahon* v. *Justice,* 127 U. S. 715."

The principle announced in the *Mahon* and other cases above

cited was not a new one. It has been distinctly recognized in the courts of England and in many States of the Union. In *Ex parte Scott*, 9 B. & C. 446 (17 E. C. L. 204) (1829), one accused of crime against the laws of England, and who was in custody for trial, sought to be discharged upon *habeas corpus* because she had been improperly apprehended in a foreign country. Lord Tenterden, C. J., said: "The question, therefore, is this, whether if a person charged with a crime is found in this country it is the duty of the court to take care that such a party shall be amenable to justice or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we can not inquire into them. If the act complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it." Some of the American cases, to the same general effect, are cited in *Mahon* v. *Justice*, namely, *State* v. *Smith*, 1 Bailey (S. C.), 283; *State* v. *Brewster*, 7 Vermont, 118; *State* v. *Ross*, 21 Iowa, 467. See also *Dow's case*, 18 Pa. St. 37; *State* v. *Kealy*, 89 Iowa, 94, 97; *Ex parte Barker*, 87 Alabama, 4, 8; *People* v. *Pratt*, 78 California, 345, 349; Church on Habeas Corpus, § 483, and authorities cited in notes, and note to *Fetter's case*, 57 Am. Dec. 389, 400.

It is said that the present case is distinguished from the *Mahon case* in the fact that the illegal abduction complained of in the latter was by persons who neither acted nor assumed to act under the authority of the State into the custody of whose authorities they delivered Mahon; whereas, in this case, it is alleged that Idaho secured the presence of Pettibone within its limits through a conspiracy on the part of its Governor and other officers. This difference in the cases is not, we think, of any consequence as to the principle involved; for, the question now is—and such was the fundamental question in *Mahon's case*—whether a Circuit Court of the United States when asked, upon *habeas corpus*, to discharge a person held in actual custody by a State for trial in one of its courts

under an indictment charging a crime against its laws, can properly take into account the methods whereby the State obtained such custody. That question was determined in the negative in the *Ker case* and *Mahon's case*. It was there adjudged that in such a case neither the Constitution nor laws of the United States entitled the person so held to be discharged from custody and allowed to depart from the State. If, as suggested, the application of these principles may be attended by mischievous consequences, involving the personal safety of individuals within the limits of the respective States, the remedy is with the lawmaking department of the Government. Congress has long been informed by judicial decisions as to the state of the law upon this general subject.

In this connection it may be well to say that we have not overlooked the allegation that the Governor and other officers of Idaho well knew at the time the requisition was made upon the Governor of Colorado, that Pettibone was not in Idaho on December 30, 1905, nor at any time near that date, and had the purpose in all they did to evade the constitutional and statutory provisions relating to fugitives from justice. To say nothing of the impropriety of any such facts being made the subject of judicial inquiry in a Federal court, the issue thus attempted to be presented was wholly immaterial. Even were it conceded, for the purposes of this case, that the Governor of Idaho wrongfully issued his requisition, and that the Governor of Colorado erred in honoring it and in issuing his warrant of arrest, the vital fact remains that Pettibone is held by Idaho in actual custody for trial under an indictment charging him with crime against its laws, and he seeks the aid of the Circuit Court to relieve him from custody, so that he may leave that State and thereby defeat the prosecution against him without a trial. In the present case it is not necessary to go behind the indictment and inquire as to how it happened that he came within reach of the process of the Idaho court in which the indictment is pending. And any investigation as to the motives which induced the action taken by

the Governors of Idaho and Colorado would, as already suggested, be improper as well as irrelevant to the real question to be now determined. It must be conclusively presumed that those officers proceeded throughout this affair with no evil purpose and with no other motive than to enforce the law.

We perceive no error in the action of the Circuit Court and its final order is

Affirmed.

MR. JUSTICE McKENNA dissenting.

I am constrained to dissent from the opinion and judgment of the court. The principle announced, as I understand it, is that "a Circuit Court of the United States, when asked upon *habeas corpus* to discharge a person held in actual custody by a State for trial in one of its courts under an indictment charging a crime against its laws, cannot properly take into account the methods whereby the State obtained such custody." In other words, and to illuminate the principle by the light of the facts in this case (facts, I mean, as alleged, and which we must assume to be true for the purpose of our discussion), that the officers of one State may falsely represent that a person was personally present in the State and committed a crime there, and had fled from its justice, may arrest such person and take him from another State, the officers of the latter knowing of the false accusation and conniving in and aiding its purpose, thereby depriving him of an opportunity to appeal to the courts, and that such person cannot invoke the rights guaranteed to him by the Constitution and statutes of the United States in the State to which he is taken. And this, it is said, is supported by the cases of *Ker* v. *Illinois*, 119 U. S. 436, and *Mahon* v. *Justice*, 127 U. S. 700. These cases, extreme as they are, do not justify, in my judgment, the conclusion deduced from them. In neither case was the State the actor in the wrongs that brought within its confines the accused person. In the case at bar, the States, through their officers, are the

offenders. They, by an illegal exertion of power, deprived the accused of a constitutional right. The distinction is important to be observed. It finds expression in *Mahon* v. *Justice*. But it does not need emphasizing. Kidnapping is a crime, pure and simple. It is difficult to accomplish; hazardous at every step. All of the officers of the law are supposed to be on guard against it. All of the officers of the law may be invoked against it. But how is it when the law becomes the kidnapper, when the officers of the law, using its forms and exerting its power, become abductors? This is not a distinction without a difference—another form of the crime of kidnapping, distinguished only from that committed by an individual by circumstances. If a State may say to one within her borders and upon whom her process is served, I will not inquire how you came here; I must execute my laws and remit you to proceedings against those who have wronged you, may she so plead against her own offenses? May she claim that by mere physical presence within her borders, an accused person is within her jurisdiction denuded of his constitutional rights, though he has been brought there by her violence? And constitutional rights the accused in this case certainly did have, and valuable ones. The foundation of extradition between the States is that the accused should be a fugitive from justice from the demanding State, and he may challenge the fact by *habeas corpus* immediately upon his arrest. If he refute the fact he cannot be removed. *Hyatt* v. *Corkran*, 188 U. S. 691. And the right to resist removal is not a right of asylum. To call it so in the State where the accused is is misleading. It is the right to be free from molestation. It is the right of personal liberty in its most complete sense. And this right was vindicated in *Hyatt* v. *Corkran*, and the fiction of a constructive presence in a State and a constructive flight from a constructive presence rejected. This decision illustrates at once the value of the right and the value of the means to enforce the right. It is to be hoped that our criminal jurisprudence will not need for its efficient administration the

destruction of either the right or the means to enforce it. The decision in the case at bar, as I view it, brings us perilously near both results. Is this exaggeration? What are the facts in the case at bar as alleged in the petition, and which it is conceded must be assumed to be true? The complaint, which was the foundation of the extradition proceedings, charged against the accused the crime of murder on the thirtieth of December, 1905, at Caldwell, in the county of Canyon, State of Idaho, by killing one Frank Steunenberg, by throwing an explosive bomb at and against his person. The accused avers in his petition that he had not been "in the State of Idaho, in any way, shape or form, for a period of more than ten years" prior to the acts of which he complained, and that the Governor of Idaho knew accused had not been in the State the day the murder was committed, "nor at any time near that day." A conspiracy is alleged between the Governor of the State of Idaho and his advisers, and that the Governor of the State of Colorado took part in the conspiracy, the purpose of which was "to avoid the Constitution of the United States and the act of Congress made in pursuance thereof, and to prevent the accused from asserting his constitutional right under cl. 2, sec. 2, of art. IV, of the Constitution of the United States and the act made pursuant thereof." The manner in which the alleged conspiracy had been executed was set out in detail. It was in effect that the agent of the State of Idaho arrived in Denver, Thursday, February 15, 1906, but it was agreed between him and the officers of Colorado that the arrest of the accused should not be made until some time in the night of Saturday, after business hours—after the courts had closed and judges and lawyers had departed to their homes; that the arrest should be kept a secret and the body of the accused should be clandestinely hurried out of the State of Colorado with all possible speed, without the knowledge of his friends or his counsel; that he was at the usual place of business during Thursday, Friday, and Saturday, but no attempt was made to arrest him until 11:30 o'clock P. M. Saturday,

when his house was surrounded and he arrested. Moyer was arrested under the same circumstances at 8:45, and he and accused "thrown into the county jail of the city and county of Denver." It is further alleged that, in pursuance of the conspiracy between the hours of five and six o'clock on Sunday morning, February 18, the officers of the State and "certain armed guards, being a part of the forces of the militia of the State of Colorado," provided a special train for the purpose of forcibly removing him from the State of Colorado, and between said hours he was forcibly placed on said train and removed with all possible speed to the State of Idaho; that prior to his removal and at all times after his incarceration in the jail at Denver he requested to be allowed to communicate with his friends and his counsel and his family, and the privilege was absolutely denied him. The train, it is alleged, made no stop at any considerable station, but proceeded at great and unusual speed; and that he was accompanied by and surrounded with armed guards, members of the state militia of Colorado, under the orders and directions of the adjutant general of the State.

I submit that the facts in this case are different in kind and transcend in consequences those in the cases of *Ker* v. *Illinois* and *Mahon* v. *Justice*, and differ from and transcend them as the power of a State transcends the power of an individual. No individual or individuals could have accomplished what the power of the two States accomplished; no individual or individuals could have commanded the means and success; could have made two arrests of prominent citizens by invading their homes; could have commanded the resources of jails, armed guards and special trains; could have successfully timed all acts to prevent inquiry and judicial interference.

The accused, as soon as he could have done so, submitted his rights to the consideration of the courts. He could not have done so in Colorado, he could not have done so on the way from Colorado. At the first instant that the State of Idaho relaxed its restraining power he invoked the aid of

habeas corpus successively of the Supreme Court of the State and of the Circuit Court of the United States. He should not have been dismissed from court, and the action of the Circuit Court in so doing should be reversed.

I also dissent in Nos. 250, 251, 265, 266 and 267. (See p. 222, *post.*)

MOYER *v.* NICHOLS.

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

No. 250. Argued October 10, 11, 1906.—Decided December 3, 1906.

Pettibone v. *Nichols*, *ante* p. 192 followed; 85 Pac. Rep. 897, 902, affirmed.

THE facts are stated in the opinion.

Mr. Edmund F. Richardson and *Mr. Clarence S. Darrow*, with whom *Mr. John H. Murphy* was on the brief, for appellants.

Mr. James H. Hawley, with whom *Mr. W. E. Borah* was on the brief, for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case does not differ, in principle or in its facts, from *Pettibone* v. *Nichols*, just decided. Moyer was also charged with the murder of Steunenberg, and was arrested in Colorado, upon the warrant of the Governor of that State, and taken to Idaho, and delivered to its authorities. He was embraced in the same indictment with Pettibone, and was held in custody for trial under that indictment. He sued out a writ of *habeas corpus* from the Supreme Court of Idaho, but the writ was

dismissed by that court, *Ex parte Moyer*, 85 Pac. 897, and a writ of error has been prosecuted to this court. That is case No. 266 on our present docket. He then sued out a writ of *habeas corpus* from the Circuit Court of the United States, and his discharge being refused by the court, he prosecuted the present appeal.

For the reason stated in *Pettibone's* case, the final order is

Affirmed.

MR. JUSTICE MCKENNA dissents.

The final order of the Circuit Court of the United States for Idaho, in *Haywood* v. *Nichols*, *No.* 251, on appeal, is affirmed on the authority of *Pettibone* v. *Nichols*, *ante*, *p.* 192, from which, as to the facts or the questions involved, it does not differ. The orders in *Pettibone* v. *Whitney*, *No.* 265, *Morey* v. *Whitney*, *No.* 266, and *Haywood* v. *Whitney*, *No.* 267—each of which cases is here upon writ of error to the Supreme Court of Idaho—involve the same questions as those determined in *Pettibone* v. *Nichols*, and by agreement is to depend upon the judgment in that case, must also be affirmed.

It is so ordered.

MR. JUSTICE MCKENNA dissents.

APPLEYARD *v.* MASSACHUSETTS.

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

No. 115. Submitted November 16, 1906.—Decided December 3, 1906.

The constitutional provision relating to fugitives from justice is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States and its faithful and vigorous enforcement is vital to their harmony and welfare; and while a State should protect its people against illegal action, Federal courts should be equally careful that the provision be not so narrowly interpreted as to enable those who have offended the laws of one State to find a permanent asylum in another.

A person charged by indictment, or affidavit before a magistrate, within a State with the commission of a crime covered by its laws and who leaves the State, no matter for what purpose nor under what belief, becomes

from the time of such leaving and within the meaning of the Constitution and laws of the United States, a fugitive from justice; and in the absence of preponderating or conceded evidence of absence from the demanding State when the crime was committed it is the duty of the other State to surrender the fugitive on the production of the indictment or affidavit properly authenticated.

Although, regularly, one seeking relief by *habeas corpus* in the state courts should prosecute his appeal to, or writ of error from, the highest state court, before invoking the jurisdiction of the Circuit Court on *habeas corpus*, where the case is one of which the public interest demands a speedy determination, and the ends of justice will be promoted thereby, this court may proceed to final judgment on appeal from the order of the Circuit Court denying the relief.

The appellant was indicted in the Supreme Court of New York, county of Erie, for the crime of grand larceny, first degree, alleged to have been committed in that county on the eighteenth day of May, 1904.

Upon that indictment a warrant of arrest was issued, but the accused was not arrested, for the reason that he was not found within the State.

Then the District Attorney of Erie County applied to the Governor of New York for a requisition upon the Governor of Massachusetts for Appleyard as a fugitive from justice. The application was based upon the above indictment and numerous accompanying affidavits, stating, among other things, that the accused was then in Massachusetts. A requisition was accordingly made upon the Governor of that Commonwealth for the apprehension of Appleyard and his delivery to a named agent of New York, who was authorized to receive and convey him to the latter State, to be there dealt with according to law. With that requisition went properly authenticated copies of all the papers which had been submitted to the Governor of New York by the District Attorney of Erie County.

The Governor of Massachusetts received the requisition and pursuant to the statutes of that Commonwealth referred it to the Attorney General for examination and report. Giving the accused full opportunity to be heard and to introduce

evidence, of which he availed himself, that officer examined the case and reported that the requisition was in regular and proper form and that there was no sufficient reason why it should not be honored. The Governor thereupon issued a warrant for the arrest of Appleyard and his delivery to the agent of New York to be taken to that State, the officer who should execute the warrant being required to give the accused such opportunity to sue out a writ of *habeas corpus* as was prescribed by the laws of Massachusetts in such cases. Appleyard having been arrested applied for a writ of *habeas corpus* to the Supreme Judicial Court of Massachusetts. This fact is stated in the return of the officer holding the accused and is not denied. That court, after hearing an argument, denied the application and remanded the petitioner to the custody of the agent of New York to be held in accordance with the warrant issued by the Governor of Massachusetts.

The accused then applied to the Circuit Court of the United States for a writ of *habeas corpus*, alleging that the warrant of the Governor of Massachusetts and the order for his delivery to the agent of New York were issued without authority of law and contrary to the Constitution and laws as well of the United States as of Massachusetts, and "especially contrary to sec. 2, art. 4, of the Constitution of the United States and of sec. 5278 of the Revised Statutes of the United States, in that your petitioner is not a fugitive from justice." The writ was issued and a return was made of the above facts.

At the hearing in the Circuit Court the accused requested a ruling that on the evidence it did not appear that, within the meaning of the Constitution and laws of the United States, he was a fugitive from justice, and, also, that he should be discharged from custody unless it appeared positively, by a preponderance of proof, that he "consciously fled from justice when he left the State of New York." Those requests were denied. But the court granted a request that the finding by the Governor of Massachusetts as a fact that the accused was a fugitive from justice was not conclusive. The court refused

to find, as facts, that the acts of Appleyard did not constitute a crime under the laws of New York; that no crime was committed by him in that State; and that Appleyard was not in New York on May 18, 1904, the date of the alleged crime. It consequently discharged the writ of *habeas corpus*. From that order the present appeal was prosecuted.

Mr. Benjamin S. Minor and *Mr. Fred H. Williams*, for appellant.

Mr. Dana Malone, Attorney General of the State of Massachusetts, and *Mr. Frederic B. Greenhalge*, for appellee.

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

It can not be said that the appellant has not had ample opportunity to test the question whether his detention was in violation of the Constitution and laws of the United States. He has had three hearings upon that question; first, before the executive authorities of Massachusetts, then before the Supreme Judicial Court of that Commonwealth, and finally before the Circuit Court of the United States. Upon each occasion he insisted that, within the meaning of the Constitution and laws of the United States, he could not be regarded as a fugitive from justice. The decision at each hearing was adverse to that contention and, unless this court reverses the judgment of the Circuit Court, he must stand his trial upon the charge that he committed a crime against the laws of New York. In view of the history of this case from the time of the demand upon the Governor of Massachusetts for the surrender of the appellant, this court should hesitate, by disturbing the ruling below, to further delay the administration by New York of its criminal laws through its own judicial tribunals. Regularly, the accused should have prosecuted a writ of error to the Supreme Judicial Court of Massachusetts before

invoking the jurisdiction of the Circuit Court of the United States upon *habeas corpus*. *Ex parte Royall*, 117 U. S. 241, 251-253; *Markuson* v. *Boucher*, 175 U. S. 184; *Minnesota* v. *Brundage*, 180 U. S. 499, 502; *Reid* v. *Jones*, 187 U. S. 153. But in view of the long time which has elapsed since the Governor of New York made his requisition for the surrender of the accused, and as the case is one which the public interests demand should be speedily determined, we think the ends of justice will be promoted if we proceed to a final judgment on this appeal.

Upon a careful scrutiny of the record we discover no ground for the assertion that the detention of the appellant is in violation of the Constitution or laws of the United States. The crime with which he is charged is alleged in the indictment to have been committed at Buffalo, New York, on May 18, 1904. It is, we think, abundantly established by the evidence that he was personally present in that city on that day and that thereafter he left New York, although there was some evidence to the effect that on the particular day named he was not in the State. In his own affidavit, submitted and accepted as evidence, the accused specified several days when he was in Buffalo, prior to and subsequent to May 18, 1904, but, as stated by the Attorney General of Massachusetts in his report to the Governor of that Commonwealth, there was in that affidavit no statement directly denying that he was in New York at the time and place indicated in the indictment.

But the appellant contended below, as he does here, that he had no *belief* when leaving New York at any time that he had violated its criminal laws, and therefore, within the meaning of the Constitution and laws of the United States, he could not be deemed a fugitive from its justice. This contention cannot be sustained; indeed, it could not be sustained without materially impairing the efficacy of the constitutional and statutory provisions relating to fugitives from justice. An alleged fugitive may believe that he has not committed any crime against the laws of the State in which he is indicted,

and yet, according to the laws of such State, as administered by its judicial tribunals, he may have done so, and his belief, or want of belief, may be without foundation in law. It is the province of the courts of New York to declare what its laws are, and to determine whether particular acts on the part of an alleged offender constitute a crime under such laws. The constitutional provision that a person charged with crime against the laws of a State and who flees from its justice must be delivered up on proper demand, is sufficiently comprehensive to embrace any offense, whatever its nature, which the State, consistently with the Constitution and laws of the United States, may have made a crime against its laws. *Kentucky* v. *Dennison,* 24 How. 66, 69; *Ex parte Reggel,* 114 U. S. 642, 650. So that the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he *consciously* fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding State. A person charged by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country,

and which each State is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States. And while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State.

In *Roberts* v. *Reilly*, 116 U. S. 80, 95, 97, this court said that the act of Congress, sec. 5278 of the Revised Statutes, made it the duty of the executive authority of the State in which is found a person charged with crime against the laws of another State, and who has fled from its justice "to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made, before a magistrate of any State, charging the person demanded with having committed a crime therein, certified as authentic by the Governor or Chief Magistrate of the State from whence the person so charged has fled. It must appear, therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the Governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be

reviewed judicially in proceedings in *habèas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. *Ex parte Reggel*, 114 U. S. 642."

Replying to the suggestion, in that case, that the fugitive was not within the demanding State subsequent to the finding of the indictment, the court further said: "The appellant in his affidavit does not deny that he was in the State of New York about the date of the day laid in the indictment when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that State on that very day; and the fact that he has not been within the State since the finding of the indictment is irrelevant and immaterial. To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." To the same effect are *Ex parte Brown*, 28 Fed. Rep. 653, 655; *In re White*, 55 Fed. Rep. 54, 57; *In re Bloch*, 87 Fed. Rep. 981, 983. It is suggested that *Roberts* v. *Reilly* was substantially modified in *Streep* v. *United States*, 160 U. S. 128, 134, in which the court had occasion to construe sec. 1045 of the Revised Statutes. But this is an error. Interpreting the words "fleeing from justice" as found in that section, the court expressly held that these words must receive

the same construction as was given in *Roberts* v. *Reilly* to like words in sec. 5278 of the Revised Statutes, the inquiry in that case being whether the accused was a fugitive from justice.

In support of his contention, the appellant refers to *Hyatt* v. *Corkran*, 188 U. S. 691. That was the case of an arrest in New York, under the warrant of the Governor of that State, of an alleged fugitive from the justice of Tennessee, in which State he stood charged by indictment with crime committed in that State. This court said (p. 719) that as the alleged fugitive "showed without contradiction and upon conceded facts that he was not within the State of Tennessee at the times stated in the indictment found in the Tennessee court, nor at any time when the acts were, if ever committed, he was not a fugitive from justice within the meaning of the Federal statute upon that subject, and upon these facts the warrant of the Governor of the State of New York was improperly issued, and the judgment of the Court of Appeals of the State of New York, discharging the relator from imprisonment by reason of such warrant must be affirmed." The present case is a wholly different one; for here the presumption arising from the recitals in the warrant of arrest in favor of its validity was not overthrown by the proof; on the contrary, it appeared, by a preponderance of evidence, that the accused was in the State of New York when the alleged crime was committed.

Similar views to those expressed in *Roberts* v. *Reilly* have been expressed by state courts. In *Kingsbury's case*, 106 Massachusetts, 223, 227, 228, the contention of the fugitive from justice was that, as she went into the demanding State and returned to her home in the other State before the alleged crime was known, she could not be deemed to have fled from justice. But the court said: "The material facts are, that the prisoner is charged with a crime in the manner prescribed, and has gone beyond the jurisdiction of the State, so that there has been no reasonable opportunity to prosecute her after the facts were known. The fact in this case, that she returned to her permanent home, cannot be material. . . . It is sufficient

that the crime of larceny has been properly charged, and that the prisoner is a fugitive, and a requisition has been properly made." In *State* v. *Richter*, 37 Minnesota, 436, 438, the contention was that to constitute a fugitive from justice a person must have left the State where the crime was committed for the purpose of escaping the legal consequences of his crime. Referring to *Roberts* v. *Reilly*, above cited, as authoritative and binding, and as in accordance with its own views, the Supreme Court of Minnesota well said: "The sole purpose of this statute, and of the constitutional provision which it was designed to carry into effect, was to secure the return of persons who had committed crime within one State, and had left it before answering the demands of justice. The important thing is not their purpose in leaving, but the fact that they had left, and hence were beyond the reach of the process of the State where the crime was committed. Whether the motive for leaving was to escape prosecution or something else, their return to answer the charges against them is equally within the spirit and purpose of the statute; and the simple fact that they are not within the State to answer its criminal process, when required, renders them, in legal intendment, fugitives from justice, regardless of their purpose in leaving." In *Voorhees case*, 32 N. J. L. 141, 150, the court said: "A person who commits a crime within a State, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act, must be regarded as a fugitive from the justice of the State whose laws he has infringed. Any other construction would not only be inconsistent with good sense, and with the obvious import of the word to be interpreted in the context in which it stands, but would likewise destroy, for most practical purposes, the efficacy of the entire constitutional provision." In *Ex parte Swearingen*, 13 S. Car. 74, 80, the court held that the terms fugitive from justice "were intended to embrace not only a case where a party after committing a crime actually *flees*, in the literal sense of that term, from the State where such crime was committed, but also a case where

a citizen of one State, who, within the territorial limits of another State, commits a crime, and then simply returns to his own home. The object of the Constitution was to enable a State whose laws had been violated, to secure the arrest of the person charged with such violation, even though such person might be beyond the reach of the ordinary process of such State." In *Mohr's case*, 73 Alabama, 503, 512, the court, referring to the words in the Constitution, "who shall flee from justice and be found in another State," said: "There is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal, but the better view, perhaps, is that any person is a fugitive within the purview of the Constitution, 'who goes into a State, commits a crime, and then *returns* home.' " In *Hibler* v. *State*, 43 Texas, 197, 201, the court said: "The words 'fugitive from justice,' as used in this connection, must not be understood in a literal sense, but in reference to the subject-matter, considering the general object of the Constitution and laws of the United States in relation thereto. A person who commits a crime in one State for which he is indicted, and departs therefrom and is found in another State, may well be regarded as a fugitive from justice in the sense in which it is here used."

Referring to the opinion in *Pettibone* v. *Nichols*, just decided, for a further discussion of the general subject, and perceiving no error in the action of the Circuit Court, its final order is

Affirmed.

FRANCIS *v.* FRANCIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 8. Submitted October 10, 1906.—Decided December 3, 1906.

A title in fee may pass to an individual by a treaty without the aid of an act of Congress; and this rule having become a rule of property in the State of Michigan in regard to lands reserved for Indians specified in the Chippewa treaty of 1819, will not be disturbed, it not appearing that the treaty has been misinterpreted.

A patent to an Indian of land reserved to him by a treaty simply locates the land, the title to which passed under the treaty, and in the absence of any provision of the treaty, or any act of Congress, a restriction in the patent against alienation without the consent of the President is ineffectual, the President having no authority by virtue of his office to impose such a restriction.

Title to lands conveyed to an Indian in fee and which the Indian has power to alienate may be acquired by prescription.

136 Michigan, 288, affirmed.

THE facts are stated in the opinion.

Mr. Nathaniel T. Crutchfield, Mr. Thomas E. Webster, Mr. James Vankleeck and *Mr. Henry M. Duffield*, for plaintiff in error:

Indians being regarded as the wards of the Government should be dealt with in the utmost good faith as respects their rights under treaties, which should be construed, not according to the technical meaning of the words, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28; *Jones* v. *Meehan*, 175 U. S. 10.

The policy of the Government has been to permit only a possessory or beneficial right in the lands occupied by Indians, both nations and individuals, and the power of alienation except with the consent of the Government has been prohibited

by Acts of Congress of 1790, 1793, 1796 and 1802. *Cherokee Nation* v. *The State of Georgia,* 5 Pet. 17; *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 67.

The tenure of individual Indians under reservations in treaties negotiated prior to June 30, 1834, was fixed by the act of March 30, 1802. This tenure could not be changed without the consent of both parties, the Indian holder and the Government; or by treaty with the Indian tribe. *Schrimpscher* v. *Stockton,* 183 U. S. 290; *United States* v. *Brooks,* 10 How. 442.

The act of 1834 did not purport to repeal in any respect the act of 1802, and § 12 of the former act did not in any manner affect tenures acquired under the latter. At most it did no more than control and regulate tenures under treaties or grants thereafter made. *Jones* v. *Meehan,* 175 U. S. 1, 9, 12; *Gaines* v. *Nicholson,* 9 How. 365.

The right to protection against improvident alienation, as expressed in the act of 1802, was excepted from the operation of the repeal clause of the Revised Statutes. Sections 5596 *et seq.*

The reservee and his heirs acquired only such title as was controlled by the act of March 30, 1802. Though an estate of inheritance, it was under this law alienable only with the consent of the Government. *Jones* v. *Meehan,* 175 U. S. 1.

Inasmuch as the tract reserved had not been located in any other manner, the patent is essential to designate the land reserved, and the clause restricting alienation without consent of the President was notice to the world of the Government's understanding of the nature of the title granted, and its acceptance by the reservee made this construction conclusive. *Best* v. *Polk,* 18 Wall. 116; *Niles* v. *Anderson,* 5 How. (Miss.) 365; quoted in *Jones* v. *Meehan,* 175 U. S. 20. The patent issued to the reservee in 1827 contained no greater restriction on the power of alienation than was already imposed by the law itself. *Doe* v. *Wilson,* 23 How. 457; *Crews* v. *Burcham,* 1 Black, 352; *Smith* v. *Stevens,* 10 Wall. 321, 327; *Auditor* v. *Williams,* 94 Michigan, 180; *Worcester* v. *Georgia,* 6 Pet. 582. *Stockton* v. *Williams,* 1 Doug. 546, and *Dewey* v. *Campau,*

4 Michigan, 565, distinguished. The questions and conditions involved are entirely different.

The Bokowtonden patent was a necessary constituent of plaintiff's title. The text of the patent was also evidence of the intent of the contracting parties to the treaty. It was part of the *res gestæ*. *Eagon* v. *Eagon*, 60 Kansas, 697, 706; Wharton, Civ. Ev., 8th ed., § 262; *Humphreys* v. *Chilcat C. Co.*, 20 Oregon, 209; *Cross* v. *Hoch*, 149 Missouri, 325; *Pickering* v. *Lomax*, 145 U. S. 310, 316.

Though the estate be fee simple, alienation may be restricted. *Libbey* v. *Clark*, 14 Kansas, 435; *S. C.* 118 U. S. 255; 4 Com. Dig. Estates, 1; 7 Stat. 348; *The Kansas Indians*, 5 Wall. 740.

The claim of title by adverse possession is fraudulent on its face; the original and only instrument granting title showing the incapacity of the grantee to convey.

As the doctrine of prescription is based upon the presumption of a grant, it necessarily follows that only such rights may be prescribed for as are capable of being granted; and a grant will not be presumed where it could not lawfully be made. 22 Am. Enc. of Law, title "Prescription," and authorities cited thereunder.

Mr. Chester L. Collins, for defendant in error:

By the provisions of the third article of said treaty, the reservees became vested of a present alienable fee-simple title and upon the treaty being executed, all that remained to be done to complete the grant was to designate the land, which was done by a patent, but could have been done by survey and map, or by any other authenticated act of the proper officials.

The patent was not necessary and is void as a conveyance; its only office, if any, was to designate the land, which designation might have been provided for by any sufficient act of the proper officers by means other than by a patent.

Neither the treaty nor the patent mentions the names of the reservees. This is not a defect in the grant of the treaty.

The question as to who were the reservees or their legal heirs is a question of fact for a court or jury when the question might arise. *United States* v. *Brooks*, 10 How. (U. S.) 460; *Doe* v. *Wilson*, 23 How. (U. S.) 457; *Crews* v. *Burcham*, 1 Black (U. S.), 352; *Best* v. *Polk*, 18 Wall. 112; *Jones* v. *Meehan*, 175 U. S. 1; *Stockton* v. *Williams*, 1 Walker Ch. (Mich.) 120; *Stockton* v. *Williams*, 1 Doug. (Mich.) 546; *Dewey* v. *Campau*, 4 Michigan, 565 and cases cited on p. 566; *Campau* v. *Dewey*, 9 Michigan, 381 and cases cited on p. 433; *Francis* v. *Francis*, 136 Michigan, 288.

The provision in the patent limiting the reservee's right to convey the land is void, and is not authorized or permitted by the treaty. *Mitchel* v. *United States*, 9 Pet. 760; *Pickering* v. *Lomax*, 145 U. S. 310; *Lomax* v. *Pickering*, 173 U. S. 26; *Lykens* v. *McGrath*, 184 U. S. 169; *Schrimpscher* v. *Stockton*, 183 U. S. 290; *McGannon* v. *Straightlege*, 32 Kansas, 524; *Sheldon* v. *Donohue*, 40 Kansas, 346; *Easton* v. *Salisbury*, 21 How. 426; *Sherman* v. *Buick*, 93 U. S. 209.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action of ejectment was brought to recover the possession of certain lands in Bay County, Michigan, which the plaintiff, Ann Francis, claims as tenant for her own life, and which are thus described in the declaration: "The east half, the Bokowtonden reserve, excepting land heretofore owned and occupied by F. A. Kaiser, and ten acres heretofore owned and occupied by Edward McGuiness, being in Township Fourteen, north range four east, and being a part of the Bokowtonden Reserve, conveyed by the United States to the children of Bokowtonden and their heirs, by patent, dated November sixth, A. D. 1827."

The defendants pleaded the general issue, giving notice that they would show that for more than twenty years next preceding the commencement of this action they and their grantors had been in open, notorious, exclusive, and adverse possession

and occupancy of the lands in question under claim and color of title.

At the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, upon which judgment was rendered. That judgment was affirmed, upon writ of error, by the Supreme Court of Michigan. 136 Michigan, 288.

By the treaty of September 24, 1819, made at Saginaw in the Territory of Michigan and proclaimed March 25, 1820, between the United States and the Chippewa Nation of Indians, the lands comprehended within certain boundaries were forever ceded to the United States. But from that cession certain tracts were reserved for the use of the Chippewa Nation of Indians. And by Art. 3 of the treaty it was provided that "there shall be reserved, for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land: . . . For the use of the children of Bokowtonden six hundred and forty acres, on the Kawkawling River." 7 Stat. 203.

Subsequently, November 6, 1827, a patent was signed by President Adams. It purported to have been issued pursuant to that treaty, for a tract of six hundred and forty acres on Kawkawling River, described by metes and bounds, "unto the said children of Bowkotonden, and their heirs forever," the patent containing these words, "but never to be conveyed by them or their heirs without the consent and permission of the President of the United States."

The particular land here in question is a part of the six hundred and forty acres reserved by the above treaty for the use of the children of Bokowtonden and their heirs, and embraced by the patent of 1827. What rights were acquired, under and by virtue of the treaty, by those children? In *Jones* v. *Meehan*, 175 U. S. 1, 8, 21, where one of the questions was as to the nature of the title that passed under an Indian treaty ceding lands to the United States, and which required a certain number of acres to be set apart from the ceded lands

for a named Indian chief, this court said: "Was it a mere right of occupancy, with no power to convey the land except to the United States or by their consent? Or was it substantially a title in fee simple with full power of alienation? Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States without the consent of the United States,"—citing *Johnson* v. *McIntosh,* 8 Wheat. 543; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17; *Worcester* v. *Georgia,* 6 Pet. 515, 544; *Doe* v. *Wilson,* 23 How. 457, 463; *United States* v. *Cook,* 19 Wall. 591; *United States* v. *Kagama,* 118 U. S. 375, 381; *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 67. But in that case, after an extended review of previous decisions, this court further said: "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Did an alienable title in fee simple pass to the children of Bokowtonden by virtue of the treaty of 1819–20? That question was under consideration in the courts of Michigan a long while ago and was answered in the affirmative; and it would seem that their construction of the provisions in question has become a rule of property in that State. In *Stockton* v. *Williams,* 1 Walker's Ch. (Michigan) 120, 129, decided in 1840,

the question was elaborately discussed and fully considered. The treaty in that case—the same one involved here—contained these words: "There shall be reserved, for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land. . . . For the use of Mokitchenoqua . . . each, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint River in such manner as the President of the United States may direct." 7 Stat. 204. The Chancellor said: "It makes no mention of a patent, nor does it require the President or other officer of the Government, after the lands have been located, to do any act whatever recognizing the right of the several reservees to the different sections. All it required of the President was to have the lands located, at and near a particular place pointed out by the treaty. To locate does not mean to patent, but to have the several sections surveyed and marked out, and a map made of them, showing the particular section belonging to each of the reservees. This was done; and, when it was done, this part of the treaty was fully executed on the part of the Government. Nothing further was required to carry it into effect, and the title then vested in the respective reservees, unless we hold the treaty itself to be clearly defective, in not providing for the execution of its several stipulations. A patent, although the usual, is by no means the only mode in which the title to the public domain can pass from the Government to an individual. It may pass by an act of Congress, or by a treaty stipulation, as well as by a patent. The Indian title to the land reserved, did not pass to the United States by the treaty, which operated as a release, by both the Indians and Government, of all interest either had in the lands reserved to the respective reservees, in fee simple; and it would be a violation of the treaty for the Government to claim the land in question." Upon appeal the Supreme Court of Michigan, *Stockton* v. *Williams*, 1 Doug. 546, 558, 564, said: "The first question to be determined is, what estate passed to the reservee

under the treaty? The third article is in the following words: 'There shall be reserved for the use of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land,' etc. 'For the use of Mokitchenoqua, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint River, in such manner as the President of the United States may direct.' It is very clear that, if a fee simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its execution. Will, then, the third article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and *her heirs*. No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of the word *heirs*, clearly implies, that such an estate was granted as would, upon her death, descend to her legal representatives. Here, then, are all the essential elements of a fee simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds not only with an opinion given by the Attorney General of the United States, to the Secretary of War (Land Laws, part 2, pp. 96, 97), but with the opinion of the Senate, a branch of the treaty making power, which is certainly entitled to great consideration. 3d vol. Senate Doc. 1836, No. 197." Again, in the same case, the court said: "The location of the lands became a duty devolving on the President by the treaty. This duty he could execute without an act of Congress; the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed. It was impossible to describe the tract granted to any of the reservees in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with an authority to locate afterwards by a sur-

vey making it definite. 10 Pet. 331. This authority being executed, the grant then became as valid to the particular section designated by the President as though the description had been incorporated in the treaty itself. We are, therefore, of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the President directing a patent to be issued."

In *Dewey* v. *Campau*, 4 Michigan, 565, 566, the court, interpreting the same treaty, said: "A title in fee, under this clause of the treaty, passed, by this language, to the reservee. The term reservation was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed. The title was conferred by the treaty; it was not, however, perfect until the location was made; the location was necessary to give it identity. The location was duly made; and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated." In *Campau* v. *Dewey*, 9 Michigan, 381, 433, reference was made to *Stockton* v. *Williams*, 1 Douglass, 546, above cited, the court saying: "This decision has, for sixteen years, been recognized as the law governing the titles under this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are, therefore, compelled to recognize it as a rule of property which we are not at liberty to disturb." These cases were not, in any sense, modified by *Attorney General* v. *Williams*, 94 Michigan, 180, which was the case of an Indian treaty which expressly provided that the land there in question should never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time—manifestly a different case from the present one, in which the treaty contained no restriction upon alienation.

The result of the cases cited is: 1. That this court and the highest court of Michigan concur in holding that a title in fee may pass by a treaty without the aid of an act of Congress,

and without a patent. 2. That the construction of the treaty here involved, whereby the respective Indians named in its third article are held to have acquired by the treaty a title in fee to the land reserved for the use of themselves, has become a rule of property in the State where the land is situated. That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty of 1819. We agree with the state court in holding that a title in fee passed by the treaty to the children of Bokowtonden, and that the patent issued in 1827 only located or made definite the boundaries of the tract reserved to them by the treaty. It follows that the words in the patent of 1827, "but never to be conveyed by them or their heirs, without the consent and permission of the President of the United States," were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. The children of Bokowtonden having then obtained by the treaty the right to convey, there is no reason to doubt that title could be acquired by prescription. The evidence shows that the defendants and those through whom they claim, have had peaceable, adverse possession of the premises in question continuously for more than half a century prior to the commencement of this action.

Without assigning other grounds in support of the ruling below, the judgment of the Supreme Court is

Affirmed.

MR. JUSTICE WHITE did not participate in the decision of this case.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY *v.* RIGGS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 34. Argued October 18, 1906.—Decided December 3, 1906.

The provisions of §§ 7890, 7891, Revised Statutes of Missouri, which as construed by the highest court of that State cut off any defense by a life insurance company based upon false and fraudulent statements in the application, unless the matter represented actually contributed to the death of the insured, and which apply alike to domestic and foreign corporations, is not repugnant to the Fourteenth Amendment, and does not deprive a foreign corporation coming into the State of its liberty or property without due process of law, nor deny to it the equal protection of the laws.

The liberty referred to in the Fourteenth Amendment is the liberty of natural, not artificial, persons.

129 Fed. Rep. 207, affirmed.

The facts are stated in the opinion.

Mr. Stephen S. Brown, with whom *Mr. W. A. Kerr* and *Mr. John E. Dolman* were on the brief, for plaintiff in error:

Section 7890, Rev. Stat., Missouri, of 1899, as interpreted to the jury by the trial court, violates § 1 of the Fourteenth Amendment. *Smiley* v. *Kansas*, 196 U. S. 447, 454; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 639; *C., B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 242, 246; Corporations are persons within the meaning of this amendment. *Smyth* v. *Ames*, 169 U. S. 466, 522; *Santa Clara Co.* v. *So. Pac. R. R. Co.*, 118 U. S. 394, 396; *C. C. & Augusta R. R. Co.* v. *Gibbs*, 142 U. S. 386, 391; *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 154; *St. Louis & S. F. Ry.* v. *Gill*, 156 U. S. 649, 657; *Chicago, M. & St. P. Ry.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362.

The position of the plaintiff in error is not affected by the fact that it is a foreign insurance company.

The law is not a condition to its doing business in the State.

It is in general terms, and hits all insurance companies. If it is invalid as to some it is invalid as to all. A company lawfully doing business in the State, is no more bound by a general unconstitutional enactment than a citizen of the State. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 409.

The right to make contracts is an indispensable incident to property, without which it cannot be lawfully acquired as between living persons nor effectively preserved or used. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591; *Holden* v. *Hardy*, 169 U. S. 366, 391. The privilege of contracting is both a liberty and a property right. *Frorer* v. *The People*, 141 Illinois, 171, 181; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931, 939; *State* v. *Julow*, 129 Missouri, 163, 172.

Due process of law, and law of the land, which are synonymous, necessarily refer to a preëxisting rule of conduct, and are intended to secure the individual from the arbitrary exercise of the powers of the Government, unrestrained by the established principles of private rights and distributive justice. These terms were intended to perpetuate old and well established principles of right and justice by securing them from abrogation or violation. *Weimer* v. *Bembury*, 30 Michigan, 201; Cooley's Const. Lim. (6th ed.) 443.

Having these principles in mind it becomes a necessary "conclusion of reason" that a statute that has the effect to enable one to obtain the property of another by fraud, which is even more odious than force, 1 Story Eq. Jurisp., 15th ed., 200, and when the fraud shall have been accomplished, vests the title in the wrongdoer, is obnoxious to that provision of the Constitution which forbids the State to deprive one of his property without due process of law. *Boyd* v. *United States*, 116 U. S. 616; *McKinster* v. *Sager*, 72 N. E. Rep. (Ind.) 815; 1 Bouvier, Law Dict., 690; Broom's Leg. Max., 3d ed., 463, *572; *Merritt* v. *Robinson*, 35 Arkansas, 483; *Riggs* v. *Palmer*, 115 N. Y. 506, 511.

Fraud will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it is utterly void. *United States* v. *The Amistad,* 15 Pet. 518, 594; *Catts* v. *Phalen,* 2 How. 376, 381; *Cochran* v. *Cummings,* 4 Dall. 250.

And this principle has in no case found or deserved a more uniform application than in case of policies of insurance upon both life and property. *Carrolton Co.* v. *American Co.,* 115 Fed. Rep. 77; *Livingston* v. *Insurance Co.,* 7 Cranch, 506; *Hubbard* v. *Association,* 100 Fed. Rep. 719; *Mattison* v. *Modern Samaritans,* 91 Minnesota, 434; *Kœrts* v. *Grand Lodge,* 119 Wisconsin, 525; *Rupert* v. *Supreme Court U. O. F.* (Minn.), 102 N. W. Rep. 715; *Royal Neighbors* v. *Wallace* (Neb.), 102 N. W. Rep. 1020; *Spencer* v. *Phœnix Ins. Co.,* 119 Wisconsin, 530; *Hanf* v. *Northwestern Assn.,* 76 Wisconsin, 450; *Ketcham* v. *American Assn.,* 117 Michigan, 521; *N. Y. Life Ins. Co.* v. *Fletcher,* 117 U. S. 519.

A contract may be avoided for fraud without reference to whom the fraud may be directed against—whether it be one of the parties, a stranger to the agreement, or the public. It is a matter affecting the public morals and the policy of the State, and one may not even make a valid contract that he will stand bound by fraud. Broom's Max. 668; quoted 14 Am. and Eng. Enc. of Law, 2d ed., 157 n.; *Bridger* v. *Goldsmith,* 143 N. Y. 424; *Hofflin* v. *Moss,* 67 Fed. Rep. 440; *Wilcox* v. *Howell,* 44 N. Y. 398; *Regan* v. *Union Mutual Ins. Co.,* 76 N. E. Rep. 217; *Columbia Ins. Co.* v. *Lawrence,* 10 Pet. 507.

Mr. Robert A. Hewitt, Jr., and *Mr. W. H. Haynes,* with whom *Mr. Kendall B. Randolph* and *Mr. W. M. Fitch* were on the brief, for defendants in error:

A foreign corporation is not a citizen within the meaning of the Fourteenth Amendment, and the States have a right to impose whatever conditions they see fit to impose upon foreign corporations doing business in the State. *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288; *Blake* v. *McClung,* 172 U. S.

239; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *New York Life Ins. Co.* v. *Craven*, 178 U. S. 389; *Hancock Mut. Life Ins. Co.* v. *Warren*, 181 U. S. 73.

The law, however, applies to all persons in like circumstances and conditions, and all insurance companies whether foreign or domestic. *Hibben* v. *Smith*, 191 U. S. 325.

The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth. Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, nor will they interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Railway* v. *Herrick*, 127 U. S. 210.

United States courts are controlled as to the interpretation of state statutes by the decision of the court of last resort of the State and will form an independent judgment as to their meaning only when no such construction has been had. *Enfield* v. *Jordan*, 119 U. S. 680; *Bank* v. *Pennsylvania*, 167 U. S. 461; *Hartford Ins. Co.* v. *Railroad Co.*, 175 U. S. 91; *McCain* v. *Des Moines*, 174 U. S. 177; *Orr* v. *Guilman*, 183 U. S. 283; *Sioux City R. R. Co.* v. *N. A. Trust Co.*, 173 U. S. 107.

A foreign insurance company doing business in a State is governed by the laws thereof, as to the interpretation of its contract. Those laws become a part of the contract. *Fletcher* v. *New York Life Ins. Co.*, 13 Fed. Rep. 526; *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *John Hancock Mut. Life Ins. Co.* v. *Warren*, 181 U. S. 73; *Equitable Life Assur. Society* v. *Pettus*, 140 U. S. 233, 234; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

This statute has been interpreted by the courts of last resort of Missouri and given the meaning placed upon it by the trial judge in his charge to the jury. *Schuermann* v. *Insurance Co.*, 165 Missouri, 641; *Kern* v. *Legion of Honor*, 167 Missouri, 471; *Jenkins* v. *Covenant Life Ins. Co.*, 171 Missouri, 375; *Smith* v. *Mut. Ben. Life Ins. Co.*, 173 Missouri, 329; *Herzberg* v. *Brotherhood*, 110 Missouri App. 328.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action upon two policies of insurance issued by the Northwestern National Life Insurance Company, a Minnesota corporation doing business in Missouri, upon the life of Eber B. Roloson; one dated November 21, 1901, the other May 14, 1902; each for the sum of $5,000, payable to the estate of the insured within ninety days after the acceptance by the company of satisfactory evidence of his death while the policy was in full force.

Each policy contained these provisions: "This policy shall not be in force until the first premium is paid, and the policy delivered to and accepted by the insured while in good health. At any time when this policy has been two years continuously in force it will be incontestable, except for fraud and nonpayment of premiums as provided herein, if the age of the insured has been correctly stated in the application."

The application for insurance was made by reference a part of the policy, the latter providing that the statements and answers therein every person accepting or acquiring an interest in the policy "adopts as his own, and warrants to be full, complete and true, and agrees to be material." The application provides: "No obligation shall arise under this application until the usual policy of insurance shall be issued and delivered to me, I being at that time in good health, and the first premium paid by me;" also, "I warrant the statements and answers as written or printed herein, or in part two of this application, to be full, complete and true, whether written

by my own hand or not, and agree that every such statement and answer is material to the risk;" also, "That I am not afflicted with any disease or disorder; nor have I had any illness, local disease, or personal injury not herein set forth."

Among the questions propounded to the insured and his answers—embodied in the application—were the following: "Q. Has any company or association ever postponed or declined to grant insurance on your life? A. No. Q. If so, for what reason and by what company or association. A. No. Q. Has any physician ever given an unfavorable opinion upon your life with reference to life insurance or otherwise? A. No. Q. Have you ever had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness, or ailment of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder, or any disease or infirmity whatever? A. No. Q. Give name and address of each physician who has prescribed for or attended you within the past ten years, and for what disease and ailments? Name, Dr. C. O. Patton, McFall, Mo. (b). For what disease or ailment? A. Bilious attack. Q. Has your husband or wife or any other immediate member of your family any tuberculous disease? A. Only sister had as stated."

It was admitted at the trial that the insured died February 28, 1903, having paid all premiums due upon his policies, and that proofs of his death were made, such proofs stating that he died of progressive anæmia.

The company denied all liability on its policies, upon the ground that each of the answers to the above questions was untrue, and known to be so by the applicant when he made them. And at the trial it was offered to be proved (and the offer was rejected, the company duly excepting) that such answers were not true, and when made were known to be untrue.

There was a verdict for the plaintiffs, the executors of the insured, for the amount due on the two policies, namely,

$11,050, for which judgment was rendered against the company.

The case was brought here under the act of March 3, 1891, *c.* 517, which authorizes an appeal or writ of error directly to this court from a Circuit or District Court of the United States, in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. 26 Stat. 826, 828.

When the policies in question were issued, it was provided by the statutes of Missouri, § 7890, that: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this State, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case, shall be a question for the jury;" and by § 7891, that "in suits brought upon life policies, heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiffs, the premiums received on such policies."

These provisions were first enacted in 1874, appearing in the Revision of 1879 as secs. 5976 and 5977, in the Revision of 1889 as secs. 5849 and 7891, and in the present revision as secs. 7890 and 7891.

At the trial in the Circuit Court the insurance company made several requests for instructions. They embodied these propositions: That the statute of Missouri, section 7890, was not applicable to this case, and could not be applied to it consistently with the Fourteenth Amendment of the Constitution of the United States; that the plaintiff could not recover on either policy if it appeared that it was not delivered to and accepted by him while he was in good health; that if the insured, at the time of making his application for a policy of insurance, knowingly, falsely and fraudulently, with the pur-

pose to mislead and deceive the company, misrepresented in the application any matter concerning his health, life or physical condition, which would reasonably affect the action of the company, then the Missouri statute was not applicable to the case; that if with the intention to deceive and mislead the company the insured made in his application an untrue warranty or misrepresentation concerning anything material to the risk, or if at the time of the application he was in bad health, and knew such to be his condition, but fraudulently and falsely, with the intent to deceive, stated that he was then and had been for twelve months in good health, free from all ailments, diseases, weaknesses and infirmities, whereby the company was deceived into issuing the policy, when it would not otherwise have done so, he could not recover in this action.

The trial court refused each request of the company, and an exception to its action was duly taken; and it charged the jury (the company excepting) that the Missouri statute was applicable to this case and not unconstitutional, and that the defendant company could not avoid liability on its policy, by reason of any representations by the insured in his application, unless the jury found that the matters to which such representations had reference *actually contributed to the contingency or event on which the policy, by its terms, was to become due and payable.*

Although the assignments of error are numerous we do not deem it necessary to notice any questions except those growing out of the application of the Missouri statute to this case.

As to the purpose and scope of that statute we need only refer to the decisions of the highest court of Missouri whose province it is to declare its meaning and effect, while it is the province of this court to adjudge whether the statute, as interpreted, is in conflict with the Constitution of the United States. We do not stop to inquire whether, having due regard to its words, the statute might not have been differently construed by the state court, but accept its judgment as indicating what it is to be taken to mean. In *Schuermann* v.

Union Central Life Ins. Co., 165 Missouri, 641, 653, reference was made to the history of business of life insurance in Missouri, the court saying: "While equality of rights and privileges should be the general aim of all laws, and special restrictions and burdens imposed its strict exception, yet laws have ever been enacted by the State, and sustained, since the adoption of our present Constitution, as before its adoption, which were made to operate against certain classes of the community only, when that class has occupied some peculiar position, or when it has been clothed with some peculiar opportunities not enjoyed by the remainder of the community. As said before, life insurance companies in this State, prior to the adoption of sec. 7890, could, and by a practice almost universal, did, insert in their policies a stipulation to the effect that any untrue statement or answer made by the applicant for insurance (regardless of its materiality or regardless of the intent of the applicant in making same) should avoid the policy, and too frequently when demands were made upon them for the obligations of the policies the companies availed themselves of these harsh provisions without a return by them of the money which they had obtained from the insured in his lifetime, and when the untrue statements made had little if any effect upon the risk undertaken by the insurer. This doctrine of warranties, in the extent to which it had grown and was applied, was something peculiar to insurance companies, and was therefore thought the subject of special legislation, in a law which properly undertook to affect insurance companies alone in that particular. By a long and hurtful practice of a given policy peculiarly their own, insurance companies had stamped themselves as a class, to which alone legislation might properly address itself, in that regard."

In the subsequent case of *Kern* v. *Legion of Honor*, 167 Missouri, 471, 487, the court, referring to the statute, said that it "was enacted to correct the evil that had grown up, of permitting insurance companies to make every statement or answer a warranty, and if any one, however trivial or however

foreign to the risk or loss, turned out to be untrue, to avoid the policy without refunding the benefits the company had received. The statute draws no distinction between innocent and fraudulent misrepresentations, and the courts have no right to draw any such distinction. The test applied by the statute is whether 'the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable,' and the power to determine that question is vested by the statute in the jury, and not in the court." The case of *Christian* v. *Ins. Co.*, 143 Missouri, 460, being called to the attention of the state court, it further said: "In that case no distinction was drawn, or intended to be permitted, between innocent and wilfully fraudulent misrepresentations. The purpose was to give full force and effect to the statute, and to hold that no misrepresentation, whether innocent or fraudulent, when based upon a warranty of truth by the terms of the policy or not, shall be a defense 'unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.'" See also *Jenkins* v. *Covenant Mut. Life Ins. Co.*, 171 Missouri, 375, 383.

We take it, then, that the statute, if enforced, cuts off any defense by a life insurance company, based upon false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured. Is the statute, therefore, to be held repugnant to the Fourteenth Amendment? Does it, in such case, deprive the insurance company of its "liberty" or property without due process of law, or deny to it the equal protection of the laws? Although the statute in some degree restricts the company's power of contracting and is so worded that the beneficiaries of its policy may sometimes reap the fruits of fraud practiced upon it by the insured, we cannot, for that reason, hold that the State may not, so far as the Constitution of the United States is concerned, regulate the business of life insurance to the extent indicated. It is true that this court has said that the liberty

guaranteed by the Fourteenth Amendment against deprivation otherwise than by due process of law embraces the right to pursue a lawful calling and enter into all contracts proper, necessary and essential to the carrying out of the purposes of such calling. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589. It is true, also, that a corporation of one State, doing business in another State, under such circumstances as to be directly subject to its process at the instance of suitors, may invoke the protection of that clause of the Fourteenth Amendment which declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Blake* v. *McClung,* 172 U. S. 239, 260, 261. But it is equally the doctrine of this court that the power, whether called police, governmental or legislative, exists in each State, by appropriate legislation, not forbidden by its own constitution or by the Constitution of the United States, to determine for its people all questions or matters relating to its purely domestic or internal affairs, and, "to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good." *Lake Shore and Michigan Southern Railway* v. *Ohio,* 173 U. S. 285, 297, and authorities there cited.

We are informed by the decisions of the Supreme Court of Missouri that life insurance companies doing business in that State often secured contracts under which they could defeat all recovery upon a policy, and retain all premiums paid by the insured, if it appeared in proof that the application for insurance contained an inaccurate or untrue statement, however innocently made, as to matters having no real or substantial connection whatever with the death of the insured, and which were in no sense material to the risk. This was deemed an evil practice to be remedied by legislation. Of course, the State, if it had seen proper, might have excepted from the operation of the statute cases in which the insured, by his representations when obtaining a policy, perpetrated a fraud upon the company, or made untrue statements in his applica-

tion as to matters material to the risk. But that remedy was deemed inadequate to prevent wrong and injustice. The State decided to go to the root of the evil, and therefore in substance, it established, as a rule of conduct for all life insurance companies, domestic and foreign, doing business in the State, that representations, of whatever nature, made to the company by the insured should not defeat recovery upon a policy unless such representations, in the judgment of a jury, actually contributed to the contingency or event on which it was to become due and payable. Surely the State could make such a regulation in relation to its own corporations; for a corporation cannot exert any power, nor make any contract, forbidden by the law of its being. Such a restriction as that founded in the Missouri statute, if embodied in the original charter of a life insurance corporation, would, of course, be binding upon it in the State granting such charter, and could not be disregarded. If, however, no such restriction was imposed by its charter, it could yet be imposed by subsequent legislation, unless the State had precluded itself from so doing by some contract (if a binding one could be made) which, as to its obligation, was protected by the Federal Constitution. The business of life insurance is of such a peculiar character, affects so many people, and is so intimately connected with the common good, that the State creating the insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs, so far, at least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions. The State may well say to its own corporate creatures engaged in the business of life insurance that they shall not refuse to pay what they agreed to pay simply because of some representation made by the insured which did not actually contribute to the contingency or event on which the agreement to pay depended. If a life insurance corporation does not approve such a restriction upon the conduct of its affairs it is its privilege to cease doing busi-

ness. Now, if the statute in question is not invalid as to life insurance corporations of Missouri, it is not perceived that the State may not make its provisions applicable to corporations of other States doing business in its territory with its sanction or under its license. That Missouri could forbid life insurance companies of other States from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted in view of the decisions of this court. If it could go that far, why may it not declare, as it has in effect done, by this statute, that its provisions shall apply to foreign life insurance companies doing business in Missouri under its license? It would, indeed, be extraordinary if the State could compel its own life insurance companies to respect this statute, but could not enforce its provisions against a foreign corporation doing business within its limits, with its consent, express or implied — especially against one which, as is the case here, came into the State for purposes of business after such statutory provisions were enacted. As the present statute is applicable alike to all life insurance companies doing business in Missouri, after its enactment, there is no reason for saying that it denies the equal protection of the laws. Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial persons. Nor in any true, constitutional sense does the Missouri statute deprive life insurance companies doing business in that State of a right of property. This is too plain for discussion.

What has been said disposes of the only questions we need to determine, and the judgment is

Affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* FLORIDA EX REL. ELLIS, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 9. Argued March 2, 5, 1906.—Decided December 3, 1906.

Where the state law provides that rates established by the railroad commission are to be taken in all courts as *prima facie* just and reasonable, and there is nothing in the record from which a reasonable deduction can be made as to the cost of transportation, or the amount transported of the single article in regard to which an intrastate rate has been established and complained of, or how that rate will affect the income of the railroad company, this court will not disturb the finding of the highest court of the State that the rate was reasonable, and hold that it amounted to a deprivation of the company's property without due process of law.

48 Florida, 146, affirmed.

On December 17, 1903, the railroad commission of the State of Florida, after notice and a hearing, made an order:

"That the rate to be charged by all the railroads and common carriers doing business wholly or in part within the State of Florida, for the transportation of phosphate from points in the State to points within the State, shall not exceed one cent per ton per mile.

"Provided, however, that where the rate of one cent per ton per mile will raise any rate now in operation, that said rate of one cent per ton per mile shall not be effective, but the rate as now charged by the railroad companies is hereby adopted by the Railroad Commissioners as their rate between such points.

"It is, therefore, ordered, that where a shipment of phosphate shall pass over two or more railroads in reaching its destination within the State of Florida, the initial line may charge one and a half cents per ton per mile for the first ten miles which said phosphate shall be hauled."

The railroad company in error, which was a party to the

proceedings before the commission, not complying with this order, application was made on March 7, 1904, to the Supreme Court of the State for a writ of mandamus to compel compliance, and on October 19, 1904, the peremptory writ was ordered by that court, as prayed for. 48 Florida, 146. Thereupon the railroad company sued out this writ of error.

No special findings of fact were made by the Supreme Court but in its opinion it said:

"There is a total lack of positive proof that the commission rate is materially less than that now charged. The company proves merely that its books do not show that any local phosphate had been carried by it, but does not show what rate it charges on the interstate shipments of phosphate. There is some showing of the expensiveness of handling phosphate for foreign shipments, much of which would not enter into the local or intrastate business, should such be carried, but nothing is shown from which this court can say that the rate fixed by the commission is unreasonable. The evidence offered might tend to show that the rate is unnecessary or that it is speculative, but such questions the court is not called upon to decide.

* * * * * * * *

"Taking the figures from the brief filed by the respondent, we find that the local business alone produces a net earning of at least 3% on the total value of the road in Florida, charging against such income the whole of the taxes. While a State is not permitted to offset local business against interstate business, and to justify low local rates by reason of the profitableness of the latter, yet the interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business; there is, however, a showing that the interstate and foreign business is large and, on a proper showing and a proper pro-

portioning of the service between domestic and foreign business, this percentage of net income would be largely increased.

* * * * * * * *

"Under the burden of proof cast by the law upon the respondent, we find that the rate in question is not unreasonable."

Mr. John E. Hartridge, for plaintiff in error:[1]

The Federal question involved may be presented in two several ways, and is properly divided: First. Whether the plaintiff in error is earning its operating expenses, taxes, and a reasonable return on the money invested. Second. Whether a reasonable rate is not understood to be a rate reasonable as an entirety? In other words, if a rate is reasonable for a long haul and unreasonable for a short haul, is not the rate as an entirety an unreasonable rate? The question involved is, whether plaintiff in error in the operation of that portion of its line situated entirely in Florida has a right to earn sufficient revenue from the state passenger and freight business done upon said division, to pay operating expenses, taxes, and a reasonable return upon its investment?

The Florida railroad commission, in fixing future rates, does not act as a court. The power to fix future rates is legislative and not judicial. *I. C. C.* v. *C. N. O. & T. P. Ry.*, 167 U. S. 499.

The Florida railroad commission, in fixing future rates, acts in a legislative capacity. Whatever judicial power it may have in regard to other matters, it does not act judicially when it assumes to fix rates. *W. U. T. Co.* v. *Myatt*, 98 Fed. Rep. 341.

Even if the legislature of Florida had denominated the commission a court, it would not be conclusive as to the nature of the jurisdiction and powers conferred upon it. That question is not to be determined by any terminology employed in the act.

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[1] See also argument in Nos. 10, 11, argued simultaneously herewith, *post*, p. 262.

Compensation implies three things—payment of the cost of service, interest on bonds, and then some dividend. *Southern Pac. Co.* v. *Railroad Commissioners*, 78 Fed. Rep. 262.

An ordinance has been held void under the Fourteenth Amendment, as depriving the company of its property without due process of law which requires a street railroad company to reduce its rates, "when the road was only making yearly net earnings of 3.3 per cent., to 4.5 per cent. on its *bona fide* investment, and paying 5 per cent. interest on its bonds, in a city where the current rate of interest on first mortgage real estate security is 6 per cent." *Milwaukee El. Ry.* v. *Milwaukee*, 87 Fed. Rep. 577.

Mr. J. M. Barrs, with whom *Mr. W. H. Ellis*, Attorney General of the State of Florida, was on the brief, for defendant in error.[1]

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

Passing all matters of a local nature, in respect to which the decision of the state court is final, the Federal question is whether the order of the railroad commission, sustained by the Supreme Court of the State, deprived the company of its property without due process of law or denied to it the equal protection of the law. The testimony taken before the commission was not preserved, but by the law of the State the rates established by such commission are to be taken in all courts as *prima facie* just and reasonable. Laws Florida, 1899, pp. 76, 82, Chap. 4700, Sec. 8. We start, therefore, with the presumption in favor of the order.

The testimony on the hearing of the application in the Supreme Court is, however, in the record. That court, in the exercise of its original jurisdiction of mandamus cases, determines questions of fact as well as of law. *State ex rel.* v. *County Commissioners of Suwannee County*, 21 Florida, 1.

[1] For abstract of argument, see p. 266, *post*.

While it did not make any distinct findings of fact, yet its deductions from the testimony are clearly indicated by the quotations from its opinion. If it be said that in the absence of special findings of fact it is the duty of this court to examine the testimony upon which the judgment was entered, it is very clear that there was no sufficient evidence presented to that court to justify a refusal to enforce the order of the railroad commission.

And here we face this situation: The order of the commission was not operative upon all local rates but only fixed the rate on a single article, to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphate has been changed by the order of the commission. There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the State of Florida, and its judgment is

Affirmed.

SEABOARD AIR LINE RAILWAY v. FLORIDA *ex rel* ELLIS, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

Nos. 10, 11. Argued March 2, 5, 1906.—Decided December 3, 1906.

Atlantic Coast Line v. *Florida ex rel. Ellis, ante*, p. 256, followed.

Where the record does not disclose why an order of a state railroad commission was made applicable only to certain local and intrastate rates, but the state law provides that rates so fixed are to be considered in all courts as *prima facie* just and reasonable, and the effect of the order was to equalize rates, this court will not hold the judgment of the highest court of the State sustaining the rate, was erroneous. A State may insist upon equality of intrastate railroad rates, the conditions being the same, without depriving the railroad company of its property without due process of law.

It will be presumed that a state railroad commission acts in fixing an intrastate railroad rate with full knowledge of the situation, and where the record does not disclose all the evidence, a rate sustained by the highest court of the State will not be held by this court to be confiscatory and depriving the railroad company of its property without due process of law where it appears by the report of the company that the rate exceeds the average rate received by the company during the previous year.

48 Florida, 129 and 150, affirmed.

THESE cases resemble the one immediately preceding, in this, that review is sought in each of an award of a peremptory writ of mandamus by the Supreme Court of Florida to compel compliance with an order of the state railroad commission. In the first the court sustained an order of the commission, made June 25, 1903, and to go into effect July 1, 1903, prescribing rates on the Florida West Shore Railway, charged to be under the control and management of the plaintiff in error, 48 Florida, 129–152, the order being in these words: "It is hereby ordered and adjudged by the railroad commission of the State of Florida that the following schedule of freight tariffs shall be allowed and adopted for freight shipments over the

Seaboard Air Line Railway, to apply only to shipments from or destined to points on the Florida West Shore Railway, and from points on the Florida West Shore Railway to points on the Florida West Shore Railway, and the same shall be put into operation and be effective on the first day of July, A. D. 1903," and followed by the schedule; and in the second, it enforced the order of the commission in respect to phosphates (which was noticed by us in the opinion in the preceding case). 48 Florida, 150.

The proceedings before the commission are not disclosed, nor is there anything to show upon what the orders were based. There was notice and a hearing. And in the pleadings in the first case appear the contracts between the plaintiff in error and the Florida West Shore Railway.

In the Supreme Court the relator presented no testimony, relying upon the statutory presumption which attends an order of the commission. The defendant introduced the report which it had made to the railroad commission for the year ending June 30, 1904, and the report of the railroad commission to the Governor of the State for the year ending March 1, 1904, and upon these two reports the cases were considered by the Supreme Court.

Mr. Hilary A. Herbert and *Mr. George P. Raney*, with whom *Mr. Benjamin Micou* was on the brief, for plaintiff in error, in this case and in No. 9 argued simultaneously herewith.[1]

If this court sustains the court below then, by § 13 of the railroad commission law of Florida, for every failure to comply with any requirement of either of the two orders appealed from the injured person may bring suit and recover damages, court costs and lawyers' fees. In other words, the roads are at the mercy of any injured person who, under the phosphate order, has demanded of us to load and carry a ton of phosphate

[1] *Atlantic Coast Line* v. *Florida ex rel. Ellis*, *ante*, p. 256.

one mile and unload it for one cent, or load and carry it for five miles and then unload it, all for five cents.

The Seaboard Air Line Railway Company is not paying any dividends to its stockholders and its business in Florida is now conducted at rates so low that any material reduction would be unreasonable. And the order of the Florida commission in relation to phosphates is discriminatory, exceptional and partial as to the particular subject matter. On its face it is an irregular, unjust, and intolerable method of rate fixing.

The order makes the rate the same for one mile as for one hundred miles, and it is material because it applies to 16.43 per cent, of all the intrastate freight business of the appellant company in Florida.

All railroad literature with which we are familiar, whether originating in discussions before legislative bodies, railroad commissions, or courts, distinguishes between long and short hauls, since it is matter of common knowledge that no railroad carrier can transport freight at the same rate per ton per mile for long and short distances. Grading rates according to mileage may not, it is well recognized, secure perfectly fair compensation, but as the best and only practicable method of approximating justice we believe it may be called an unvarying custom.

It has been the custom of the railroad commission of Florida in other cases to follow this rule of grading rates with some reference to mileage as is shown by the record in both these cases. The commission, however, has selected phosphates to signalize a new departure from this just principle.

A railroad company may sometimes, for purposes of its own, do things which a commission cannot be justified in ordering. *Louisville & Nashville R. Co.* v. *Behlmer*, 175 U. S. 669. Just such an order as this, however, we cannot conceive that any railway company has ever prescribed for itself.

Appellant's rates on phosphates were, when altered, for long distances less than one cent per ton per mile, and more for shorter distances. If the rates between any points or for

any particular distances were too high, the board should have addressed itself to the task of reducing such rates, grading them according to distances; this because, as the court judicially knows, short hauls and deliveries cost more than long hauls. *Chicago, M. & St. P. R. Co.* v. *Tompkins,* 176 U. S. 168.

This court has jurisdiction to review on writ of error. The Florida law provides that: "All rules and regulations made and prescribed by said commissioners for the transportation of persons and property on the railroads subject to the provisions of this act or to prevent unjust discrimination or other abuses by them shall be deemed and held to be *prima facie* reasonable and just."

If the commission make a freight rate which, on its face, is *prima facie* unreasonable and unjust, certainly the Supreme Court of Florida could not take away from this court the right to pass upon this question by declaring that said rates were just and reasonable. If the Florida court had any such power as this all questioning of the conduct of a state commission would end with the state courts, and there would be no such thing as Federal jurisdiction over cases of this class.

In no case has such a sweeping straight rate as this been sustained. If upheld now, the decision will greatly simplify the duties of state boards in the future, but the rule here laid down seems to us to be totally inconsistent with the ideas of equity and fair play heretofore exacted of all bodies entrusted with the delicate and difficult task of dealing with the property rights of others. *Lake Shore* v. *Smith,* 173 U. S. 695, 696.

The order of the board must be taken as a whole, and if in any part of it it is unjust and without warrant, the whole must fall. The commission made this unfair order. There was no reason why it should not have made it just and fair. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Pacific Ry.* (C. C.), 64 Fed. Rep. 188.

When the state railroad commission in Mississippi sought to compel a telegraph company to keep open a particular office as part of a system, the state court held that the com-

pany could not be compelled to do business at a loss even in that one little office. *W. U. Tel. Co.* v. *Railroad Commission*, 74 Mississippi, 80.

This official report in evidence is uncontradicted. Altogether the Seaboard Air Line Railway constitutes a great system extending with many branches through Virginia, North Carolina, South Carolina, Alabama and Florida. Its present funded debt amounts in round numbers to some $61,000,000 besides its stock; whereas its total cost of construction is given in round numbers at some $7,000,000 less—$54,000,000. But this is by no means proof of overcapitalization. The fair conclusion is, there being no evidence to the contrary, that the system as a whole is worth not only the amount it actually cost in dollars and cents to construct and equip it, but the amount it cost its owners and at which it was capitalized; because, like other great systems of railways, it was extended into an undeveloped country and over desirable lines, upon the credit of the company, the company utilizing its credit by raising money on its bonds, which money was used in buying and building connecting roads, in operating them for a considerable period of time, during which they did not and could not be expected to pay interest on the money invested, the enterprising managers of the system in the meanwhile counting on the future development of the country for a return of their investments. See *Met. Trust Co.* v. *The Houston & T. C. R. Co.*, 90 Fed. Rep. 168.

In estimating the value of the property on which a railroad company is entitled to earn a return from tariff rates, the following authorities show that the cost of bare physical reproduction is too narrow a basis: *Milwaukee Electric R. & Light Co.* v. *Milwaukee*, 87 Fed. Rep. 577, 585; *Ames* v. *Union P. R. Co.*, 64 Fed. Rep. 165; *Smyth* v. *Ames*, 169 U. S. 547; *Chicago, B. & Q. R. Co.* v. *Dey*, 38 Fed. Rep. 656.

Railway companies should be allowed to earn something by way of dividends in addition to paying operating and maintaining expenses, interest on outstanding bonds, and taxes.

Chicago & N. W. R. Co. v. *Dey*, 35 Fed. Rep. 866; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Louisville & N. R. Co.* v. *Brown*, 123 Fed. Rep. 951; *Southern Pacific* v. *Railroad Commissioners*, 78 Fed. Rep. 263.

Mr. J. M. Barrs, with whom *Mr. W. H. Ellis*, Attorney General of the State of Florida, was on the brief, for defendant in error in this case and in No. 9, argued simultaneously herewith:[1]

The authority of the railroad commissioners, under the constitution and laws of Florida, to make and enforce rates for the transportation of freight and passengers from points in Florida to points in Florida, is limited only by the provisions of the Federal Constitution against the taking of property without due process of law; the right of the State to enforce the orders of the state railroad commission by mandamus instituted originally in the Supreme Court of the State; the regularity of the proceeding before the railroad commission preliminary to the making of its orders; and the *prima facie* correctness, justice and validity of the orders of the commission, and the duty of the courts to enforce the orders of the commission, in the absence of an affirmative showing before the court made by the defendant in a mandamus proceeding sufficient to overcome the *prima facie* validity of the orders of the commission,—are, we understand, not questioned by the plaintiff in error, and are entirely manifest by reference to the constitution and laws of Florida, and cannot be reviewed by this court. Florida Laws, 1899, ch. 4700, p. 76.

This court is precluded from reviewing the judgment of the Supreme Court of Florida on the second assignment of error. *Tripp* v. *Santa Rosa St. R. Co.*, 144 U. S. 126; *Iowa Cent. R. Co.* v. *Iowa*, 160 U. S. 389; *Grand Rapids, etc., R. Co.* v. *Butler*, 159 U. S. 87; *Wood* v. *Brady*, 150 U. S. 18; *Gibson* v. *Mississippi*, 162 U. S. 565; *French* v. *Hopkins*, 124 U. S. 524; *Lœber* v.

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[1] See p. 256, *ante*.

Schrœder, 149 U. S. 580; *Thorington* v. *Montgomery*, 147 U. S. 490; *McNulty* v. *California*, 149 U. S. 645; *Northern Pacific R. Co.* v. *Patterson*, 154 U. S. 130; *O'Neill* v. *Vermont*, 144 U. S. 323; *Hibbin* v. *Smith*, 191 U. S. 310; *Smith* v. *Indiana*, 191 U. S. 138.

The third, fourth, fifth, sixth and seventh assignments of error are in effect the same, and all are based on the final decision of the Supreme Court of Florida. The eighth is a blanket assignment which covers all the others. No Federal question of law is raised by any of the assignments. The Supreme Court of Florida found the facts as stated in its opinion and that finding is conclusive in this court. *Hall* v. *Jordan*, 15 Wall. 393; *Carpenter* v. *Williams*, 9 Wall. 785; *Republican River Bridge Co.* v. *Kansas Pac. R. Co.*, 92 U. S. 315; *Martin* v. *Marks*, 97 U. S. 345; *Kenney* v. *Effinger*, 115 U. S. 577; *Quimby* v. *Boyd*, 128 U. S. 488; *Dower* v. *Richards*, 151 U. S. 658; *Hedrick* v. *Atchison &c. R. Co.*, 167 U. S. 673; *Atchison &c. R. Co.* v. *Matthews*, 174 U. S. 96; *Backus* v. *Fort St. Union Depot Co.*, 169 U. S. 557; *Egan* v. *Hart*, 165 U. S. 188; *In re Buchanan*, 158 U. S. 31; *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 226; *Missouri &c. R. Co.* v. *Haber*, 169 U. S. 513.

The Supreme Court of Florida, in their original jurisdiction of mandamus cases, are the judges of the fact as well as of the law. *Columbia County* v. *Suwannee County*, 21 Florida, 1.

The Supreme Court of Florida in their opinion in this case, did not enunciate any questionable principles of law. The opinion is limited almost, if not quite, to their findings of facts based on the testimony of the plaintiff in error before them.

Plaintiff in error has not shown sufficient facts to reverse the judgment of the Supreme Court of Florida, if the court should decide, contrary to our contention, and that the points raised in the case are questions of mixed law and fact and properly reviewable by this court. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649; *Covington*

& L. Tr. Co. v. *Sanford,* 164 U. S. 578; *Smyth* v. *Ames,* 169 U. S. 466; *San Diego L. & T. Co.* v. *Jasper,* 189 U. S. 439.

If this court could go back of the findings of fact of the Supreme Court of Florida, it would be found that the Seaboard Air Line Railway introduced in evidence to sustain its plea or return absolutely nothing even tending to sustain the same, confining itself to the introduction in evidence of two printed reports, the one being a report of that company filed with the Florida Railroad Commission for the year ending June 30, 1904, and the other the report of the state railroad commission for the year ending March 1, 1904. Neither of those reports have the slightest relevancy to the issue in the cause.

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

There are no special findings of facts in these cases, and only from an examination of the opinions filed by the Supreme Court can we ascertain what its conclusions were or upon what its judgments were based. It may well be doubted whether a railroad company can rely, as evidence in its own behalf, upon a report made and filed by it, and while a report of the railroad commission to the Governor may undoubtedly be used against it in an application made at its instance to secure compliance with one of its orders, yet there is little in its report which throws light upon the questions in these cases.

Referring to the first case, in which is presented the reasonableness of an order made by the commission respecting local rates for business on, to or from the Florida West Shore Railway, we find it stated in the brief of the plaintiff in error that the railroad commission on December 22, 1903, made an order, to go into effect July 1, 1904, reducing local freight rates generally; that from this order no appeal was taken; that in November, 1903, an order was made reducing by ten per cent rates on certain freights going over two or more roads, and that from such order no appeal was taken. These are the

orders referred to in the report of the commission to the Governor. But the order in controversy was made on June 25, 1903, to go into effect July 1, 1903, and is applicable solely to the Florida West Shore road. Now, whether this order of June 25, 1903, was simply operative to make the rates on the Florida West Shore road the same as those then obtaining generally in the State, or whether it made them higher or lower than such rates, does not appear. For some reason not disclosed the order touched only the local freight rates to and from the Florida West Shore Railway and over the Seaboard Air Line Railway. Even if the total receipts by the latter company from local freight rates were insufficient to meet what could properly be cast as a burden upon that business, such insufficiency would not justify it in an inequality of rates between different parts of the State, in one part too high and in the other too low. The State might properly insist that there should be equality in the rates—the conditions being the same—and if nothing more was accomplished by the order of the commission than to establish such equality we cannot hold that the judgment of the Supreme Court was erroneous.

With reference to the second of these cases, the order made by the railroad commission is said by the plaintiff in error to be an "irregular, unjust and unreliable method of rate fixing," and this upon the theory that the order makes the rate per mile the same for any distance, whether one mile or a hundred miles. It appears that 16.43 per cent of all the local freight business of the company in Florida comes from the carrying of phosphates, and reference is made to several cases in which the courts have noticed the fact that the cost of moving local freight is greater than that of moving through freight, and the reasons for the difference. But evidently counsel misinterpret the order of the railroad commission. It does not fix the rate at one cent per ton per mile. It simply provides that it shall not exceed one cent per ton per mile, prescribes a maximum which may be reduced by the railway company, and if distance

demands a reduction the company may and doubtless will make it. In addition it must be borne in mind that it is to be presumed that the railroad commission acted with full knowledge of the situation; that phosphates were in Florida possibly carried a long distance, the place of mining being far from the place of actual use or preparation for use. Further, when we turn to the report of the railroad company (which of course is evidence against it) we find that the company's average freight receipt per ton per mile in the State of Florida was $8\frac{15}{100}$ mills; so that the rate authorized for phosphates was nearly two mills per ton larger than such average. Under these circumstances it is impossible to say that there was error in the conclusions of the Supreme Court of the State, and its judgments are

Affirmed.

HEYMAN *v.* SOUTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 32. Submitted October 17, 1906.—Decided December 3, 1906.

In the absence of Congressional legislation goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package.

The word "arrival" as used in the Wilson law means delivery of the goods to the consignee, and not merely reaching their destination and expressions to that effect in *Rhodes* v. *Iowa*, 170 U. S. 412 are not *obiter*.

The power of the State over intoxicating liquors from other States in original packages after delivery and before sale given by the Wilson law does not attach before notice and expiration of a reasonable time for the consignee to receive the goods from the carrier; and this rule is not affected by the fact that under the state law the carrier's liability as such may have ceased and become that of a warehouseman.

118 Georgia, 616, reversed.

THE facts are stated in the opinion.

Mr. Samuel H. Myers and *Mr. Milton Strasburger* for plaintiff in error.

Mr. Joseph B. Cumming for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

In March, 1902, P. B. Wise and H. D. Harkins, residents of Charleston, South Carolina, each ordered a cask of whiskey from Paul Heyman, a wholesale liquor dealer in Augusta, Georgia. The price of the whiskey accompanied the orders, which were given upon the understanding that if for any cause delivery was not made to the consignees the purchase price would be refunded.

The two casks of whiskey, consigned to the respective purchasers at Charleston, were delivered to the Southern Railway Company at Augusta. In due course the packages of liquor reached Charleston, and were by the railroad company at once unloaded into its warehouse, ready for delivery. The record does not show that the consignees were notified of the arrival of the goods. Shortly after the goods were so placed in the warehouse of the railroad company they were seized and taken from its possession. The seizures were made without any warrant or other process, by constables asserting their right to do so under the authority of what is known as the dispensary law of South Carolina, which law was considered in *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. 438. The agent of the railroad company did not resist the seizure.

Thereafter, Heyman, the consignor, sued the railroad company for failing to make the deliveries as contracted in the bills of lading, and in the Superior Court of Richmond County, on appeal from a justice's court, obtained a verdict and judgment. The case was appealed to the Supreme Court of Georgia, and by that court the judgment was reversed and the case remanded. 118 Georgia, 616. On the second trial the defendant had a verdict and judgment; and on appeal the

judgment was affirmed by the Supreme Court of Georgia upon the authority of its previous opinion. The case was then brought here.

The act of Congress of August 8, 1890, commonly known as the Wilson Act, provides that all intoxicating liquors "transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The Supreme Court of Georgia held—although the goods had not been delivered to the consignees and although there was no showing of notice to them from the carrier, or even if notice by the local law was unnecessary, of the lapse of a reasonable time for the consignees to call for and accept delivery—that as the interstate transportation of the goods ended when they were placed in the warehouse, and the carrier was thenceforward liable only as a warehouseman, and that the goods ceased to be under the shelter of the interstate commerce clause of the Constitution. This was based upon the conclusion that goods warehoused under the circumstances stated must be considered as having arrived within the meaning of the Wilson Act, and therefore the packages of liquor in question were lawfully seized because subject to the police authority of the State of South Carolina. The meaning thus affixed to the word "arrival," as employed in the Wilson Act, was adopted after consideration of the opinion in *Rhodes* v. *Iowa*, 170 U. S. 412. While it was conceded by the learned court that language contained in the opinion in that case indicated that this court deemed delivery essential to constitute "arrival" within the Wilson Act, yet as the expressions in the opinion to that effect were not binding, as they were merely *obiter*, since the

Rhodes case was only concerned with whether goods had come under the state authority on reaching their place of destination and before they had been warehoused by the carrier.

We cannot concur in the view taken by the learned court of the decision in the *Rhodes case.* In that case a railroad employé at a town in Iowa was indicted under the law of that State because after an interstate shipment of liquors had reached the depot of the final carrier, at the point of destination, he moved the package from the platform where it had been placed on being unloaded to a freight warehouse belonging to the railroad company, a few feet away. It was insisted on behalf of the State of Iowa that the effect of the Wilson Act was to confer upon that State the power to subject to state regulations merchandise shipped from another State the moment it reached the boundary line of the State of Iowa. On the other hand, it was contended that an interstate shipment of liquor did not arrive within that State within the meaning of the Wilson Act until the consummation of the shipment by delivery at its destination to the consignee. The case, therefore, necessarily involved deciding the meaning of the word arrival in the Wilson Act, and this required an ascertainment of when goods shipped from one State to another, generally speaking, ceased to be controlled by the interstate commerce clause of the Constitution, and how far the general rule resulting from the power of Congress to regulate commerce had been limited, if at all, by the provisions of the Wilson Act. Considering the first question, the elementary and long-settled doctrine was reiterated that delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the States were concerned. In passing upon the second question the court, referring to a previous case involving the Wilson law, *In re Rahrer*, 140 U. S. 545, pointed out that the contention which was made in that case, that the Wilson Act was repugnant to the Constitution of the United States because it was an abdication by Congress of its power to regulate commerce,

was held to be untenable, because the Wilson Act was simply legislation by Congress creating a uniform rule applicable to all the States, by which liquor, when the subject of interstate commerce, could come under the power of a State at an earlier date than it otherwise would have done. Contemplating the grounds of the previous ruling upholding the constitutionality of the Wilson Act and coming to precisely determine the meaning of the word "arrival" as used in that act, it was said in the *Rhodes case* (p. 426):

"Interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

And as a result of this ascertainment of the meaning of the Wilson Act it was held that as the act of moving the goods preceded the period affixed by the Wilson Act at which the state power could attach, the conviction was erroneous.

The *Rhodes case* involved of necessity a construction of the import of the Wilson Act, and the mere fact that the particular conduct which happened in that case to be the subject of complaint occurred prior to the delivery did not operate to cause the affirmative construction which was given to the Wilson Act, and which it was necessary to give, to be *obiter*, and, therefore, subject to be disregarded. And a case decided by this court on the same day as the *Rhodes case* leaves no room for controversy concerning the affirmative construction given to the Wilson Act in the *Rhodes case*. The case referred to is *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. 438. The court said (p. 451):

"The interstate commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows state

authority to attach to the original package before sale but only after delivery. *Scott* v. *Donald,* and *Rhodes* v. *The State of Iowa, supra.* It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other States and that the inhibitions of a state statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use."

And in subsequent cases the construction adopted in the previous cases of the word "arrival" as employed in the Wilson Act has been reaffirmed and applied. Thus in *American Express Co.* v. *Iowa,* 196 U. S. 133, in reviewing the *Rhodes case* the meaning of the Wilson Act was again reiterated, the court saying (p. 142):

"The contention was that, as by the Wilson Act, the power of the State operated upon the property the moment it passed the state boundary line, therefore the State of Iowa had the right to forbid the transportation of the merchandise within the State and to punish those carrying it therein. This was not sustained. The court declined to express an opinion as to the authority of Congress, under its power to regulate commerce, to delegate to the States the right to forbid the transportation of merchandise from one State to another. It was, however, decided that the Wilson Act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages."

Again, in *Foppiano* v. *Speed,* 199 U. S. 501, referring to the Wilson Act and its previous construction, it was declared (p. 517):

"This act was held to be constitutional in the case of *In re Rahrer,* 140 U. S. 545, and that by virtue of said act, state

statutes might operate upon the original packages of intoxicating liquors before sale in the State. *Rhodes* v. *Iowa*, 170 U. S. 412, and *Vance* v. *W. A. Vandercook Company*, No. 1, 170 U. S. 438, held that the state statute must permit the delivery of the liquors to the party to whom they were consigned within the State, but that, after such delivery, the State had power to prevent the sale of the liquors, even in the original package."

As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the State power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular State, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several States concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority.

Of course we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrive at the point of destination and after notice and full opportunity to receive them are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson Act, because constructively delivered. We say we

are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition. And as in this case we deal only with the power of the State to enforce its police regulations against goods of the character of those enumerated in the Wilson Act, the subject of interstate commerce, before delivery, we must not be understood as in any way limiting or restricting the ruling made in *Vance* v. *Vandercook Co.*, No. 1, *supra*, upholding the right of a citizen of one State to bring from another State into the State of his residence, and keep therein, for his personal use, the merchandise referred to in the Wilson Act. In other words, as in the case at bar, delivery had not taken place when the seizures were made, and the control of the State over the goods had not attached, we are not called upon to consider whether, if the power of the State had attached by delivery, the State might not have levied upon the goods on the charge that they had not been *bona fide* brought into the State, and were not held by the consignees for their personal use, and, therefore, were not within the ruling in *Vance* v. *Vandercook Co.*, No. 1, *supra*.

The conclusion that the court below erred in declining to follow the prior rulings of this court construing the Wilson Act disposes of the entire controversy arising on the record before us, for the following reasons: In its answer filed in the trial court the railroad company substantially defended alone upon the ground that the seizure was rightful. And the Supreme Court of Georgia treated the liability of the defendant as depending solely upon the validity of the seizure. The court said:

"If they [the goods] were still in the course of interstate transportation, the seizure by the constable was not even *prima facie* legal, for the very law under which the seizure was made had, prior to such seizure, been declared by the Supreme Court of the United States to be unconstitutional in so far as it interfered with interstate commerce. *Scott* v. *Donald*, 165 U. S. 58. It, therefore, follows that if the shipment had not

been completed at the time the goods were seized, the railroad company would have no right to defend on the ground that it submitted to the superior authority, granting that such a defense, if established, would relieve it from liability."

Moreover, in this court counsel in their brief on behalf of the defendant in error rely exclusively upon the correctness of the construction given to the Wilson Act by the court below, and do not urge, in the event such construction be not sustained, that it was exempt for any reason whatever from liability.

The judgment of the Supreme Court of Georgia is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

C. H. NICHOLS LUMBER COMPANY *v.* FRANSON.

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

No. 30. Argued October 17, 1906.—Decided December 3, 1906.

A declaration that plaintiff is a resident of a State of the Union and a citizen of a foreign country under a monarchical form of government is sufficient to show the meaning of the pleader and the nationality of the plaintiff, and there is no merit in an objection to the jurisdiction of the Circuit Court, diverse citizenship existing, because plaintiff was not a citizen but a subject of the foreign power.

While under the Judiciary Act of 1891, in case of direct review on question of jurisdiction, when the record does not otherwise show how the question was raised, the certificate of the Circuit Court may be considered for the purpose of supplying such deficiency; when the elements necessary to decide the question are in the record the better practice, in every case of direct review on question of jurisdiction, is to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised, and passed on, and also the elements upon which the question was decided.

THE facts are stated in the opinion.

Mr. Carroll T. Bond, with whom *Mr. William L. Marbury* was on the brief, for plaintiff in error:

The allegation of plaintiff's being a citizen of Sweden was not a sufficient allegation for the purposes of jurisdiction in the Circuit Court in a suit between plaintiff and a corporation existing under the laws of Wisconsin. *Stuart* v. *Easton*, 156 U. S. 46; *Hennessy* v. *Richardson Drug Co.*, 189 U. S. 25, 34.

If the allegations in the complaint had been sufficient, as still seems to be supposed, the denial in the first paragraph of the answer would have been sufficient to put those allegations in issue. *Roberts* v. *Lewis*, 144 U. S. 653, 657; *Yokum* v. *Parker*, 130 Fed. Rep. 770; Ballinger's Code, etc., §§ 4907, 4909.

The proof that plaintiff was "from Sweden," and "came from Sweden to Minnesota in 1903," would not be sufficient to support a verdict for the plaintiff. The allegations in the complaint having been denied, it would have been essential to the plaintiff's recovery that he sustain them by proof. The burden of proof would have been upon him to support them by evidence. *Roberts* v. *Lewis*, 144 U. S. 653, 657; *Yocum* v. *Parker*, 130 Fed. Rep. 770.

Mr. Walter S. Fulton and *Mr. Martin J. Lund*, for defendant in error, submitted:

The allegation of citizenship negatived the idea that plaintiff was a citizen of the State of Washington. *Stuart* v. *Easton*, 156 U. S. 46, distinguished.

It is no longer necessary to describe a foreign citizen as an alien. Act of March 3, 1891. This statute supersedes the provisions of Rev. Stat. § 629, relating to jurisdiction in civil suits, where an alien was a party, and it is no longer necessary to describe a party as an alien. *Hennessy* v. *Richardson Drug Co.*, 189 U. S. 24.

If diverse citizenship is alleged, it is not put in issue by a general denial. *Adams* v. *Shirk*, 117 Fed. Rep. 801; *Collins* v. *City of Ashland*, 112 Fed. Rep. 175.

MR. JUSTICE WHITE delivered the opinion of the court.

A motion has been made to dismiss the writ of error, among others, on the ground of the absence of a bill of exceptions and the character of the order appealed from. We pass to the merits of the case without stopping to review the grounds of the motion, as we think they will be substantially disposed of by the views which we shall hereafter express.

By this writ of error the C. H. Nichols Lumber Company seeks the reversal of a judgment obtained by Charles Franson in the Circuit Court of the United States for the Western District of Washington. Considering the record alone, and putting out of view for the moment the effect of statements contained in a certificate made by the court below on the allowance of the writ of error, the case is this: The action was brought to recover for personal injuries alleged to have been sustained while in the employ of the defendant. The jurisdiction of the court below was invoked solely upon the ground of diversity of citizenship, it being alleged in the first paragraph of the complaint that the defendant was a corporation organized under the laws of the State of Washington, and doing business in the State of Washington, and that the plaintiff was at the time of the filing of the complaint, and had been for more than a year prior thereto, "a resident of Washington and a citizen of Sweden." Admitting its incorporation, and that it was doing business in the State of Washington, the defendant, by its answer, specifically denied each and every other allegation of the first as well as other specified paragraphs of the complaint.

The cause was tried to a jury, and, after verdict and remittitur of a portion thereof, a judgment was entered in favor of plaintiff. The record does not contain a bill of exceptions, and in the brief of counsel for plaintiff in error it is stated that none was prepared.

This writ of error, upon the ground solely of a want of jurisdiction in the trial court, was prayed and allowed, and a

formal certificate was made by the judge, reciting the time when and how the question of jurisdiction was raised and decided, accompanied with a statement of the pleadings and of the court's impression of certain testimony given at the trial by the plaintiff, deemed by the court pertinent to the elucidation of the question of jurisdiction. The certificate concludes with the statement of enumerated "questions of jurisdiction," which the court was of opinion arose for decision, all of them being based upon the overruling by the court of a motion to dismiss the action for want of jurisdiction, which motion, it is recited in the certificate, was made between verdict and judgment. And the only ground here assigned as error is predicated upon the action of the court in denying such motion to dismiss.

As the Circuit Court was without power to make a certificate containing a statement of facts as the basis for legal propositions upon which it desired the guidance of this court, *Mexican Central Ry. Co.* v. *Eckman*, 187 U. S. 429; *United States* v. *Rider*, 163 U. S. 132, it follows, speaking in a general sense, that our right to review on a direct proceeding concerning the jurisdiction of that court must depend upon the record and not upon the mere statement of facts made in the certificate prepared by the trial court. Applying this general rule, as it nowhere appears from the record that the issue as to jurisdiction presented by the motion to dismiss, the overruling of which is the sole ground for reversal relied upon in the assignment of error, was made or passed upon by the court, we should be constrained to dismiss this writ of error on the ground that the record did not disclose the presence in the case of the question of jurisdiction which is made the basis of the assignment of error. As, however, under the Judiciary Act of 1891, on a direct review of a question of jurisdiction, the trial judge is authorized to certify as to the existence of such question, we think we may look at his certificate for the purpose of ascertaining when and how the question of jurisdiction was raised, although, for the purpose of deciding the question

shown to have been thus raised, we may not resort to the statements in the certificate for the purpose of supplying elements of decision which we could not properly consider in an action at law without a bill of exceptions. We have said that we may resort to the certificate, in the absence of a proper showing on the record as to when and how the question of jurisdiction was raised and decided, for the limited purpose stated, because the power to do so is implied in a previous decision of the court, *North American &c. Co.* v. *Morrison*, 178 U. S. 262, and because of the general rule that it would be our duty, without action of the trial court or of the parties, to look at the record to determine whether or not the court below had jurisdiction of the action. *Thomas* v. *Ohio State University Trustees*, 195 U. S. 207. It is apparent under the rule we have stated that, whilst we must consider the record for the purpose of determining the question of jurisdiction which the certificate shows adequately to have been raised, we may not consider, in passing upon that question, in the absence of a bill of exceptions, the extraneous matter, such as the testimony of the plaintiff, etc., which forms no part of the record. The question, therefore, for decision under these circumstances is merely this: Does the record show jurisdiction in the court below? This solely depends upon the contention that the allegation in the complaint of the alienage of the plaintiff was insufficient.

The allegation was as follows: "That the plaintiff now is and for more than one year last past has been a resident of Washington and a citizen of Sweden." In brief, the argument is that at the time the action was brought Sweden was under a monarchical form of government, being, jointly with Norway, under the rule of the King of Sweden and Norway, and if the plaintiff owed allegiance to the government of Sweden he was not a "citizen," but a "subject" of that country. It is not, however, disputed that, although at the time of the bringing of this action, Sweden, a limited monarchy, was united to Norway under the same king, and the two countries were

bound to assist each other in the event of war, they were otherwise free and independent. (9 Century Dictionary and Encyclopedia, 969.) The allegation that the plaintiff was a resident of the State of Washington clearly shows that the designation citizen of Sweden was not employed to indicate mere residence, and could only have been intended as a statement of the nationality of the plaintiff, the country to which he bore allegiance. Whether, as contended for the defendant in error, the plaintiff, if he owed allegiance to the ruler of the kingdom of Sweden, was properly described, in the strictest technical sense as a citizen instead of as a subject of Sweden, we need not consider. The meaning of the pleader being evident, the objection is without merit. *Hennessy* v. *Richardson Drug Co.*, 189 U. S. 25.

Whilst we hold that in a case of direct review under the Judiciary Act of 1891, when the record does not otherwise show when and how the question of jurisdiction was raised, the certificate of the Circuit Court may be considered for the purpose of supplying such deficiency when the elements necessary to decide the question are in the record, we deem it the better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon and the elements upon which the decision of the question was based.

Judgment affirmed.

MARTIN *v.* PITTSBURG AND LAKE ERIE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 66. Argued October 26, 29, 1906.—Decided December 3, 1906.

In the absence of action by Congress a State may by statute determine, and either augment or lessen a carrier's liability, and such a statute limiting the right of recovery of certain classes of persons does not deprive a person injured thereafter of a vested right of property. *Pennsylvania Railroad Co.* v. *Hughes*, 191 U. S. 477.

Although a citizen of the United States has a right to travel from one State to another, in the absence of Congressional action, he does not possess as an incident of such travel the right to exert in a State in which he may be injured a right of recovery not given by the laws thereof, although that right may be given by the laws of other States including the one in which suit is brought. A classification with a railroad company's employés of all persons, including railway postal clerks, not passengers, but so employed in and about the railroad as to be subject to greater peril than passengers, is not so arbitrary as to deprive the railway postal clerk of the equal protection of the laws within the meaning of the Fourteenth Amendment.

The Pennsylvania statute of April 4, 1868, P. L. 58, providing that any person, not a passenger, employed in and about a railroad but not an employé, shall in case of injury or loss of life have only the same right of recovery as though he were an employé, is not void, either because contrary to the power delegated to Congress to establish post offices and post roads; or because repugnant to the commerce clause of the Constitution; or in conflict with the due process or equal protection clauses of the Fourteenth Amendment; or because it abridges the privileges and immunities of citizens of the United States.

Whether a railway postal clerk is a passenger or whether his right of recovery is limited by such statute is not a Federal question.

72 Ohio St. 659, affirmed.

Reuben L. Martin brought this action to recover compensation for personal injuries. At the time Martin was injured he was on a train of the railroad company, in the employ of the United States as a railway postal clerk on a route extending from Cleveland, Ohio, to Pittsburg, Pennsylvania. The

injuries arose from the derailing in Pennsylvania of the train, by the negligence of the crew of a work train, in permitting a switch leading to a side track to be open. Among other defenses the company pleaded a law of Pennsylvania, passed April 4, 1868 (P. L. 58), which, it alleged, was applicable and relieved from responsibility. In reply the plaintiff denied the existence and applicability of the statute, and moreover, defended on the ground that the statute, if existing and applicable, was void; first, because contrary to the power delegated to Congress to establish post offices and post roads; second, because repugnant to the commerce clause of the Constitution; and, third, because in conflict with the equal protection and due process clauses of the Fourteenth Amendment, and also the clause prohibiting a State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

On trial before a jury the court held the statute in question to be applicable and valid, and hence operative to defeat a recovery. A verdict and judgment in favor of the railroad company was severally affirmed by the Circuit Court and by the Supreme Court of the State of Ohio. 72 Ohio St. 659.

Mr. Charles Koonce, Jr., with whom *Mr. Robert B. Murray* and *Mr. William S. Anderson* were on the brief, for plaintiff in error:

Prior to the enactment of the statute everyone lawfully on a train who was not in fact an employé of the company was, and had the rights of a passenger in Pennsylvania. *Lockhart* v. *Lichtenthaler*, 46 Pa. St. 151, 159; *Pennsylvania Railroad Co.* v. *Henderson*, 51 Pa. St. 315, 326; *Creed* v. *Railroad Co.*, 86 Pa. St. 139; *Railroad Co.* v. *Myers*, 55 Pa. St. 288. And it was so held in this court. *Railroad Co.* v. *Derby*, 14 How. 468; *Railroad Co.* v. *Gleason*, 140 U. S. 435.

The same rule has been announced without exception in every other jurisdiction. *Calvin* v. *Southern Pac. Co.*, 136 Fed. Rep. 592; *Southern Pacific Co.* v. *Schuyler*, 135 Fed. Rep.

1015; *Arrowsmith* v. *Railroad Co.*, 57 Fed. Rep. 165; *Collett* v. *London, &c., R. R. Co.*, 15 Jur. 1053, *S. C.*, 16 Ad. & El. N. S. 948, *S. C.*, 16 Q. B. 984; *Mellor* v. *Railroad Co.*, 105 Maryland, 460; *Magoffin* v. *Railroad Co.*, 102 Missouri, 540; *Seybolt* v. *Railroad Co.*, 95 N. Y. 562; *Blair* v. *Railroad Co.*, 66 N. Y. 564; *Yeomans* v. *Navigation Co.*, 44 California, 71; *Hammond* v. *Railroad Co.*, 6 S. Car. 130; *Railroad Co.* v. *State*, 72 Maryland, 36; *Railroad Co.* v. *Klingman* (Ky.), 35 S. W. Rep. 464; *Railroad Co.* v. *Crudup*, 63 Mississippi, 291; *Railroad Co.* v. *Ketchum*, 133 Indiana, 346; *Railroad Co.* v. *Shott*, 92 Virginia, 34.

It was also the established law of Pennsylvania that a common carrier could not by contractual stipulation relieve himself of liability for the negligence of himself or his servants, whereby those carried by him were injured. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; 368, citing *Laing* v. *Colder*, 8 Pa. St. 479; *Pennsylvania R. R. Co.* v. *Henderson*, 51 Pa. St. 315.

This is true even though the injured one so seeking to recover for such negligence was in charge of freight, and the evidence of his right to be transported was denominated a "free ticket." *Pennsylvania Railroad Co.* v. *Henderson*, 51 Pa. St. 315; *Railroad Co.* v. *Lockwood*, 17 Wall. 357.

The act is in violation of the interstate commerce clause of the Federal Constitution, article 1, section 8. The authority of Congress to legislate with reference to the establishment of post offices and post roads and all matters of an executive and administrative character pertaining thereto, is exclusive. *In re Debs*, 158 U. S. 564, 583; *Gilman* v. *Philadelphia*, 3 Wall. 713–725. The United States have a property in the mails. *In re Debs*, 158 U. S. 593; *Searlight* v. *Stokes*, 3 How. 151.

The transmission of the United States mails, and those having charge thereof, from one point to another are not only subjects of interstate commerce, but the duties of the latter, as railway postal clerks, and the rules and regulations prescribing them, having their source exclusively in the Federal Government, and being, as such, liable to Federal authority only, they are constituted by such conditions subjects wholly

national in their character and, concerning the rights, duties and liabilities governing the same, there can, necessarily, be but one uniform system or plan of regulation.

When this is true, the rulings of the Supreme Court of the United States have been uniform that the legislative authority vests only in Congress to regulate such subjects, and an attempt on the part of a state legislative body so to do is beyond its power, and invalid. And where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489–493; *Gibbons* v. *Ogden*, 9 Wheat. 1, 222; *Passenger Cases*, 7 How. 283, 462; *State Freight Cases*, 15 Wall. 232, 279; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631; *Walling* v. *Michigan*, 116 U. S. 446, 455; *Pickard* v. *Car Co.*, 117 U. S. 34; *Railroad Co.* v. *Illinois*, 118 U. S. 557.

Wherever state laws instead of being of a local nature and not affecting interstate commerce, but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the class of those laws wherein the jurisdiction of Congress is exclusive. *Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212; *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Railroad Co.*, 125 U. S. 465.

Subject to certain exceptions only, which exceptions pertain in no respect to subjects of a national character, the States have no right to impose restrictions, either by way of taxes, discrimination or regulation of commerce between the States. *Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212; *Claire County* v. *Interstate Transfer Co.*, 192 U. S. 454. To the same effect see also: *Crutcher* v. *Kentucky*, 141 U. S. 47; *Hanely* v. *Railroad Co.*, 187 U. S. 617; *Caldwell* v. *North Carolina*, 187 U. S. 622;

Kelley v. *Rhoades*, 188 U,S. 1; *Telegraph Co.* v. *Philadelphia*, 190 U. S. 160.

But even if the right of Congress to legislate with reference to the rights and liabilities of the plaintiff were not exclusive, the state statute is in conflict with the interstate commerce clause of the Federal Constitution.

The commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

The transportation of freight and passengers from one State to another, or through more than one State, either by land or by water, is interstate commerce, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line. The means of transportation and the time of transit are immaterial. *Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Kelley* v. *Rhoades*, 188 U. S. 1.

The transportation of freight and passengers from the interior of one State to a point in another State is commerce among the States, even as to that part of the voyage that lies wholly within either State, provided the transportation is under an entire contract for a continuous voyage. *Railway Co.* v. *Illinois*, 118 U. S. 557. A state statute which only assumes to regulate those engaged in interstate commerce while passing through the particular State is nevertheless void because it in effect necessarily regulates and controls the conduct of such persons throughout the entire voyage which stretches through several States. *Hall* v. *DeCuir*, 95 U. S. 485–489.

Any regulation of transportation from State to State, whether upon the high seas, the lakes, the rivers, or upon railroads, or upon artificial channels of communication, operates as a regulation of interstate commerce, and if imposed by a State

is void. *State Freight Tax Case,* 15 Wall. 232. A state statute prohibiting discrimination in rates of carriage of passengers or freight, or in facilities furnished, is void so far as it applies to the interstate transportation of freight and passengers. *Railroad Co.* v. *Illinois,* 118 U. S. 557.

The interstate passenger is comprehended by the constitutional provision as well as the interstate carrier. *Railway Co.* v. *Murphey,* 196 U. S. 194, 206. The former utterances of this court in the "separate coach law" cases permit of no other conclusion. *Hall* v. *DeCuir,* 95 U. S. 485; *Railway Co.* v. *Mississippi,* 133 U. S. 587; *Plessy* v. *Ferguson,* 163 U. S. 537; *Railway Co.* v. *Kentucky,* 179 U. S. 388.

The Pennsylvania statute is invalid because it is in contravention of the Fourteenth Amendment.

The right of contract, and the power to make a contract, are "property" within the meaning of the state and Federal organic law. The privilege of making and entering into contracts is a property right. It is an essential incident to the acquisition and protection of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Lochner* v. *New York,* 198 U. S. 45–53; *Cleveland* v. *Construction Co.,* 67 Ohio St. 197, 219; *Palmer* v. *Tingle,* 55 Ohio St. 423; *Ritchie* v. *People,* 155 Illinois, 98; *Low* v. *Printing Co.,* 41 Nebraska, 127; *Frorer* v. *People,* 141 Illinois, 171; *State* v. *Loomis,* 115 Missouri, 307; *Commonwealth* v. *Perry,* 155 Massachusetts, 117; *People* v. *Hawkins,* 157 N. Y. 1; *Leep* v. *Railroad Co.,* 58 Arkansas, 404.

Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer, and so to contend would be to say that one's property may be taken without due process of law. *Pumpelly* v. *Canal Co.,* 13 Wall. 166; *State* v. *Julow* (Mo.), 29 L. R. A. 257; *Re Jacobs,* 98 N. Y. 98; *State* v. *Goodwill,* 33 W. Va. 178. That the right to recover in an action for liability for damages to reputation, cannot be abridged by statute has been established by the adjudica-

tions of a number of courts. *Park* v. *Detroit Free Press Co.*, 72 Michigan, 560; *McGee* v. *Baumgartner*, 129 Michigan, 287; *Hanson* v. *Krehbeil* (Kans.), 64 L. R. A. 790; *Osborne* v. *Leach*, 135 N. Car. 628. The act is class legislation and void. *Railroad Co.* v. *Ellis*, 165 U. S. 150; *Smyth* v. *Ames*, 169 U. S. 466; *Cotting* v. *Goddard*, 183 U. S. 79; *Railroad Tax Cases*, 13 Fed. Rep. 722; 18 Fed. Rep. 385; *Passadena* v. *Stinson*, 91 California, 238; *Lunnan* v. *Hutchinson Bros. Co.*, 46 L. R. A. 393; *State* v. *Walsh*, 35 L. R. A. 231; *Ex parte Leo Jentzsch*, 32 L. R. A. 664; *Stratton* v. *Morris* (Tenn.), 12 L. R. A. 70; *Dixon* v. *Poe*, 60 L. R. A. 308; 33 L. R. A. 589, 592; *Railroad Co.* v. *Taylor*, 86 Fed. Rep. 168; Cooley on Constitutional Limitations, 393.

Mr. James P. Wilson, for defendant in error:

This statute in no manner obstructs or interferes with or attempts to regulate commerce between the States, and is not in contravention of art. I, sec. 8, of the Constitution of the United States. It may be conceded that the carrying of the United States mails is a matter relating to interstate commerce, and that the regulation of it rests with Congress. It is conceded that the plaintiff was in charge of the mails at the time of his injury. These admitted facts in no manner affect the question. *Pennsylvania Railroad Co.* v. *Price*, 96 Pa. St. 264; *Railroad Co.* v. *Price*, 113 U. S. 218; *Lake Shore &c. R. R.* v. *Ohio*, 173 U. S. 258.

The cases cited by plaintiff in error are examples of an attempt upon the part of a State either to impose a direct tax upon articles of commerce coming into the State, or attempts to exclude or discriminate against the classes of persons brought into the State or to impose a tax upon the traffic in articles carried from another State, and thus to interfere with interstate commerce. They are all based upon the principle that a State cannot legislate in such a manner as to obstruct the free carriage of freight or passengers from State to State, or to enact laws which have for their tendency the regulation of such traffic. These authorities are all reviewed

and clearly distinguished in the case of *Railroad* v. *Kentucky*, 116 U. S. 700. See also *Pierce* v. *Van Dusen*, 78 Fed. Rep. 693; *Northern Pacific R. R.* v. *Adams*, 192 U. S. 440; *Boering* v. *C. B. Ry. Co.*, 193 U. S. 442; *Duncan* v. *Maine Ry. Co.*, 113 Fed. Rep. 508.

A State might entirely cut off the right of a beneficiary to recover for wrongful death and such an act might by a parity of the reason deter mail clerks from coming into the State lest, if they be killed, their heirs would have no right to compensation, yet no court would hold that such an act attempted to regulate or interfere with interstate commerce. *Sherlock* v. *Alling*, 93 U. S. 99.

The constitutionality of this statute has been challenged in the case of *Kirby* v. *Railroad Co.*, 76 Pa. St. 506; *Railroad* v. *Price*, 96 Pa. St. 256 and *Miller* v. *Railroad Co.*, 154 Pa. St. 473. The latter case went to the Supreme Court of the United States and is reported in 168 U. S. 131. This statute is clearly within the constitutional rights of the legislature to enact laws which operate equally upon all of a certain class and which affect all persons pursuing the same business under the same conditions, alike. 6 Am. & Eng. Ency. of Law, 2d ed., 970.

Statutes of this nature must not be capricious, arbitrary or unreasonable, but a very large discretion is accorded to the state legislatures and recognized by the Federal courts. *Louisville &c. Ry. Co.* v. *Kentucky*, 161 U. S. 701.

The classification of the statute is not arbitrary and not against public policy. *Voigt* v. *Baltimore & Ohio R. R.*, 176 U. S. 176; *Bates* v. *Old Colony R. R.*, 147 Massachusetts, 255. See *Northern Pacific Railroad Co.* v. *Adams*, 192 U. S. 440; *Boering* v. *Chesapeake Beach R. R. Co.*, 193 U. S. 442.

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

We quote the Pennsylvania statute of April 4, 1868, upon which the case turns:

"Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car, therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé, provided that this section shall not apply to passengers."

As the application of the statute, if valid, presents no Federal question, we are unconcerned with that matter, although it may be observed in passing that it is conceded in the argument at bar that under the settled construction given to the statute by the Supreme Court of Pennsylvania the plaintiff, as a railway postal clerk, was not a passenger and had no greater rights in the event of being injured in the course of his employment than would have had an employé of the railroad company.

Was the application of the statute thus construed to a railway postal clerk of the United States, in conflict with the power of Congress to establish post offices and post roads?

In *Price* v. *Pennsylvania Railroad Co.*, 113 U. S. 218, this question was in effect foreclosed against the plaintiff in error. That case was brought to this court from a judgment of the Supreme Court of Pennsylvania, 96 Pa. St. 258, holding that a railway postal clerk was not a passenger within the meaning of the Pennsylvania act, and hence had no right to recover for injuries suffered by him in consequence of the negligence of an employé of the company. The Federal ground there relied upon was substantially the one here asserted; that is, the power of the Government of the United States to establish post offices and post roads, and the effect of the legislation of Congress and the act of the Postmaster General in appointing mail clerks thereunder. After fully considering the subject the case

was dismissed because no substantial Federal ground was involved, the court saying (113 U. S. 221):

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the Government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right*, as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States."

This brings us to the second contention, the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. It is apparent from the decision in the *Price case*, just previously referred to, that in deciding that question we must determine the application of the statute to the plaintiff in error, wholly irrespective of the fact that at the time he was injured he was a railway postal clerk. In other words, the validity or invalidity of the statute is to be adjudged precisely as if the plaintiff was at the time of the injury serving for hire in the employ of a private individual or corporation.

Under the circumstances we have stated, the case of *Pennsylvania Railroad Co.* v. *Hughes*, 191 U. S. 477, clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. In that case a horse was shipped from a point in the State of New York to a point in the State of Pennsylvania under a bill of lading which limited the right of

recovery to not exceeding one hundred dollars for any injury which might be occasioned to the animal during the transit. The horse was hurt within the State of Pennsylvania through the negligence of a connecting carrier. In the courts of Pennsylvania, applying the Pennsylvania doctrine which denies the right of a common carrier to limit its liability for injuries resulting from negligence, a recovery was had in the sum of ten thousand dollars, the value of the animal. On writ of error from this court the judgment of the Supreme Court of Pennsylvania was affirmed, it being held that, at least in the absence of legislation by Congress on the subject, the effect of the commerce clause of the Constitution was not to deprive the State of Pennsylvania of authority to legislate as to those within its jurisdiction concerning the liability of common carriers, although such legislation might to some extent indirectly affect interstate commerce. The ruling in the *Hughes case* in effect but reiterated the principle adopted and applied in *Chicago, Milwaukee &c. Ry. Co.* v. *Solan*, 169 U. S. 133, where an Iowa statute forbidding a common carrier from contracting to exempt itself from liability was sustained as to a person who was injured during an interstate transportation.

The contention, that because in the cases referred to, the operation of the state laws, which were sustained, was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the state statute may be to lessen the carrier's liability, rests upon a distinction without a difference. The result of the previous rulings was to recognize, in the absence of action by Congress, the power of the States to legislate, and of course this power involved the authority to regulate as the State might deem best for the public good, without reference to whether the effect of the legislation might be to limit or broaden the responsibility of the carrier. In other words, the assertion of Federal right is disposed of when we determine the question of power, and doing so does not involve considering the wisdom

with which the lawful power may have been under stated conditions exerted.

And the views previously stated are adequate to dispose of the assertion that the Pennsylvania statute is void for repugnancy to the Fourteenth Amendment. If it be conceded, as contended, that the plaintiff in error could have recovered but for the statute, it does not follow that the legislature of Pennsylvania in preventing a recovery took away a vested right or a right of property. As the accident from which the cause of action is asserted to have arisen occurred long after the passage of the statute, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated. Such a contention in reason must rest upon the proposition that the State of Pennsylvania was without power to legislate on the subject, a proposition which we have adversely disposed of. This must be, since it would clearly follow, if the argument relied upon were maintained, that the State would be without power on the subject. For it cannot be said that the State had authority in the premises if that authority did not even extend to prescribing a rule which would be applicable to conditions wholly arising in the future.

The contention that because plaintiff in error, as a citizen of the United States, had a constitutional right to travel from one State to another he was entitled, as the result of an accident happening in Pennsylvania, to a cause of action not allowed by the laws of that State, is in a different form to reiterate that the Pennsylvania statute was repugnant to the commerce clause of the Constitution of the United States. Conceding, if the accident had happened in Ohio, there would have been a right to recover, that fact did not deprive the State of Pennsylvania of its authority to legislate so as to affect persons and things within its borders. The commerce clause not being controlling in the absence of legislation by Congress, it follows of necessity that the plaintiff in error, as an incident of his right to travel from State to State, did not possess the privilege, as to an accident happening in Pennsylvania, to exert a cause

of action not given by the laws of that State, and had no immunity exempting him from the control of the state legislation.

The proposition that the statute denied to the plaintiff in error the equal protection of the laws because it "capriciously, arbitrarily, and unnaturally," by the classification made, deprived railway mail clerks of the rights of passengers which they might have enjoyed if the statute had not been enacted, is without merit. The classification made by the statute does not alone embrace railway mail clerks, but places in a class by themselves such clerks and others whose employment in and about a railroad subject them to greater peril than passengers in the strictest sense. This general difference renders it impossible in reason to say, within the meaning of the Fourteenth Amendment, that the legislature of Pennsylvania, in classifying passengers in the strict sense in one class, and those who are subject to greater risks, including railway mail clerks, in another, acted so arbitrarily as to violate the equal protection clause of the Fourteenth Amendment.

Judgment affirmed.

NATIONAL LIVE STOCK BANK OF CHICAGO *v.* FIRST NATIONAL BANK OF GENESEO.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 33. Argued October 17, 18, 1906.—Decided December 3, 1906.

The proper way to review judgments in actions at law of the Supreme Court of the Territory of Oklahoma where the case was tried without a jury is by writ of error, not by appeal.

The objection that the Supreme Court of Oklahoma found no facts upon which a review can be had by this court is untenable, where it appears that the case was before that court a second time and that in its opinion it referred to and adopted its former opinion in which it had made a full statement and findings of fact.

The endorsement and delivery before maturity of a note secured by a chattel mortgage by the payee transfers not only the note but by operation of law

the ownership of the mortgage which has no separate existence; and such a chattel mortgage if recorded, although the assignment thereof was not recorded, remains a lien on the property, superior to that of subsequent mortgages even though the original payee may, without authority and after the transfer, have released the same, if the law of the State in which the mortgage was given does not require the assignment of chattel mortgages to be recorded.

Under the law of Kansas there is no statute making it necessary to record or file the assignment of a chattel mortgage in order to protect the rights of the assignee thereof.

An assignee does not lose his rights under a mortgage by not recording or filing it, unless there is a law which either in express terms or by implication provides therefor; where there is no such statute it is not necessary, nor is it the duty of the assignee to record or file a mortgage.

The rights of the holder of a chattel mortgage over the property after the same has been removed to another State are determined by the law of the State where the property was when the mortgage was given.

This is an action of replevin, brought by the plaintiff in error against the defendant in error, in the District Court of Woodward County in the then Territory of Oklahoma, to recover possession of certain cattle, once belonging to one W. B. Grimes and by him mortgaged. The trial resulted in a judgment for the defendant, which was affirmed by the Supreme Court of the Territory, and the plaintiff has brought the case here by writ of error.

The action has been twice tried. The first trial ended in a judgment for the plaintiff. Upon appeal to the Supreme Court of the Territory it was reversed and the case remanded, and a second trial had, resulting in the judgment for defendant now under review. Upon the second appeal to the Supreme Court of the Territory a brief opinion was given, in which it was stated that upon appeal from the first judgment the court had "promulgated an opinion, in which it made a full statement and findings of facts and enunciated the law as applied thereto, reversed the judgment of the lower court, and remanded the case, directing a new trial." 76 Pac. Rep. 130. The court also stated in its opinion on the second appeal that it had been agreed upon between the parties in the trial court that a jury should be waived and the case submitted on the record as made

on the first trial, and that "no new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared. The judgment of the lower court is hereby affirmed at the cost of appellant."

The following facts were found by the Supreme Court on the first appeal, and were adopted by it as the facts for review on the second appeal:

One W. B. Grimes, who at the time was a resident of Clark County, in Kansas, executed at that place, on the twenty-seventh day of June, 1900, and delivered to Siegel-Sanders Live Stock Commission Company his negotiable promissory note for $11,111.23, due November 1, 1900, with interest from maturity at the rate of eight per cent per annum. To secure the payment of this note he executed and delivered a chattel mortgage to the payee of the note on five hundred and twenty-six cattle then in the county, and the mortgage was duly filed in the office of the register of deeds of Clark County on July 12, 1900. The note was then indorsed and delivered by the payee to the Geneseo Bank, the defendant in error. It does not appear that there was any separate assignment of the mortgage. No record of any assignment was ever made in the register's office of Clark County, Kansas. On the twenty-fourth day of November, 1900, although the Siegel-Sanders Company had already sold and delivered the note for $11,111.23 to the Geneseo Bank, the defendant in error, yet notwithstanding such sale the president of that company, Frank Siegel, without any authority, filed in the office of the register of deeds a pretended release of the mortgage, in which payment of the above debt was acknowledged.

On the twenty-fifth day of February, 1901, the Chicago Cattle Loan Company caused its agent to examine the records of Clark County as to chattel mortgages against Grimes, and upon this examination he found the record clear, except as to a mortgage executed by Grimes to the Siegel-Sanders Live Stock Company, October 24, 1900, and by it assigned to the

Chicago Cattle Loan Company, and True so reported to the last-named company.

On April 17, 1901, Grimes executed two other notes to the Siegel-Sanders Company for $7,694.70 each, due October 27, 1901. These notes were probably renewals of notes previously given. To secure the payment of these two notes Grimes at the same time executed and delivered a chattel mortgage to the Siegel-Sanders Company on the cattle in question and other cattle. The two notes thus given were then sold by that company to the plaintiff in error for the amount named in the notes, and the plaintiff believed at the time it bought these notes that the mortgage securing them was the first lien on the cattle, and it secured this information through its agent, who personally examined the record.

It is further stated in the finding that there was practically no dispute as to the facts, and that the trial court expressly found that both parties to this action acted in good faith.

The release of the first mortgage, signed by the president of the Live Stock Commission Company and filed in the office of the register of deeds, as above stated, on November 24, 1900, was not acknowledged.

After the execution of these various instruments, and between the twenty-fifth of April and the first of May, 1901, without the knowledge or consent of either of the banks, parties to this suit, Grimes, the original owner of the cattle, moved them from the State of Kansas to the county of Woodward, in the Territory of Oklahoma, at which latter place, between the nineteenth and twentieth of May, 1901, they were seized and taken possession of by the Geneseo Bank, the defendant. The plaintiff, within one year from the filing of the first mortgage, dated June 27, 1900, in the office of the register of deeds of Clark County, Kansas, commenced this suit in replevin in the District Court of Woodward County, Oklahoma, to recover possession of the cattle, claiming under the mortgage which was executed and delivered to the Siegel-Sanders Company on April 17, 1901, and by it sold to plaintiff; while the

defendant claimed under the mortgage dated June 27, 1900, a pretended release of which had been filed as already stated, but after the assignment to defendant.

Upon these facts, as found by the Supreme Court of Oklahoma, judgment was rendered for the defendant in error.

Mr. Silas H. Strawn, with whom *Mr. Frederick S. Winston, Mr. John Barton Payne, Mr. Ralph M. Shaw, Mr. Blackburn Esterline* and *Mr. Earle W. Evans* were on the brief, for plaintiff in error:

The failure of the Geneseo Bank to take and record an assignment of the chattel mortgage left it within the power of the commission company to release the same of record. The Geneseo Bank should abide by the consequences of its negligence and sustain the loss, as it is the law that when one of two innocent parties must suffer, the loss should be borne by him through whose negligence it was brought about. Dassler's Stat. of Kansas, § 4234, par. 19; § 4241, par. 26, app.; *Lewis* v. *Kirk*, 28 Kansas, 356; *Thomas* v. *Reynolds*, 29 Kansas, 217; *Parkhurst* v. *First Nat. Bank*, 35 Pac. Rep. 1116; *Williams* v. *Jackson*, 107 U. S. 478; *Swasey* v. *Emerson et al.*, 46 N. E. Rep. 426; *Ogle* v. *Turpin*, 102 Illinois, 148; *Mann* v. *Jummel*, 183 Illinois, 533; *Lennartz* v. *Quilty*, 191 Illinois, 174; *Bowling* v. *Cook*, 39 Iowa, 200; *Rand, Ex'r*, v. *Barrett*, 24 N. W. Rep. 530; *Jenks* v. *Shaw*, 68 N. W. Rep. 900; *Purdy* v. *Huntington*, 42 N. Y. 339; *Van Keuren* v. *Corkins*, 66 N. Y. 79; *Clark* v. *Mackin*, 95 N. Y. 345; *Porter* v. *Ourada*, 71 N. W. Rep. 52; *Conn. Mutual Life Ins. Co.* v. *Talbot*, 113 Indiana, 373; *Baugher* v. *Woolen*, 45 N. E. Rep. 94; *Ayers* v. *Hays*, 60 Indiana, 455; *Morris* v. *Beecher*, 45 N. W. Rep. 696; *Pickford* v. *Peebles*, 63 N. W. Rep. 779; *Banking Co.* v. *Woodruff*, 2 N. J. Eq. 117; *Ferguson* v. *Glassford et al.*, 35 N. W. Rep. 820; Jones on Mort., §§ 481, 791, 820; Cobbey on Chattel Mort., § 648; *Townsend* v. *Little*, 109 U. S. 504.

The execution, filing and recording of the release of the chattel mortgage by the commission company, in whom the

record title to the cattle stood, was a notice to all the world that the debt secured by the mortgage had been paid and that the cattle were cleared of the lien. Dassler's Stat. of Kansas, § 4251, par. 36; § 4221, par. 6; § 4224, par. 9; § 4249, par. 34; § 4222, par. 7 (app.); *Carpenter* v. *Longan*, 16 Wall. 271, citing *Pierce* v. *Faunce*, 47 Maine, 513; *Drum-Flato Com'n Co.* v. *Barnard*, 66 Kansas, 568.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage* and *Mr. Odus G. Young* were on the brief for defendant in error:

This case should have been brought to this court by appeal and not by writ of error, and the writ of error should be dismissed. *Stringfellow* v. *Cain*, 99 U. S. 610; *Davis* v. *Fredericks*, 104 U. S. 618; *Neslin* v. *Wells*, 104 U. S. 428; *Hecht* v. *Boughton*, 105 U. S. 235; *United States* v. *Railroad Co.*, 105 U. S. 263; *Gray* v. *Howe*, 108 U. S. 12; *Story* v. *Black*, 119 U. S. 235; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 513; *Gregory Mining Co.* v. *Starr*, 141 U. S. 222; *San Pedro Co.* v. *United States*, 145 U. S. 130; *Mining Co.* v. *Machine Co.*, 151 U. S. 447; *Bonnifield* v. *Price*, 154 U. S. 672; *Hawes* v. *Mining Co.*, 160 U. S. 303; *Grayson* v. *Lynch*, 163 U. S. 468; *Young* v. *Amy*, 171 U. S. 179; *Marshall* v. *Burtis*, 172 U. S. 630; *Cohn* v. *Daly*, 174 U. S. 539.

Even if this case were here on appeal instead of by writ of error, this court is without jurisdiction to consider the case, because there is no finding of facts in the nature of a special verdict by either the Supreme Court of Oklahoma or the District Court of Woodward County, Oklahoma. This is necessary to give this court jurisdiction. The statement of facts in the opinion of the Oklahoma Supreme Court on the first hearing does not constitute a finding of facts in the nature of a special verdict. *Dickinson* v. *Bank*, 16 Wall. 250; *Lahner* v. *Dickson*, 148 U. S. 71, 74; *Saltonstall* v. *Birtwell*, 150 U. S. 417; *Stone* v. *United States*, 164 U. S. 380; *Kentucky Life Ins. Co.* v. *Hamilton*, 63 Fed. Rep. 93; *Minchen* v. *Hart*, 72 Fed. Rep. 294;

National Masonic Ass'n v. *Sparks*, 83 Fed. Rep. 225; *Mutual Reserve Ass'n* v. *DuBois*, 85 Fed. Rep. 586.

On the facts shown by the record in this case and recited in our statement of facts, the Chicago Bank was not a subsequent purchaser *bona fide* for value without notice of its notes and mortgages. 1 Ency. Plead. & Prac., p. 880; *Boone* v. *Childs*, 10 Pet. 177, 211; Vol. 2 Pomeroy Eq. Jurisp., 2d ed., § 784; *Holdsworth* v. *Shannon*, 113 Missouri, 508, 524; *Ins. Co.* v. *Smith*, 117 Missouri, 261, 293.

It is conceded that the Geneseo Bank had no actual knowledge of the filing of the release or of the filing of the mortgage under which the Chicago Bank claims. That release and the mortgage of the Chicago Bank were filed and recorded months after the filing and recording of the mortgage of the Geneseo Bank. It is well settled that a prior mortgagee is not affected with constructive notice of any instrument made and filed by his mortgagor subsequent to the filing of his mortgage. *Tydings* v. *Pitcher*, 82 Missouri, 379; *Meier* v. *Meier*, 105 Missouri, 412, 433; *Sensenderfer* v. *Kemp*, 83 Missouri, 582; *Ford* v. *Church Ass'n*, 120 Missouri, 498, 516; 2 Jones on Mort., § 1624.

The general principle applicable to the registry laws of the different States upon the point of notice is that the registering of instruments is notice to subsequent purchasers and encumbrancers only. The filing for record of the unauthorized and void release of the mortgage held by the Geneseo Bank and the filing for record of the mortgage held by the Chicago Bank were, therefore, not notice to the Geneseo Bank which held under a prior recorded mortgage. *Ackerman* v. *Hennicker*, 85 N. Y. 43, 50; Gen. Stat., Kansas, 1899, Dassler's Comp., § 4060, p. 842; *Rowen* v. *Mfg. Co.*, 29 Connecticut, 282, 325; *Schmidt* v. *Zahrndt*, 148 Indiana, 447; *Tapia* v. *Deamartini*, 77 California, 383; *Nelson* v. *Boyce*, 7 J. J. Mar. (Ky.) 401; *Ward* v. *Cooke*, 17 N. J. Eq. 93, 99; *Shirras* v. *Craig*, 7 Cranch, 34, 51; *Trust Co.* v. *Iron Works*, 51 N. J. Eq. 605; *Summers* v. *Roos*, 42 Wisconsin, 778; *Witzzinski* v. *Everman*, 51 Mississippi,

841; *George* v. *Wood*, 9 Allen, 80; *McDaniels* v. *Cohn*, 16 Vermont, 300, 306; *Seymour* v. *Darrow*, 31 Vermont, 122, 134.

While the real estate mortgage laws of Kansas contain ample provisions for the assignment of a real estate note and mortgage, no provision has ever been enacted authorizing or permitting the making and recording of an assignment of a chattel mortgage, and there has been no law at any time in that State which authorized or permitted the Geneseo Bank to obtain and record an assignment of its chattel mortgage. Dassler's Statutes of Kansas, 1899, pp. 842–845, §§ 4060–4078. For statutes of Kansas, relating to real estate mortgages containing the provision authorizing the filing and recording of assignments of real estate mortgages, see pp. 837–842. Where there is no law authorizing the holder of a negotiable note secured by a mortgage to put on the record an assignment of the mortgage, the subsequent release of that mortgage by the original mortgagee and the subsequent conveyance or mortgage by the mortgagor to a third party are unavailing as against the holder of the first mortgage note. *Carpenter* v. *Langan*, 16 Wall. 271; *Burhans* v. *Hutcheson*, 25 Kansas, 625; *Insurance Co.* v. *Huntington*, 57 Kansas, 744; *Bronson* v. *Ashlock*, 7 Kansas App. 255–259; *Swift* v. *Smith*, 102 U. S. 442; *Railway Co.* v. *Bank*, 136 U. S. 283; Jones on Chattel Mort., § 662 (a), 633; *Biggerstaff* v. *Marstin*, 161 Massachusetts, 101; *Watson* v. *Wyman*, 161 Massachusetts, 106; *Mulcahy* v. *Fenwick*, 161 Massachusetts, 164; *Hoffman* v. *Boteler*, 87 Mo. App. 316; *Brooke* v. *Struthers*, 68 N. W. Rep. 272; *Lee* v. *Clark*, 89 Missouri, 553; *Hagerman* v. *Sutton*, 91 Missouri, 519, 532; *Swift* v. *Bank of Washington*, 104 Fed. Rep. 643; *Cummings* v. *Hurd*, 49 Mo. App. 139; *Walter* v. *Logan*, 63 Kansas, 193; 20 Am. & Eng. Enc. Law, 2d ed., 1045, 1046; *Robinson* v. *Campbell*, 60 Kansas, 60; *De Laurel* v. *Kemper*, 9 Mo. App. 77; *Lakeman* v. *Roberts*, 9 Mo. App. 179; *Bank* v. *Buck*, 71 Vermont, 190; *Parker* v. *Randolph*, 5 S. D. 54; *Williams* v. *Paysinger*, 15 S. C. 171; *Black* v. *Reno*, 59 Fed. Rep. 917; *Brewer* v. *Atkeison*, 121 Ala-

bama, 410; *Roberts* v. *Halstead*, 9 Pa. St. 32; *Anderson* v. *Karaider*, 52 Nebraska, 171; *Kelon* v. *Smith*, 97 Illinois, 156; *Stiger* v. *Bent*, 111 Illinois, 329; *Preston* v. *Morris*, 2 Iowa, 549; *Martindale* v. *Burch*, 57 Iowa, 291; *Tandercosk* v. *Baker*, 48 Iowa, 199; *Gordon* v. *Mulhore*, 13 Wisconsin, 22; *Demoth* v. *Bank*, 85 Maryland, 315; *Laping* v. *Duffy*, 47 Indiana, 51; *Dixon* v. *Hinter*, 57 Indiana, 278; *Reeves* v. *Hayes*, 95 Indiana, 521.

Section 4246 of the Chattel Mortgage Law of Kansas, Dassler's Stat., 1901, p. 896, provides that every holder of a mortgage may keep his mortgage alive by filing an affidavit during the last thirty days of the year following the recording of his mortgage, and the Chicago Bank having taken its mortgage within the year and before the time had arrived when the Geneseo Bank could file the affidavit contemplated by that provision, is not a subsequent purchaser or mortgagee in good faith. *Meech* v. *Patchen*, 14 N. Y. 71; *Howard* v. *Nat'l Bank*, 44 Kansas, 549; *Bank* v. *Bank*, 46 Kansas, 376.

The Chattel Mortgage Law of Kansas, in all its provisions, recognizes the transferee of a negotiable note secured by a chattel mortgage as the "assignee," where the word "assignee" is used in that statute. Secs. 4068, 4069, p. 844, of Dassler's Kans. Stat., 1899.

After the original mortgagee of a chattel mortgage indorses and transfers the negotiable note secured by the mortgage, he has no beneficial interest in the mortgage and cannot maintain an action of replevin or trover in his own name, but such action must be brought by the transferee of the negotiable promissory note as the real holder and owner of the note and mortgage and therefore as being the "assignee" within the meaning of the Kansas chattel mortgage statute. *Bohart* v. *Buckington*, 62 Kansas, 658; *Wiscum* v. *Huberly*, 51 Kansas, 580.

The release of the mortgage of the Geneseo Bank was void because the same was not acknowledged. It was improperly recorded for that reason. The contentions of defendant in

all respects are sustained by *First National Bank* v. *Baird,* 141 Fed. Rep. 862.

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

The defendant in error, at the outset, objects to the jurisdiction of this court on the ground that the plaintiff should have brought the case here by appeal instead of by writ of error, because the case was tried without a jury, and, therefore, the writ of error was improper. There is nothing in this objection, as in actions at law coming from the Territory of Oklahoma it has been held that the proper way to review the judgments of the Supreme Court of that Territory was by writ of error. *Comstock* v. *Eagleton,* 196 U. S. 99; *Oklahoma City* v. *McMaster,* 196 U. S. 529; *Guss* v. *Nelson,* 200 U. S. 298.

Further objection is made that the court below found no facts upon which a review can be had in this court. The foregoing statement disposes of this objection also, and shows it to be untenable.

On the merits, the question arises which of these two parties shall sustain the loss occasioned by the improper act of the president of the Live Stock Commission Company in signing this pretended release, and acknowledging the payment of the eleven thousand dollar note, as above stated? The plaintiff in error contends that the defendant bank should bear the loss because of its failure to record or file the assignment to it of the first mortgage, securing the eleven thousand dollar note. The defendant opposes this view and insists that, being the holder and the owner of the eleven thousand dollar note, secured by a first mortgage duly executed on the twenty-seventh of June, 1900, and duly filed in the register's office, it has the prior right to the cattle, and that the statutes of Kansas do not require that it should file or record the assignment to it of the note and mortgage, and its claim should not, therefore, be postponed.

The note executed by Grimes for eleven thousand and some odd dollars was negotiable, and the chattel mortgage was given at that time to secure the payment of the note. The indorsement of the note and its delivery before maturity to the defendant by the payee of the note transferred its ownership to the defendant bank. This transfer also transferred, by operation of law, the ownership of the mortgage which was collateral to the note. Such a mortgage has no separate existence, and when the note is paid the mortgage expires, as it cannot survive the debt which the note represents. *Carpenter* v. *Longan*, 16 Wall. 271; *Burhans* v. *Hutcheson*, 25 Kansas, 625; *The Mutual Benefit Life Insurance Company* v. *Huntington*, 57 Kansas, 744; *Swift* v. *Bank of Washington*, 114 Fed. Rep. 643.

The mortgage, therefore, is a prior lien upon the cattle, as security for the payment of the note, unless defendant has lost it by its failure to record an assignment of the mortgage. Whether it has or not is to be determined by the law of Kansas.

There is no express provision in the statutes of Kansas for the filing or recording of assignments of chattel mortgages. Paragraph 36, section 4251, General Statutes of Kansas for 1901, by Dassler, may be found in the margin.[1] It is said this statute by implication provides for the recording of an assignment of a chattel mortgage.

Assuming that the statute makes provision for such recording, it is then argued that it is the duty of the assignee to do

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[1] Paragraph 36, Section 4251, General Statutes of Kansas for 1901, by Dassler, provides as follows:

"When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assigns or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in case of a satisfaction of mortgages of real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of 'Remarks,' and filed with the mortgage or copy thereof, and preserved therewith in the office of the register."

so, and his failure takes away a right of priority of lien which he might otherwise have. This reasoning is not satisfactory. We cannot make the assumption that the statute cited does make provision for the recording of the assignment, and we fail, therefore, to find its necessity. That necessity depends upon statute, and without some statutory provision therefor the necessity does not exist. Uncertain and doubtful implications arising from portions of a statute not requiring the recording of an instrument are not to be regarded as furnishing a rule upon the subject. There are statutory provisions for recording assignments of real estate mortgages to be found in the Kansas statutes. See paragraph 19, section 4234, and paragraph 26, section 4241, General Statutes of Kansas for 1901, by Dassler. Paragraph 19, above, provides for the acknowledgment of assignments of real estate mortgages by the assignor, and paragraph 26 provides that on presentation of such assignment for record it shall be entered upon the margin of the record of the mortgage by the register of deeds, who is to attest the same, as therein provided. Now, in relation to chattel mortgages and the assignment thereof, there is no such provision or anything similar to it. Provision is made for the satisfaction of a chattel mortgage when paid by the mortgagee, assignee, etc., but that does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee.

The Supreme Court of Kansas has held that there is no statute making it necessary to record an assignment of a chattel mortgage, in order to protect the rights of such assignee, and that it need not be recorded or filed. *Burhans* v. *Hutcheson*, 25 Kansas, 625; *Wiscomb* v. *Cubberly*, 51 Kansas, 580; *Mutual Benefit Life Insurance Company* v. *Huntington*, 57 Kansas, 744. It is true that these cases refer to real estate mortgages, but the reasoning sustains the statement as to chattel mortgages.

The first of the above cases (*Burhans* v. *Hutcheson*) holds that where a mortgage upon real estate is given to secure payment of a negotiable note, and before its maturity the note

and mortgage are transferred by indorsement of the note to a *bona fide* holder, the assignment, if there be a written one, need not be recorded. This is held even where there was an express statute as to the record of such an assignment. The statute was held not to apply to the case of a mortgage given as collateral to a negotiable note.

The second case (*Wiscomb* v. *Cubberly*) has reference also to a mortgage on real estate, and involves much the same principle.

In the third case (*Mutual Life Insurance Benefit Co.* v. *Huntington*) it was again held that after the assignment and delivery by the payee of a negotiable promissory note, before maturity, together with the mortgage on real estate given as collateral security for its payment, the original mortgagee had no power to release or discharge the lien of the mortgage, and a release made by him without authority, even though the assignment was not recorded, would not affect the rights of the assignee.

These cases would seem to establish the rule in Kansas that it is not necessary to record the assignment of a mortgage even upon real estate, when given to secure payment of negotiable notes, although there is a statute which in general terms provides for the recording of assignments of real estate mortgages. Still stronger, if possible, is the case of a chattel mortgage given to secure the payment of negotiable notes, when there is no statutory provision for the recording of the assignment of such mortgage. It is probable that in the large majority of cases the only evidence of an assignment of a negotiable note and a chattel mortgage given to secure its payment is the indorsement of the note and delivery thereof to the purchaser. In such a case there would be no assignment to record, and there is no provision in the statute for filing a copy of the note with its indorsement, together with a statement that it had been delivered to a third party, as the purchaser or assignee thereof.

The policy of the State of Kansas seems to be not alone to

give to a negotiable promissory note all the qualities that pertain to commercial paper, but also to clothe mortgages given as collateral security for the payment of such notes, with the same facility of transfer as the note itself, to which it is only an incident.

The plaintiff, however, contends for the opposite doctrine, and cites, among others, *Lewis* v. *Kirk*, 28 Kansas, 497, as its authority. In that case the question was which should suffer, a *bona fide* purchaser of the real estate which had been mortgaged, or the *bona fide* purchaser of the mortgage who had failed to have his assignment recorded. The court held in favor of the purchaser of the real estate, and distinguished *Burhans* v. *Hutcheson, supra,* though not assuming to overrule it. The mortgage in the *Lewis case* was upon real estate, and would not, therefore, necessarily affect the case of a chattel mortgage, where there is no statute for recording an assignment of the mortgage.

But in *Insurance Company* v. *Huntington*, 57 Kansas, *supra*, the case of *Burhans* v. *Hutcheson*, 25 Kansas, *supra*, was cited, and the doctrine that a *bona fide* holder of negotiable paper, transferred by him by indorsement thereon before maturity, and secured by a real estate mortgage, need not record the assignment of mortgage, was again approved.

In *Thomas* v. *Reynolds*, 29 Kansas, 304, cited by plaintiff, it was held that an action to recover the penalty provided for by the statute for refusal to enter satisfaction of a chattel mortgage when it had been paid, could not be sustained against the assignee of the mortgage without proof of the assignment of record, as the purpose of the statute was to clear the record, and, therefore, the defaulting party must have record title or his satisfaction would apparently be an impertinent interference by a stranger. That action did not raise the question herein presented, and the court made no reference to the case of *Burhans* v. *Hutcheson, supra.* It is quite clear that it did not intend to overrule that case. In any event, as already mentioned, the *Burhans case* has been approved in 57 Kansas, 744,

above cited. We cannot treat the rule which we have stated above as having been at all shaken by the two cases from 28 and 29 Kansas, *supra.*

The counsel for plaintiff contends that, assuming there was no statute providing for the recording of an assignment of a chattel mortgage in the State of Kansas, yet there was no law of that State which prohibited the Geneseo Bank from recording its assignment. It is not necessary that there should be a law to prohibit the recording of such assignments. There must be a law which provides for their record, either in express terms or by plain and necessary implication from the words stated. Where the statute does not so provide, it is not necessary nor is it the duty of the assignee to record or file his assignment. There must be some legal duty imposed upon the assignee before the necessity arises for the recording of the assignment.

Counsel have cited many cases from States other than Kansas, in which the rights of assignees of mortgagees as against subsequent mortgages or conveyances have been discussed and decided. In many cases the question has arisen in regard to the recording of assignments of mortgages upon real estate, where the States had provided for the recording of such assignments, and where, in the absense of such recording, the assignee has failed in obtaining priority of rights under his mortgage, which he would have had if the assignment had been recorded. But as the owner of the cattle mentioned herein resided in Kansas at the time the mortgages were given, and the cattle were then in that State, and the mortgages were filed there, the transactions are to be judged of with reference to the law of that State, and we decide this question with reference to such law. Under that law the assignee of the first mortgage of June, 1900, has a superior lien to the assignee of the second mortgage of April, 1901, although such assignee of the first mortgage did not have his assignment recorded.

Judgment is

Affirmed.

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE *v.* CITY OF COLUMBUS.

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

No. 50. Argued October 22, 23, 1906.—Decided December 3, 1906.

Where the bill of the trustee of bondholders of a water company, claiming an exclusive contract with a municipality, shows that an act of the legislature and an ordinance of the city have been passed under which the city shall construct its own water works, and that during the life of the contract the source of the ability of the water company to pay interest on, and principal of, its bonds will be cut off, a case is presented involving a constitutional question, and irrespective of diverse citizenship, the Circuit Court of the United States has jurisdiction to determine the nature and validity of the original contract and whether the subsequent legislation and ordinance impaired its obligations within the meaning of the Federal Constitution.

The appellant filed its bill in this case in the United States Circuit Court for the Northern District of Georgia to obtain an injunction restraining the city of Columbus, in the State of Georgia (one of above defendants) from the construction of waterworks for the supplying of water to the defendant city and its inhabitants. Judgment was entered by the Circuit Court dismissing the bill for the want of jurisdiction, and the question of jurisdiction alone was certified to this court under sec. 5, ch. 517, of the acts of Congress of 1891.

The complainant based the jurisdiction of the Circuit Court on the ground of diverse citizenship, and also upon the existence of a Federal question. An amended bill was filed and a motion made for an injunction *pendente lite*, enjoining the city from issuing bonds or doing any work towards the construction of the waterworks. The motion was granted, and a demurrer to the amended bill having been overruled, and issue having been joined by the service of an answer and replication, the

case was referred to a master. Evidence was taken before him, and a report thereafter filed, to which exceptions were duly taken by both parties and an argument had thereon before the court. The judge certifies that before a decision had been made by the court on the questions of law raised by the exceptions the defendant filed a motion to dismiss the bill on the ground that if the parties to the suit were properly placed, there was no such diversity of citizenship as was required to sustain the jurisdiction of the court, and also on the ground that there was no Federal question involved. The court granted the motion on those grounds and made its certificate, as stated.

The suit was brought by the appellant, a citizen of Maryland, against the city of Columbus, a municipal corporation created by the State of Georgia, and its mayor and aldermen, all of them citizens of the State of Georgia, and against the Columbus Waterworks Company, a corporation also created by the State of Georgia.

It appears from the averments contained in the bill that the complainant is trustee for the bondholders in a certain mortgage executed by the waterworks company, in January, 1891, to complainant, as trustee, to secure the payment of certain bonds, and to raise money for the purpose of making improvements and additions to the waterworks which were to supply the city of Columbus with water, and for providing for future extensions and improvements thereof. The mortgage is upon all of the company's property, and also upon all contracts made, or thereafter to be made, between the waterworks company and the city of Columbus for the supplying of water by the company to the city, or any public institution or public office. The mortgage also included all the water rents, etc., and all the income whatsoever of the mortgagor, due or to grow due, arising from its business of supplying water within the city, or within its vicinity or elsewhere, during the continuance of the lien under the mortgage.

It also included therein a contract, which had been entered

into in October, 1881, between one Thomas R. White, of the city of Philadelphia, and the mayor and council of the city of Columbus (defendant herein), for the construction and operation of an effective system of waterworks for the supplying of the city with water for the various uses required. This is the contract in question in this suit. Provision for a corporation was made in the contract to which it was to be assigned; the corporation was subsequently created, and such contract was assigned by White to the water company, and the assignment was assented to by the city. The contract provided in great detail for the erection of a water system for the city and for private consumers, and it contained all the usual provisions for that kind of a contract.

It was, among other things, provided in the contract that the city should grant a franchise to the other party named therein, for the exclusive privilege of maintaining and operating the waterworks for a period of thirty years, or until they might be purchased by the city, as provided in the contract.

The work under the contract was completed and accepted by the city November 6, 1882, and the company then commenced to, and did for some years, furnish water, under its provisions, to the city and its inhabitants.

Thereafter disputes and differences arose between the parties, regarding the sufficient supply of water for the city and its inhabitants, the city contending that the water company had entirely failed to satisfactorily fulfill the contract in that respect. The company contended, on the other hand, that it had done all that possibly could be done, under the circumstances of an extraordinary and unprecedented drought, and was willing to spend more money for the purpose of enlarging its field of supply, if the city would not by its proposed action defeat such purpose. The differences continued, until finally, on the fourteenth day of September, 1902, the city passed an ordinance for submitting to the voters of the city the question of issuing $250,000 of bonds of the city, to be used for the purpose of building and operating and owning a system of

waterworks by the city. A special election was called for the fourth day of December, 1902. The ordinance opened with the statement that the water company had totally failed to supply the city of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water, and that the public health of the city was of paramount importance to every other consideration, and the city, therefore, proposed an ordinance (which it set forth for the approval of the electors) for the issuing of bonds for the building of a separate system of works to be owned and operated by the city. It was provided in the proposed ordinance that if the electors assented to the issue and sale of the bonds to be used for the purpose of building and operating the waterworks, that thereafter bonds of the city should be issued upon certain conditions, and an annual tax should be levied for the payment of the interest on the bonds and a certain proportion of the principal every year. The proposed ordinance also provided that in the event of the assent of the voters at the election, and the issuing of the bonds when the same should have been validated, as by law required, thereafter the waterworks were to be considered a separate and distinct department of the city government, and a water commission was to be created for the government and control and operation of the waterworks. Other provisions were contained in the proposed ordinance regulating the doing of the work and the operation of the constructed work.

On the third day of December, 1902, (the day before the election under the city ordinance), the legislature, at the request, as it may be presumed, of the city, passed an act to amend its charter, so as to confer power and authority upon the city to construct, maintain and operate a system of waterworks of its own. The act gave power to the city to appropriate private property, and to lay its pipes through its streets, either within or without the corporate limits of the city, and the city was given power and authority generally to do and perform all things necessary to carry the object and purposes of the act into effect. Sec. 7 of the act expressly conferred

upon the city the right to issue and sell its bonds, for the purposes of building and operating the waterworks. Provision was also made in the act for the appointment of a board of water commissioners, who should have the supervision and control of the construction, operation and management of the waterworks. This board was to regulate the distribution and use of water in all places, it was to fix the price for the use thereof, and terms of payment therefor. The moneys coming into the hands of the board for water rents and the sale of any apparatus, or other property, or from any other source connected with the waterworks, were to be paid to the treasurer of the city, and were to be used by him only for the purpose of paying any principal and interest becoming due on the bonds issued by the city. The board was to be regarded as a subordinate branch of the city government.

The ordinance above mentioned and this act of the legislature of Georgia having been passed subsequently to the execution of the contract, are asserted by the complainant to be acts which impair the obligation of such contract.

Proceedings were taken under the ordinance, and the election was held pursuant to its provisions on the fourth of December, 1902, and resulted in the assent of the requisite number of electors to the issuing of the bonds and the use of the proceeds in the erection of a water system, to be owned and controlled by the city.

A board of water commissioners was thereupon appointed, under the provisions of the ordinance and the act of the legislature, and on the sixth of May, 1903, the common council received a communication from the board, through its secretary, wherein the board requested the common council to invite bids for the bonds of the city for the purpose of constructing the system of waterworks, which bids were to be opened on the first of August, 1903. Thereupon the common council on the same day complied with the request, and directed the publication of a notice for receiving bids for the bonds up to August 1, 1903.

On the thirtieth of July, 1903, the complainant filed this bill against the parties named. It is contended in the bill that, as trustee for the bondholders, the complainant can maintain this action, on the ground of an impairment of the obligation of the contract already mentioned, and that as the water company has mortgaged to the complainant the benefits of its contract with the city, together with the other property of the water company, as security for the payment of its bonds, any such action as proposed by the city will destroy the value of the bonds of the water company and will amount to the taking of complainant trustee's property without due process of law, and will deprive it of the equal protection of the laws. The water company is made a defendant for the purpose of binding it, as averred in the bill, by the judgment and decree that may be rendered in this cause, so that the right and equity of subrogation, or other rights and equities set up, may be enforced and decreed against the water company, and that the water company may be held and decreed, on its part, to specifically perform all the obligations of such contract. An injunction was asked for and granted, as stated, *pendente lite.* It was also asked that the defendant city might be enjoined from refusing to carry out the contract with the waterworks company, and from placing any obstacle in the way of the due performance thereof, according to its terms.

Mr. Joseph Packard, and *Mr. Olin J. Wimberly,* with whom *Mr. Louis F. Garrard,* and *Mr. John I. Hall* were on the brief, for appellant.

Mr. W. A. Wimbish and *Mr. J. H. Martin,* with whom *Mr. T. T. Miller* was on the brief, for appellee:

Should the acts of the city be construed to be the equivalent of a repudiation of the contract, this would not give rise to any Federal question.

A denial of liability under a contract does not affect its obligation. The inherent difference between a contract and

its obligation has been repeatedly recognized by this court, which has declared that the word "obligation" occurring in the contract clause of the Constitution was used advisedly. Parties make contracts; the law creates the obligation. *Sturges* v. *Crowninshield,* 4 Wheat. 122; *Ogden* v. *Saunders,* 12 Wheat. 213.

Since the law creates the obligation, only the law can impair or destroy it. It cannot be affected by any act or default of either contracting party. The constitutional provision is intended to protect the obligation of contracts against impairment by the laws of a State. The subsequent law must have the effect of loosening the chain of the obligation by changing the rights or the essential remedies of the parties as they existed when the contract was entered into. *Bronson* v. *Kinzie,* 1 How. 312; *McCracken* v. *Haywood,* 2 How. 608; *Edwards* v. *Kearzey,* 96 U. S. 595.

A municipal ordinance, if authorized by the legislature, may have the force and effect of a law of the State; and if obnoxious to the Constitution, be held to impair the obligation of a contract. The ordinance must have been passed in pursuance of state legislation passed subsequent to the contract. *McCracken* v. *Haywood,* 2 How. 608; *Lehigh Water Co.* v. *Easton,* 121 U. S. 392.

The mere fact, however, that a party repudiating a contract is a municipal corporation, does not give to its refusal to perform the character of a law impairing the obligation of the contract, or constitute the taking of private property without due process of law. *Dawson* v. *Columbia Ave. Trust Co.,* 197 U. S. 178; *Gas Light Co.* v. *St. Paul,* 181 U. S. 142; *Gas Co.* v. *Hamilton,* 146 U. S. 258.

In pursuing the course adopted, the city of Columbus acted without legislative sanction. No law of the State had been passed subsequent to the contract which in the slightest degree altered the rights or remedies of either party.

Whether the contract granted an exclusive privilege such as to prevent the city from constructing its own system, and

if so whether the city had power to grant such an exclusive right, are questions to be determined by the laws of the State, in no wise involving the construction or application of the Constitution of the United States. *Fergus Falls* v. *Water Co.*, 72 Fed. Rep. 873.

If the city in fact granted such exclusive privilege, and if in law it had power so to do, none of the alleged acts on the part of the city have in the least impaired the obligation of the contract.

The refusal of the city to pay an installment of water rental claimed to be due is alleged to have been "unlawful," and is plainly a mere breach of the contract. *Ratton Water Co.* v. *Ratton*, 174 U. S. 360; *Gas Light Co.* v. *St. Paul*, 181 U. S. 142; *Dawson* v. *Columbia Avenue Trust Co.*, 197 U. S. 178.

In Georgia, a city in the exercise of its police power and in order to promote the general welfare may contract for or itself provide a supply of water for domestic use and fire protection. *Frederick* v. *Augusta*, 5 Georgia, 561; *Rome* v. *Cabott*, 28 Georgia, 50; *Wells* v. *Atlanta*, 43 Georgia, 67; *Dawson* v. *Dawson Waterworks Co.*, 106 Georgia, 709.

Nothing in the act of December 3, 1902, vitalized, sanctioned or ratified any previous action on the part of the city which would otherwise be illegal. The city already possessed the power to build waterworks. Its right to issue bonds for this purpose was not derived from the act, but was founded upon laws in existence when the contract was made. If it was forbidden by its contract from taking the action the city could claim no immunity by anything contained in this act of the legislature. It was only authorized to proceed lawfully in the execution of its purpose, not in contravention of law by a disregard of any valid contract obligation.

The court will look beyond the allegations of the bill to the facts properly pleaded in order to determine whether a real and substantial Federal question is presented. *Millingar* v. *Hartupee*, 6 Wall. 258; *Wilson* v. *North Carolina*, 169 U. S. 586, 595; *McCain* v. *Des Moines*, 174 U. S. 168, 181; *New*

Orleans Waterworks Co. v. *Louisiana,* 185 U. S. 336, 344; *Sawyer* v. *Piper,* 189 U. S. 154; *Waterworks Co.* v. *Newburyport,* 193 U. S. 561, 576; *Harris* v. *Rosenberger,* 145 Fed. Rep. 449.

In the absence of express legislative authority a municipal corporation cannot grant an irrevocable, exclusive privilege so as to create a monopoly. *Minturn* v. *La Rue,* 23 How. 453; *Wright* v. *Nagle,* 101 U. S. 791; *Street Railway Co.* v. *Detroit,* 171 U. S. 48; *Illinois Trust & Savings Bank* v. *Arkansas City,* 76 Fed. Rep. 271; *Jackson Co. R. Co.* v. *Interstate &c. Co.,* 24 Fed. Rep. 306; *Saginaw Gas Co.* v. *Saginaw,* 28 Fed. Rep. 529; *Grand Rapids* v. *Grand Rapids,* 33 Fed. Rep. 659; *In re Brooklyn,* 143 N. Y. 596; *Long Island Water Co.* v. *Brooklyn,* 166 U. S. 685.

In grants of exclusive franchises by municipal corporations nothing passes by implication. The grant is to be construed more strongly in favor of the public and against the grantee. *Water Co.* v. *Knoxville,* 200 U. S. 22; *Joplin* v. *Light Co.,* 191 U. S. 150; Const. Georgia, art. I, § 2, par. 2; Code, § 5730; Const. Alabama, § 1, art. 23, construed in *Railway Co.* v. *Birmingham Railway Co.,* 58 Am. Rep. 615; *Beinville Water Co.* v. *Mobile,* 186 U. S. 212.

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

The sole question arising herein is whether the Federal Circuit Court had the jurisdiction to determine the issue involved. That question alone has been certified to this court by the Circuit Court, under the provisions of the fifth section of the act of Congress of 1891. The grounds of the dismissal of the bill are set forth in the foregoing statement of facts.

Whether this case comes within the principle laid down by this court in *City of Dawson* v. *Columbia Avenue Saving Fund &c. Co.,* 197 U. S. 178, upon the question of diversity of citizenship, it is unnecessary to determine, because there is, in our

opinion, a Federal question involved, which gave the Circuit Court jurisdiction to determine the case without reference to citizenship. It is averred in the bill that by reason of the passage of the ordinance of the common council of the city and the act of the legislature of Georgia, passed December 3, 1902, the obligation of the contract set forth in the bill was impaired. It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation. That the ordinance of the common council of a municipal corporation may constitute a law within the meaning of this constitutional clause is too well settled to admit of doubt. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Davis &c. Co.* v. *Los Angeles*, 189 U. S. 207, 216. The contract in this case provided in terms for the exclusive privilege of supplying water to the city and its inhabitants for thirty years from the date of its completion. By the ordinance of the city of 1902 the city insisted that the water company had totally failed to fulfill its contract to supply water to the city and its inhabitants. Such ordinance then went on and proposed to the electors an ordinance, the material portions of which have been set forth in the foregoing statement.

The act of the legislature, passed the day before the day of the election, is also referred to in the statement, and some of its material provisions are mentioned.

The ordinance and the act should properly be considered together, and they evidently contemplate an immediate execution of the work in case the electors assented to the issuing of the bonds. If the provisions of the ordinance and act were carried out, the effect, of course, could be none other than disastrous to the water company, as the obligations of the contract (if any) would thereby be so far impaired as to render the contract of no value. The source of the ability of

the water company to pay the interest on its bonds, and the principal thereof, as they became due was, by this ordinance and act, entirely cut off.

Was not this legislation, and legislation of a kind materially to impair the obligation of the contract then existing, and not only to impair, but to wholly destroy its value? We are not called upon now to say whether the exclusive right for thirty years, granted to the water company by the contract to supply the city with water, was legal and valid, because that is a part of the question whether the obligation of the contract has been impaired by the subsequent ordinances of the city and the laws of the State. It cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be determined whether the subsequent proceedings of the city council and legislature impaired its obligation. The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142. It was stated in that case that the ordinance in question "created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. . . . When the substantial scope of this provision of the ordinance is clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the con-

tract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the legislature aided the city by granting it power to itself erect waterworks and to issue bonds in payment of the cost thereof, and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla City* v. *Walla Walla Water Company*, 172 U. S. 1; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, again reported 202 U. S. 453; *Davis &c. Co.* v. *Los Angeles*, 189 U. S. 207; *Knoxville Water Company* v. *Knoxville*, 200 U. S. 22. In the last cited case the water company contended that the agreement mentioned in that case constituted a contract, for which it acquired for a given period the exclusive right to supply water to the city and its inhabitants, and it insisted that the obligation of this contract would be impaired if the city, acting under the acts of the legislature and under the ordinance mentioned, established and maintained an independent and separate system of waterworks in competition with those of the water company. It was held that such a question was one arising under the Constitution of the United States and that the Federal Circuit Court had jurisdiction thereof without regard to the citizenship of the parties. It must be remembered that in the case before us the sole question is whether the Federal Circuit Court had jurisdiction to determine the

case, and we are not now concerned with the question as to how the matter should be determined, but only whether the Circuit Court had jurisdiction to determine it. As stated in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, at page 82, in speaking of the question of jurisdiction: "We do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the Circuit Court had jurisdiction to consider them."

Concluding that the court below had such jurisdiction, because it presents a controversy arising under the Constitution of the United States, the judgment of the Circuit Court is reversed, and the case remanded to that court to take proceedings therein according to law.

Reversed.

SECURITY TRUST AND SAFETY VAULT COMPANY *v.* CITY OF LEXINGTON.

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

No. 55. Argued October 23, 24, 1906.—Decided December 3, 1906.

Before a special assessment, levied by legislative authority of a State—in this case providing for back taxes in Kentucky—can be actually enforced, or during the process of its enforcement, the taxpayer must have an opportunity to be heard as to its validity and extent; but this rule is met where the state court has afforded the taxpayer full opportunity to be heard on both of those questions, and after such opportunity has rendered a judgment providing for the enforcement of such amount of the tax as it finds actually due.

In so determining the amount due and reducing the amount assessed the state court does not assume the legislative function of making an assessment, but merely, after hearing, judicially decides the amount of an assessment, made by the assessor under color of legislative authority.

Whether under the constitution and laws of the State the burden of showing the invalidity of a tax is on the taxpayer, is not a Federal question.

THE plaintiff in error, which was plaintiff below, filed its

petition in the Fayette County Circuit Court, State of Kentucky, in equity, on February 3, 1899, for the purpose of obtaining an injunction restraining the defendants in error from the collection of certain back taxes accruing during the years 1894 to 1898, both inclusive, imposed in favor of the city of Lexington, and which the plaintiff asserted were illegally assessed. A temporary injunction was prayed for and granted, restraining the collection of the tax, and upon the trial the amount of the taxes was reduced, and, as so reduced, declared to be a lien on the property of the plaintiff in error as trustee, and judgment accordingly was entered, which judgment was, upon appeal to the Court of Appeals of the State, affirmed, and the plaintiff brings the case here by writ of error.

In the amended petition it is averred that the plaintiff, as trustee, owned certain real estate in the city of Lexington, and that the tax collector of the city, asserting a claim for back taxes from 1894 to 1898, both inclusive, in favor of the city against the trust estate in the plaintiff's hands for $13,964.96, had, to satisfy the claim, levied on the real property held by it as trustee and described in the petition, and had advertised the same to be sold, and would sell the same, unless restrained by order of the court. It was averred that the claim for back taxes was for alleged omissions of personal property owned by the plaintiff as trustee, which had not been assessed for city taxation for the years stated, and that the tax was based on alleged assessments imposed in December, 1898, for these years, made by the city assessor of Lexington. The plaintiff denied that the pretended assessments made in 1898 for those years were any assessments at all, and alleged that there had been no assessment for the back taxes of those years or for any of them. It was averred that certain entries which had been made in the assessor's books, for the years mentioned, purporting to assess the property for these back taxes, were interpolated among the assessments for those years, but were not legally made, that such entries were not assessments, nor any step in the valid assessment of back taxes in those years, and

were made by the city assessor without any notice to, or conference with, the plaintiff of his intention to make the same, or any assessment, and the plaintiff at no time, either before or since said pretended assessment, had been given or allowed any opportunity or privilege to make any complaint or show cause against the assessment before any competent officer or tribunal whatever. It was also averred that all of the property of plaintiff as trustee, during each of the years covered by the claim for back taxes, had been duly assessed, and if it had been given the opportunity plaintiff would have established the fact of such assessment and that it had been fully and legally paid.

The plaintiff averred that collection of taxes based on assessments made as above stated would be in violation of the Constitution of the United States and of the State of Kentucky, forbidding that a citizen should be deprived of his property without due process of law.

The defendants in their answer averred that all of the property (with an exception not material) on which the defendants were claiming taxes as upon omitted property, had in fact been omitted by the plaintiff from its assessment lists during the years mentioned, and that the lists made out by the plaintiff for those years had been imperfect and improper lists, and that there was omitted therefrom a large part of the personalty owned by the plaintiff as trustee. The defendants averred that all the omitted property was properly assessable for the respective years, and that there was due thereon, in 1898, as the back taxes on the said omitted property, the sum named, to wit, $13,964.96; and the defendants denied that the valuation of the property, as fixed in the assessment, was any larger in proportion than the value of the assessment generally placed on similar property in the city of Lexington. After the assessment was made, it was averred that the delinquent tax collector demanded payment of the same, which was refused, and thereupon he levied upon the property on December 31, 1898. The answer then set up the making of the assessment

on the property omitted, and showed that it was made substantially as averred in the amended petition, by inserting in each of the books for the various years an additional assessment on account of omitted property, and that after each of the entries of assessment in the various books had been made by the assessor he signed his name after the words, "Assessed by me;" and it is averred that the assessment was also recorded by the assessor in the back tax assessment book, kept by the city of Lexington, and was by him reported to the auditor of the city of Lexington on the day that the assessment was made, December 31, 1898. The defendants also averred that, more than thirty days prior to the time the assessment was made, the city, through its duly authorized officers and agents, had notified the plaintiff that it had omitted from its assessments for the years 1894 to 1898, both inclusive, a large portion of the estate held by it as trustee, and, at the time of giving such notice, the officers of the city had furnished and delivered, as a part of such notice, an itemized statement of the securities and other personal property belonging to the estate, and held by the plaintiff, on the respective dates, for taxation for the respective years, and that payment of the taxes upon this omitted property was repeatedly demanded of the plaintiff by the city during a period of more than thirty days prior to the assessment, and the plaintiff refused to pay any additional taxes or to list the omitted property, and that ample time and opportunity were afforded plaintiff to show that the property had not been omitted from the yearly assessments, and the plaintiff failed to do so.

A reply and rejoinder were filed, and upon the pleadings the parties went to trial.

Judgment was given for the defendant, refusing the injunction, and providing for the sale of the real estate to satisfy the amount due for back taxes, as stated in the judgment. The total amount of back taxes due on the omitted property was, by such judgment, reduced from $13,964.96, the amount claimed by the defendant, to the sum of $8,626.63.

Mr. John T. Shelby and *Mr. George R. Hunt*, with whom *Mr. Joseph D. Hunt* and *Mr. John R. Allen* were on the brief, for plaintiff in error:

The right to be heard in tax cases is a constitutional right and indefeasible.

It is fundamental that in judicial or *quasi*-judicial proceedings affecting the rights of the citizen he shall have notice and an opportunity to be heard before any judgment, decree, order or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are *quasi*-judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken. Cooley on Taxation, 2d ed., 362; 3d ed., 626; *McMillan* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hager* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660; *Lent* v. *Tillson*, 140 U. S. 316; *Pittsburg, Cincinnati &c. Ry. Co.* v. *Backus*, 154 U. S. 421; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 537.

The action of the assessing officers, when completed according to the statutes, is a finality; at all events, so far as it relates to the value placed on the assessed property. In fixing these values, the assessors and the Boards of Review, if there be such boards, exercise a judicial or *quasi*-judicial function, and their conclusions are not open to review by any tribunal or court, unless otherwise expressly provided by statute. We must, therefore, look to the assessment proceedings to determine whether or not there was the due process of law required by the Constitution.

If the facts, or any material facts are there conclusively established against the property owner, without the required notice and opportunity to be heard, due process of law is wanting. *Stanley* v. *Supervisors*, 121 U. S. 550; Cooley, Taxation, 2d ed., 730; 3d ed., 1353.

The doctrine of the Kentucky cases is the same. *Odd*

Fellows v. *Dayton*, 25 Ky. Law Rep. 665; *Ward* v. *Beale*, 91 Kentucky, 65; *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 623; *Royer Wheel Co.* v. *Taylor County*, 104 Kentucky, 741; *Coulter* v. *Louisville Bridge Co.*, 114 Kentucky, 42; *Albin Co.* v. *Louisville*, 117 Kentucky, 895; *Citizens National Bank* v. *Lebanon*, 118 Kentucky, 60; *Slaughter* v. *Louisville*, 89 Kentucky, 112; *Turner* v. *Pewee Valley*, 18 Ky. Law. Rep. 757.

Both as to Kentucky authorities and the law as expounded by this court and the authorities generally, the action of the assessing officers, whatever the form of the assessment, when completed, if it be of any force at all, becomes conclusive as to the value of the property embraced in the assessment; and that matter is not open to further inquiry in any court, and if in these proceedings the requisite notice and opportunity for hearing be not allowed, then the so-called assessment is void for want of due process of law. No other hearing can be the legal equivalent or substitute for the hearing the party to be affected is entitled to before the assessing officers, whose authority to value, and give relief against errors of valuation, is full and exclusive.

Tested by these well established principles, we submit that there cannot be any reason to doubt that the assessment in this case, made as stated above, is absolutely void.

The right of the city to the affirmative relief granted upon its cross-action must be tested by precisely the same principles, as would determine its right to such relief had it been sought in an original suit, brought by it for the collection of the tax levied on the assessment in controversy. The whole question, therefore, is whether the alleged assessment was such an assessment as could constitute the basis of any enforceable tax claim at all. If there was no valid assessment the court had no power to make one. No such power is conferred by statute, and the authorities, so far as we have seen them, deny any such power to the courts. Certainly such power does not pertain to the courts of Kentucky. *Palmer* v. *McMahon*, 133

U. S. 669; *Slaughter* v. *Louisville*, 89 Kentucky, 123, and authorities *supra.*

Until a valid assessment is made by an authorized officer, the city or municipality has no standing to enforce any claim.

Mr. George C. Webb and *Mr. George S. Shanklin*, with whom *Mr. J. R. Morton* and *Mr. E. P. Farrell* were on the brief, for defendants in error:

The decision of the Court of Appeals was based upon facts showing due process of law. Due process of law means notice, and an opportunity to be heard in such manner as adapted to the exigencies of the case. This requirement of due process of law was complied with in this case by the public notice which was given in accordance with the statute; by actual notice before the omitted property was assessed; by a full hearing given to the plaintiff in error in this suit as to the justice of such assessment. *Central Land Co.* v. *Laidley*, 159 U. S. 103; Kentucky Code, § 126; Pomeroy on Code Remedies, 623; *Reynolds* v. *Bowen*, 36 N. E. Rep. 756; *Clark* v. *Louisville Water Works*, 90 Kentucky, 524; Kentucky Statutes, § 3179; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Kentucky Railroad Tax Cases*, 115 U. S. 321; 1 Cooley on Taxation, 3d ed., 61, 65; *Weyerhaueser* v. *Minnesota*, 176 U. S. 550; *Paulson* v. *Portland*, 149 U. S. 30; *Sturgis* v. *Carter*, 114 U. S. 511; *Foster* v. *Essex Bank*, 16 Massachusetts, 245; Greenleaf on Evidence, § 78; *Brandt* v. *Hyatt*, 7 Bush, 363; *Brown* v. *Young*, 2 B. Mon. 26; *Baldwin* v. *Shine*, 84 Kentucky, 502; *Gates* v. *Barrett*, 79 Kentucky, 295; *Stanley* v. *Board of Supervisors*, 121 U. S. 535; *McMillan* v. *Anderson*, 95 U. S. 37.

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

There are in the State of Kentucky two distinct methods by which an assessment for so-called back taxes can be made. One method is an assessment by a special back tax assessor,

elected as provided for by an ordinance of the city of Lexington. This ordinance the Court of Appeals of the State of Kentucky has held, contrary to the contention of the plaintiff in this case, did not displace the regular assessor, or affect his right to make an assessment for back taxes. The other method provides for an assessment by the regular assessor, under section 3179 of the laws relating to the city of Lexington, which section, among other things therein contained, provides that: "Whenever the assessor shall ascertain that there has, in any former year or years, been any property omitted which should have been taxed, he shall assess the same against the person who should have been assessed with it, if living; if not against his representative."

In this case the assessment for back taxes was made by the regular assessor, but not until December 31, 1898, under the above quoted provision in section 3179. It was, however, a special assessment, made after the regular assessment in the assessor's books of 1898, and after such books had been transmitted within the time prescribed by law (sec. 3180) December 1, 1898, to the auditor, subject to the inspection of the public. In regard to the regular assessment the Statutes of Kentucky provide (section 3181) for a board of equalization, which sits on the first Monday of January, and continues in session not longer than four weeks. The auditor must deliver to the board the assessment books filed with him by the assessor, and it is to hear all complaints against the assessments made by the assessor, and may determine the same, but it cannot increase the assessment without notice to the party whose property is to be increased. The section is part of the general statutes as to assessments for the annual taxes, and it refers evidently to the assessments made by the assessor up to the first of December preceding, and which appear in the book which the law directs to be sent to the auditor and by him transmitted to the board of equalization. It does not refer to an extraordinary assessment made by the assessor for back taxes subsequently to the time provided for by law for

the making of the general assessment. The assessor must return the general assessment which he makes in his book under section 3179 to the auditor on or before December 1 in each year. (Section 3180.) This book remains in the auditor's office subject to the inspection of the public until transmitted, in the January following, to the board of equalization, under section 3181. In the case before us the assessment for the back tax was made December 31, 1898, by entering a separate assessment for each year in the assessor's book for that year, and, therefore, these various assessments were not contained in the books of the assessor, as they were sent to the auditor on December 1 of each year respectively. The assessor's books for the years prior to 1898 were obtained in some way, and the entries of the assessments were therein made, because, as stated, there were no other books provided. We find no provision of the statute as to assessments for back taxes which requires notice of such assessment if made at any time other than in the regular course for the general assessment as provided for in the general statute. If the assessment happens to be made in the assessor's book prior to December 1 in any year it, of course, goes with the book to the auditor, and remains there for inspection by the public until taken before the board of equalization. Such an assessment would carry with it the provision of the law of the State applicable to the city on the subject of assessments, including the general notice under the law providing for such assessment. But that, of course, cannot apply where the assessment is not made on or before December 1, in the regular assessment book. That book the taxpayer must omit to examine at his peril, when filed with the auditor, or when before the board of equalization. As sent to the auditor, December 1, 1898, the book did not contain the assessment in question. And as to the books of the former years, they had passed out of the legal custody of the assessor, and he could not take any of such books and, without notice, impose a conclusive assessment for back taxes for the particular year the book had been made

use of as an assessment book. Such assessment could not be enforced unless the taxpayer could thereafter at some time, and as a matter of right, be heard upon the question of the validity and the amount of such tax. The general statutory notice as to the regular assessment proceedings cannot be regarded as notice of this special assessment made years after the completion of the old assessments.

In regard to the question of notice, the Court of Appeals held that the burden of proof in such a proceeding as this was upon the plaintiff to establish that there was no notice of the assessment given it; but it also held that the defendant had, in fact, proved that there was notice given to the plaintiff in error before the assessment was made. This applies to a notice in fact, but the Court of Appeals did not hold that there was any notice made necessary by the statute in regard to such a special assessment as above described. An assessment made on December 31, 1898, in the manner set forth, although imposed before the meeting of the board of equalization in January following, was not imposed at a time which made the general statutes as to assessments applicable, and, therefore, the taxpayer had no statutory notice or opportunity furnished him to appear and be heard before the board. He may have examined the assessor's books for the various years 1894–1898, when filed in the auditor's office on the first of December, by the assessor, and prior to December 31, when this assessment was made, and found that there was no assessment made against him for any back taxes. There was no statutory obligation imposed on him to again examine the books lest perchance they may have had an interlined assessment made in them, for the making of which the law provided no notice. It follows that the subsequent assessments placed in such books and not appearing on any book when sent to the auditor by the assessor, would not be made under any statutory provision for notice, and would not afford the taxpayer an opportunity to be heard before the board of equalization in regard to the illegality of such tax.

If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute. *Stuart* v. *Palmer*, 74 N. Y. 183. Before this special assessment could be actually enforced or during the process of enforcement the taxpayer must have an opportunity to be heard as to its validity and extent. In *Wayerhaueser* v. *Minnesota*, 176 U. S. 550, it was held that the taxpayer was entitled to an opportunity to be heard before the tax could be enforced (see page 556); that the filing of the tax list therein spoken of was, in effect, as held by the court, the institution of an action against each tract of land described in it, and the taxpayer thereafter had opportunity to make any defense he might have. This the court held was sufficient. The proceedings leading up to that assessment originated in a complaint, in writing, to the governor, who thereupon appointed a commission to hear the matter, and if proper, impose the tax, but before it could be enforced or during the process of collection the landowner had a right to be heard. The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessment before the board of equalization.

But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and after such opportunity has rendered a judgment which provides for the enforcement of the tax as it has been reduced by the court, the reduction amounting to over five thousand dollars. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provisions of some statute, as in *McMillen* v. *Anderson*, 95 U. S. 37, and *Hagar* v.

Reclamation District, 111 U. S. 701, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. The state court in this case has held the taxpayer entitled to a hearing and has granted and enforced such right, and upon the trial has reduced the tax. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color at least of legislative authority.

The Court of Appeals has held that the power of the trial court in giving the hearing has been properly exercised.

It is urged that the court below has not in fact decided that the assessment against plaintiff as reduced was legal, but only that plaintiff will not be heard upon the question of enjoining the collection of the tax until plaintiff tenders the amount of tax equitably due. The plaintiff denies that there is any amount equitably due, and it contends that it has not had an opportunity to show the invalidity of the assessment. We think the contention not well founded. The court has held that the burden rested upon the plaintiff to show the invalidity of the tax. Even if erroneous this decision is not one of a Federal nature. It had the chance, at all events, to show the invalidity of the tax in whole or in part. Upon the evidence given on the trial the tax was reduced, and the Court of Appeals has said:

"The claim of appellant to escape a retrospective assessment of the property of its *cestui que trust* in this case is wholly technical. That it owes the tax it seeks to evade is made apparent by an examination of this record. Although it had in its hands the means of instantly and most conclusively showing either that the trust estate did not own the property with which it was assessed, or that the values were too high, it introduced no evidence whatever on this subject. While it was not incumbent on the appellees to introduce any evidence, being authorized under the principles herein enunciated to

await the evidence of appellant showing the invalidity of the assessment complained of, yet they did introduce evidence which we think clearly establishes that appellant justly owes the amount of the tax which has been adjudged against the estate of its *cestui que trust*."

We think it sufficiently appears that the plaintiff had an opportunity to be heard upon the question of the validity of the tax, both for want of notice in fact, and whether the property assessed for back taxes had really been omitted from the original list for the years in question, and was therefore properly taxable under the assessment for back taxes. Even if the assessment had been made by the assessor without notice, yet if upon the hearing in this cause the plaintiff had the right and an opportunity to be heard, and the assessment was thereon reduced, it has obtained all the hearing it was entitled to. We think the plaintiff did have such a hearing, and the judgment is correct, so far at least as this court is authorized to review it. It is therefore

Affirmed.

MISSISSIPPI RAILROAD COMMISSION *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

No. 64. Argued October 26, 1906.—Decided December 3, 1906.

Where complainant not only sets up diverse citizenship but also a constitutional question he has the right to appeal from the judgment of the Circuit Court to the Circuit Court of Appeals, and from its decision an appeal or writ of error may be taken to this court. *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, distinguished.

A commission created by the law of a State for the purpose of supervising and controlling the acts of railroad companies operating within the State is subject to suit, and a suit brought by a company of another State in the

Circuit Court of the United States against the members of the commission is not a suit against the State within the prohibitions of the Eleventh Amendment.

The Railroad Commission of Mississippi is not, as has been determined by the highest court of that State, a court, but a mere administrative agency of the State, and the prohibitions of § 720, Rev. Stat., against injunctions from United States courts to stay proceedings in state courts are not applicable thereto; and even though the Commission might, under the state law, resort to the state courts to aid it in enforcing its orders the proceeding cannot be regarded as one in the state courts within the meaning of § 720, Rev. Stat. While a state railroad commission may, in the absence of congressional legislation, order a railroad company to stop interstate trains at stations where there is only an incidental interference with interstate commerce, based on a legal exercise of the police power of the State exerted to secure proper facilities for the citizens of the State, where the railroad company has—as in this case—furnished all proper and reasonable facilities, such an order is an improper and illegal interference with interstate commerce and void as a violation of the commerce clause of the Constitution.

138 Fed. Rep. 327, affirmed.

THE railroad commission of the State of Mississippi, and its members and clerk, as appellants, bring to this court by appeal the judgment of the Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment of the United States Circuit Court for the Southern District of Mississippi in favor of the appellants, and remanded the case, with directions to enter a decree for the complainant, the railroad company.

The case, as it appears in the record, shows the following facts:

The citizens of the town of Magnolia, which has about 1,200 inhabitants, and is situated in the State of Mississippi, on the line of the railroad of the defendant in error, and about ninety-eight miles north of New Orleans, in April, 1903, presented a petition to the Mississippi Railroad Commission, asking that commission to order the railroad company to stop its passenger trains numbers one, three and four at the Magnolia station, the ground of the request being, as stated in the petition, that Magnolia was one of the most progressive towns in the State and the county seat of the county, and the petitioners believed

that they were entitled to have these trains make regular stops at that point, and they stated their belief that it was for the best interest of the public, as well as the town, to have the passenger trains named make regular stops at the town.

Trains numbers one and three were south bound trains from Chicago, passing Magnolia on their way to New Orleans, while train number four was a train on its way north to Chicago from New Orleans.

After a hearing before the railroad commission, on notice to the railroad company, the commission made an order granting the application as to trains one and three and denying it as to number four.

Before obeying the order the company brought this suit to enjoin its enforcement. Upon the filing of the bill a temporary injunction was issued, and a subsequent motion to dissolve it was denied. The defendant in the suit, the railroad commission, answered the bill, and denied that the railroad company furnished the town of Magnolia with adequate accommodations for the south, and put in issue the allegations of the bill that the order made by the commission was unreasonable or an illegal interference with the interstate commerce of the railroad company. The case came on for hearing before the Circuit Court, at the end of which a decree was made denying the relief asked for by the complainant, the court holding that the order of the commission was not unreasonable, and that, therefore, the temporary injunction should be and it was dissolved. An appeal to the Circuit Court of Appeals was prayed for by the railroad company and granted.

The bill stated, amongst other things, that the corporation was created under the laws of the State of Illinois, and that the complainant was a resident of that State, and domiciled in the city of Chicago; and that the railroad commission was created by the State of Mississippi, and its individual members were citizens and residents of that State. The complainant further showed that it was operating an interstate line of railroad, extending from the city of New Orleans, in Louisiana,

north through that State and the States of Mississippi, Kentucky, Indiana and Illinois to the Great Lakes of the Northwest, connecting at various points with other lines of interstate railroads. It is also averred that the Congress of the United States had established the line of railroad operated by the complainant as a national highway, for the accommodation of interstate commerce and the carriage of the mails of the United States, and had been so recognized and promoted as such by various acts of Congress; that owing to the exigencies of its interstate business and the requirements of modern commerce and passenger transportation, as well as the transportation of freight and the United States mails, the complainant had been, from time to time, required to shorten its schedule and to maintain and operate certain fast through trains, intended primarily and chiefly for interstate transportation and interstate commerce; that the two trains, numbered one and three—one being known as the fast mail and the other as the New Orleans and Chicago Limited—were run expressly for the purpose of carrying the interstate business and for the transportation of the United States mail, and that they were run on special schedules for that purpose, and of necessity had to make close connections with other through trunk lines of railroad doing an interstate business, and in order to maintain the necessary schedule of time for the operation of these interstate trains it was impossible and wholly impracticable to stop at all stations; and, further, that these trains, being south bound trains, only stop regularly at junction points and all such points of importance in the State of Mississippi which are necessary and which justify such stops. The bill showed the accommodations which were afforded the town of Magnolia by the other trains provided by the company, and which it alleged sufficiently accommodated the traveling public at that point; that a compliance with the order of the commission, by stopping the trains named, would imperil the ability of the complainant to comply with its contract with the United States for the carriage of the mails, and

would embarrass its interstate traffic, and that it would be impossible, under the present condition of the roadbed and equipment of the complainant, to increase the speed of the trains so as to allow for the stoppage of the trains as directed by the commission; that the complainant protested before the commission against the issuing of the order, and it alleged that it showed that it was then furnishing the town of Magnolia all reasonable and necessary railroad facilities, and that the effect of the order would be to give that town greater railroad facilities than were afforded by complainant to any other town in the State of Mississippi, including the city of Jackson, the capital of the State, excepting only the town of McComb City, which, being a relay station on complainant's road, it is necessary for all trains to stop there to change the engine, and for fuel, water, etc.; that the effect of the order also would be to give to the town five daily trains to the city of New Orleans, running within short intervals of each other. It was further alleged that by the statutory law of the State of Mississippi the complainant was subject to a penalty of fifty dollars for each time it failed to stop its trains on the order of the commission, and that the complainant would, therefore, be compelled to comply with the order or be subject to a multiplicity of suits for penalties arising from each and every violation of the order, and that defendants threaten by suit to enforce the order. It was then averred that the order of the commission was a direct burden upon interstate commerce, and also a direct and unnecessary interference with the speedy carriage of the mails of the United States.

An amendment to the bill was subsequently filed, showing that Congress had granted a right of way and sections of land in the State of Illinois to aid in the construction of a railroad from the southern termination of the Illinois and Michigan Canal, to a point at or near the junction of the Mississippi and Ohio Rivers, with branches, etc., which should remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any

property or troops of the United States, and on which mails of the United States should at all times be transported, and the Congress had made like grants to the States of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from the city of Mobile to a point near the mouth of the Ohio River; and it was also averred that the State of Illinois had chartered the complainant in 1850, and ceded to it rights and lands granted to that State by the act of Congress.

The defendant commission answered and denied the averments in the bill, as already stated.

Mr. Marcellus Green, with whom *Mr. William Williams*, Attorney General of the State of Mississippi, *Mr. Garner Wynn Green* and *Mr. J. N. Flowers* were on the brief, for plaintiffs in error.

Mr. Edward Mayes, with whom *Mr. J. M. Dickinson* was on the brief, for defendants in error.

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

The decision in this case by the Circuit Court of Appeals is reported in 138 Fed. Rep. 327, in which will be found a statement of the material portions of the evidence taken at the hearing before the trial court. It is unnecessary to repeat it.

The first objection raised by the appellant is, that this suit is, in substance, one against a State. The commission was created by the State of Mississippi, under the authority of its constitution and laws, for the purpose of supervising, and to some extent controlling, the acts of the railroads operating within the State. Such a commission is subject to a suit by a citizen. *Reagan* v. *Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537. We do not see that *Arbuckle* v. *Blackburn*, 191 U. S. 405, is at all in point.

It is also objected that an injunction will not lie from a United States court to stay proceedings in a state court, because of the provisions of section 720, United States Revised Statutes. 1 Comp. Stat. 581. The commission is, however, not a court, and is a mere administrative agency of the State, as held by the Mississippi court. *Telegraph Co.* v. *Railroad Commission*, 74 Mississippi, 80.

It is urged, however, that proceedings in a state court were commenced by the presentation of the petition of the citizens of Magnolia to the railroad commission, and because the commission, having made an order to stop the trains, would have to resort to the proper state court to aid it in the enforcement of its order, therefore the whole proceeding must be regarded as in a state court from the commencement. Whatever may be the provision of the state statute in regard to the enforcement solely by the state court of the order of the railroad commission, the proceeding while before the commission never thereby became a proceeding in a state court, and the jurisdiction of the Federal court to enjoin the commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected.

The appellants also object that the Circuit Court of Appeals had no jurisdiction to review the judgment of the Circuit Court in this case, because, as is stated, the jurisdiction was predicated upon diversity of citizenship, and also upon the claim that the state statutes, requiring the stoppage of trains, when applied to the trains under discussion, violated the commerce clause of the Federal Constitution, and, therefore, the case should have come directly here from the Circuit Court, and *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, is cited as authority. The complainant in this case, by a proper pleading, set up not only the diversity of citizenship, but also a constitutional question, and the complainant had the right to appeal from the judgment of the Circuit Court to the Circuit Court of Appeals, and from its decision in such a case an appeal or writ of error may be taken to this court. *American Sugar*

Refining Co. v. *New Orleans*, 181 U. S. 277, 281; *Huguley Manufacturing Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 295. The case of *Field* v. *Asphalt Co.*, *supra*, does not hold otherwise. It simply holds that where the jurisdiction of the Circuit Court attaches on the ground of diverse citizenship, and also upon a separate and independent constitutional ground, the party may take a direct appeal to this court, but it does not hold that the defeated party must do so and that he cannot go to the Circuit Court of Appeals.

The main question is, as stated in the court below, whether the order of the commission is valid with reference to the Federal Constitution. That depends upon the question whether it is only an incidental interference with interstate commerce, based upon a legal exercise of the police powers of the State for the purpose of securing proper and sufficient accommodation from the railroad company of railroad facilities for the residents of the State. The authority of the commission to interfere with a railroad is based on the statutes of Mississippi. Section 3550 (Chapter 112, Code of Mississippi, 1892, relating to railroads) reads as follows:

"3550. *To stop all passenger trains, if, etc., at county seats.*—Every railroad shall cause each and all of its passenger trains to stop for passengers at all county seats at which it has a depot, at the discretion of the railroad commission."

Chapter 134 of the same code relates to the supervision of common carriers. Section 4302 thereof reads as follows:

"*Necessary depots to be maintained.*—Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require; and the commission may cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the travelling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established or to fail to keep up the same and to regularly

stop the trains thereat, without the consent of the commission."

Under these statutes the commission has power (*a*) to stop, in its discretion, all passenger trains at all county seats at which the company has a depot; (*b*) to stop such of the passenger and freight trains at any depot as the business and public convenience may require. The order in question was made with regard to a place which is both a county seat and also one where the railroad has a depot. It is not plain under which section the commission acted. Its order simply states that the petition of the citizens of Magnolia is granted as to trains one and three and denied as to train four. The petition throws no light upon the subject. We may assume, however, that the commission acted under all the authority it had from the above quoted sections of the statute. It is fair to assume that it had exercised its discretion in causing the trains to stop at a county seat, and that it did so because in its judgment it was reasonable and necessary for the public convenience. The question is whether, having regard to the facts, the order is valid.

The matter of the validity of statutes, directing railroad companies to stop certain of their trains at stations named, has been before this court several times, and the result of its holdings is: That a statute of Illinois, which required the Illinois Central Railroad to stop its fast mail train from Chicago to New Orleans at Cairo, in the State of Illinois, which was a county seat, was unconstitutional if the company had made adequate accommodation by other trains for interstate passengers to and from Cairo. That a statute which required every railroad corporation to stop all regular passenger trains running wholly within the State at its stations at all county seats was a reasonable exercise of the police power of the State, where the statute did not apply to railroad trains entering the State from any other State, or transcontinental trains of any railroad. A statute relating to railroad companies which provided that a company should cause three of its trains each

way, if so many were run daily, Sundays excepted, to stop at a station containing over 3,000 inhabitants, was valid in the absence of legislation by Congress on the subject; and also a state statute which required all regular passenger trains to stop at county seats was invalid, when applied to an interstate train, intended only for through passengers from St. Louis to New York, when it appeared that the railroad company furnished sufficient trains to accommodate all the local through business in the State, and where such trains stopped at county seats. These principles have been decided in *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142; *Gladson* v. *Minnesota*, 166 U. S. 427; *Lake Shore &c. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514. Upon the principles decided in these cases, a state railroad commission has the right, under a state statute, so far as railroads are concerned, to compel a company to stop its trains under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running and compel it to stop at a locality named. In such case, in the absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right; but if the company has furnished all such proper and reasonable accommodation to the locality as fairly may be demanded, taking into consideration the fact, if it be one, that the locality is a county seat, and the amount and character of the business done, then any interference with the company (either directly by statute, or by a railroad commission acting under authority of a statute) by causing its interstate trains to stop at a particular locality in the State, is an improper and illegal interference with the rights of the railroad company, and a violation of the commerce clause of the Constitution.

In reviewing statutes of this nature, and also orders made by a state railroad commission, it frequently becomes necessary

to examine the facts upon which they rest and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the State or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts. In this case there was no important conflict of evidence on the material points, and so the Circuit Court of Appeals has stated, and these facts are clearly and sufficiently set forth in 138 Fed. Rep., *supra*. The fact that the company has contracts to transport the mails of the United States within a time which requires great speed for the trains carrying them, while not conclusive, may still be considered upon the general question of the propriety of stopping such trains at certain stations within the boundaries of a State. The railroad has been recognized by Congress, and is the recipient of large land grants, and the carrying of the mails is a most important function of such a road. We think that the railroad company has fully performed its duty towards the town in the way of furnishing it proper and adequate and reasonable accommodation, without stopping these interstate trains as ordered, and, therefore, the order of the commission was improper and illegal, and not merely an incidental interference with the interstate commerce of the company. The Circuit Court of Appeals has, in effect, so held, although it did say that the commission and the Circuit Court had made an order that indicated that the trains which already stopped at Magnolia were not sufficient and that the town should have five daily trains going south, and, therefore, the court said it thought it well to examine other questions, which it did. A reading of the whole opinion of the Circuit Court of Appeals shows that the court did not concede, in any degree, that the passenger facilities afforded were inadequate, but that the remedy was to compel the company to run more trains and not stop the ones in question. The opinion simply suggests that even if the facilities were inadequate, the appropriate course was to order more trains

instead of stopping those mentioned. In any event, the question is before us upon uncontradicted evidence as to whether there were or were not proper facilities, and we hold there were.

The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The legislature of a State could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.

The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the State through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a State or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of

the road to successfully compete with its rivals in the transportation of interstate passengers and freight.

We are of opinion that the judgment of the Circuit of Appeals was right, and it is

Affirmed.

ALLEN v. RILEY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 99. Submitted November 6, 1906.—Decided December 3, 1906.

While a State may not pass any law prohibiting the sale of patents for inventions or nullifying the laws of Congress regulating their transfer, it has the power, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud; and a requirement in the laws of Kansas that before sale or barter of patent rights, an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the clerk of the county within which the rights are sold is not an unreasonable regulation.

71 Kansas, 378, affirmed.

Frances J. Riley, the defendant in error, who was plaintiff below, recovered a judgment against plaintiffs in error, defendants below, for $1,250, in the District Court of Brown County, in the State of Kansas, which judgment was affirmed by the Supreme Court of the State, and the defendants below have brought the case here by writ of error.

The suit was commenced by the filing of a petition by defendant in error, plaintiff below, in a District Court of Kansas, March 17, 1902, to recover the value of certain lands alleged to have been transferred by the plaintiff to the defendant Erasmus W. Allen, in part payment for the transfer to plaintiff of rights for the State of Kentucky under a patent dated January 30, 1901, for a washing machine. The right to recover is based upon the failure of the defendants to comply with the Kansas statute, which failure defendants do not

deny, but they insist that the statute is void as being in violation of the Constitution of the United States and the act of Congress referred to in the opinion. The Kansas statute is chapter 182 of the Laws of 1889. A copy of the act is set out in the margin.[1]

Mr. N. H. Loomis, Mr. R. W. Blair and *Mr. H. A. Scandrett* for plaintiffs in error:

The Constitution gives Congress power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, and Congress has exer-

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[1] Chapter 182, Laws of 1889 (paragraphs 4356, 4357 and 4358, General Statutes of Kansas, 1901), reads as follows:

"SEC. 1. It shall be unlawful for any person to sell or barter or offer to sell or barter any patent right, or any right which such person shall allege to be a patent right, in any county within this State, without first filing with the clerk of the District Court of such County copies of the letters patent duly authenticated, and at the same time swearing or affirming to an affidavit before such clerk that such letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented; which affidavit shall also set forth his name, age, occupation and residence; and if an agent, the name, occupation and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person on demand.

"SEC. 2. Any person who may take any obligation in writing for which any patent right, or right claimed by him or her to be a patent right, shall form a whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words, 'Given for a patent right.'

"SEC. 3. Any person who shall sell or barter or offer to sell or barter within this State, or shall take any obligation or promise in writing for a patent right, or for what he may call a patent right, without complying with the requirements of this act, or shall refuse to exhibit the certificate when demanded, shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined in any sum not exceeding one thousand dollars, or be imprisoned in the jail of the proper county not more than six months, at the discretion of the court or jury trying the same, and shall be liable to the party injured in a civil action for any damages sustained."

cised that power by appropriate legislation regulating the issue of letters patent and providing for their assignment. 3 U. S. Comp. Stat. 1901, § 4898, as amended by act of March 3, 1897. Congress has attempted to take exclusive charge of the issuing and assignment of patents.

It has prescribed the manner of making application, the proof required, the time for which granted, and finally, that every patent shall be assignable by an instrument in writing, which shall be recorded in the Patent Office within three months from its date.

That the assignment shall be in writing and be recorded in the Patent Office are the only restrictions prescribed by Congress, and are the only ones contemplated.

The question is squarely presented whether or not the state statute placing additional restrictions on the assignment of a patent is in conflict with the Constitution and laws of the United States. The state court has held it was not. *Mason* v. *McLeod*, 57 Kansas, 105. The decisions of the state courts are not harmonious. Those taking a contrary view to the Kansas court include *Hollida* v. *Hunt*, 70 Illinois, 109; *Cranson* v. *Smith*, 37 Michigan, 309; *Crittenden* v. *White*, 23 Minnesota, 24; *Ex parte Robinson*, 2 Biss. 309; *Helm* v. *National Bank*, 43 Indiana, 167, but see *Patterson* v. *Kentucky*, 97 U. S. 501. See also *Brechbill* v. *Randall*, 102 Indiana, 528; *Hankey* v. *Downey*, 116 Indiana, 118; *Wilch* v. *Phelps*, 14 Nebraska, 134; *Commonwealth* v. *Petty*, 29 S. W. Rep. 291; *Woolen* v. *Banker*, 2 Flipp. 33; *Castle* v. *Hutchinson*, 25 Fed. Rep. 394; *Pegram* v. *Am. Alkali Co.*, 122 Fed. Rep. 1000; *Brown* v. *Pegram*, 125 Fed. Rep. 577. *Reeves* v. *Corning*, 51 Fed. Rep. 787; *Webber* v. *Virginia*, 103 U. S. 344, distinguished.

This court has decided that a State in the exercise of its police powers may regulate the handling of a product manufactured under a patent, such as illuminating oil as in *Patterson's case* and sewing-machines in *Webber's case*, but it has never decided that a State can in any way interfere with an

inventor's exclusive right to his discoveries. The decisions in commenting on *Patterson's* and *Webber's cases* show the plain distinction made between the tangible property manufactured under a patent and the incorporeal rights of the owner of the patent. *Commonwealth* v. *Petty*, 29 S. W. Rep. 291; *Castle* v. *Hutchinson*, 25 Fed. Rep. 394; *Pegram* v. *Am. Alkali Co.*, 122 Fed. Rep. 1005; *Wilch* v. *Phelps*, 14 Nebraska, 134.

The Kansas Supreme Court upholds the statute on the ground that it is a police regulation, but overlooks the vice of including in one class all patent-right owners, good and bad, and imposing upon a certain kind of property created by an act of Congress, burdens not borne by any other property in the State.

The act is no more a proper police regulation than was the act of Virginia, requiring all flour imported from other States to be inspected, which was held void by this court. *Voight* v. *Wright*, 141 U. S. 62.

The Kansas statute also violates the equal protection clause of the Fourteenth Amendment, because it singles out a class of property brought into existence by an act of Congress under a constitutional grant and imposes a burden simply on account of its character. *Cammeyer* v. *Newton*, 94 U. S. 226.

Mr. A. E. Crane and *Mr. T. T. Woodburn* for defendants in error:

The statute does not trench upon Federal power, nor interfere with the right secured to a patentee by the Federal law. It is true that no State can interfere with the right of the patentee to sell and assign his patent, or take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations, designed for the protection of the people against imposition and fraud. There is great opportunity for imposition and fraud in the transfer of intangible property, such as exists in a patent right, and many

States have prescribed regulations for the transfer of such property, differing essentially from those which control the transfer of other property. There were some early decisions holding that such regulations trenched upon the Federal power and the rights of the patentee, but recent authorities hold that reasonable police regulations may be enacted by the State without usurping any of the powers of the Federal Government or infringing upon the exclusive rights of the patentee. *Breckbill* v. *Randall* 102 Indiana, 528; *New* v. *Walker*, 108 Indiana, 356; *Pape* v. *Wright*, 116 Indiana, 502; *Sandage* v. *Studebaker*, 142 Indiana, 148; *Tod* v. *Wick Brothers & Co.*, 36 Ohio St. 370; *Herdic* v. *Rœssler*, 109 N. Y. 127; *Haskell* v. *Jones*, 96 Pa. St. 173; *Patterson* v. *Kentucky*, 97 U. S. 501; *Webber* v. *Virginia*, 103 U. S. 344.

The power to establish the ordinary regulations of police has been with the individual States, and cannot be assumed by the National Government. Cooley, Const. Lim., 572, 574; *Patterson* v. *Kentucky*, 97 U. S. 501, and see also *Reeves* v. *Corning*, 51 Fed. Rep. 774, 782; *Re Brosnahan*, 18 Fed. Rep. 62; *Livingston* v. *Van Ingan*, 9 Johns. 528; *Cammeyer* v. *Newton*, 94 U. S. 225.

The statute does not abridge the privileges and immunities of citizens guaranteed by the Fourteenth Amendment to the Constitution. That amendment does not interfere with the proper exercise of police power by the States. *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

If the statute is a reasonable exercise of police power, it necessarily follows that it does not violate the protective clause of the amendment. *Voight* v. *Wright*, 141 U. S. 62, distinguished.

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

The sole question for our determination in this case is con-

cerning the constitutionality of the Kansas act. The opinion of the Supreme Court of the State of Kansas is reported in 71 Kansas, 378, and 80 Pac. Rep. 952.

The judgment herein is founded upon *Mason* v. *McLeod*, 57 Kansas, 105, which case has been followed by that of *Pinney* v. *First National Bank of Concordia*, 68 Kansas, 223.

The defendants insist that the act in question violates article one, section 8, of the Constitution of the United States, and the Federal statute passed in pursuance thereof, being Rev. Stat. § 4898; 3 Comp. Stat. p. 3387. The Constitution grants to Congress the right "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;" and section 4898 of the Revised Statutes provides that every patent or interest therein shall be assignable in law by an instrument in writing, which assignment is made void against any subsequent purchaser or mortgagee, for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.

It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provision quoted above, and that any regulations whatever, by any state authority in regard to such assignment or sale, and making provision in respect to them, are illegal.

The Supreme Court of Kansas has maintained and upheld the Kansas act on the ground that the statute is simply a reasonable and proper exercise of the police power of the State in regard to the subject of the act. *Mason* v. *McLeod, supra*. That court was of opinion that the provisions of the Kansas statute did not trench upon the Federal power nor interfere with the rights secured to patentees by Federal law. The opinion does not assert that a state statute can interfere with the right of a patentee to sell or assign his patent, nor that it can take away any essential feature of his exclusive right, but,

as is stated, the provisions in the act have no such purpose or effect; that "they are in the nature of police regulations designed for the protection of the people against imposition and fraud. There is great opportunity for fraud and imposition in the transfer of intangible property, such as exists in a patent right, and many of the States have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property." Many authorities are cited, and the opinion then continues: "The doctrine of these cases is that the patent laws do not prevent the State from enacting police regulations for the protection and security of its citizens, and that regulations like ours, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights or own patent rights to sell, should be upheld. We think the statue is valid."

In Indiana a statute, which is like that in Kansas, has been upheld by the Supreme Court of that State. *Brechbill* v. *Randall*, 102 Indiana, 528. That case has since that time been followed in Indiana. *New* v. *Walker*, 108 Indiana, 365. In Ohio a statute somewhat similar to the one in question has been upheld. *Tod* v. *Wick Bros. & Co.*, 36 Ohio St. 370. And the same result has been reached in Pennsylvania. *Haskell* v. *Jones*, 86 Pa. St. 173. In *Herdic* v. *Roessler*, 109 N. Y. 127, the validity of the same kind of a statute has been upheld. See also *Wyatt* v. *Wallace*, 67 Arkansas, 575; *State* v. *Cook*, 107 Tennessee, 499. The statutes in the different States are not all precisely like the Kansas law, but they make provisions in regard to the sale or assignment of rights under a patent, and sometimes in regard to notes given for their purchase, which cannot be upheld under the contention of plaintiffs in error herein, that all such provisions are in violation of or inconsistent with the laws of Congress on the subject. The courts of some other States, having like questions before them, have held their statutes void. *Hollida* v. *Hunt*, 70 Illinois, 109; *Cranson* v. *Smith*, 37 Michigan, 309; *Wilch* v. *Phelps*, 14

Nebraska, 134; *State* v. *Lockwood,* 43 Wisconsin, 403, and some others.

The Circuit Court of Appeals of the Eighth Circuit, in *Ozan Lumber Co.* v. *Union County National Bank,* 145 Fed. Rep. 344, has held a statute of Arkansas upon this same subject void, because of its discrimination between articles of property of the same class or character, based only on the fact that the property discriminated against was protected by a patent granted by the United States. In the opinion in the case, authorities upon the subject are cited and commented upon. Among the cases cited are *Patterson* v. *Kentucky,* 97 U. S. 501, and *Webber* v. *Virginia,* 103 U. S. 344.

In *Patterson* v. *Kentucky, supra,* the owner of a patent right for an improved burning oil was convicted of the violation of a Kentucky statute by the sale of the oil covered by the patent. The owner claimed the right to sell such oil notwithstanding the statute, which provided a standard below which oil was regarded as dangerous for illuminating purposes and the sale of which was prohibited. It was admitted the patented oil did not come up to the state standard. This court held the conviction was right, and that the owner of the patent was not protected, by reason of his ownership, from liability under the state statute. That statute was held to be one passed in the legitimate exercise of the powers of the State over its purely domestic affairs, and it was said that it did not violate either the Constitution or laws of the United States, as when property protected by patent once comes into existence its use is subject to the control of the several States to the same extent as any other species of property.

Webber v. *Virginia, supra,* relates also to tangible property covered by a patent, and it was held that the patent did not exclude from the operation of the taxing or licensing law of the State the tangible property manufactured under a patent. It was said in that case that "Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good

order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits."

While these two cases do not cover the one now before us, because they refer to tangible property which has been manufactured and come into existence under a patent, and the case before us relates to provisions which are to accompany an assignment of intangible rights, growing out of a patent, yet the general power of the States to legislate in order to protect their citizens in their lives and property from fraud and deceit is recognized, not as being without limit, of course, but as being properly exercised in the cases named.

We think the State has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act referred to.

In some of the cases holding such statutes void it is said that it is unfortunately true that many frauds are committed under color of patent rights, and that the patent laws are not so framed as to secure the public from being cheated by worthless inventions, but notwithstanding that they hold statutes of the nature of the one under consideration to be void, as trenching upon the rights of the owner of a patent secured by the Constitution and laws of the United States.

To uphold this kind of a statute is by no means to authorize any State to impose terms which, possibly, in the language of Mr. Justice Davis, in *Ex parte Robinson*, 2 Biss. 309, "would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the Constitution." Such a statute would not be a reasonable exercise of the powers of the State.

In Michigan the court, speaking through Mr. Justice Campbell, while holding the act under review in that case upon this subject invalid, *Cranson* v. *Smith*, 37 Michigan, 309, said: "While we cannot but recognize the magnitude of an evil which has brought patents into popular discredit, and has provoked legislation in several States similar to that in Michigan, we cannot on the other hand fail to see in these laws a plain and clear purpose to check the evil by hindering parties owning patents from dealing with them as they may deal with their other possessions." If there is a special evil, unusually frequent and easily perpetrated when parties are dealing in the sale of rights existing or claimed to exist under a patent, we do not see why a State may not, in the *bona fide* exercise of its powers, enact some special statutory provision which may tend to arrest such evil, and may omit to enact the same provision concerning the disposal of other property. There is no discrimination which can be properly so called against property in patent rights, exercised in such legislation. It is simply an attempt to protect the citizen against frauds and impositions which can be more readily perpetrated in such cases than in cases of the sale or assignment of ordinary property.

The act must be a reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various States the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute. The expense of

filing copies of the patent and the making of affidavits in the various counties of the State in which the owner of the rights desired to deal with them is not so great in our judgment as to be regarded as oppressive or unreasonable, and we fail to find any other part of the act which may be so regarded. Some fair latitude must be allowed the States in the exercise of their powers on this subject. It will not do to tie them up so carefully that they cannot move, unless the idea is that the States have positively no power whatever on the subject. This we do not believe, at any rate in the absence of Congressional legislation. The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the States to legislate on the subject themselves in a manner neither inconsistent with nor opposed to the Federal statute. We think the judgment is right, and it is

Affirmed.

MR. JUSTICE WHITE, with whom concurs MR. JUSTICE DAY, dissenting.

My brother Day and myself dissent. The reasons, however, which impel him are broader than those influencing me. In general terms the Kansas statute, which the court now upholds, compels one selling a patent right in any county of the State of Kansas to file with the clerk of such county an authenticated copy of the patent, together with an affidavit as to the genuineness of the patent, and as to other matters. The statute, moreover, exacts that where a note is given for the purchase price of a patent right, there shall be inserted in the note a statement that it is given for a patent right, presumably to deprive the note of the attributes of commercial paper. We both think that the requirements as to recording the patent and affidavit are void, because repugnant to the power delegated to Congress by the Constitution on the subject of patents, and because in conflict with the legislation of Congress on the

same subject. And, for like reasons, my brother Day is also of the opinion that the provision is void which exacts an insertion in a note given for the sale of a patent right of the fact that it was given for such sale. This latter provision, in my opinion, the State had the power to make as a reasonable police regulation not repugnant to the authority as to patents delegated to Congress by the Constitution or the legislation which Congress has enacted in furtherance thereof.

JOHN WOODS & SONS *v.* CARL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 102. Submitted November 7, 1906.—Decided December 3, 1906.

Allen v. *Riley, ante* p. 347 followed as to power of a State to require one selling patent rights to record the letters patent and applied to a law of Arkansas, which also makes a note void if given for a patent right, if the note does not show on its face for what it was given.

75 Arkansas, 328, affirmed.

THE facts are stated in the opinion.

Mr. Homer C. Mechem and *Mr. Edwin Mechem* for plaintiff in error.

Mr. John Fletcher and *Mr. W. C. Ratcliffe* for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought in the proper court of the State of Arkansas by the plaintiffs in error to recover the amount of a promissory note, which was given by the defendant in error on the sale to him of a patented machine and of the right to the patent in the State of Arkansas. Before the

maturity of the note it was indorsed by the payee and transferred to plaintiffs in error. The note was not executed as provided for by the statute of that State relating to the sale of rights under a patent. Act of April 23, 1891, Kirby's Dig., sec. 513. The section reads as follows:

"SEC. 513. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void."

The defendant set up the violation of the statute as a defense. The verdict was for the defendant, and the judgment entered thereon having been affirmed by the Supreme Court, the plaintiffs have brought the case here by writ of error.

The sole question involved is the validity of the statute. The opinion of the Supreme Court of Arkansas is reported in 75 Arkansas, 328. See also *Wyatt* v. *Wallace*, 67 Arkansas, 575; *State* v. *Cook*, 107 Tennessee, 499. This case is governed by the immediately preceding one, although the statute of Arkansas renders the note void if given for a patent right if the note does not show on its face for what it was given. The difference is not so material as to call for a different decision. The judgment is

Affirmed.

MR. JUSTICE DAY dissents.

CITY OF MONTEREY *v.* JACKS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 27. Argued October 16, 1906.—Decided December 3, 1906.

In California, pueblo lands, which were simply ancillary to the execution of the public trust and in which the pueblo never had an indefeasible proprietary interest, and which were subject to the supreme political dominion of the former Mexican government, became, on the change of government, equally subject to the sovereignty of the State of California through its legislature, and the title to such lands did not pass to the United States.

The title of one holding under a deed to pueblo lands from a city in California, ratified by the legislature, sustained as against the city claiming to hold under a subsequent patent from the United States.

139 California, 542, affirmed.

The facts are stated in the opinion.

Mr. Hamilton Gay Howard for plaintiff in error.

Mr. W. I. Brobeck, with whom *Mr. John Garber* and *Mr. Frederic D. McKenney* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action to quiet title brought by plaintiff in error (and, being plaintiff in the court below, we will so designate it) in the Superior Court of the county of Monterey to 1,635.03 acres of land, situate in Monterey County, State of California. Plaintiff alleged title in fee simple, and contends that such title has come to it as successor of the pueblo of Monterey of Upper California. There is no dispute that the land was part of the pueblo of Monterey, and that, after proper proceedings had in pursuance of acts of Congress, the title of the city of Monterey was confirmed by a decree of the Board of Land Commissioners and a patent issued to the city November 19, 1891.

The defendant gets his title through one D. R. Ashley, who was the attorney for the city to present and prosecute its claim to the land before the Board of Land Commissioners. To pay the indebtedness incurred for his services the land was sold under the authority of certain acts of the legislature of the State, and purchased by him. The validity of the title so derived, as against the title of the city as successor of the pueblo of Monterey, free from the control of the legislature, makes the question in the case. Judgment passed for the defendant in the trial court and was affirmed by the Supreme Court. 139 California, 542. This writ of error was then allowed.

The city of Monterey was incorporated by an act of the legislature of the State of California, March 30, 1850, and became thereby successor of the former pueblo to its pueblo lands. In 1857 the charter of the city was amended, and by section 7 thereof the trustees were empowered to pay off the expenses of prosecuting the title of the city before the United States land commissioners and before the United States courts, and for that purpose sell and transfer any property, right or franchise upon such terms and for such price as might by them be deemed reasonable. It was found by the lower courts (and we quote from the opinion of the Supreme Court) that—

"On January 24, 1859, said Ashley presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such pueblo claim to the commissioners. The claim was approved and allowed, and, there being no funds in the treasury to pay it, the board of trustees passed a resolution directing that a sale of all the pueblo lands of the city, or so much of them as might be necessary to pay the claim of said Ashley, be made at public auction on the ninth day of February, 1859. Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the entire pueblo tract was bid in by the said D. R. Ashley and the defendant, David Jacks, for the sum of $1,002.50, being

the amount of the indebtedness and the necessary expenses of sale; no one offering to purchase less than the whole, or bid a higher amount. Thereafter said trustees made, executed and delivered a conveyance of said lands, dated February 9, 1859, but acknowledged February 12, 1859, in favor of said D. R. Ashley and the defendant, David Jacks, and in the conveyance the proceedings taken by the trustees in the matter of such sale were recited. This conveyance was recorded in the county recorder's office of the county of Monterey, on June 11, 1859. On April 2, 1866, the act to incorporate the city of Monterey was amended to read as follows: 'SEC. 2. All sales and conveyances made by the corporate authorities of said city since the eighth day of February, 1859, and which conveyances purport to have been recorded in the county recorder's office of Monterey County, purporting to convey public lands, or lands confirmed to said city of Monterey, in pursuance of the act of Congress of March 3, 1851, and entitled: An act to ascertain and settle the private land claims in the State of California, are hereby ratified and confirmed.' On September 4, 1869, Ashley conveyed all his interest in the land in controversy to the defendant."

The contentions of the parties are in part made to turn upon the kind of right the city of Monterey derived as the successor of the pueblo of Monterey, whether proprietary or in trust, and because in trust subject to the disposition of the legislature of the State. This distinction was expressed by the Supreme Court and the case determined by it, and the court supported its action by a citation of prior decisions. It was said: "There is a marked difference, however, between lands which are held by a municipality in trust for public, municipal purposes, such as pueblo lands, and lands acquired by a municipality through purchase or special grant, and held in proprietary right." Of the latter class it was said: "That it is beyond the power of the State to control its disposition without the consent of the municipality." In the other case, "the lands being simply ancillary to the execution of the public trust—lands in which

the pueblo never had an indefeasible proprietary interest—and which were subject to the supreme political dominion of the former Mexican government, became equally subject to the sovereignty of the State of California through its legislature upon the change of government."

Plaintiff attacks this conclusion, and contends that the title to the lands vested, not in the State of California as succeeding sovereign, but in the United States, and the United States, having the title, passed it by the patent of November 19, 1891, to the plaintiff. And this contention, plaintiff asserts, presents the Federal question to be decided. At one time this might have been regarded as a serious question, but it is no longer so. Whatever of legal power the State of California may exercise over its municipalities has received decisive definition in many decisions. The cases are quoted by the Supreme Court in the case at bar. Whatever power the United States may exercise, or, by refraining from exercising, yield to the State of California to exercise, has long been decisively settled. We need not review the cases. An exposition of them can be found in *United States* v. *Santa Fe*, 165 U. S. 675.

If the United States was, as contended, a paramount sovereign, and as such possessed the power to direct the trust to which pueblo lands were subject, it did not do so, but conveyed land to the "city of Monterey, its successors and assigns." In other words, the conveyance was made to a municipality of the State of California, a creature of the laws of the State and subject to the State. *Payne* v. *Treadwell*, 16 California, 220; *San Francisco* v. *Canavan*, 42 California, 541. See also *Kies* v. *Lowrey*, 199 U. S. 233. And we may observe that the United States by an act passed June 15, 1906, has designated the city of Monterey as trustee of the original grant and confirmed the land to the city as patented. 34 Stat. 267.

We do not think, however, that the Federal question presented is so far unsubstantial as to justify a dismissal of the writ of error, and the motion to dismiss is denied.

Judgment affirmed.

INTERNATIONAL TRUST COMPANY *v.* WEEKS.

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

No. 31. Argued October 17, 1906.—Decided December 3, 1906.

An action for rent of premises for unexpired term of a lease brought by the lessor against the stockholders' agent to whom the comptroller has released the assets of a national bank is a suit to wind up the affairs of the bank of which the Circuit Court of the United States has jurisdiction.

Under a provision in a lease that in case of reëntry for breach of covenant the lessors may relet the premises at the risk of lessee, who shall remain for the residue of the term responsible for the rent reserved and shall be credited with such amounts only as shall by the lessors be actually realized, as the same has been construed by the highest court of Massachusetts, the lessor has not the absolute discretion, after entry, to relet or not to relet the premises, but it is his duty to prevent unnecessary loss or diminution of rent, and, in the absence of a reasonable effort to relet the premises, cannot recover.

125 Fed. Rep. 370, affirmed.

THE facts are stated in the opinion.

Mr. Robert M. Morse, with whom *Mr. William M. Richardson* was on the brief, for plaintiff in error.

Mr. G. Philip Wardner, with whom *Mr. Edward E. Blodgett* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action on contract brought in the Circuit Court of the United States for the District of Massachusetts, for rent alleged to be due under the terms of a lease made by Henry Parkman and others to the Broadway National Bank.

The original lessors sold the land and building leased to the International Trust Company, plaintiff in error. Defendant

in error is agent of the shareholders of the Broadway National Bank.

The premises leased were the first floor of the building and the basement under the same, "to be used as the business offices of said corporation and for no other purpose." The lease contained a provision for reëntry upon breach of any covenant. "And thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

On December 16, 1899, the bank became insolvent, and the Comptroller of the Currency appointed a receiver. On February 15, 1900, the Comptroller released the estate of the bank to defendant in error as the stockholders' agent. Between December 16, 1899, and January 5, 1900, the Trust Company entered upon the premises and repossessed itself of the same as of its former estate. The receiver occupied the premises for a while, but it was stipulated that such occupation was not to affect the rights of the parties. Defendant in error occupied the premises until May 19, 1900. He contended in defense of the action that upon the termination of the lease it was the duty of the Trust Company to use all reasonable effort to relet the premises, so as to minimize the damages, and that the company had not done so. And further, that suitable and responsible parties were willing at various times to hire the premises at a rent as great or greater than the rent reserved in the lease.

At the first trial of the case the Circuit Court took the opposite of defendant in error's contention, and held that by force of the lease the Trust Company did not assume any risk, and was only required to use its discretion "with some degree of reasonableness and with some degree of justice, and have some regard to the rights of the position of the other parties concerned." The court further held that the evidence did not show that the company had abused its discretion, and

directed a verdict for it less certain payments made by the occupant of the basement, formerly the bank's tenant. This was reversed by the Circuit Court of Appeals. 125 Fed. Rep. 371. The latter court held that a lessor had the right to reenter and might exercise his discretion to relet the premises at the risk of the lessee. The lessor, it was said, need not go through the form of reletting, but an honest and reasonable attempt to relet should be made, and whether so made was a question for the jury.

Upon the second trial of the case in the Circuit Court the Trust Company expressed its contentions in requests for instructions to the jury as follows: (1) That it was entitled to rent the premises and relet them at the risk of the bank; (2) that there was no obligation upon it to notify the bank of its election so to do, or to relet the premises or attempt to relet them. The court declined to give the instructions, but instructed the jury in accordance with the principle expressed by the Court Circuit of Appeals. The jury returned a verdict for defendant in error, upon which judgment was duly entered. It was affirmed by the Circuit Court of Appeals.

(1) It is objected by defendant in error that the Circuit Court had no jurisdiction of this action. We think otherwise. The action is clearly one to wind up the affairs of the bank. *In re Chetwood*, 165 U. S. 443, 459; *Guarantee Co.* v. *Hanway*, 104 Fed. Rep. 369.

(2) The fact that the Trust Company did not make a reasonable effort to relet the premises was settled by the verdict of the jury against it, and the case is reduced to the simple question whether the company can recover by virtue of the provisions of the lease without any attempt whatsoever to relet the premises.

It is said in argument that the provision in controversy has been found in the usual form of lease in Massachusetts for a generation, and yet its meaning, as now brought in dispute, has not come up for or received explicit decision. To this absence of contention and decision both parties refer with

equal confidence to establish that their respective constructions have been so indisputable as never to have been questioned. However, there are some indications of a judgment between the two constructions in the case of *Edmands* v. *Rust & Richardson Drug Co.*, 191 Massachusetts, 123, which may be turned to in passing on a question so essentially local.

The lease passed on contained a provision for an entry by the lessors to terminate the lease for the breach of covenants, followed by this language: "But the lessee covenants to be responsible for any loss or diminution of rent sustained by lessors in consequence till the end of the lease." The defendant in the case requested instructions, expressing it to be the duty of the lessor to accept any tenant that was satisfactory financially to defendant. His instructions were refused, and the court instructed the jury, among other things, as follows: "In general, the effort must be that which a reasonable landholder would make under the circumstances. Not every proposed tenant need be accepted, but an unreasonable refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee." Commenting on the instructions the Supreme Judicial Court said: "That the jury were left to decide between the parties, in a way of which the defendant has no reason to complain."

It is manifest from this decision that the lessor, after entry, has not the absolute discretion to relet or not to relet the premises, but that it is his duty to "prevent unnecessary loss or diminution of rent in consequence of the termination of the lease."

In *Bowditch* v. *Raymond*, 146 Massachusetts, 109, the liability of the lessor, under the provision of a lease such as that in controversy, was denied against an insolvent lessee on the ground that it was dependent upon a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. "The lessors," the court said, "in their discretion might not relet the premises, but resume possession of them." This case rests on the principle

expressed by Judge Lowell, speaking for the Circuit Court of Appeals, that if the lessor avail himself of the covenant and reënter he may exercise his discretion to relet the premises at risk of the lessee or occupy them. If he elect to relet he must make "an honest and reasonable attempt to relet." And this is a reasonable and just exaction. It is the spirit as well as the letter of the covenant, fulfilling its security without unnecessary loss to the lessee.

Whether the bank could have made a lease to extend beyond its charter life we need not decide.

Judgment affirmed.

CRUIT *v.* OWEN.

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

No. 51. Argued October 19, 22, 1906.—Decided December 3, 1906.

A trust in a will in favor of testator's four daughters and "from and after their death" for the "children of each of them," and in which the idea of provision for the grandchildren is especially prominent, will not be construed, by rigidly giving plurality to the pronoun "their," as creating a joint tenancy so that the last surviving daughter takes all the income to the exclusion of the children of her sisters previously deceased.

25 App. D. C. 514, affirmed.

The facts are stated in the opinion.

Mr. Edward H. Thomas for appellant.

Mr. Chapin Brown, with whom *Mr. J. P. Earnest* was on the brief, for appellees.

Mr. Justice McKenna delivered the opinion of the court.

This suit involves the construction of the will of Robert

Cruit, deceased, and, as dependent thereon, the liability of appellant to account to the appellees for the rents of certain real estate located in the city of Washington and in the State of Virginia. Decree in the Supreme Court passed for appellees, which was affirmed by the Court of Appeals. 25 App. D. C. 514.

The will was executed September 1, 1858, and was duly admitted to probate.[1] The testator left surviving him a wife

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[1] This is the last will and testament of me Robert Cruit of the city of Washington in the District of Columbia.

First I give my two nephews Edwin Cruit the son of George, and Henry the son of John L. Cruit, the legacy of one hundred dollars, to each of them, to be paid as soon after my death as may be. And all the rest residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever situated, I give devise and bequeath unto my dear daughter Susan Cruit, her heirs, executors and administrators, upon the following trusts to wit In trust for my dear wife Catherine for and during her life, and to permit her to receive and take the whole income thereof after paying taxes repairs and insurance, and to apply and dispose of such net income as she my said wife may think proper and from and after her decease, in trust, as to my real estate for my dear daughters Catherine E. the wife of Samuel Owens, Ann Cruit, Louisa Cruit, and herself the said Susan Cruit, equally share and share alike, for and during their respective lives, for their own sole and separate benefit, free from the control of the husband of my said daughter Catherine and any husband or husbands she or my said other daughters or any of them, may hereafter happen to marry, and not to be liable in any way for the debts of any such husbands, the receipts of my said daughters alone being a valid discharge And from and after their death in trust for the child or children of each of my said daughters then living in fee simple, such child or children respectively to take the share to which his, her or their parent was entitled And if any of my said daughters shall die without having been married, her share shall pass to her or their surviving sisters or sister for life equally; and upon her or their death the same shall vest in her or their child or children in the same manner, and for the same estate and pass on her or their death, as her or their original shares or share And as to my personal property, also given in trust as above expressed, I direct that the same shall, after the death of my said wife, be divided equally among all my said children, Catherine, Susan, Ann and Louisa share and share alike, and I accordingly give the same to them as aforesaid for their own sole and separate use

And lastly I appoint my said daughter, Susan Cruit, sole executrix of this my last will and testament. And if my said daughter shall die or from any cause should become unable to act in the trust, I direct, that a trustee

and four daughters, Catherine E., then the wife of Samuel Owen, Susan, Ann (appellant) and Louisa. The widow of the deceased died May 13, 1876; Louisa died January 2, 1876; Susan died December 31, 1900, and Catherine E. Owen died May 14, 1901. Susan and Louisa never married, nor has Ann up to the present time. Catherine E. Owen left surviving her three daughters, Evania F. Mackall and the appellees, Kate D. Owen and Jessie Owen Cugle. The property produces an income of $11,000 or $12,000.

The question in the case is whether appellant succeeded to the whole estate upon the death of Catherine E. Owen, or whether the children of the latter, appellees, were the successors of their mother.

The will gives small legacies to two nephews, and disposes of "all the rest and residue and remainder of the testator's estate to Susan Cruit in trust (1) for his wife for and during her life, and to permit her to take and receive the whole income thereof; (2) in trust, as to testator's real estate, to his daughters equally, share and share alike, for and during their respective lives, . . . and from and after their death in trust for the child or children of each of my said daughters, then alive, in fee simple, such child or children, respectively, to take the share to which his, her or their parent was entitled. And if any of my said daughters shall die without having been married, her share shall pass to her or their surviving sisters or sister for life equally, and upon her or their death the same shall vest in her or their child or children in the same manner and for the same estate and pass on her or their death, as her or their original share or shares."

We do not think it is difficult to discern the intention of the testator. There is very little ambiguity in the will. If ambiguity exist it is in the pronoun "their" in the provision "and from and after their death in trust for the child or children of each of my said daughters then living in fee simple, such

shall be appointed by the Circuit Court so that the trusts hereby created shall be at all times preserved and carried into effect.

child or children respectively to take the share to which his, her or their parent was entitled." It is contended by appellant that it is manifest from these words and others in the will that it was drawn by a skillful hand to create a joint tenancy in the daughters of the testator, and cases are cited in which wills containing such words have been construed, it is contended, as giving such effect. We might review these cases and those cited in opposition by appellees if the will in controversy were less clear in its meaning. Provision for his daughters and equality between them were clear and definite in the mind of the testator. One daughter was married and that the others might be was contemplated, and that children might result therefrom. This idea is especially prominent and is carefully expressed and provision is made for such children. The contention of appellant militates against this idea. It would leave grandchildren unprovided for. If such had been the intention of the testator, we think, he would have explicitly expressed it. It was not so natural an intention as the other. It is not the first impression of the will, and can only be made out by rigidly giving plurality to the pronoun "their" in the provision "and from and after *their* death in trust for the child or children of each of my said daughters, then living, in fee simple." But the word is qualified and made several by what precedes it. The devise is to his daughters "for and during *their respective* lives." It is qualified also by what follows it. One of the daughters of the testator was married, the others were not, and might not be, and anticipating this possibility the testator provided that if any of his daughters should die without having been married her share should pass to the survivors. In other words, it was only upon the death of a daughter "without having been married" (and without issue possibly), that her share was to pass to her sisters or sister. We also agree with the courts below that the trust continues.

The concluding paragraph of the will is:

"And lastly I appoint my said daughter Susan Cruit sole

executrix of this my last will and testament. And if my said daughter shall die or from any cause should become unable to act in the trust, I direct that a trustee shall be appointed by the Circuit Court so that the trusts hereby created shall be at all times preserved and carried into effect."

Decree affirmed.

OFFIELD *v.* NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 59. Argued October 25, 1906.—Decided December 3, 1906.

Where plaintiff in error contends that the purpose for which his property has been condemned is not a public use; that the condemnation is unnecessary in order to obtain the desired end; and that the proceedings and state statute on which they are based violate the due process clause of the Fourteenth Amendment and impair contract rights, Federal questions are involved and, if not frivolous, the writ of error will not be dismissed.

It is within the power of a State to provide for condemnation of minority shares of stock in railroad and other corporations where the majority of the shares are held by another railroad corporation if public interest demands; and the improvement of the railroad owning the majority of stock of another corporation may be a public use if the state courts so declare, and the condemnation under §§ 3694, 3695, Public Laws of Connecticut, of such minority shares of a corporation is not void under the impairment clause of the Constitution either because it impairs the obligation of a lease made by the corporation to the corporation obtaining the shares by condemnation, or because it impairs the contract rights of the stockholder.

78 Connecticut, 1, affirmed.

The facts are stated in the opinion.

Mr. Edward H. Rogers and *Mr. W. H. H. Miller*, with whom *Mr. Charles K. Bush* was on the brief, for plaintiff in error:

The statute is based upon the principle of eminent domain,

and the real, and indeed the only, reason which the state court had to justify its decision was that every railroad is a public trust, and that the State can exercise the power of eminent domain so far as may be necessary to secure the property taken being put to the best use in fulfilment of the trust for a public use.

The right of eminent domain can only be legally exercised when the property taken is taken for a public use. The right is not a creature of grant. It is one of the inherent powers of sovereignty. In some States, as in Connecticut, it is recognized by the constitution, § 11, art. I, const. of Connecticut; *Farist Steel Co.* v. *Bridgeport Co.*, 60 Connecticut, 278, 291.

The condemnation of the stock is not a taking for a public use. The question of what is a public use is always one of law. Cooley's Const. Lim., 774; *Re Niagara Falls* v. *Whirlpool R. W. Co.*, 108 N. Y. 375; *In re Split Rock Cable Road Co.*, 128 N. Y. 408; 1 Lewis on Em. Domain, § 163.

The use of a thing is strictly and properly the employment of the thing in some manner, and this employment must be something more than a merely incidental public benefit. Cases *supra* and *Re Eureka Basin Warehouse Co.*, 96 N. Y. 42; *Varner* v. *Martin*, 21 West Va. 534, 552.

Unless it be proposed to subject the property taken to a use public in its nature not already within the charter powers of the New Haven and Derby Railroad Company, the power of eminent domain should not be exercised. There can be no necessity for or propriety in the taking unless the rights of the public with reference to the property taken are to be enlarged, and that directly and actually, and not indirectly and constructively. For definitions of public use see *Evergreen Cemetery Association* v. *Beecher*, 53 Connecticut, 551; *Avery* v. *Vermont Electric Co.*, 75 Vermont, 235; *Re Rhode Island Suburban Ry. Co.*, 28 R. I. 457, 461; *Berrien Springs Water Co.* v. *Berrien*, 133 Michigan, 48. *Black* v. *Delaware & Raritan R. R. Co.*, 24 N. J. Eq. 455, distinguished.

There is no right in the majority holders of a corporation

to extinguish the rights and stock of a dissenting minority by taking their shares at a valuation. If a majority of the stockholders of the New Haven and Derby Railroad Company had undertaken to transfer the defendant's stock against his wishes, they could have been enjoined by him. *Clearwater* v. *Meredith,* 1 Wall. 25; *Stevens* v. *Rutland & B. R. R. Co.,* 29 Vermont, 545.

The actual taking was dependent upon a finding by a judge of the state court that the purchase would be for the public interest, which finding is an exercise of the judicial power which is vested in the Superior Court of the State of Connecticut, or a judge thereof, by the constitution of that State. *New Milford Water Co.* v. *Watson,* 75 Connecticut, 237; *Norwalk Street Ry. Co.'s Appeal,* 69 Connecticut, 576, 601, 608; *Betts* v. *Connecticut Indemnity Association,* 71 Connecticut, 751, 755.

Neither can the decision of the Connecticut court be justified on the ground that the proceeding is a dissolution proceeding.

A taking for a private use is unlawful, and even if there can be any lawful taking under the statute, it is inseparably blended in the application with the unlawful one; where the proceeding shows upon its face, as this does, two distinct uses or purposes, one lawful and the other not, which are so inseparably blended as not to be separable, it cannot be sustained. 7 Ency. of Pl. & Pr., 527; *Chicago & N. W. R. R. Co.* v. *Galt,* 133 Illinois, 657.

The statute as applied in this case impairs a contract.

The statute being an invalid enactment under the Constitution of the United States, this court has jurisdiction of this writ of error.

It is a taking for a private purpose. *Traction Co.* v. *Mining Co.,* 196 U. S. 239; *C., B. & Q. R. R. Co.* v. *Chicago,* 106 U. S. 226, 241; *Missouri R. R. Co.* v. *Nebraska,* 164 U. S. 403, 417.

A State has no constitutional right to say that a private use is a public use, or to pervert the doctrine of eminent

domain by declaring that any private purpose is a public purpose. *Tracy* v. *Elizabethtown R. R. Co.*, 80 Kentucky, 259, 265.

The right of the plaintiff in error as a stockholder of the New Haven and Derby Railroad Company is a contract right which the Supreme Court of Errors of the State of Connecticut has by its action impaired.

The stock taken is not put to any public use. Indeed it may not be put to a public use if the taker so decides, and the only possible interest which the public have or may have is remote and indirect.

Mr. George D. Watrous, with whom *Mr. Edward G. Buckland* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error brings up for review a judgment of the Supreme Court of Errors of the State of Connecticut, rendered in a proceeding under the statutes of that State for the condemnation of two shares of stock owned by plaintiff in error in the New Haven and Derby Railroad Company.

There was a demurrer to the application, which was overruled by the advice of the Supreme Court of Errors, the judgment on demurrer having been reserved, under the practice of the State, for the advice and consideration of that court. 77 Connecticut, 417. Upon the hearing judgment was rendered for defendant in error, which was affirmed by the Supreme Court of Errors. 78 Connecticut, 1.

Defendant in error is the lessee of the New Haven and Derby Railroad Company, and has acquired all of the shares of stock of the latter road except the two shares owned by plaintiff in error.

That the lease and acquisition of stock are valid under the laws of the State is decided by the Supreme Court of Errors, and it is sought by proceedings under review to obtain the two

shares of stock owned by plaintiff in error, under sections 3694 and 3695 of the Public Laws of Connecticut, which are as follows:

"SEC. 3694. In case any railroad company, acting under the authority of the laws of this State, shall have acquired more than three-fourths of the capital stock of any steamboat, ferry, bridge, wharf, or railroad corporation, and cannot agree with the holders of outstanding stock for the purchase of the same, such railroad company may, upon a finding by a judge of the Superior Court that such purchase will be for the public interest, cause such outstanding stock to be appraised in accordance with the provisions of section 3687. When the amount of such appraisal shall have been paid or deposited as provided in said section, the stockholder or stockholders whose stock shall have been so appraised shall cease to have any interest therein, and on demand shall surrender all certificates for such stock, with duly executed powers of attorney for transfer thereon, to the corporation applying for such appraisal.

"SEC. 3695. If any person holding a minority of the shares of stock in any corporation referred to in section 3694 cannot agree with the railroad company owning three-fourths of such stock for the purchase of his shares he may cause the same to be appraised in accordance with the provisions of section 3687. When such appraisal has been made and recorded in the office of the clerk of the Superior Court of any county where such railroad company operates a railroad, and the certificates for such stock, with duly executed powers of attorney for transfer thereon, have been deposited with such clerk for such railroad company, such appraisal shall have the effect of a judgment against such company and in favor of the holder of such stock, and at the end of sixty days, unless such judgment is paid, execution may be issued."

The purpose of the acquisition of the stock is to enable defendant in error to improve the New Haven and Derby Railroad.

It is contended by plaintiff in error (1) that the purpose for which the stock is sought to be obtained is not a public use. (2) That defendant in error has the power and authority to make the improvements mentioned in its application, which would be as advantageous as taking the stock. (3) The proceedings and statutes are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and impair the contract rights of plaintiff in error as stockholder of the New Haven and Derby Railroad Company, and his rights in, under and by virtue of the lease to defendant in error.

These contentions raise a Federal question, and we cannot say that it is frivolous. The motion to dismiss is, therefore, denied.

(1) The power of the State to declare uses of property to be public has lately been decided in *Clark* v. *Nash,* 198 U. S. 361, and in the case of *Strickley* v. *Highland Boy Mining Company,* 200 U. S. 527. These cases exhibit more striking examples of the power of a State than the case at bar. In the first case the statute of the State permitted an individual to enlarge the ditch of another to obtain water for its own land; in the second case the statute authorized the condemnation of a right of way to transport ore from a mine to a railroad station. In the first case it was said that the public policy of the State declaring the character of use of property depends upon the facts surrounding the subject. In the second case it was said, commenting on the first, "it provided that there might be exceptional times and places in which the very foundations of public welfare cannot be laid without requiring concessions from individuals to each other upon due compensation, which under other conditions would be left wholly to voluntary consent." The case at bar does not need the support of such broad principles. The ultimate purpose of defendant in error in the case at bar is the improvement of the New Haven and Derby Railroad, which "connects [we quote from the opinion of the Supreme Court of Errors], at

New Haven, on the east with four, and at its western terminals with two, important railroad lines owned by plaintiff (defendant in error), and forms a link in an all-rail route between Boston and the West, which is the only one controlled by it over which goods can be transported with assured dispatch in all weathers and seasons." In this purpose the public has an interest and to accomplish it the court applied the statute. The court observed: "To develop this route so as best to serve the public interest requires the laying of additional tracks on the New Haven and Derby Railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of stock of the lessee. They are owned by the defendant, who refuses to agree on the terms of purchase."

(2) The contract which it is contended was impaired is the lease of the New Haven and Derby Railroad by defendant in error. The lease is for a period of ninety-nine years from July 1, 1892, at a rental of four per cent. per annum upon the capital stock, together with the payment of taxes, assessments and interest upon the funded debt. Associated with this contention there is another more general, to the effect that the statute impairs the contract rights of plaintiff in error as a stockholder of the New Haven and Derby Railroad Company. We do not find it necessary to give precise and separate discussion to these contentions. They seem to us to be but parts or incidents of the contention that the stock is sought for a private use. If they are not incidents of that they are answered and opposed by the case of *Long Island Supply Company* v. *Brooklyn*, 166 U. S. 685. Whatever value the lease gives the shares of stock will be represented in their appraisement.

Judgment affirmed.

FAIR HAVEN AND WESTVILLE RAILROAD COMPANY *v.* NEW HAVEN.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 84. Argued November 5, 6, 1906.—Decided December 3, 1906.

A general law requiring street railways to keep a certain space between and outside their tracks paved and repaved and assessing them therefor amounts, in respect to companies whose charters contain other provisions, to an amendment thereof, and as such a purpose is consistent with the object of the grant it falls within the reserved power of the State to alter, amend or repeal the original charter, and if imposed in good faith and not in sheer oppression the act is not void either as depriving the company of its property without due process of law or as impairing the contract obligations of the original grant. So held as to law of 1899 of Connecticut.

One of the public rights of great extent of the State is the establishment, maintenance and care of its highways. *West Chicago Railway* v. *Chicago*, 201 U. S. 506.

77 Connecticut, 677, affirmed.

THE facts are stated in the opinion.

Mr. George D. Watrous and *Mr. Talcott H. Russell* for plaintiff in error:

The act of 1895 so far as affects the plaintiff cannot be sustained as an exercise of the police power. It is not in fact an exercise of the police power, but an attempt to exercise the revenue power. Cooley's Const. Lim., 6th ed., 704; 4th ed., 719; Freund, Police Power, § 3; *Rochester Turnpike Co.* v. *Joel*, 41 App. Div. (N. Y.) 43; Potter's Dwarris, 458.

The taxing power is a separate and distinct power from the police power.

Whether the railroad paid these assessments or not did not affect in any way the object sought by the police power. The act is plainly an example of that class of acts by which it has been attempted to exercise the power of special assessment

by fixed rules in order to avoid inquiry in reference to the benefits in each case; the same class of acts which have repeatedly come before this court, and particularly in the case of *Norwood* v. *Baker*, 172 U. S. 269. Dillon on Mun. Corp., § 752.

The act of 1899 repealed the act of 1895.

Neither the act of 1895 nor that of 1899 can be upheld under the reserved power of amendment. The legislature cannot take property under guise of the power of repeal and amendment. *Inland Fisheries Co.* v. *Holyoke Water Co.*, 104 Massachusetts, 446; *Holyoke* v. *Lyman*, 15 Wall. 500; *Railway Co.* v. *Bristol*, 151 U. S. 556, do not support the opinion below. See *Railway Co.* v. *Smith*, 173 U. S. 684; *New York* v. *O'Brien*, 111 N. Y. 1; *State* v. *Haun*, 61 Kansas, 146.

An obligation to keep in repair does not include an obligation to repave.

Mr. Leonard M. Daggett and *Mr. E. P. Arvine* for defendant in error:

The assessment directed by the act of 1895, treated as an assessment of benefits, is not a taking of property without compensation or without due process of law. *French* v. *The Barber Asphalt Co.*, 181 U. S. 324; *Brown* v. *Drain*, 112 Fed. Rep. 582; *Davidson* v. *New Orleans*, 96 U. S. 97; *Scott* v. *Pitt*, 169 N. Y. 521.

The Special Law of 1895 was an amendment of the plaintiff's charter.

This has been held by the Supreme Court of Connecticut in this case, interpreting Connecticut legislation and it should not now be questioned in this court. *Bulkley* v. *N. Y., N. H. & H. R. R. Co.*, 27 Connecticut, 479; *N. Y. & N. E. R. R. Co.* v. *Waterbury*, 60 Connecticut, 1; *N. Y. & N. E. R. R. Co.'s Appeal*, 62 Connecticut, 527, 538; *English* v. *N. Y., N. H. & H. R. R. Co.*, 32 Connecticut, 243.

The power of amendment cannot be restricted to such measures as might be justified also as an exercise of the police

power. The police power may be exercised in derogation of rights claimed by contract. The power of amendment covers acts which are not an exercise of the police power; otherwise the power of amendment is ineffective.

While the power of amendment is not without some restriction, and may not be exercised to impair the obligation of a contract made by the company pursuant to its charter rights that it was designed to enable the State to change the obligation of its contract, that is the terms of the corporate charter. This certainly may be done by a legislative measure, passed in good faith, consistent with the scope and object of the act of incorporation and respecting vested rights of property. *Stanislaus County* v. *San Joaquin Canal Co.*, 192 U. S. 201; *Sioux City Ry. Co.* v. *Sioux City*, 138 U. S. 98; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 567; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson* v. *Jessup*, 15 Wall. 454; 1 Morawetz, Corporations, §§ 1093 *et seq.*

That the act of 1895 was a valid exercise of the police power is shown by the authorities cited in the opinion of the Supreme Court of Connecticut in this case.

It is not necessary to determine whether the act of 1895 should be regarded as an act authorizing an assessment of benefits, that is of taxation, or one imposing a new condition on the original grant. *Lincoln St. Ry. Co.* v. *Lincoln*, 84 N. W. Rep. 802.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the validity of an assessment of $36,879, against plaintiff in error, for the cost of paving between its tracks and for one foot on each side thereof. Plaintiff in error operates a double track electric railway through West Chapel street in New Haven.

In pursuance of certain laws of the State the court of common council, through a contractor, caused the street to be

paved with sheet asphalt. The work was begun in June, 1897, and completed in October or November of the same year. The city paid for the work, and, as provided by the statutes, assessed against plaintiff in error its proportion of the cost, to wit, $36,879. On appeal to the Superior Court for New Haven County, that court reduced the assessment to $5,823, and entered judgment against plaintiff in error for that sum.

The learned judge of the Superior Court expressed the contentions of the parties and his conclusions as follows:

"It is contended by the defendant that the assessment against the plaintiff is legal and valid under the act of 1895. Charter of New Haven, page 80.

"It is contended by the plaintiff that the act of 1895 is repealed by the act of 1899, Special Laws of 1899, p. 181; and if it is not repealed, the act of 1895 is unconstitutional and void.

"Inasmuch as I hold and rule that the act of 1895 is repealed by the act of 1899, it is unnecessary to pass upon the constitutionality of the former. The intention and effect of the latter act is to repeal the former. The last act covers the whole subject-matter of assessments for benefits and damages arising from paved streets, and provides expressly for the assessments of benefits and damages for pavements already constructed in West Chapel street.

"This conclusion entitles the plaintiff to relief from the assessment as laid by the amendment to the report of the bureau of compensation; and it is, therefore, ordered that the assessment be reduced to the sum of $5,823, as recommended by the bureau of compensation."

And the judgment of the Superior Court recited:

"The asphalt pavement in said street is not a direct benefit to the plaintiff or its property, but on the other hand is a direct damage to the plaintiff and its property, inasmuch as it largely increases the expense of repairing the roadway between the rails, and of general repairs to the track, ties, and structure of the railroad. The only benefit to the railroad is such as

results from the general improvement to the locality by reason of such pavement tending to increase the population and traffic in that section of the city. Such benefit does not exceed the amount of $5,823."

Upon the appeal of the city the judgment was reversed by the Supreme Court of Errors. 75 Connecticut, 442. On the return of the case to the Superior Court that court rendered judgment dismissing the application of plaintiff in error, and confirming and establishing the assessment of $36,879. The judgment was reversed by the Supreme Court of Errors and the case remanded to the Superior Court, with directions to deduct from the assessment the cost of repair. In accordance with this direction the Superior Court deducted from the assessment the sum of $3,590.85, and confirmed the assessment less such deduction. This judgment was affirmed by the Supreme Court of Errors.

The statutes under which the street was paved and the assessment against plaintiff in error was made may be summarized as follows: Section 9 of the charter of plaintiff in error authorized the common council of the city to establish such regulations in regard to the railway as might be required for "paving . . . in and along the streets," and the company was required to conform to the grades then existing or thereafter established. And it was provided that the company should "keep that portion of the streets and avenues over which their road or way shall be laid down, with a space of two feet on each side of the track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way."

It was provided (section 13) that the act might be altered, amended or repealed at the pleasure of the general assembly.

The charter was amended July 9, 1864, and the company was authorized to lay down its tracks and run its cars through Chapel street, subject to the prohibitions of the ninth section of its original charter.

In 1893 a general law was passed applicable to all railways,

by section 6 of which it was provided that every street railway was required to keep so much of the street or highway as is included within its tracks, and a space of two feet on the outer side of the outer rails, in repair, to the satisfaction of the authorities of the city, town or borough, which was bound by law to maintain such street or highway. More expensive material, however, was not to be required than that used on the other parts of the street, except, however, for a space of one foot on each side of each rail, unless a more expensive kind of material was required in the order permitting the original location of such railway. If the railway company did not make such repairs after notice, it was provided that the city might do so, and recover the expense thereof from the company. And it was provided that the act should be deemed an amendment to the charters of all existing railway companies.

On July 1, 1895, an act was passed authorizing and empowering the court of common council of the city to issue bonds for the construction of permanent pavements, and providing that all pavements laid by authority of the act should be laid upon the grade of the street, and the city was empowered to collect the cost thereof from the owners of abutting land. The act contained the following provisions as to railways:

"On all streets occupied by the track, or tracks, of any railway company, or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length, and nine feet wide for each and every line of track of such railway or railways, now existing, or that may hereafter be laid in any street of said city."

By supplement to this act, passed in March, 1897, it was provided that in estimating the cost of each square yard to be assessed the entire cost of laying the pavement and the agreement to keep the pavement in repair for a period not exceeding fifteen years should be considered.

An act passed April 28, 1899, provided for an assessment

upon the "grand list" one mill on the dollar for the paving of streets, to be expended only for the original construction of pavements. There was a provision for the laying of benefits and damages, and a specification of limits of the assessment varying with the kind of material used for paving. Assessment of benefits and damages for the pavement on certain streets and on West Chapel street were required to be laid in accordance with the provision of the act. Any one aggrieved by the assessment was given the right of appeal to the Superior Court. The act was declared to be an amendment to the charter of the city, and acts inconsistent therewith were repealed. The liability of street railway companies under the general laws was preserved.

The statutes and the assessments made under them are attacked by plaintiff in error as repugnant to the contract clause of the Constitution of the United States and the Fourteenth Amendment.

1. The contention that the assessment was unconstitutional, even though the act of 1895 is constitutional, was commented on by the Supreme Court of Errors on the second appeal as follows:

"Other claims new to the case are made, to the general effect that as the street had been paved twenty-three years before and the plaintiff had been assessed a portion of the cost thereof, and especially as the city had not shown the need of the new pavement as a means of repair, an unconstitutional use of the act would result if the present charge against the plaintiff was enforced. These claims have no foundation either in the application or pleadings and, therefore, have no standing in the case. We do not hesitate to say, however, without discussion, that in view of the pleadings, which did not put the plaintiff to the proof of the necessity of the new work as a means of repair and proper maintenance of the street, the facts indicated could not be held sufficient to accomplish the results claimed for them."

Plaintiff in error contests this conclusion of the court, and

insists that the claims were made on the first appeal of the case and were overlooked by the court. It is questionable whether we may dispute the ruling of the Supreme Court of Errors as to what the record in the case before it showed. But, granting we have such power, the record does not justify the assertion of plaintiff in error. A bill of exceptions was tendered by plaintiff in error to the Superior Court of certain claims, and requests for rulings made by plaintiff in error, so that the questions arising thereon could be considered by the Supreme Court of Errors in connection with those by the appeal of the city, and one of the claims was "that the repavement, if required at all, could only be required when it was found to be a satisfactory, or the most satisfactory, method of repair, which did not appear in this case."

The bill of exceptions stated also that the court did not rule upon the requests, because it was of opinion that the act of 1895, so far as it affects the pavement in question, was repealed by the act of 1899, "and therefore decided against said requests." The court allowed the bill of exceptions, and expressed the reason as follows: "Being of the opinion that some, at least, of the questions arising upon the above bill of exceptions will arise again, if a new trial of this cause should be had, the above bill of exceptions is hereby allowed, and ordered to be made a part of the record."

But this does not militate with the ruling of the Supreme Court of Errors nor indicate that the court did not consider the claims and requests of plaintiff in error. The ruling was based upon the application or pleadings, and it is not contended that the court's view of the application or pleadings was erroneous. Indeed, on the return of the case to the Superior Court an application was made by plaintiff in error for leave to amend its application by adding six paragraphs, setting out the grounds indicated above and other grounds why the assessment was an unconstitutional exercise of the authority in terms conferred by the act of 1895. The motion was denied on the ground (1) that the court had no power to

allow the amendment, and (2) that the amendment ought not as a matter of discretion to be allowed. The ruling was affirmed by the Supreme Court of Errors. Justifying its ruling, the court denied that it thereby enforced a stringent rule of pleading, but said it enforced only the familiar one which confined the evidence to the matters pleaded, and that it was the duty of plaintiff in error to have made its application full enough to cover all the claims desired to be made.

(2) It will be observed that the Superior Court ruled that the act of 1895 was repealed by the act of 1899, and that the latter act covered the whole subject-matter of assessment for benefits and damages accruing from paved streets, and provided expressly for the assessments of benefits and damages for pavements which had been constructed on West Chapel street. The Supreme Court of Errors reversed the ruling and sustained the contention of the city that the assessment should be made under the act of 1895. The court said: "The difference of view explains the situation disclosed by the case. The city bases its claim to the larger sum assessed by it upon the rule of recovery laid down in the act of 1895; the railway company claims to limit its liability at least to the smaller sum assessed by the court upon the strength of the rule of assessment prescribed in the act of 1899, as interpreted by the court and accepted by the company." And after the construction and discussion of the provision of the two acts the court said: "The situation is, we think, susceptible of a simple explanation. The act of 1899 is to be taken in its natural meaning. Its provisions relating to assessment were intended to deal only with assessments of benefits and damages in favor of or against owners of land whose land adjoins the street in which the pavement is laid, by reason of some benefit or damage received affecting its value. The railway companies were not meant to be and are not to be regarded as within their scope. No change in the burden already upon them for the completed work was intended to be effected."

So deciding between the statutes, the court adjudged that

the act of 1895 was constitutional, on the ground that it was a proper exercise of the police power of the State, and on the ground that the act was an exertion of the power reserved by the State of altering, amending or repealing the charter of the railway company. If either ground is tenable the judgment must be affirmed. We will place our decision on the second ground, as being of more local character, and because the exercise of the power expressed only comes under our review in its excesses.

We accept the decision of the Supreme Court of Errors, that the statutes were intended as an exercise of the power of amendment reserved by the State, although plaintiff in error contends that such was not their intention. The court treated the question involved as primarily one on statutory construction, and "best approached," to use the language of the court, "by an examination of the statutory situation," and upon that examination pronounced its conclusion that "the act of 1895 was in effect an amendment of the plaintiff's charter," citing *Bulkley* v. *New York & New Haven R. R. Co.*, 27 Connecticut, 479; *New York & New England R. R. Co.* v. *Waterbury*, 60 Connecticut, 1. Was such an amendment in excess of the power of the State? The limitation upon the power of amendment of charters of corporations has been defined by this court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter. *Holyoke* v. *Lyman*, 15 Wall. 500, 522. In another case it was said that the "alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." *Shields* v. *Ohio*, 95 U. S. 319, 324. Later cases have repeated these definitions.

Sinking Fund Cases, 99 U. S. 700, 720; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Close* v. *Glenwood Cemetery*, 107 U. S. 476. In the *Sinking Fund Cases*, it was said that whatever regulations of a corporation could have been inserted in its charter can be added by amendment. All the cases are reviewed and their principles affirmed in *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201, and water rates fixed by the board of supervisors of the county of Stanislaus under a law of the State, sustained through the income of the company, were reduced from one and a half per cent per month to six per cent per annum.

In the light of these cases let us examine what the statutes of Connecticut require of plaintiff in error. By its original charter (1862) plaintiff in error was required to keep the street between its tracks, with a space of two feet on each side of the tracks, in good and sufficient repair. In the amendment of the charter in 1864 this obligation was retained, and also in the public acts of 1893. In the act of 1895 the duty of paving and repairing was imposed on all railway companies. We shall assume, for the purpose of our discussion, that the duty to repair did not include the duty to pave and repave, although much can be said and cases can be cited against the assumption. Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the State? Has it no proper relation to the objects of the grant to the company or any of the public rights of the State? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and alterwards with a double track. Before granting this right the State certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong and the good faith of the

State cannot be questioned. It is imposed in the exercise of one of the public rights of the State, the establishment, maintenance and care of its highways. The extent of this right is illustrated by *West Chicago Railroad Co.* v. *Chicago*, 201 U. S. 506, and cases cited.

Judgment affirmed.

CHATTANOOGA FOUNDRY AND PIPE WORKS *v.* CITY OF ATLANTA.

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

No. 94. Argued November 9, 12, 1906.—Decided December 3, 1906.

By express provision of the act of July 2, 1890, 26 Stat. 209, a city is a person within the meaning of section 7 of that act, and can maintain an action against a party to a combination unlawful under the act by reason of which it has been forced to pay a price for an article above what it is reasonably worth.

A person whose property is diminished by a payment of money wrongfully induced is injured in his property.

Where Congress has power to make acts illegal it can authorize a recovery for damage caused by those acts although suffered wholly within the boundaries of one State.

Although the sale may not have been so connected with the unlawful combination as to be unlawful, the motives and inducements to make it may be so affected by the combination as to constitute a wrong.

The five year limitation in § 1047, Rev. Stat., does not apply to suits brought under § 7 of the act of July 2, 1890, but by the silence of that act the matter is left under § 721, Rev. Stat., to the local law.

The three year limitation in § 2773, Tennessee Code, for actions for injuries to personal or real property, applies to injuries falling upon some object more definite than the plaintiff's total wealth and the general ten year limitation in § 2776 for all actions not expressly provided for controls actions of this nature brought under § 7 of the act of July 2, 1890.

127 Fed. Rep. 23; 101 Fed. Rep. 900, affirmed.

THE facts are stated in the opinion.

Mr. Frank Spurlock, with whom *Mr. Foster V. Brown* was on the brief, for plaintiff in error:

The city of Atlanta has no cause of action under the Anti-trust Act.

While the declaration alleges that the defendant in error was injured in its business of supplying water to its inhabitants, the averment can only mean that it was injured by the payment of an excessive price for the pipe bought to extend its water mains. There is no allegation showing an injury of any other character either to the business or property of the defendant in error. The action can only be maintained, if at all, on the ground that the defendant in error, as a consumer, has been compelled to pay more for the goods it purchased by reason of the fact that the seller was a party to an illegal combination. *Brown & Allen* v. *Jacob's Pharmacy*, 115 Georgia, 429; *Boutwell* v. *Marr*, 71 Vermont, 1; *Doremus* v. *Hennessy*, 176 Illinois, 608; *Mogul S. S. Co.* v. *McGregor*, L. R. 15 Q. B. Div. 476; *S. C.*, 21 Q. B. Div. 544; *S. C.*, 23 Q. B. Div. 598.

From the nature and purpose of a combination to restrain and monopolize, it was expected that every contract, combination or conspiracy to restrain trade or to monopolize the same would include among its purposes that of an assault upon the business of independent rival traders. For such action is necessary to complete the illegal scheme.

So by §§ 1 and 2 of the act Congress struck at the initial step towards the creation of these injurious combinations by imposing heavy penalties for joining in them, and by § 7 penalties, in the nature of treble damages and attorneys' fees, were provided to protect the independent trader by giving him a right of action if injured in his business or property by the combination of those endeavoring to create the monopoly.

There is not only no language in the act from which it could be inferred that Congress meant to protect the business of those engaged in trade wholly within the States, but *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 247, held that Congress has no jurisdiction over that part of a combination

or agreement which relates to commerce wholly within the State and which is subject alone to the jurisdiction of the State. Whenever, therefore, the business of a waterworks company, or the like, is injured by a combination or monopoly, redress therefor must be sought under the laws of the State under which the business is carried on.

To extend the operation of the act so as to give a right of action, under the seventh section thereof, to every consumer seeking to recover back, as excessive, a part of the price paid for goods bought and shipped from another State, would include a class of actions not contemplated by Congress, and not necessary to insure competition in interstate trade. Such damages could only arise from fraud or deceit in making the sale, and would be governed by the laws of the State under which the contract was made and to be performed. *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Gibbs* v. *McNeeley*, 118 Fed. Rep. 127; *Whitwell* v. *Tobacco Co.*, 125 Fed. Rep. 545.

Defendant in error contracted for the purchase of pipe at an agreed price fixed in the contract. This agreement was legal and binding under the laws of Georgia, where it was made and to be performed, notwithstanding the fact that the selling company was a party to a contract in restraint of trade, which was illegal under the laws of the United States. *National Distilling Co.* v. *Cream City Importing Co.*, 86 Wisconsin, 352; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The Anti-trust Act is not a legal method of regulating prices. While denying to interstate traders the right to form combinations that would have the power to prescribe prices, Congress did not undertake itself to do, either directly or indirectly, what it prohibited to others. An action for threefold damages will only lie where there has been an actual, direct injury inflicted by something done in violation of the act (*Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70), and this injury must have been done to the person suing in his business of interstate commerce, or in his property while the subject of interstate commerce.

Under the statute of limitations of Tennessee applicable to this case the suit is barred either in one year as a statute penalty or in three years as an injury to property for tort. *State* v. *House*, 2 Shannon's Cases, 610; *State* v. *Shaw*, 113 Tennessee, 536; *Hogan* v. *Chattanooga*, 2 Tennessee, 339; *Greenwood* v. *State*, 6 Baxt. 567, 576; *Huntington* v. *Attrill*, 146 U. S. 657, 667; *Merchants' Bank* v. *Bliss*, 35 N. Y. 412; *Stokes* v. *Stickney*, 96 N. Y. 326.

A statute may not be penal in the international sense of that term, but penal within the meaning of the statutes of limitations applicable to private actions only. The following cases, brought to enforce statutory liability, were held to be penal actions within the meaning of the statutes of limitations barring civil suits for statute penalties. *Beadle* v. *Railroad Company*, 48 Kansas, 379; 51 Kansas, 252; *Savings Bank* v. *Bailey*, 66 N. H. 334; *Gridley* v. *Barnes*, 103 Illinois, 211; *Baker Wire Co.* v. *Chicago & N. W. Ry. Co.*, 106 Iowa, 239; *A., T. & S. F. Ry. Co.* v. *Tanner*, 19 Colorado, 559; *State Savings Bank* v. *Johnson*, 18 Montana, 440; *Raticon* v. *Terminal Assn.*, 114 Fed. Rep. 666; *Davis* v. *Mills*, 113 Fed. Rep. 678; *S. C.*, 121 Fed. Rep. 703; *Patterson* v. *Wade*, 115 Fed. Rep. 770; *Goodridge* v. *Union Pac. Ry. Co.*, 35 Fed. Rep. 35; *Barry* v. *Edmonds*, 116 U. S. 550, 565; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 522; *Minneapolis Ry.* v. *Beckwith*, 129 U. S. 35.

If the penalty, or recovery in excess of compensatory damages, is imposed for a failure to pay a debt, and not in the exercise of the police power which concerns the interest of the public, then the statute is unconstitutional. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Railroad Co.* v. *Matthews*, 174 U. S. 96; *Railroads* v. *Crider*, 91 Tennessee, 490.

The suit was brought not only to recover treble damages for the injury sustained, but attorneys' fees besides. The actual damages as found by the jury were $1,500; but the judgment rendered was for $7,000, or nearly five times the damages actually suffered. This judgment can be sustained upon no other principle than that declared in the cases cited—

that is, vindictive or punitive damages, and imposed under the police power of the government for the purpose of deterring others from the commission of similar offenses.

If not barred, however, as a statute penalty in one year, the action is within § 2747, providing that all wrongs and injuries to the property and person, in which money only is demanded as damages, shall be commenced within three years and redressed by an action on the case.

As to what will support an action on the case and fall within this provision see *Love* v. *Hogan*, 5 Yer. 290; *Allison* v. *Tyson*, 5 Hum. 449; *Rosson* v. *Hancock*, 3 Sneed, 434; *Gwinther* v. *Gerding*, 3 Head, 198; *Bank* v. *Doughty*, 2 Tennessee, 584; *Railroad* v. *Guthrie*, 10 Lea, 432; *Ramsey* v. *Temple*, 3 Lea, 252; *Rhea* v. *Hooper*, 5 Lea, 390; *James & Co.* v. *Bank*, 105 Tennessee, 1. The cases cited by Court of Appeals of Tennessee can be distinguished and that court erred in holding that this action fell under the ten year statute.

An action may be in the form of debt where the statutory liability is certain, or may be made so from the face of the statute. But while such actions are in form debt, they are criminal in their nature and within the statute of limitations relating to criminal proceedings. Civil liabilities founded on statutes may be in the nature of debt, or contract, but an action to enforce such liability, whatever its form, would be barred by the statute applicable to contracts; and limitations applicable would always depend on the nature of the liability declared or imposed. *Bagley* v. *Shoffach*, 43 Arkansas, 377; *Chaffee* v. *United States*, 18 Wall. 516; *Stockwell* v. *United States*, 18 Wall. 531. *Bullard* v. *Bell*, 1 Mason, 243, is inapplicable. See *Householder* v. *City of Kansas*, 83 Missouri, 488, 495; *Topley* v. *Forbes*, 2 Allen, 24; Addison on Torts, 49; *Knowlton* v. *Ackley*, 8 Cush. 97; *Stearns* v. *A. & St. L. Ry. Co.*, 46 Missouri, 114; *Pollard* v. *Bailey*, 20 Wall. 520, 527; *Hightower* v. *Fitzpatrick*, 42 Alabama, 600. And see also as to action on the case being the proper remedy *Aldrich* v. *Howard*, 7 R. I. 199, 213; *Sandford* v. *Haskell*, 50 Maine, 86; *Reed* v.

Northfield, 13 Pick. (Mass.) 99; *Morrison* v. *Bedell*, 22 N. H. 238; *Russell* v. *L. & N. Ry. Co.*, 93 Virginia, 325; *Mount* v. *Hooter*, 58 Illinois, 246; *Boyn* v. *Smith*, 17 Wend. 88; *Beatly* v. *Barnes*, 8 Cr. 98, 108.

Actions for liabilities arising out of duties imposed or acts prohibited by statutes are within the limitation imposed on all similar actions. *Metropolitan Ry. Co.* v. *District of Columbia*, 132 U. S. 1, 13; *Carroll* v. *Green*, 92 U. S. 509; *Campbell* v. *Haverhill*, 155 U. S. 610.

The liabilities created by the statutes authorizing the organization of national banks, or for the infringement of patent rights, or rights founded on other acts of Congress, have never been treated as specialties, even though sometimes clearly in the nature of debt. *McDonald* v. *Thompson*, 184 U. S. 72; *Cockrill* v. *Butler*, 78 Fed. Rep. 680; *Stephens* v. *Overstolz*, 43 Fed. Rep. 465.

Mr. Churchill P. Goree and *Mr. George Westmoreland*, with whom *Mr. Linton A. Dean* and *Mr. J. L. Foust* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action by the city of Atlanta (Georgia), against two Tennessee corporations, members of the trust or combination held unlawful in *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211. The object of the suit is to recover threefold damages for alleged injury to the city "in its business or property" under § 7 of the act of July 2, 1890, c. 647, 26 Stat. 209. The alleged injury is that the city, being engaged in conducting a system of waterworks, and wishing to buy iron water pipe, was led, by reason of the illegal arrangements between the members of the trust, to purchase the pipe from the Anniston Pipe and Foundry Company, an Alabama corporation, at a price much above what was reasonable or the pipe was worth. The purchase was made after a simulated

competition, at a price fixed by the trust and embracing a bonus to be divided among the members. The plaintiffs in error demurred to the declaration, and pleaded not guilty, and that the action accrued more than one year and more than three years before the suit was brought, relying upon §§ 2772 and 2773 of the Code of Tennessee, the Eastern District of Tennessee being the district in which the suit was brought. The demurrer to the declaration was overruled and the plaintiff had a verdict and judgment in the Circuit Court. The verdict was for the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way, together with an attorney's fee. The judgment trebled the damages. It was affirmed by the Circuit Court of Appeals, the plaintiffs in error having saved their rights at every stage. The discussions of the law took place before the jury trial was reached. They will be found in 127 Fed. Rep. 23 and 101 Fed. Rep. 900. For our purposes it seems unnecessary to state the case at greater length.

The facts gave rise to a cause of action under the act of Congress. The city was a person within the meaning of § 7 by the express provision of § 8. It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. The transaction which did the wrong was a transaction between parties in different States, if that be material. The fact that the defendants and others had combined with the seller led to the excessive charge, which the seller made in the interest of the trust by arrangement with its members, and which the buyer was induced to pay by the semblance of competition, also arranged by the members of the trust. One object of the combination was to prevent other producers than the Anniston Pipe and Foundry Company, the seller, from competing in sales to the plaintiff. There can be no doubt that Congress had power to give an

action for damages to an individual who suffers by breach of the law. *Montague* v. *Lowry*, 193 U. S. 38. The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff, which is owned within some particular State. In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one State. Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud.

The limitation of five years in Rev. Stat. § 1047, to any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply. The construction of the phrase "suit for a penalty," and the reasons for that construction have been stated so fully by this court that it is not necessary to repeat them. Indeed the proposition hardly is disputed here. *Huntington* v. *Attrill*, 146 U. S. 657, 668; *Brady* v. *Daly*, 175 U. S. 148, 155, 156.

Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to the local law by the silence of the Statutes of the United States. Rev. Stat. § 721; *Campbell* v. *Haverhill*, 155 U. S. 610. The material provisions of the Tennessee Code are as follows: By Article 2769 (Shannon, 4466), all civil actions are to be commenced within the periods prescribed, with immaterial exceptions. By Article 2772 (Shannon, 4469), actions, among others, "for statute penalties, within one year after cause of action accrued." By 2773

(Shannon, 4470), "Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action." By 2776 (Shannon, 4473), certain actions enumerated, "and all other cases not expressly provided for, within ten years after the cause of action accrued." The Circuit Court of Appeals held that the case did not fall within 2772 or 2773, but only within 2776, and therefore was not barred. Although the decision is appealed from, as this question involves the construction of local law we cannot but attribute weight to the opinion of the judge who rendered the judgment, in view of his experience upon the Supreme Court of Tennessee. And although doubts were raised by the argument, we have come to agree with his interpretation in the main.

As to the article touching actions for statute penalties, notwithstanding some grounds for distinguishing it from Rev. Stat. § 1047, which were pointed out, so far as this liability under the laws of the United States is concerned we must adhere to the construction of it which we already have adopted. The chief argument relied upon is that this suit is for injury to personal property, and so within Article 2773. It was pressed upon us that formerly the limitations addressed themselves to forms of action, that actions upon the case, such as this would have been, were barred in three years, following St. 21 Jac. 1, c. 21, § 3, and that when a change was necessitated by the doing away with the old forms of action, it is not to be supposed that the change was intended to affect the substance, or more than the mode of stating the time allowed. Of course, it was argued also that this was an injury to property, within the plain meaning of the words. But we are satisfied, on the whole, and in view of its juxtaposition with detention and conversion, that the phrase has a narrower intent. It may be that it has a somewhat broader scope than was intimated below, and that some wrongs are within it besides physical damage to tangible property. But there is a sufficiently clear distinction between injuries to property

and "injured in his business or property," the latter being the language of the act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trade-mark, or a trade-name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there. It was urged that the opening article to which we have referred expressed an intention to bar all civil actions, but that hardly helps the construction of any particular article following, since the dragnet at the end, 2776, catches all cases not "expressly provided for." On the whole case we agree with the court below.

Judgment affirmed.

THE CHIEF JUSTICE and MR. JUSTICE PECKHAM dissent.

GUY v. DONALD.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 90. Argued November 8, 1906.—Decided December 3, 1906.

While one carrying on private business may be answerable for the torts of another to whom he entrusts part of the work, he is not answerable for the torts of one whom he cannot select, control or discharge.

The members of a pilot association recognized by state statute and to which every pilot licensed by the State belongs, are not to be held liable as partners to owners of piloted vessels for the negligence of each other,

because the association collects the fees for pilotage and after paying certain expenses distributes them to those on the active list according to the number of days they have been on duty. So *held* as to Virginia Pilot Association.

135 Fed. Rep. 429 reversed.

The facts are stated in the opinion.

Mr. D. Tucker Brooke and *Mr. R. C. Marshall* for appellants:

While for a long time participation in common loss and profits of a common business was one of the most conclusive tests of copartnership relations, yet the later and best opinion now is that this is not necessarily so. The rule now is that the question of partnership or no partnership is not to be settled by arbitrary tests; that to attempt to do so is mischievous, resulting in error. In the absence of conclusive tests the essential element of copartnership is that the parties are mutually principals of and agents for each other. *Beecher* v. *Bush*, 45 Michigan, 188; Meachem's Elements of Partnership, §§ 18 and 63.

In the case of pilot associations the individual pilots are not, and under our statutes cannot be, each the agents of the other members.

Our entire system of statutes on this subject show that the individual pilots are quasi-public officers; they derive their authority not from the association, but from the State; their service is personal, and in its performance they represent only themselves, individually, with a responsibility only to the State; their right to compensation is given to them individually by statute, as officers of the State; their fees are fixed by statute, as the fees of other state officers are; and there can be no copartnership in state officers.

As the parties who are sought to be held as partners cannot, under the law, occupy the relation each of principal for himself and agent for his associates (because each renders only a personal service), no presumption of copartnership, arising from the participation in the profits of the concern, can exist, be-

cause the relation of partnership *inter sese* cannot legally exist between them.

These pilots are quasi-public officers, or at least invested with a personal trust, and, this being so, they cannot occupy the relation of principals for themselves and agents for their associates (without which, a copartnership cannot exist), for, under the principles of the common law, it is against public policy for a copartnership to exist in public offices. *Jones* v. *Perchard*, 2 Esp. 507; *Canfield* v. *Hard*, 6 Connecticut, 180; see *Gaston* v. *Drake*, 1 Nevada, 175; *Seely* v. *Back*, 42 Missouri, 143; *Bowen* v. *Richardson*, 133 Massachusetts, 293; *Gould* v. *Kendall*, 15 Nebraska, 549; *Warner* v. *Griswold*, 8 Wend. 665; *Wolcott* v. *Gibson*, 51 Illinois, 69.

The fact that the State imposes a "personal" obligation to perform the duty of pilotage affects the legality of such a partnership, in that it makes them public officers, and so renders it impossible to form a legal partnership.

It is the personal element which distinguishes the case of the pilot from that cited of a railroad company or common carrier. A corporation cannot, from the nature of things, be a public officer; hence the cases are not analogous.

The pilot association pleads no wrong in its defense, since it denies the existence of the partnership and cites the illegality only to show that, had it desired, it could not have formed one. Had it claimed to be an "illegal partnership," then its illegality might not have been set up.

If a court may take judicial cognizance of the statute laws of the State, it may also take cognizance of the rules and regulations of a body created by those statutes, by them invested with the power of making rules and regulations supplementary to the provisions of the statutes.

City of Dundee, 103 Fed. Rep. 696; *S. C.*, 108 Fed. Rep. 679, in which the exact question involved here arose, and in the same way, upon the Pennsylvania pilot laws, which are identical with those of Virginia. See also *Mason* v. *Ervine*, 27 Fed. Rep. 459.

Mr. Robert M. Hughes for appellee:

There is such a community of profits and losses shown as to constitute the Virginia Pilot Association a partnership. *Fleming* v. *Lay*, 109 Fed. Rep. 952; *Brown* v. *Higginbotham*, 5 Leigh, 583; *Keasley* v. *Codd*, 2 C. & P. (12 E. C. L.) 408; *Davison* v. *Holden*, 55 Connecticut, 103. As to liability of members of unincorporated associations, and of corporations whose organization was absolutely void, see *McGovern* v. *Robertson*, 5 L. R. A. 589; *Kaiser* v. *Bank*, 56 Iowa, 104; *Jones* v. *Murphy*, 93 Virginia, 214; *Robbins* v. *Butler*, 24 Illinois, 387, 426; *Railway Co.* v. *Pearson*, 128 Massachusetts, 445; *Frost* v. *Walker*, 60 Maine, 468; *Kramer* v. *Arthur*, 7 Pa. St. 165; *Ricker* v. *Trust Co.*, 140 Massachusetts, 346, 348.

It is no answer to this that the pilots did not intend to form a partnership. Men always intend the legal consequences of their own acts, and if their acts constituted a partnership, they cannot be heard to say that such was not their intention. 1 Lindley on Part., 5th ed., 11; *Fleming* v. *Lay*, 109 Fed. Rep. 955, 956. See, also, *Davison* v. *Holden*, 55 Connecticut, 103; Meachem on Part., § 43, p. 31; *Jones* v. *Clifford*, 5 Florida, 510.

Even if the pilots are public officers this does not affect the question; they are not such public officers as cannot go into partnership. While a public officer cannot form a partnership so as to allow his partner to perform any of his duties, which, to a certain extent, are personal, this does not prevent two public officers from going into a partnership, each performing his own duties and merely dividing the profits. There is nothing personal in the act of the pilots. The Virginia statute requires the master of a vessel to take the first one that offers. Hence, so far as the ship at least is concerned, she has not the opportunity of any selection as among them. They are classified according to length of service, and all are supposed to be equally competent.

Independent of this general principle, the Virginia law recognizes the right of pilots to form a partnership. Act of

1775, 6 Hen. Stat. 490; acts of 1792 and 1802, 1 Va. Code, 1803, 240 and 417; act of 1819, Rev. Code, 1819, 121. And see Code of 1849, and present Code, § 1960.

Even if the pilot association is an illegal partnership, this can only be set up as among themselves and is no answer to a suit against them by a third party. *Brett* v. *Beckwith*, 3 Jur. N. S. 31; Meachem on Part., § 20, p. 16; *Hale* v. *Hale*, 4 Beav. 369; *United States* v. *Baxter*, 46 Fed. Rep. 350.

The members of such a partnership are liable for each other's torts, if in furtherance of the objects of the association, and if the fruits of their labors are received by the association. *Hyrne* v. *Erwin*, 23 S. Car. 226; *Fleming* v. *Lay*, 109 Fed. Rep. 952; *Mellors* v. *Shaw*, 1 Best & S. (101 E. C. L.) 437; *Ashworth* v. *Stanwix*, 3 C. & E. (107 E. C. L.) 700; *United States* v. *Baxter*, 46 Fed. Rep. 350; *Cobb* v. *Abbott*, 14 Pick. 289; *Strang* v. *Bradner*, 114 U. S. 555.

The pilots, if not a partnership, are jointly liable.

This is well settled by a number of decisions, as in case of joint owners of stage coaches. *Champion* v. *Bostwick*, 18 Wend. 174; *Moreton* v. *Harden*, 4 B. & C. (10 E. C. L.) 223; *Railroad Co.* v. *Ross*, 31 N. E. Rep. 412; *Cobb* v. *Abbott*, 14 Pick. 289; *Steel* v. *Lester*, L. R. 3 C. P. D. 121; *Connelly* v. *Davison*, 15 Minnesota, 428, 519.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes before us on a certificate from the Circuit Court of Appeals. It is a libel brought by the owners of a steamer against the members of the Virginia Pilot Association, and seeks to hold them all liable for the alleged negligence of Guy, one of their number. For the proceedings in the District Court see 127 Fed. Rep. 228; 135 Fed. Rep. 429. The negligence occurred when Guy was acting as pilot of the steamer and led to a collision, for which the owners of the steamer paid damages to the other vessel in order to end a suit. The questions certified are (1) whether the members of

the association are partners on the facts set forth; (2) whether, if partners, they are liable to owners of piloted vessels for the negligence of each other; (3) whether, if not technically partners, they nevertheless are so liable.

The facts appear in the third article of the libel, which was excepted to, and in answers to interrogatories. They are as follows: The defendants are a voluntary, unincorporated association. By their agreement they take turns in boarding vessels required by law to take a pilot, and the fees, which otherwise would be paid to the pilot that boarded the vessel, are paid, except in cases of national vessels and disputed bills, to the association upon bills made out by it, and go into a common fund, from which the association pays the expenses of the business, including office rent. At the time of the accident the net profits were divided according to the number of days the several pilots were upon the active list. The constitution and by-laws of the association are exhibited and will be referred to. It is proper to add here a few words as to the Virginia law. By the Code of 1887 a Board of Commissioners is instituted to examine persons applying for branches as pilots; and the commissioners are given "full authority to make such rules as they may think necessary for the proper government and regulation of pilots licensed by them." § 1955. There are details as to the qualification and classification of pilots and their duties, including a requirement, as to boats, of the pilot "or the company to which he belongs." § 1960. Acting as pilot without authority is punished. § 1963. Certain vessels are required to take the first pilot that offers his services or to pay full pilotage. § 1965. See § 1976. The amount of pilotage is fixed. § 1969. A personal liability is imposed for the amount, and it is to be noticed that it is a liability to the individual pilot employed. § 1978. The pilot's right to collect his account is fortified by a penalty. § 1979. The Board of Commissioners is authorized to decide any controversy between licensed pilots or between a pilot and the master, owner, or consignee of a vessel, and to enter judgment,

which, if for money, may be collected by a sheriff, etc. § 1980. But a judgment of suspension against a pilot is limited in general to between one and twelve months. § 1981. And the board cannot decide upon the liability of "a pilot" to any party injured by his negligence. § 1982. Pilots demanding or receiving more or less than their lawful fees are subjected to a forfeiture. § 1985. And certain further duties are prescribed.

The rules of the Board of Commissioners provide for the appointment by them of a supervisory board from the Pilot Association, to report to the President of the Board of Commissioners all cases of insubordination, breach of rules, etc., or any misdemeanor, afloat or on shore, on the part of any member of the association. A pilot desiring to go off duty for five days or longer is required to apply to the Board of Commissioners. Suspensions, by whomsoever ordered, are to be reported within twenty-four hours to the president of the board, and are to be acted upon by the board. All pilots are required to look out for their turns, and each pilot is held responsible for whatever turn he may hold upon the list, officers being prohibited from having anything to do with the swapping of turns. It will be seen that the rules of the board, made under the authority of this statute, recognize the association, as does the code, more vaguely, in § 1960, quoted above. The rules also recognize the substitution of turns for the free competition of which there are traces in the code. The rules tacitly assume that every pilot is a member of the association. All punishment and suspension is in the hands of the board, except, as may be added here, that the by-laws of the association impose a fine of ten dollars for a first violation of the rules of the association, of twenty dollars for a second offense, and provide that a third shall be reported to the Board of Pilot Commissioners. Thus substantially the whole government of the Association is in the hands of the Board.

The questions certified very properly go beyond the question

of the existence of a partnership. As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied. The substance of the case is this: A man who is responsible before the law is alleged to have committed a tort. It is proposed to make other men pay for it who not only have not commanded it or any act of which it was the natural consequence, but who would have prevented it if they could, and who have done what they could to prevent it, so far as the qualifications and employment of the pilot were not taken out of their hands by law. Why they should have to pay is the problem recurring through agency in all its forms, and whatever may be thought of some of the reasons that have been offered when the obligation has been imposed, it is certain that something more and better must be found than that the defendants divide the pay for the work that they have done, or that it is a convenience to the party aggrieved to discover a full purse to which to resort.

Whether the ground be policy or tradition, such a liability is imposed, as we all know, in many cases. When a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself. But there is always a limitation. It is true that he is not excused by care in selection or orders sufficient to secure right conduct, if obeyed. But when he could not select, could not control, and could not discharge the guilty man, he does not answer for his torts. As a familiar instance, the servants of an independent contractor are not the servants of the contractee. The liability of a vessel when in the hands of a compulsory pilot is not put upon the ground that the pilot is the agent or servant of the owners, and, therefore, does not bear upon the question. *The China*, 7 Wall. 53. Now, we are not curious to inquire what form of test shall be accepted as

the most profound for the existence of a partnership when considering liability for debts; but it is plain that when we are considering a liability for torts under the circumstances supposed no stricter or different criterion ought to be applied than in those cases where agency is the admitted ground. The rule, however stated, presses to the verge of general principles of liability. It must not be pressed beyond the point for which we can find a rational support.

So far as appears, the Virginia Pilot Association had no one of the three powers which we have mentioned. Seemingly it could neither select nor discharge its members, as certainly it could not control or direct them in the performance of their duties as pilots. To take the last first, it is quite plain that the Virginia code contemplates a bond of mutual personal liability between the master of a vessel and the pilot on board. If we imagine such a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best. Then as to the selection of members, there is no indication of any in the code, the rules of the board, or the constitution and by-laws of the association. Nothing is said about membership, and the implication is plain that a condition of the association being permitted by the board to exist is that every pilot belongs to it. Probably, while it exists, a pilot scarcely would find it possible to compete from the outside. It is still plainer that the only provision for expulsion is that which would follow upon a pilot's being deprived of his license. The association has no power over that.

All that there is upon which to base a joint liability is that the pilots, instead of taking their fees as they earn them, accomplish substantially the same result by mingling them in the first place and then, after paying expenses, distributing them to those on the active list according to the number of

days they respectively have been there. Apart from the possible slight difference between the proportion of days on the active list and days of active service, the case is the same as if each pilot kept his fees, merely contributing to keep up a common office from which his bills might be sent out and where a few details of common interest could be attended to. In the latter case this suit hardly would have been brought. The distinction between it and the one at bar is not great enough to justify a different result. See *The City of Dundee*, 108 Fed. Rep. 679, 684; *S. C.*, 103 Fed. Rep. 696.

The second and third questions certified are answered No.

UNITED STATES *v.* DALCOUR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 69. Argued October 30, 31, 1906.—Decided December 3, 1906.

Section 6 of the act of March 3, 1891, 26 Stat. 826, recognizes that there are exceptions other than those enumerated therein in which appeals to this court at that time provided for by law were saved; and this applies to the appeal by the United States under § 11 of the act of June 22, 1860, 12 Stat. 87, from adverse decisions of the District Court of the United States in cases to establish land titles in Florida.

The provision in § 3 of the act of June 22, 1860, that no claims for lands in Florida could be presented to the District Court of the United States that had been theretofore presented before any board of commissioners or other public officers acting under authority of Congress and rejected as being fraudulent, *held* to bar a claim which had been presented to a judge of the Superior Court of Florida under the act of May 23, 1828, 4 Stat. 284, and by him refused and rejected on the ground of an unwarranted alteration of the register of the grant in a particular material to its validity.

THE facts are stated in the opinion.

The Solicitor General, and *Mr. Robert A. Howard,* Special Assistant Attorney, for the United States:

This court has jurisdiction. The appeal by the United States to this court is special and mandatory under § 11 of the act of 1860; therefore the Circuit Court of Appeals Act does not apply. This principle is recognized respecting original jurisdiction under the act of August 13, 1888. *Re Hohorst,* 150 U. S. 653, 661. *Gwin* v. *United States,* 184 U. S. 669, distinguished.

If the Circuit Court of Appeals Act applies, the construction of the treaty is really and substantially drawn in question in this case. The petitioners adduced testimony for a grant of January 10, 1818, still in reliance upon the treaty, and not until the final amendment did they repudiate the treaty and rely solely on the act of 1860. *Mitchell* v. *Furman,* 180 U. S. 402, supports the treaty ground of jurisdiction here. It is doubtful if any other than a direct appeal would lie. *American Sugar Refining Co.* v. *New Orleans,* 181 U. S. 277, 281.

As to the statute of limitation, the amendments to the original petition made a different cause of action, which was barred by the limitation of the act of 1860 as extended by the act of 1875. *The Harrisburg,* 199 U. S. 199, 214; *Gray* v. *Trapnall,* 23 Arkansas, 510, 512; *Lytle* v. *State,* 17 Arkansas, 608, 649; *Marstellar* v. *McClean,* 7 Cr. 156; *Bennington* v. *Dinsmore,* 2 Gill (Md.), 348; *United States* v. *Martinez,* 196 U. S. 459; *United States* v. *Heirs of Innerarity,* 19 Wall. 595; *United States* v. *Watkins,* 97 U. S. 219, 223; *Union Pacific R. R. Co.* v. *Wyler,* 158 U. S. 285.

As to the amendment of 1878 adding the Innerarity heirs as parties, the briefs herein reveal an antagonism between the Forbes and Innerarity interests, which certainly imports the introduction of a new cause of action. As to the amendment of 1904, the proper time to make it was after the answer of the United States, setting up the treaty bar and the adjudication of 1830. But they chose to speculate with testimony for the regularity of the grant as of January 10, 1818, and then

faced about squarely with the claim of a grant of February 20. This change came too late. The new declaration is a material and fatal variance. They cannot avail of a document which the United States pleaded and produced for the purpose of showing that a grant of January 10 was impossible, because there was no valid grant at all, in order to maintain the document as a valid grant of February 20.

The claim is barred by the former adjudication under the act of May 23, 1828. The territorial court adjudged this grant in 1830 under laws which discredited claims antedated or forged as well as claims annulled by the treaty (§ 6, act of 1828), and gave the court full power to determine all questions arising (§ 2, act of 1824). That court refused and rejected the claim on grounds going to the validity of the record itself, that is, because the instrument was null and void. In the court's view the grant was not guaranteed by the treaty because it was fundamentally invalid under the law by reason of the alterations. It was not a valid grant before January 24, 1818, because it was not valid at all. The suit of 1830 was in fact a suit ending in a decree between the same parties about the same property, wherein the whole right and all possible rights were litigated. No appeal was taken, and the statute expressly provided that, no appeal being taken, the judgment of the lower court was final and conclusive. The principles laid down by statutes and decisions of this court which are to guide in these cases require a court adjudicating under § 11 of the act of 1860 to regard the principles of the proviso to § 3. A claim previously rejected by an authorized tribunal as fraudulent shall not be confirmed, nor one twice rejected on the merits by previous boards. The commissioners of 1824 disapproved this claim; Congress did not confirm it, which is tantamount to rejection; the territorial court of 1830 rejected it. Judge Brackenridge was a "public officer acting under authority of Congress" within the proviso of § 3 of the act of 1860, which was evidently framed to cover every examination made by any authorized body. The various statutes

appoint commissioners, registers and receivers, who are frequently called boards of commissioners and courts or judges of courts. These latter are clothed with judicial powers and are the only officers who do not act in the capacity of commissioners. That they are public officers cannot be disputed.

United States v. *Baca,* 184 U. S. 653, simply held that grants specially confirmed by acts of Congress were outside the jurisdiction of the Court of Private Land Claims by the terms of the statute. There was no such restriction on the authority of Judge Brackenridge, but he was empowered to adjudicate this case completely, and did. He was right on the merits and as to the Spanish law. Appellees' argument is wholly inconsistent. They say, in effect, that the court ought to accept the unexplained alteration of the registro as regular and official, because in that form only the Spanish authorities certified the document on several occasions; or that the court ought to say that the alteration is to be wholly ignored, the grant saved under the act of 1860 despite the treaty, and the instrument valid without suspicion of fraud. These alternative propositions are fatally antagonistic. The mere antedating of such foreign grants has always lain under condemnation as contrary to the principles of law, justice and equity by which the adjudications are guided, and the strongest presumptions should run against an alteration which antedates, when the change attempts to place the instrument ahead of the absolute bar of an intervening date. *United States* v. *Galbraith,* 2 Bl. 394, cannot be distinguished, as counsel suggest, because there the whole grant was fabricated. There is no distinction. Here the grant was made when the authorities had no power, and was antedated with the same motive and purpose as in the *Galbraith case.*

The act of 1860 does not validate the claim. In the *McMicken case,* 97 U. S. 204, the court said that "claims invalid from intrinsic defects in 1815 or 1825 are not helped by the act of 1860." In the *Lynde case,* 11 Wall. 632, it was declared that the validating effect of the act of 1860 was "sub-

ject, of course, to the express exceptions of the treaty of 1819 and the supplementary declaration of the King of Spain finally annexed thereto;" and that "if it should appear that a grant was obtained by fraud or was affected by any other special vice, it would be the duty of the tribunals to reject it." The treaty reservation of the *Lynde case* cannot refer only to the three specifically annulled grants mentioned in the King of Spain's supplementary declaration appended to the treaty, because the language of the opinion is in the conjunctive. The treaty contained the express exceptions, but no specific annulments. Besides other grants than the three named were meant to be annulled, and they were, therefore, within the express exceptions of the treaty. The three grants were not excluded by name, to save the honor of the King, and also because there were other similar grants; "to have named them might have left room for a presumptive inference in favor of others, the determination was to exclude them all." *Arredondo case*, 6 Pet. 755.

The opinion in the *Morant case*, 123 U. S. 335, did not intend to open the door to a grant made after January 24, 1818. It only saves those grants which were initiated before, although not completed by survey until after the treaty limitation. Such a grant as the one in suit, now nearly ninety years old, stale and rejected, antedated and, therefore, forged because it purports to be what it is not, cannot be confirmed as valid by this court under the treaty or under the act or under any principles of law, equity or justice.

Mr. William A. Blount, with whom *Mr. William W. Dewhurst* and *Mr. A. C. Blount, Jr.*, were on the brief, for appellees:

This court is without jurisdiction. *The Paquete Habana*, 173 U. S. 685; *United States* v. *Rider*, 163 U. S. 132; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 431; *Gwin* v. *United States*, 184 U. S. 669; *DeLamar's Nevada* v. *Nesbitt*, 177 U. S. 523; *New Orleans* v. *Louisiana*, 105 U. S. 336; *Iowa* v. *Rood*, 187 U. S. 92; *Sloan* v. *United States*, 193 U. S. 614.

This court will not review the order reëstablishing the lost files and records, and if it reviews, will not reverse. *Cook* v. *Burnley*, 11 Wall. 672, 676; *Hart's Executor* v. *Smith*, 20 Florida, 63; *United States* v. *Darrington*, 146 U. S. 338; *Farrar* v. *United States*, 3 Pet. 459; *P. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 332; *Morris's Lessee* v. *Vandreen*, 1 Dall. 65; *Winn* v. *Patterson*, 9 Pet. 677; *Weatherhead's Lessee* v. *Baskerville*, 11 How. 360; *Burton* v. *Driggs*, 20 Wall. 125; *Renner* v. *Bank*, 9 Wheat. 581; *Ruggs* v. *Tayloe*, 9 Wheat. 483; *Rich* v. *Rock Island &c.*, 97 U. S. 694; *Stockbridge* v. *West Stockbridge*, 12 Massachusetts, 400; *Mobley* v. *Walls*, 98 N. Car. 284; *Pruden* v. *Alden*, 34 Am. Dec. 51; *Jackson* v. *Hammond*, 1 Caines Rep. 496; *Tomlinson* v. *Funston*, 1 Green (Iowa), 544; *Lyons* v. *Gregory*, 3 H. & M. 237; *Cook* v. *Wood*, 1 McCord Rep. 139; *Green* v. *Stevens*, 2 Duv. (Ky.) 420; *Jackson* v. *Cullum*, 2 Blackf. (Ind.) 229; *United States* v. *Britton*, 2 Mason, 468; *Goetz* v. *Kochler*, 20 Ill. App. 233; *Harris* v. *McRae's Admr.*, 4 Ired. 81; *Keen* v. *Jordan*, 13 Florida, 335; 2 Phil. Ev., 351 (4th Am. ed.), note 376; Comyns Dig., Evidence A, 3; 1 Green, Evi. § 509.

This court will not review, and if it reviews will not reverse the order permitting the survivor to prosecute the cause for the benefit of all the heirs. *Richmond* v. *Irons*, 121 U. S. 46; *Western Ins. Co.* v. *Eagle Fire Ins. Co.*, 1 Paige, 284; *Verplank* v. *Caines*, 1 John. Ch. 57, and cases cited, p. 59; *F. S. Ry. Co.* v. *Hill*, 40 Florida, 1; *Seymour* v. *Freer*, 8 Wall. 202; 1 Danl. Ch. Pr., 422 (ed. 1865); *Brown* v. *Story*, 2 Paige, 594; *Smith* v. *Swormstedt*, 16 How. 302; *United States* v. *Old Settlers*, 148 U. S. 480; *Osborne* v. *Wisconsin Cent.*, 43 Fed. Rep. 824; *Tilford* v. *Henderson*, 1 A. K. Marshall, 483; *Scrimeger* v. *Bucchanon*, 3 A. K. Marshall, 219; Story's Eq. Pl., 89, 97, 103, 107, 110, 116, 120, 364–367, 831; *Hallett* v. *Hallett*, 2 Paige, 15; *Cutting* v. *Gilbert*, 5 Blatch. 259, 261; Fed. Cas. No. 3,559; approved in *Scott* v. *Donald*, 165 U. S. 116; *Seaman* v. *Slater*, 18 Fed. Rep. 485; *Penhallow* v. *Doane's Admr.*, 3 Dall. 118; *West* v. *Randall*, 2 Mason, 181, 189; *Gainer* v. *Gainer*, 30 W.

Va. 402; *Meux* v. *Waltby*, 2 Swan. 281; *Hale* v. *Hale*, 146 Illinois, 258; *Lilly* v. *Tolbein*, 102 Missouri, 477; Mitford, Chancery Pr., §§ 58, 61, 76, 79, 96, 120, 167; Barton's Suit in Equity, 134; *United States* v. *Morant*, 123 U. S. 335, 339, 343; *Payne* v. *Hook*, 7 Wall. 425, and citations; *West* v. *Randall*, 2 Mas. 181; Fed. Cas. No. 17, 424; *Lockhart* v. *Horn*, 3 Woods, 542; Fed. Cas. No. 8,446; *Wabash &c.* v. *Beers*, 2 Black. 448; *Perry* v. *Jenkins*, 1 Mylne & Craig, 122; *Coit* v. *Campbell*, 82 N. Y. 513; *Gunton* v. *Carroll*, 101 U. S. 426 (25–986); *Deloraine* v. *Brown*, 3 Brown's Ch. Cases, 646; *Brooks* v. *Gibbons*, 4 Paige, 375; *United States* v. *Boisdori*, 11 How. 88; *Barry* v. *Gamble*, 3 How. 57; *United States* v. *Auguisola*, 1 Wall. 352; *United States* v. *Arredondo*, 6 Pet. 746; *Penn Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Galliher* v. *Cadwell*, 145 U. S. 368; *O'Brien* v. *Wheelock*, 184 U. S. 493; *Nelson* v. *Carrington*, 4 Munf. (Va.) 332, 342 (6 Am. Dec. 524); Wood on Limitations, § 59, p. 119; § 26, pp. 74, 124, 125 (ed. 1883); *Elmendorf* v. *Taylor*, 10 Wheat. 176; *Shorter* v. *Smith*, 56 Alabama, 208; *Rhode Island* v. *Massachusetts*, 15 Pet. 273; *Townsend* v. *Vanderwerker*, 160 U. S. 186; 12 Enc. Law, 533, 558; *The Norway*, 1 Ben. 173; *Pacific R. R.* v. *Ketchum*, 101 U. S. 289; *Ricard* v. *Sears*, 6 A. & E. 469; 11th Eng. Ruling Cases, 78; 2 Pomeroy Eq., § 902; *Coombs* v. *Jordan*, 22 A. D. 274; *Lawrence* v. *Trustees*, 2 Denio, 585; *Pacific Ry.* v. *Mo. Pacific Ry.*, 111 U. S. 505; *Seymour* v. *Freer*, 8 Wall. 202; *Waddell* v. *United States*, 25 C. C. A. 323; *Sprujer* v. *Sprujer*, 114 Illinois, 553; *Jackson* v. *Horton*, 126 Illinois, 569; *Callender* v. *Colegrove*, 17 Connecticut, 1; *Terry* v. *Sharon*, 131 U. S. 40; *Fretz* v. *Stover*, 89 U. S. 198; *Bettes* v. *Dana*, 2 Sum. 383; Fed. Cas. No. 1,368; *Mason* v. *Hartford &c. Ry.*, 19 Fed. Rep. 56; *Newcombe* v. *Murray*, 77 Fed. Rep. 493; *Wilson* v. *Codman's Extx.*, 3 Cranch, 207; *Pendleton* v. *Fay*, 3 Paige, 204; 2 Danl. Ch. Pr., 1624 (3d Am. ed. 1865); p. 1491, note 2, and § 1509 (6th Am. ed.).

The court did not err in its order striking out the plea of defendant to the bill of revivor, and this court will not review the correctness of the order. *Sharon* v. *Terry*, 36 Fed. Rep.

346; *Fretz* v. *Stover*, 22 Wall. 198; *Slack* v. *Walcott*, 3 Mason, 508; Fed. Cas. 12,932; *Bettes* v. *Dana*, 2 Sum. 383; Fed. Cas. No. 1,368; 2 Barb., Ch. Pr., 52; *Milligan* v. *Milleage*, 3 Cranch, 220; *Piatt* v. *Oliver*, 1 McLean, 295; Fed. Cas. No. 11,114; Story, Eq. Pl., § 693, note 4 (ed. 1870).

The court did not err in permitting the heirs of James Innerarity and John Innerarity to be formally made parties, and this court will not review the order. *Credit's Com. Co.* v. *United States*, 175 U. S. 117; *Chapman* v. *Barney*, 129 U. S. 677; *Robertson* v. *Baker & Macrae*, 11 Florida, 192; *United States* v. *Delespine*, 15 Pet. 326; *Egberts* v. *Wood*, 24 Am. Dec. 238; *Hunter* v. *United States*, 5 Pet. 173, 182; *Hall* v. *Fisher*, 3 Barb. Ch. 637; *Tildesley* v. *Harper*, 10 Ch. Div. 393; 2 English Ruling Cases, 780; *Lewis* v. *Darling*, 16 How. 1, 8; *United States* v. *Watkins' Heirs*, 97 U. S. 219; *United States* v. *Innerarity*, 19 Wall. 595; *United States* v. *Sutter*, 21 How. 170; *McMicken* v. *United States*, 97 U. S. 204; *United States* v. *Morant*, 123 U. S. 343; *Castro* v. *Hendricks*, 23 How. 438; *Brown* v. *Brackett*, 21 Wall. 387; *Buyck* v. *United States*, 15 Pet. 215; *Seymour* v. *Freer*, 3 Wall. 202; *Cross* v. *Sabin*, 13 Fed. Rep. 308; *Moreau* v. *Saffarans*, 3 Sneed, 595; 1 Wash. Real Prop., 574; 3 Wash. Real Prop., 241 (ed. 1868); *Van Vetchen* v. *Terry*, 2 John Ch. 197; *Hopkirk* v. *Page*, 2 Brock, 20; Fed. Cas. No. 6,697; *Mitchell* v. *United States*, 9 Pet. 733; *Ely* v. *United States*, 171 U. S. 220; *United States* v. *Kingsley*, 12 Pet. 485; *United States* v. *Hanson*, 16 Pet. 196; *United States* v. *Forbes*, 15 Pet. 182; *United States* v. *Mitchell*, 15 Pet. 89; *Henshaw* v. *Bissell*, 18 Wall. 255; *United States* v. *Fossatt*, 21 How. 446; *United States* v. *White*, 23 How. 249; *Doe* v. *MacFarland*, 9 Cranch, 153; *United States* v. *King*, 7 How. 893; *Scull* v. *United States*, 98 U. S. 410; *Poole* v. *Fleeger*, 11 Pet. 185; *Moody* v. *Johnson*, 112 N. Car. 546; *Newman* v. *Virginia &c.*, 80 Fed. Rep. 228; *Pierson* v. *Grice*, 6 La. Ann. 232; *The Beaconsfield*, 150 U. S. 312; *United States* v. *Heirs of Clarke and Atkinson*, 16 Pet. 228; *Becnel* v. *Wagnespack*, 40 La. Ann. 109; *Foote* v. *O'Roork*, 59 Texas, 215; *Wyman* v.

Wilcox's Estate, 63 Vermont, 487; *Vunk* v. *Raritan &c.,* 56 N. J. Law, 395; *Guild* v. *Parker,* 43 N. J. Law, 43; *Dixon* v. *Dixon,* 19 Iowa, 512; *United States Ins. Co.* v. *Ludwig,* 108 Illinois, 514, 518; *McCall* v. *Lee,* 120 Illinois, 261; *S. C.,* 11 N. E. Rep. 522; *Winston* v. *Mitchell,* 93 Alabama, 554, 559; *Lyon* v. *Tallmadge,* 1 John Ch. 184; *Hardin* v. *Boyd,* 113 U. S. 756; *Union Pac. Ry.* v. *Wyler,* 158 U. S. 287; *French* v. *Hay,* 22 Wall. 238; *Neale* v. *Neales,* 76 U. S. 1; 9 Wall. 1; *Tremaine* v. *Hitchcock,* 90 U. S. 518; *Bray* v. *Creedmore,* 109 N. Car. 49; *Lilly* v. *Tobbein,* 103 Missouri, 477; *S. C.,* 23 Am. St. Rep. 887; *Penn. Co.* v. *Sloane,* 24 Ill. App. 48; *S. C.,* 125 Illinois, 72; *Sublett* v. *Hodges,* 88 Alabama, 491; Wood on Lim., 294; 1 Danl. Ch. Pr., § 402; Story, Eq. Pl., § 332; Rule 28, Eq. Rules; *Davis* v. *N. Y. R. R. Co.,* 160 N. Y. 646; *Scovill* v. *Glassner,* 79 Missouri, 449; *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593; *Gormley* v. *Bunyan,* 138 U. S. 623; *McDonald* v. *Nebraska,* 101 Fed. Rep. (C. C. A.) 178.

This court will not review the order permitting the amendment relying upon the grant of February 20, 1818, instead of January 10, 1818, and if it reviews, will affirm the order. *Clements* v. *Moore,* 6 Wall. 310, 311; *Cook* v. *Barr,* 44 N. Y. 158; *Kennard* v. *Withrow* (Ct. Civ. Appeals Texas), 28 S. W. Rep. 226; *Commissioners* v. *Keene &c.,* 108 Fed. Rep. 505, 515; *Cannell* v. *Milburn,* 3 Cr. C. C. 424; Fed. Cas. No. 2,384; *Nash* v. *Towne,* 5 Wall. 689, 698; *Moses* v. *United States,* 166 U. S. 580; *United States* v. *King,* 7 How. 887, 888; *McMicken* v. *United States,* 97 U. S. 210; *United States* v. *Turner,* 11 How. 665, 668; *United States* v. *Wiggins,* 14 Pet. 346; *United States* v. *Percheman,* 7 Pet. 85; *United States* v. *Delespine,* 12 Pet. 655; *United States* v. *Mitchell,* 9 Pet. 732; *Gonzales* v. *Ross,* 120 U. S. 605; 2 Manuel del Abogado Americano, 62, Title 13, de las pruebas; 1 White's Recopilacion, 297; *Owings* v. *Hull,* 9 Pet. 625; *United States* v. *Sutter,* 21 How. 170; *United States* v. *Davenport's Heirs,* 15 How. 7; *United States* v. *Hanson,* 19 Pet. 200, 241; *United States* v. *Wiggins,* 14 Pet. 346; *United States* v. *Boisdore,* 11 How. 97; *United States* v. *Percheman,* 7

Pet. 51; *United States* v. *Delespine,* 15 Pet. 319, and cases cited; *Page's case,* 5 Coke, 74; *Patterson* v. *Winn,* 5 Pet. 241; *Moses* v. *United States,* 166 U. S. 578; *Washington* v. *Hickley,* 166 U. S. 521, 532; *Dunstan* v. *Kirkland,* 3 Hughes, 641; Fed. Cas. No. 4,181; *Roberts* v. *Graham,* 6 Wall. 578; *Salt Lake City* v. *Smith,* 104 Fed. Rep. 458; cases cited 163 U. S. 477; *Blackwell* v. *Patton,* 7 Cr. 471; *Scull* v. *United States,* 98 U. S. 410; *Hallford* v. *Blanchford,* 2 Sanf. Chancery, 152; *Every* v. *Merwin,* 6 Cow. 366, 367; *McDonald* v. *State,* 101 Fed. Rep. 171, 176; *Oteri* v. *Scalzo,* 145 U. S. 589; *Jones* v. *Van Doren,* 130 U. S. 684, 692; *Hopkins* v. *Grimshaw,* 165 U. S. 358; *Allen* v. *Woodruff,* 96 Illinois, 11; *Ridgely* v. *Bond,* 18 Maryland, 433; *Filler* v. *Tyler,* 91 Virginia, 458; *Dodge* v. *Evans,* 43 Mississippi, 570; *Bartee* v. *Tompkins,* 36 Tennessee, 623; *Kelly's Heirs* v. *McGuire,* 15 Arkansas, 555; *Jenkins* v. *Collard,* 145 U. S. 560, 561; *Jones* v. *United States,* 137 U. S. 202, 212, 215; *United States* v. *Reynes,* 9 How. 147, 148; 1 Chitty on Pleading (16 Am. ed.), 237; *Clarke* v. *Village &c.,* 88 Michigan, 308; *Chicago &c.* v. *Porter,* 72 Iowa, 426; *Yontz* v. *United States,* 23 How. 495; *Landes* v. *Brant,* 10 How. 372; *North Chicago* v. *Monka,* 107 Illinois, 343; *Bogardus* v. *Trinity Church,* 4 Paige Ch. 197; *Railroad Co.* v. *Nix,* 68 Georgia, 572.

The captain general had authority to make the grant to John Forbes & Company. *United States* v. *Clarke,* 8 Pet. 452; *Chouteau* v. *Eckhart,* 2 How. 374; *United States* v. *The Mayor &c.,* 11 How. 660; *United States* v. *Turner,* 11 How. 665; *Smith* v. *United States,* 10 Pet. 332; *Arredondo* v. *United States,* 6 Pet. 711; *Keen* v. *McDonough,* 8 Pet. 310; *Glenn* v. *United States,* 13 How. 261; *United States* v. *Acosta,* 1 How. 26; *United States* v. *Segui,* 10 Pet. 306; *United States* v. *Hanson,* 16 Pet. 199.

The decree of Judge H. M. Brackenridge is not *res adjudicata* as against this claim. *United States* v. *Clarke,* 8 Pet. 467; *Smith* v. *United States,* 10 Pet. 321; *United States* v. *Wiggins,* 14 Pet. 350; *Ely* v. *United States,* 171 U. S. 224; *United States* v. *Arredondo,* 6 Pet. 711; *United States* v. *Curry,* 6 How. 112;

Moore v. *Albany*, 98 N. Y. 408; *United States* v. *Baca*, 184 U. S. 653; *So. Pac. Ry.* v. *United States*, 168 U. S. 49; *De-Chambrun* v. *Schermerhorn*, 59 Fed. Rep. 508; *Utter* v. *Franklin*, 172 U S. 424; *Cromwell* v. *Sac County*, 94 U. S. 351; *Norton* v. *Huxley*, 13 Gray, 290; *Merriam* v. *Whittemore*, 5 Gray, 317; *Dauterive* v. *United States*, 101 U. S. 700; *United States* v. *Morant*, 123 U. S. 342; *United States* v. *Lynde*, 11 Wall. 632.

The alteration of the dates of the grant does not preclude recovery thereon. *United States* v. *King*, 7 How. 890; *United States* v. *Perchman*, 7 Pet. 51; 1 Green, Evi., § 566, cases cited note 1; *Henfee* v. *Bromley*, 6 East, 309; *S. C.*, 2 Smith, 400; *Speake* v. *United States*, 9 Cranch, 37; 6 Pet. 722; 9 How. 167, 663; 17 How. 442, 557; 98 U. S. 428; Escriche's Dictionary of Jurisprudence, 888; Jacob's Law Dictionary, vol. 5, p. 398 (ed. 1811); 2 Enc. Law, 265 (2d ed.); 1 Taylor on Evidence, § 164; *Malin* v. *Malin*, 1 Wend. 625, 659; 2 Enc. Law, 268; *Doane* v. *Hadlock*, 42 Maine, 72; *United States* v. *Linn*, 1 How. 104, 113; *United States* v. *Marshall Silver Mining Co.*, 129 U. S. 579, 589; *United States* v. *Stinson*, 197 U. S. 204; *United States* v. *King*, 3 How. 786; *United States* v. *Bernal*, 1 Hoffman's Repts. 62; *Stringer* v. *Young*, 3 Pet. 341; *Mitchell* v. *United States*, 9 Pet. 732; *United States* v. *Wiggins*, 14 Pet. 345; *United States* v. *Galbraith*, 2 Black, 394; *Friedman* v. *Shamblin*, 117 Alabama, 454; *United States* v. *Hatch*, 1 Paine, 336; *DeVoy* v. *The Mayor*, 35 Barb. 264; *People* v. *Minck*, 21 N. Y. 539; *Casoni* v. *Jerome*, 58 N. Y. 321; see 1 Executive Papers, Sess. 16 Cong., Doc. 2, p. 25; see Letter Sec. State, Doc. 274, 1 Sess. 22 Cong., p. 12; *Hornsby* v. *United States*, 10 Wall. 224; *Speake* v. *United States*, 9 Cranch, 28; *Gonzales* v. *Ross*, 120 U. S. 605; *Penny* v. *Corwithe*, 18 John, 501; *Prouty* v. *Wilson*, 123 Massachusetts, 297; *Stewart* v. *Port Huron*, 40 Michigan, 348; *Mallory* v. *Stodder*, 6 Alabama, 861; *Lewis* v. *Payn*, 8 Cow. 71; *Morgan* v. *Elam*, 4 Yerger, 411; 2 Am. & Eng. Enc. of Law, 2d ed., 196, 204; *Doe* v. *Hurst*, 3 Starkie, 60; *S. C.*, E. C. L. 162; *Woods* v. *Hilderbrand*, 46 Missouri, 284;

1 Greenleaf, Evi., § 568; *Jackson* v. *Chase*, 2 John, 84, 87; *Hatch* v. *Hatch*, 9 Massachusetts, 307; *Dana* v. *Newhall*, 13 Massachusetts, 498; *S. C.*, 138 U. S. 21; *Alabama State* v. *Thompson*, 104 Alabama, 570; *Insurance Co.* v. *Fitzgerald*, 16 Q. B. 450; *Davison* v. *Cooper*, 11 M. & W. 778, 800; *Burnett* v. *McCluey*, 78 Missouri, 676; *Chessman* v. *Whittemore*, 23 Pick. 231; 10 Wall. 36; 2 Ed. Smith L. C. 1; 1 Whart., Evi., 629; 158 U. S. 27; *Jackson* v. *Gould*, 7 Wend. 364; *North* v. *Henneberry*, 44 Wisconsin, 306; *Alexander* v. *Hickox*, 34 Missouri, 496; *Patterson* v. *McClay*, L. R. 10 Ex. 360; *Ward* v. *Wesley*, 5 H. & N. 87; *Hutchins* v. *Scott*, 2 M. & W. 815; *Sutton* v. *Toome*, B. & C. 16; *S. C.*, 14 E. C. L. 66; *Herrick* v. *Malin*, 22 Wend. 388; 1 Ex. Papers, 1 Session, 16 Congress, Doc. No. 2, p. 34, read in Congress Dec. 7, 1819; *Marbury* v. *Madison*, 1 Cranch, 137; *Lott* v. *Proudhomme*, 3 Rob. La. 293; *Lavergne's Heirs* v. *Elkins' Heirs*, 17 Louisiana, 226; *Donner* v. *Palmer*, 31 California, 513; *Pinkerton* v. *Ledroux*, 119 U. S. 254; *United States* v. *Clark*, 8 Pet. 436, 468; *United States* v. *Schurz*, 102 U. S. 378; *LeRoy* v. *Jamison*, 3 Sawy. 369; Fed. Cas. No. 8,271; *Testimony of Carlos Evans*, 4 Am. State Papers, 172; 2 White's Recopilacion, 256; *United States* v. *West*, 22 How. 315; Law 6, Title 5, Partida 5; Law 4, Title 4, Partida 4; Law 2, Title 11, Partida 5; 1 Sala Illustracion Derecho Real, 271; 2 Tapias Febrero Novissimo, § 3, 134 (Paris ed., 1855); *Long* v. *Dollarhide Co.*, 24 California, 218; *Strother* v. *Lucas*, 12 Peters, 450.

No right of Indian occupancy at the time of the grant prevents it from being valid. *United States* v. *Fernandez*, 10 Pet. 303; *Mitchell* v. *United States*, 9 Pet. 711; *Fletcher* v. *Peck*, 6 Cranch, 143; Reports of Coms., 4 Am. St. Papers, 93 (Duff Green ed.); 2 White's Recopilacion, 324.

The act of 1860 repealed the time limit fixed in the treaty of February 22, 1819. *Headmoney cases*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190, 196; *S. C.*, 143 U. S. 570; *S. C.*, 130 U. S. 581; *United States* v. *Scull*, 98 U. S. 410; *United States* v. *Morant*, 123 U. S. 335; *United States* v. *Clamorgan*, 101 U. S. 822; *United States* v. *Repentigny*, 5 Wall. 211; *United*

States v. *D'Auterive,* 10 How. 609; *United States* v. *Phila. and New Orleans S. S. Co.,* 11 How. 609; *Montault* v. *United States,* 12 How. 47; *United States* v. *Castant,* 12 How. 437; 2 Pet. 317; 12 Pet. 516; 9 How. 151; *United States* v. *Lynde,* 11 Wall. 632; *McMicken* v. *United States,* 97 U. S. 204; *United States* v. *Watkins,* 97 U. S. 219.

This grant has not been rejected because of fraud by any public officer acting under authority of Congress. *United States* v. *Scull,* 98 U. S. 410; *United States* v. *Morant,* 123 U. S. 325. See § 3, act of March 3, 1823, 3 Stat. 757; § 6, act of March 3, 1825, 4 Stat. 126; *United States* v. *Baca,* 184 U. S. 63.

Mr. Henry R. Hatfield for heirs of John Forbes, appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to establish title by a grant of about one million eight hundred and fifty thousand acres of land in Florida, brought in the District Court under the act of June 22, 1860, c. 188, § 11, 12 Stat, 85, 87, extended by act of June 10, 1872, c. 421, 17 Stat. 378, for three years from the last date. The petitioners had a decree in the District Court, and the United States appealed to this court under the above-mentioned § 11.

As the jurisdiction of this court is denied, we will dispose of that question before going further into the facts. The ground of the denial is that by § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, the Circuit Court of Appeals shall exercise appellate jurisdiction to review final decisions in the District Courts, etc., in all cases other than those provided for in the preceding section, "unless otherwise provided by law." There is no doubt that this enactment was intended to supersede previous general provisions, and to establish in what cases and to what courts appeals might be taken from the District Courts. *The Paquete Habana,* 175 U. S. 677, 686. But the statute recognizes, in addition to the exceptions which it enumerates, others

where it is "otherwise provided by law." These words must be taken to refer to existing provisions and not to be merely a futile permission to future legislatures to make a change. They do not save every existing provision, of course, or the act would fail of its purpose. But they save some. There is no case to which they can apply more clearly than one in which, by reason of its interest, the United States has manifested its will to submit to no judgment not sanctioned by its highest court. The language of § 11 is not the usual permission to appeal, such as existed in the act of March 3, 1851, c. 41, §§ 9, 10, 9 Stat. 632, 633, referred to in *Gwin* v. *United States*, 184 U. S. 669. See also act of August 31, 1852, c. 108, § 12, 10 Stat. 99. It bears the unusual form of a positive requirement. "If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States." This is a provision based on a specific policy with regard to a certain class of claims. It is not a matter of general principle but a special trust. See also act of May 23, 1828, c. 70, § 9, 4 Stat. 284, 286, May 26, 1824, c. 173, § 9, 4 Stat. 52, 55. It stands on the same ground of peculiar importance that is the foundation of the express grant of certain direct appeals in § 5 of the act of 1891. Therefore, without considering whether the case at bar falls within the other exceptions, we are of opinion that the jurisdiction of this court given by § 11 of the act of 1860 remains unchanged.

The petition was filed on March 3, 1875, by the heirs of John Forbes. It alleged a grant to John Forbes by the Captain General of Cuba, on January 10, 1818, that is, a grant made in time to escape the eighth article of the treaty with Spain, of February 22, 1819, declaring all such grants made after January 24, 1818, void. On the other hand, it invoked the earlier part of the same article, by which all grants made by the King of Spain or by his lawful authorities, in the territories ceded to the United States, before January 24 were to be confirmed to the same extent as if the territories had not been sold. On December 14, 1878, an amendment was allowed,

by which the grant was alleged to have been made to John Forbes and Company, a partnership consisting of Forbes, James Innerarity and John Innerarity, and the Innerarity heirs were joined as parties. The rights of the United States, especially under the statute of limitations, were saved, and one question argued is whether this amendment could be allowed, when the time for bringing suit under the act of 1860 had expired. We shall not find it necessary to discuss this question, and shall assume for the purposes of decision that the amendment properly was allowed. *United States* v. *Morant*, 123 U. S. 335, 343. We shall assume that the proceeding is to establish the claim and appropriate the land to it, rather than to determine in detail the present holders of the claim. See *Butler* v. *Goreley*, 146 U. S. 308, 309, 310; *S. C.*, 147 Massachusetts, 8, 12; *Pam-To-Pee* v. *United States*, 187 U. S. 371, 379, 380.

It is unnecessary to trace all the vicissitudes of the case or to explain the delays. It is enough for our purposes to say that the parties reached an issue on May 29, 1903. A master was appointed and testimony was taken. At the hearing before him the United States put in the registro, or instrument of grant, which was in fact the original instrument, although the document of title under Spanish law is a copy delivered to the grantee, while the registro is retained by the Government. It appeared upon inspection that this instrument had been altered in the date to January 10, from February 20, 1818, the true date making the grant void under the treaty. Thereupon the petitioners asked leave to amend by adding an allegation that the grant was made on February 20, 1818, but had been altered so that it purported to have been made on January 10. The result of this amendment was that whereas the ground of recovery previously had been the treaty, now it was that the act of 1860 had given a right to recover in a case which the treaty put an end to in so many words. It abandoned the old ground, and that no longer could be relied upon if the amendment was allowed. The amendment,

although filed, was not formally allowed before the hearing, and after the hearing the United States filed a suggestion that it had been treated as allowed and that an order should be made *nunc pro tunc* that the amendment had been allowed. Thereupon the order suggested was made, and an additional answer was filed setting up the treaty and the limitation in the statutes. We do not perceive that the United States, by its course, lost its right to maintain that the amendment set up a new cause of action which was barred by the limitation fixed by the statutes on the matter, and it urges that defense. *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285, 298.

It has been decided that a decree upon a bill to have a patent declared void as forfeited under an act of Congress was a bar to a subsequent bill for the same purpose upon the different ground that the land was excepted from the grant as an Indian reservation. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355. In that case it was intimated that in general a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*. But while such a decision might be persuasive on the question whether the cause of action is the same or different for the purposes of amendment, it has been decided that an amendment could not be allowed in a Missouri district, changing the ground of recovery from the common law to the common law as modified by a Kansas statute, which did away with the defense that the negligence complained of was that of a fellow servant, in actions against railroads. *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285. In the present case the change is a change in the allegations of fact, and was most material, because it necessarily was followed by a direct facing about with regard to the law. We shall not dispose of the case on this ground, but we think it proper to say that the difficulties in the way of upholding this amendment under the last mentioned decision have not been removed from our minds.

The fundamental questions in the case are whether the petitioners are within the act of 1860, and if they are, whether

they are not met by an exception to which we shortly shall refer. The former we shall not decide. The statute by § 1 gave a petition to any persons "who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant . . . emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated." And somewhat similar language is used in § 11, allowing a proceeding in the District Court. There, however, the words apply only in case of a complete grant or concession and separation from the mass of the public domain prior to the cession to the United States, "or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over or had the actual possession of such territory."

The petitioners rely upon the words of the act and upon *United States* v. *Morant*, 123 U. S. 335. That case involved lands in Florida, lying like the present east of the river Perdido, of which the grant was made before January 24, 1818, but the survey was not completed until afterwards. The court, while intimating that such a grant well might have been held to be saved by the treaty, pointed out that the treaty was not signed until February 22, 1819, or possession taken until July, 1822, and held that the case was within the act.

On the other hand, there must be, and it has been intimated that there are, some limits to the generality of the words of the statute. Certain large grants were expressly excepted from recognition by the King of Spain on his ratification of the treaty. The act was not intended to bring them to life. There is a strong argument that it no more was intended to validate all other grants expressly annulled, but rather that what was aimed at was the so-called disputed territory lying west of the river Perdido, of which a short and clear account

is to be found in *United States* v. *Lynde,* 11 Wall. 632. In the light of that history and in view of the alternative ground of decision kept open in *United States* v. *Morant,* if there are no other possible distinctions between that case and this, we also shall leave it open whether the intimation in that case is right, or whether the same Justice was more accurate when he said, even with regard to grants of land in the disputed territory, that the intention of the act was to validate them, "subject, of course, to the express exceptions of the treaty of 1819 and the supplementary declaration of the King of Spain finally annexed thereto." *United States* v. *Lynde,* 11 Wall. 632, 646, 647. See *McMicken* v. *United States,* 97 U. S. 204, 208, 209; *United States* v. *Clamorgan,* 101 U. S. 822, 825, 826, ("which passed by the Louisiana purchase" in 25 Lawy. Ed. 836).

However it may be as to the question upon which we have touched, we are of opinion that this case "comes within the purview of the third section of this act" (of 1860) in the words of § 11, in which event the petition is not allowed to be maintained. The third section provides for a division of the claims into three classes, numbers one and two containing claims which ought to be confirmed, number three containing those which ought to be rejected, "*Provided,* That in no case shall such commissioners embrace in said classes *number one* and *number two* any claim which has been heretofore presented for confirmation before any board of commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." We are of opinion that this proviso excludes the petitioners, for the reasons which we proceed to state.

Before the act of 1860 was passed, an act of May 23, 1828, c. 70, § 6, 4 Stat. 284, 285, authorized the presentation of certain land claims in Florida to a judge of the Superior Court of West Florida, subject to the restrictions of the act of May 26, 1824, c. 173, 4 Stat 52. This claim was presented by the Innerarities for themselves and the Forbes heirs, and after a

trial the prayer for confirmation of the title was "refused and rejected" for the reasons set forth in an opinion which is in the record before us. The general ground was the unwarranted alteration of the registro, which we have mentioned above. The judge was careful not to implicate the public officer, remarking that it would be unjust when he was not a party and had no opportunity of defense. He also stated that it was not intended to implicate the parties in interest. But he pointed out that the inducement for an alteration of the registro a year or two after it was made, when the time became essential in consequence of the treaty, was obvious, and as plainly intimated that he considered the alteration fraudulent, as he could without saying so in words. He simply avoided finding by whom the alteration was made. He quoted the Curia Filipica for the invalidity of a public instrument which does not authenticate alterations by a salvado, and he concluded that the claimants had no legal grant prior to January 24, 1818. He relied upon the absence of a salvado, no doubt, but only as one of the grounds for deciding that the alterations were made without authority of law, and as leading to the further consequence that the instrument was void.

The United States set up this adjudication as a bar under the above-mentioned § 3. The petitioners make several replies. In the first place they contend that if a decision by a judge had been embraced within the proviso of § 3, he would not have been referred to in a slight, subordinate and alternative way, under the general head of "other public officers acting under authority of Congress," after the specific mention of "any board of commissioners." The reason seems plain enough, however. The whole scheme of the earlier acts was that the claims should be presented to a board of commissioners. Act of May 8, 1822, c. 129, 3 Stat. 709; March 3, 1823, c. 29, 3 Stat. 754; February 8, 1827, c. 9, 4 Stat. 202. The right to present a claim to a judge came in only by way of a late supplement in a limited number of cases. Act of May 23, 1828, c. 70, § 6, 4 Stat. 284, 285. The judges referred

to were judges of a territorial court established by the acts of March 30, 1822, c. 13, § 6, 3 Stat. 654, and March 3, 1823, c. 28, § 7, 3 Stat. 750. They were not District Judges, and there was a certain ambiguity in their standing which was under discussion when the act of 1828 was passed and has been discussed since. *American Ins. Co.* v. *356 Bales of Cotton,* 1 Peters, 511; *McAllister* v. *United States,* 141 U. S. 174. It was most natural to use cautious words, but there was no other public officer which the act of 1860 is likely to have had in mind. No further argument seems necessary to justify the conclusion that these judges were embraced within the actual as well as the literal meaning of the words used.

In the next place, it is said the claim was not found to be fraudulent or maintained by fraudulent or improper means. With regard to this we think that we have said enough already. The claim was found to be based upon an alteration, the motive for which was pointed out, and to be maintained by a reliance upon the unlawful alteration. The main contention is that the judge had no jurisdiction to reject the claim on that ground because, the moment that he decided the true date of the grant to be after January 24, he fell within a proviso of the act of May 23, 1828, c. 70, § 6, 4 Stat. 285, which excluded him from taking cognizance of any claims annulled by the treaty. *United States* v. *Baca,* 184 U. S. 653. It appears to us that this argument rests on too narrow a view of the statutes and of what was done. The claim as presented was within the judge's jurisdiction. He had authority to inquire whether it was so in fact. The document produced by the petitioner showed a claim which he could decide upon the merits, for the copy did not disclose the alteration. When the registro was put in it appeared that the date had been altered. He still had authority to decide whether the alteration was valid. He decided that it was unlawfully and fraudulently made. It would be an extraordinary refinement to say that he had authority to decide that it was made unlawfully but not to decide why it was unlawful. The illegality did not

follow from the mere fact of alteration. Had there been a salvado it might have been valid. He could not come to his conclusion without some definite ground.

Moreover, while it is true that the limitation in § 6 of the act of 1828 in form provides that the act shall not be taken to authorize the judge to take cognizance of any claim annulled by the treaty, etc., in substance it is addressed to maintaining the invalidity of the excluded claims. The jurisdiction of the judge was no different from what it would have been if the proviso had declared that nothing in the act should be taken to validate or to authorize the recognition of any claim which the treaty declared void. We are of opinion that the judge had authority to find the claim to be fraudulent and maintained by improper means.

The decree "rejected" the claim upon the grounds which we have stated, and an opinion was expressed that the grant was not merely annulled by the treaty, but void under Spanish law. But the objection remains to be answered that even if "reject" was a proper term for the decree in such a case, and even if the jurisdiction to reject included authority to find that the claim had been saved from the treaty by fraud, still there was no jurisdiction to pass upon its validity apart from the treaty, and that, therefore, the claim now may be set up since the act of 1860 has brought it to life. The proviso in § 3 of the act of 1860, it may be said, refers to claims rejected on their merits, when all the merits as admitted by that act were open. We are of opinion that there is no reason for thus artificially narrowing words that on their face include all cases. They include as well any claim which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty, as when it related to some other fact material to the validity of the claim at the time when it was created. The fraud went to the merits of the case. For by the meaning of the act of 1828, as just explained, the date of the grant was as material to the validity of the claim as the authority of the Captain General

of Cuba to convey on behalf of the King. Therefore it is our opinion that the claim is barred by the decree, even if it could escape from the other objections upon which we have found it unnecessary to pass.

Decree reversed.

NEW YORK FOUNDLING HOSPITAL *v.* GATTI.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 21. Argued April 26, 1906.—Decided December 3, 1906.

A *habeas corpus* proceeding involving the care and custody of a child of tender years is not decided on the legal rights of the petitioner, but upon the court's view, exercising its jurisdiction as *parens patriæ*, of the best interest and welfare of the child; such a proceeding does not involve the question of personal freedom, and an appeal will not lie to this court, under § 1909, Rev. Stat., from the order of the Supreme Court of a Territory awarding the custody of a child of three years of age to one of several rival claimants therefor.

Appeal from 79 Pac. Rep. 231, dismissed.

The facts are stated in the opinion.

Mr. D. Cady Herrick, with whom *Mr. Charles E. Miller* and *Mr. William C. Trull* were on the brief, for appellant:

The order is appealable. By § 1909, Rev. Stat., writs of error and appeal are allowed to the Supreme Court of the United States, upon writs of *habeas corpus* involving the question of personal freedom. *Gonzales* v. *Cunningham*, 164 U. S. 612; *Cross* v. *Burke*, 146 U. S. 82.

This right was not taken away by the Circuit Court of Appeals act, 26 Stat. 830, § 15; *Shute* v. *Keyser*, 149 U. S. 649; *Folsom* v. *United States*, 160 U. S. 121.

The State of New York, in its capacity of *parens patriæ*,

has an absolute right to the custody of the child. Coke, Litt., 74 B, § 103; Dwight on Law of Persons, 242; *Cary* v. *Bertie*, 2 Vernon, 333, 342; *Ryre* v. *Shaftsbury*, 2 P. Wms. 103, 119; *Butler* v. *Freeman*, Ambler's Rep. 301.

The right of a parent to the custody of a child is superior to the right which is exercised by a guardian. The parent has what is known as the natural right of guardianship, which means that the law of the sovereign State has recognized the propriety of permitting a parent to control his child to the extent of establishing, as a uniform doctrine governing the exercise of the sovereign right, that, in the absence of a controlling reason for depriving the parent of his so-called natural right, he shall take precedence over others in the matter of guardianship. But consideration of the historical development of the law of this subject demonstrates that the king, as the source of power and authority over all his subjects, or the State standing in the place of the king, over its citizens, has a power to re-take unto itself the delegated right of custody of an infant, and this power is superior, not only to that of a guardian, but to the power of a parent.

The doctrine of comity between States prevented the Supreme Court of Arizona from depriving the State of New York of the custody of the infant child to which, by the laws of New York, it was entitled. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 590.

The exercise of comity is an exercise of sovereign power, a determination of sovereign policy.

There is no sovereignty in a Territory; its authorities can exercise no sovereign power, can determine upon no sovereign policy.

The United States is the sovereign of the Territories, and it is for that Government to determine the policy of those Territories. And in the absence of any legislation in that behalf, it is for this court, in proper cases, to determine what that policy shall be.

The State of New York, having all of the rights of a natural

parent to the control of this child, was entitled to its custody by reason of the finding of the Supreme Court of Arizona that the State of New York was a fit guardian for the child. Dwight on Persons, 243; *Richards* v. *Collins*, 45 N. J. Eq. 283, 286; *Re Finn*, 2 DeGex & S. 457; *Curtis* v. *Curtis*, 5 Jurist (U. S.), 1148.

The facts found by the court below entitled appellant as a matter of right to the custody of the child.

The child, having been abandoned, became a ward of the State, which under such circumstances acts as *parens patriæ*. *Fondham* v. *Pierce*, 141 Massachusetts, 203; *Ex parte Krauss*, 4 Wharton (Pa.), 9; *In re Barry*, 42 Fed. Rep. 113, 118.

The Foundling Hospital, therefore, in all that it did with reference to this child, under its charter, acted as the agent of the State of New York, and as its representative, in carrying out and fulfilling the duties imposed upon the State itself. Whatever interference was had by anyone with the Hospital, while carrying out such duties, was an interference with the agents of that State. *Woodworth* v. *Spring*, 4 Allen, 321, distinguished.

The relation of a State to an abandoned child within its jurisdiction gives it and its agents even a greater right to recognition in a foreign State than in the case of a parent. The State acts upon the assumption that its authority as *parens patriæ* supersedes all authority conferred by birth. *People* v. *Chegary*, 18 Wend. 637, 642; *People* v. *Mercein*, 8 Paige Ch., 47, 69.

It is well settled by the courts of New York that the managers of the institution are not bound by state limits in providing for children committed to them under the statutes. *People* v. *House of Refuge*, 18 How. Pr. 409. The Hospital, therefore, when it sent the child to Arizona, was carrying out its duty in a manner recognized by the laws of the State.

The State of New York having rightfully confided these children to the appellant, the appellant has, irrespective of its agency for the State of New York, a legal right to the custody

and control of the children, even when such children are without the State of New York and within a Territory, because of the powers lawfully vested in it as a corporation. *Am. & For. Christian Union* v. *Yount*, 101 U. S. 352.

As a mere matter of legal discretion, upon the facts found, the court should have restored these children to the custody of the appellant. *Seymour* v. *DeLancey*, 3 Cowen, 505, 521.

The fact that the respondent has been appointed guardian of the infant Norton, gives him no legal right to its custody, and presents no legal obstacle to its being restored to the appellant.

Mr. Walter Bennett, with whom *Mr. A. A. Hoehling, Jr.*, was on the brief, for appellee:

This being a proceeding by *habeas corpus* to invoke the powers of this court, as *parens patriæ* to award the care, custody and control of a minor child, it is not a case of *habeas corpus* "involving the question of personal freedom" within the meaning of § 1909, Rev. Stat., and this court has no jurisdiction to review the judgment of the Supreme Court of the Territory of Arizona on this appeal. Sec. 1909, Rev. Stat.; *Gonzales* v. *Cunningham*, 164 U. S. 612; *In re Burrus*, 136 U. S. 586; *In re Barry*, 42 Fed. Rep. 113; *King* v. *McLean Asylum*, 64 Fed. Rep. 331; *Clifford* v. *Williams*, 131 Fed. Rep. 100.

The charter of the New York Foundling Hospital gives it no power to place children confided to its care in other homes or institutions, either within or without the State of New York, or to retain any control over them when so placed, except in case of children of suitable age, bound out or apprenticed to some trade, profession or employment.

The Hospital is a foreign corporation in relation to Arizona; as such foreign corporation, or as *de facto* foreign guardian, it could exercise no power or authority over the minor child as a matter of right in that Territory. It has not complied with its laws so as to give it any standing as a corporation, in that it

has not filed in the office of the territorial auditor a copy of its charter or appointment of an agent upon whom process can be served. Ch. IX, Rev. Stat. Ariz., 1901; *Morgan* v. *Potter*, 157 U. S. 195; *Hoyt* v. *Sprague*, 103 U. S. 613, 631; *Jones* v. *Bowman*, 67 L. R. A. 860; *In re Nichols Est.*, 34 Pac. Rep. 250.

At the time of the issuance of the writ of *habeas corpus* the respondent was the guardian of the minor child William Norton, by appointment of the Probate Court, and had qualified and was acting as such guardian. The respondent could, not as a matter of law, be guilty of restraining or depriving his ward of his liberty. *Fitts* v. *Fitts*, 21 Texas, 511; *Ferguson* v. *Ferguson*, 36 Missouri, 197; *Mathews* v. *Wade*, 2 West Va. 464; *Ex parte Miller*, 109 California, 643; *In re Chin Mee Ho*, 73 Pac. Rep. 1002; *In re Lundberg*, 77 Pac. Rep. 156; Church on Habeas Corpus, § 457.

On appeal from the Supreme Courts of the Territories, this court is restricted to an inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions duly taken to rulings on admission or rejection of evidence. *Grayson* v. *Lynch*, 163 U. S. 468; *Bear Lake* v. *Garland*, 164 U. S. 1, 18; *Harrison* v. *Pearce*, 168 U. S. 311, 323; *Young* v. *Army*, 171 U. S. 171, 183; *Apache County* v. *Barth*, 177 U. S. 538, 542.

In all cases in which the court has jurisdiction to award the custody of a minor child, the best interests of the child is the controlling consideration. *In re Barry*, 42 Fed. Rep. 113, 121; *Woodworth* v. *Spring*, 4 Allen, 321; *Kelsey* v. *Gollee*, 69 Connecticut, 291; *Lamar* v. *Harris*, 44 S. E. Rep. 867; Church on Habeas Corpus, § 446.

MR. JUSTICE DAY delivered the opinion of the court.

The suit below was begun by a petition for a writ of *habeas corpus*, by the New York Foundling Hospital, a corporation of the State of New York, against John C. Gatti, to command

said Gatti to produce the body of one William Norton, an infant, and to show by what right he held such infant under his custody and control.

The petitioner set out in substance that, by its charter granted by the legislature of New York, it was authorized to receive and keep under its charge, custody and control children of the age of two years or under, found in the city of New York, abandoned or deserted, and left in the crib or other receptacle of petitioner for foundlings, and to keep such children during infancy; that the child William Norton had come to it as a foundling within the terms of its charter; that the petitioner, the fourth of October, 1901, to October 2, 1904, had the care, charge, custody and management of said child; that on or about the first of October, 1904, petitioner placed the child in the home of a certain person in the town of Clifton, county of Graham, Territory of Arizona, to be held and cared for by the said person in said home temporarily, and at all times subject to the supervision of the petitioner and its officers and agents; that at such time the petitioner had officers and agents of trained experience at the town of Clifton, with instructions to supervise said child and the care and management of it while temporarily in the charge and care of the said person as aforesaid; that at all times the petitioner had the right at will to withdraw the child from the care and charge of the said person and retain the custody thereof, and continue to keep the said child in pursuance of law under its care, charge, custody and management during the term of its infancy as aforesaid.

Upon information and belief it charges that thereafter, and on or about the second day of October, 1904, one John C. Gatti, residing at the said town of Clifton, his servants and employés, unlawfully and with force and violence entered into the house of the said person, where at the time of said unlawful entrance the said child William Norton was, having been placed there as aforesaid, and forcibly, unlawfully, and without right took possession of said William Norton and removed him thence to

the custody of the said John Gatti. That the said child has ever since said day been in the custody and under the control of the said Gatti, and that the said child is now restrained of its liberty by the said Gatti, without the consent or license of the petitioner and against its desire, intention and protest, and in violation of its rights under the laws of the State of New York, of the United States and of the Territory.

The respondent made return and claimed to be entitled to the custody of the child named in the petition as the legally appointed guardian, duly qualified as such under letters of guardianship issued by the Probate Court of Graham County, Arizona. And further set forth in the return that the child in question is a white, Caucasian child; that the petitioner on or about the first day of October, 1904, brought the said child to the Territory of Arizona and abandoned him to the keeping of a Mexican Indian, whose name is unknown to the respondent, but one financially unable to properly clothe, shelter, maintain and educate said child, and, by reason of his race, mode of living, habits and education, unfit to have the custody, care and education of the child; that said person, to whom petitioner is alleged to have abandoned said child, voluntarily surrendered it to certain persons, who thereupon placed it in the care, custody and control of respondent, who is a fit person for that purpose, and it will be to the best interest of the child that he be permitted to remain with the respondent, whose purpose and intention it is to rear, maintain, educate and provide for said child as though he were his own.

The petitioner traversed the return, and denied that the said minor was in the care, custody and control of the respondent by virtue of letters of guardianship, and alleged that the said minor has been in the care, custody and control of respondent Gatti by force and violence, and without authority of law or of any person legally authorized to place the child in the custody of the respondent.

The case came to trial on the issues of fact raised in the petition, return and traverse thereof by the petitioner, and

the testimony having been heard in open court, a final order was made, adjudging the said William Norton to be a minor of the age of two and one-half years, and that his best interests required that the said John C. Gatti have the care, custody and control of said infant, who was thereupon remanded to the care, custody and control of said respondent.

In the view which we take of the jurisdiction of this court to entertain the appeal in this case it is unnecessary to consider the elaborate findings of fact made in the Supreme Court of Arizona as the basis of its order, further than they bear upon the question of jurisdiction to entertain this appeal.

It was found that children were taken into the Territory by the representatives of the Foundling Hospital, to remain there and be placed in suitable homes in Arizona, but, by imposition practiced upon the agents of the society, the children were distributed among persons wholly unfit to be instrusted with them, being, with one or two exceptions, half-breed Mexican Indians of bad character. That thereupon a committee was appointed from the citizens resident of the vicinity, who visited the homes of the persons having possession of the children, stating to them that they had been appointed by the American residents to take possession of the children, who were then voluntarily surrendered by such persons. The children were taken charge of by certain good women, and afterwards the child William Norton was given to the respondent, who has since had his care, custody and control. This was done without the consent of the society or its agents. Afterwards letters of guardianship were issued to the respondent by the Probate Court of Graham County, Arizona. The petitioner took an appeal from the order granting the letters of guardianship to the District Court of the county. Pending this appeal the petition for the writ of *habeas corpus* was filed.

The court, acting upon the principle that the best interests of the infant are controlling, awarded the care and custody thereof to the respondent, 79 Pac. Rep. 231, and the petitioner took an appeal to this court.

The jurisdiction of the Supreme Court of the Territory to issue the writ of *habeas corpus* is not called in question in this case.

We are met at the threshold with an objection to the appellate jurisdiction of this court. The appeal in such cases is allowed under cover of section 1909, Rev. Stat. *Gonzales* v. *Cunningham,* 164 U. S. 612. That section provides:

"Sec. 1909. Writs of error and appeals from the final decisions of the Supreme Court of either of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming shall be allowed 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 the oath of either party, or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the Supreme Courts created by this title, or of any judge thereof, or of the District Courts created by this title, or of any judge thereof, upon writs of *habeas corpus* involving the question of personal freedom."

The question is, therefore, is this a writ of *habeas corpus* "involving the question of personal freedom"? That this section of the statute does not permit appeals from all cases in which the writ is issued is manifest in the use of language in the act, specifically limiting the right of review in this court to cases of writs which involve the question of personal freedom.

A brief consideration of the history and nature of the writ will, we think, make manifest the purpose of Congress in using this restrictive language giving the right of appeal. The writ is usually granted in order to institute an investigation into the illegal imprisonment or wrongful detention of one alleging himself to be unlawfully restrained of his liberty.

The jurisdiction is conferred to enable the cause of restraint

to be inquired into, and the person imprisoned or wrongfully deprived of freedom restored to liberty.

The subject was discussed by Mr. Justice Miller in the case of *In re Burrus*, 136 U. S. 586, in which it was held that a District Court of the United States has no authority to issue a writ of *habeas corpus* to restore an infant to the custody of its father when unlawfully detained by its grandparents.

Appended to that case, and printed by request of the members of the court, is an instructive opinion by Judge Betts, delivered in the case of *In re Barry*, United States Circuit Court for the Southern District of New York, in which he reached the conclusion that a Circuit Court of the United States had no jurisdiction in *habeas corpus* to entertain a controversy as to the custody of a child when the father sought to compel the mother to deliver it to him, a question not decided in *In re Burrus*. In the course of the discussion the learned judge points out the origin of the writ as a means of relief from arrest or forcible imprisonment, and its growth in later use as a means of determining the custody of children:

"There is no reason to doubt that originally the common-law writ was granted solely in cases of arrest and forcible imprisonment under color or claim of warrant of law.

"As late as 2 James II, the court expressly denied its allowance in a case of detention or restraint by a private person (*Rex* v. *Drake*, Comberback, 35, 16 Viner, 213); and the *habeas corpus* act of Charles II, which is claimed as the Magna Charta of British liberty, has relation only to imprisonment on criminal charges. 3 Bac. Ab. 438, note.

"It is not important to inquire at what period the writ first was employed to place infant children under the disposal of courts of law and equity. This was clearly so in England anterior to our Revolution (*Rex* v. *Smith*, 2 Strange, 982; *Rex* v. *Delaval*, 3 Burrow, 1434; *Blissett's case*, Lofft. 748); and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day. (*King* v. *Demanneville*, 5 East. 221; *Demanneville* v.

Demanneville, 10 Ves. 52; *Ball* v. *Ball*, 2 Sim. 35; *Ex parte Skinner*, 9 J. B. Moore, 278; *King* v. *Greenhill*, 4 Ad. & El. 624); and this indifferently, whether the interposition of the court is demanded by the father or mother. (4 Ad. & El., 624 *ubi sup.; 9* Moore, 278 *ubi sup.*)

* * * * * * * *

"The authority to take cognizance of the detention of infants by private persons, not held under claim, or color, or warrant of law, rests solely in England on the common law. It is one of the eminent prerogatives of the crown, which implies in the monarch the guardianship of infants paramount to that of their natural parents. The royal prerogative, at first exercised personally *ad libitum* by the King (12 Pet. 630), and afterwards, for his relief, by special officers, as the Lord High Constable, the Lord High Admiral and the Lord Chancellor, in process of time devolved upon the high courts of equity and law, and in them this exalted one, of allowing and enforcing the writ of *habeas corpus ad subjiciendum*, became vested as an elementary branch of this jurisdiction. In the performance, however, of this high function in respect to the detention of infants by parents, etc., the court or judge still acts with submission to the original principle, out of which it sprang, that infants ought to be left where found, or be taken from that custody and transferred to some other, at the discretion of the prerogative guardian, and according to its opinion of their best interests and safety."

It was in the exercise of this jurisdiction as *parens patriæ* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. In such cases the question

of personal freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint. As was said by Sharkey, C. J., in 6 How. (Miss.) 472:

"An infant is not entitled to his freedom; an adult is. When a *habeas corpus* is granted to an adult, the object is to inquire whether he is legally restrained of his liberty, because if he is not, he must be set free, for the plain reason that by law he is entitled to his freedom. But if the court is also to set the infant free, they give him a right to which he is not entitled, and deprive the parent or guardian of a right to which he is entitled; to wit, the custody of the infant."

We think that such considerations as these induced Congress to limit the right of appeal to this court in *habeas corpus* cases. The discretionary power, exercised in rendering the judgment, the ability of local tribunals to see and hear the witnesses and the rival claimants for custody of children, induced, in our opinion, the denial of appeal in such cases as the one at bar, as distinguished from those of a different character, where personal liberty is really involved, and release from illegal restraint, a high constitutional and legal right not resting in the exercise of discretion, is sought, in which an appeal is given to this court.

In the present case there was no attempt to illegally wrest the custody of the child from its lawful guardian while temporarily in the Territory of Arizona. The society voluntarily took the child there with the intention that it should remain. Through imposition the child was placed in custody of those unfit to receive or maintain control over it, and, as above stated, came into the custody and possession of the respondent.

The child was within the jurisdiction of the court under such circumstances that rival claimants of the right of custody might invoke the jurisdiction of a competent court of the Territory to determine, not the right of personal freedom, but to which custodian a child of tender years should be committed. *Woodworth* v. *Spring*, 4 Allen, 321.

We do not think that the case comes within the provisions of section 1909, permitting an appeal to this court only in cases involving the question of personal freedom.

The appeal will be dismissed for want of jurisdiction.

Mr. Justice Brewer took no part in the decision of this case.

CRANE *v.* BUCKLEY.

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

No. 58. Argued October 25, 1906.—Decided December 3, 1906.

The obligation of sureties upon bonds is *strictissimi juris* and not to be extended by implication or enlarged construction of the terms of the contract entered into.

Sureties on a supersedeas bond given by defendant to answer, in case of his failure to prosecute his appeal to effect, to plaintiff for loss in use and possession of premises, which, under decree of Circuit Court, plaintiff was entitled to reënter on a date therein specified in default of payment by defendant of balance of purchase price, *held* not liable on the bond where the Circuit Court of Appeals affirmed the decree as to plaintiff's right to reënter in case of non-payment, but modified it by giving defendant until a later date to make the final payment, thereby also extending his right of possession until that date.

The facts are stated in the opinion.

Mr. Charles S. Cushing, with whom *Mr. William Grant* was on the brief, for plaintiff in error:

The bond under consideration is given under § 1000, Rev. Stat., and is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use become a formula in legal proceedings, with a fixed and definite meaning. *Hotel Co.* v. *Kountze*, 107 U. S. 378.

The affirmance of the judgment by the upper court conclusively establishes the liability of the appellant on the bond.

Davis v. *Patrick*, 57 Fed. Rep. 909; *Babbit* v. *Shields*, 101 U. S. 7.

The only question to consider is, was the judgment of the lower court affirmed? In the case now under consideration the judge, who first tried the case in the lower court, determined that the judgment had been affirmed and instructed the jury accordingly. This ruling was correct although reversed by the Circuit Court of Appeals.

As to the term "prosecute to effect," meaning "prosecute with success," see 10 Am. & Eng. Ency. of Law, 2d ed., 445; *Perreau* v. *Bevan*, 5 B. & C. 284; *Gould* v. *Warner*, 3 Wend. (N. Y.) 54; *Karthaus* v. *Owings*, 6 H. & J. (Md.) 138.

The construction placed upon this phrase, "prosecute to effect," by the bulk of authorities, is that the suit shall be prosecuted successfully to a final judgment. Note to 38 Am. St. Rep. 706; *Wood* v. *Thomas*, 5 Blackford, 553; *Trent* v. *Rhomberg*, 66 Texas, 253; *Butt* v. *Stinger*, 4 Cr. C. C. 252; *Hopkins* v. *Orr*, 124 U. S. 510.

The decree entered by the lower court, modifying the former judgment, is a false quantity in the case and cannot affect the question as to whether Buckley made good his appeal. The action of the upper court in affirming the judgment conclusively established the liability on the bond. *Davis* v. *Patrick*, 57 Fed. Rep. 909; *Babbitt* v. *Shields*, 101 U. S. 7.

Mr. D. M. Delmas for defendant in error, submitted:

The right of Buckley to remain in possession of the premises was coextensive with his right to complete the payment of the amount adjudged to be due to Crane. *Gessner* v. *Palmateer*, 89 California, 91, 97; *Dingley* v. *Bank of Ventura*, 57 California, 471; *Avery* v. *Clark*, 87 California, 619; *Sparks* v. *Hesse*, 15 California, 194; *Purser* v. *Cody*, 120 California, 218.

The appeal was prosecuted to effect so far as the possession of the property was concerned, between January 1, 1899, and November 1, 1899, and, therefore, the sureties upon the supersedeas bond were relieved from all liability to plaintiff in

error. *Powers* v. *Crane*, 67 California, 65; *Powers* v. *Chabot*, 93 California, 263; *McCallion* v. *Hibernia S. & L. S.*, 98 California, 442; *Chase* v. *Ries*, 10 California, 518; *Hawes* v. *Sternheim*, 57 Ill. App. 126; *Heinlen* v. *Beans*, 73 California, 340; *Daggett* v. *Mensch*, 141 Illinois, 396; *Poppenhausen* v. *Selley et al.*, 41 Barb. 450; *Perkins* v. *Spaulding*, 3 T. B. Mon. (Ky.), 12; *Kibble* v. *Butler*, 28 Mississippi, 587.

MR. JUSTICE DAY delivered the opinion of the court.

This was an action upon a supersedeas bond, brought by the plaintiff in error, Henry A. Crane, against defendants in error, Cornelius F. Buckley as principal, and Rudolph Spreckles and Timothy Hopkins as sureties.

The bond was given in an action brought by Crane against Buckley in the Superior Court of Tulare County, California, removed to the United States Circuit Court of the Southern District of California.

Crane brought suit to foreclose a contract for the sale of certain lands to Buckley and for the recovery of possession thereof. Upon answer and cross-bill Buckley made the defense that the sale was procured by false and fraudulent statements and misrepresentations. The court found for complainant Crane; that the charges of fraud were not sustained; that the rights, interests and claims of Buckley in and to the property should be foreclosed, subject to the equitable privilege that if Buckley should pay to Crane prior to January 1, 1899, the unpaid portion of the purchase price and the interest thereon, with taxes and costs, Crane should convey to Buckley all the said real estate pursuant to the agreement of purchase, and it was provided in said decree:

"And unless said respondent shall place on file herein some sufficient and satisfactory evidence that he has paid, or has tendered, and is able, ready and willing to pay, to said complainant, Henry A. Crane, the amounts of money hereinbefore provided to be paid for the purchase of said property, on or

before the first day of January, A. D. 1899, it is ordered, adjudged and decreed that the clerk of this court do, on request of said complainant, Henry A. Crane, or of his counsel, issue a suitable and sufficient order or writ to the marshal of this court, and under the seal thereof to remove said respondent, Cornelius F. Buckley, from the possession, use and occupation of said real property, water ditches, water rights and rights of way, and to place complainant, Henry A. Crane, or his legal representatives, in the exclusive possession, use and occupation thereof."

This decree was entered on November 16, 1898; on December 16, 1898, Buckley appealed from the decree to the Circuit Court of Appeals, and a supersedeas bond in the sum of $8,000, being the one in suit, was given. This bond is as follows:

"Whereas, the said respondent and cross complainant is desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of the land and premises involved therein, and is desirous of staying the execution of said judgment or decree, so appealed from, in so far as it relates to the costs awarded to complainant therein:

"Now, the condition of the above obligation is such that if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him, if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void, else to remain in full force and effect."

October 2, 1899, the Circuit Court of Appeals affirmed the decree. On October 19, 1899, Buckley having filed a petition for rehearing as to a part of the judgment given October 2, 1899, or for such modification thereof as would allow him until November 1, 1899, within which to make the payments required, the Circuit Court of Appeals found:

"The record does show that the appellant made large payments under the contract, and that he has made other large expenditures in the improvements of the property, which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments, the decree of the court below, which was entered on the sixteenth day of November, 1898, required to be made prior to January 1, 1899, in order that the rights and interests of the appellant in the property be saved, which were by the decrees otherwise forever foreclosed and ended. Under the circumstances appearing in the record this court is of the opinion that it is equitable and just to allow the appellant until the first day of November, 1899, within which to make the payments required by the decree from which the appeal is taken; and, accordingly, it is ordered that the judgment of this court on the second day of October, 1899, be, and hereby is, so modified as to read: 'Cause remanded to the court below, with directions to substitute for the first day of January, 1899, the first day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed.'" 97 Fed. Rep. 980.

Upon mandate from the Circuit Court of Appeals, this modification was entered in the Circuit Court.

Possession of the property was not in fact delivered till November 4, 1899. After the proceedings above recited action was commenced on the bond to recover $8,000, the penalty thereof, for the alleged value of the use and occupation of the premises by Buckley, between January 1 and November 1, 1899, and waste.

On the first trial of the case in the Circuit Court a verdict of $5,000 was rendered against the present defendant in error, afterwards reduced to $3,000.

This judgment was reversed upon writ of error to the Circuit Court of Appeals. 123 Fed. Rep. 29.

Upon a subsequent trial of the case, upon instructions following the ruling of the Circuit Court of Appeals, a verdict and

judgment were rendered in favor of the defendant in error. Another writ of error being taken to the Circuit Court of Appeals, this judgment was affirmed, and the plaintiff in error brought the case here.

The question in this case as presented here is briefly this: Can the plaintiff in error recover upon the supersedeas bond for the value of the use and occupation of the premises in question from January 1, 1899, to November 1, 1899? This was the period for which the Circuit Court of Appeals, upon the application for rehearing, modified the decree so far as to extend the right of Buckley, one of the defendants in error, and the principal in the bond, to remain in possession of the premises, postponing the foreclosure of his rights therein until the end of the period named in the extension. The bond was given under cover of section 1000 of the Revised Statutes of the United States, which provides:

"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 by damages and costs where the writ is a supersedeas and stays execution, or the costs only where it is not a supersedeas as aforesaid."

The object and purpose of this section and the bond given in pursuance thereof is to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court. The successful party in this case, the plaintiff, could not have the decree executed, so far as the possession of the property was concerned, after the supersedeas bond was given, and the purpose of that instrument was to secure him from loss during the time and to the extent that his hand was stayed from action. In order to keep the obligation of the bond it was necessary that the plaintiff in error should substantially reverse the judgment or decree in the respects in

which the bond was indemnity. As was said by Mr. Chief Justice Waite, in *Gay* v. *Parpart*, 101 U. S. 391, 392:

"If, on final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed and the writ of error or appeal has not been prosecuted with effect."

It is elementary that the obligation of sureties upon bonds in *strictissimi juris*, and not to be extended by implication or enlarged construction of the terms of the contract entered into. What then was the attitude of the case when this appeal bond was given? The action had been brought to foreclose a contract of purchase. The defense had proved unavailing. The decree had provided that unless Buckley made the payments required by January 1, 1899, his right and interest in the property should be forever foreclosed, and a writ should issue to put the plaintiff in possession of the property.

From this decree Buckley appealed, and in order to prevent its execution gave the bond in suit, which recites that he is desirous of staying the execution of the judgment appealed from in so far as it relates to the possession of the lands and premises involved, and as to costs, which are not now in controversy. Then comes the condition of the obligation, that the appellant shall prosecute his appeal to effect, and the undertaking that if he fails to make his appeal good he shall answer in damages which shall accrue by reason of the value of the use and occupation of the premises until the delivery of the possession thereof, and for waste committed thereon. The effect of this bond was to permit Buckley to remain in possession and to require him to prosecute his appeal to effect; in default of which he and his sureties may be subjected to liability upon the bond.

What is meant by prosecuting his appeal to effect? It is an expression substantially equivalent to prosecuting his appeal with success; to make substantial and prevailing his attempt to reverse the decree or judgment awarded against him.

It is to be remembered that there is not involved in this suit

any right to recover for use and occupation other than that between the dates of January 1, 1899, and November 1, 1899. This is the very time during which, by the modified decree entered by virtue of the order of the Circuit Court of Appeals, the foreclosure of the contract was postponed and the defendant in error, Buckley, permitted to remain in possession of the premises.

As we have said, the appeal bond was to secure the plaintiff from loss in the use and possession of the premises, unless Buckley prosecuted his appeal to effect. It is manifest that the effect of the decree in the Circuit Court of Appeals was to extend the time of rightful possession for the period covered in this suit. This right of possession, withheld from the plaintiff in error by the extension awarded in the Court of Appeals, was the essence of the thing for which the plaintiff in error was indemnified by the terms of the obligation. We cannot think it makes any legal difference in the liability of the sureties upon the bond that Buckley did not pay the balance of the purchase money within the time of the extension. The effect of the decree was to extend the right of possession and to prevent a foreclosure of his rights after January 1, 1899, until the date named, November 1, 1899.

This extended right of possession and postponement of foreclosure to November 1, 1899, Buckley gained by the appeal, which, in our view, he thus prosecuted to effect, or what, is another way of saying the same thing, to a successful issue upon the very thing—the wrongful possession of the property—against which the plaintiff in error was indemnified by the terms of the obligation sued upon. In this view of the case the judgment of the Circuit Court of Appeals is

Affirmed.

Ex parte WISNER.

PETITIONS FOR WRITS OF MANDAMUS AND OF PROHIBITION.

Nos. 9, 10. Original. Submitted May 14, 1906.—Decided December 10, 1906.

The Supreme Court of the United States alone possesses jurisdiction derived immediately from the Constitution and of which the legislative power cannot deprive it; that of the Circuit Court depends on some act of Congress.

No suit which could not have been originally brought in the Circuit Court of the United States can be removed therein from the state court.

Under §§ 1, 2, 3, of the act of March 3, 1875, 18 Stat. 470, as amended by the act of March 1, 1887, 24 Stat. 552, corrected by the act of August 13, 1888, 25 Stat. 433, an action commenced in a state court, by a citizen of another State, against a non-resident defendant who is a citizen of a State other than that of the plaintiff cannot be removed by the defendant into the Circuit Court of the United States.

Where the Circuit Court refuses to remand to the state court a case removed to it, but over which it has no jurisdiction, mandamus from this court is the proper remedy and not prohibition.

Abram C. Wisner, a citizen of the State of Michigan, commenced an action at law, on February 17, A. D. 1906, in the Circuit Court in and for the city of St. Louis and State of Missouri, against John D. Beardsley, a citizen of the State of Louisiana, by filing a petition, together with an affidavit, on which that court issued a writ of attachment, in the usual form, directed to the sheriff of St. Louis. The sheriff returned no property found, but that he had garnisheed the Mississippi Valley Trust Company, a corporation of Missouri, and also had served Beardsley with summons in the city of St. Louis.

Saturday, March 17, A. D. 1906, the garnishee answered, and on the same day Beardsley filed his petition to remove the action from the state court into the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship, together

with the bond required in such case. An order of removal was thereupon entered by the state court and the transcript of record was filed in the Circuit Court of the United States.

Monday, March 19, Wisner moved to remand in these words: "Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the Circuit Court of the city of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court cannot acquire jurisdiction by removal."

The motion was heard and denied April 2, 1906, the Circuit Court referring to *Foulk* v. *Gray*, 120 Fed. Rep. 156, and *Rome Petroleum Company* v. *Hughes*, 130 Fed. Rep. 585, as representing the different views of the courts below on the question involved.

On April 23, Wisner applied to this court for leave to file a petition for mandamus as well as a petition for prohibition, leave was granted, and rules entered returnable May 14, 1906, and the cases submitted on the returns to the rules.

Mr. H. S. Mecartney, *Mr. James C. Jones*, *Mr. J. J. Darlington* and *Mr. C. G. B. Drummond* for petitioner:

The Circuit Court to which the case was removed had no jurisdiction under the act of 1887–1888, as it does not appear that either of the parties to the suit is a citizen of the State and an inhabitant and resident of the district in which the

Circuit Court in which it is brought is held. Neither of the parties to the suit involved in this application resided in the Eastern Judicial District of Missouri, so that it could not have been maintained in that court if it had been brought there originally by original process. 25 Stat. 433; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *McCormick* v. *Walthers*, 134 U. S. 43; *Smith* v. *Lyon*, 133 U. S. 319; *St. Louis Ry.* v. *McBride*, 141 U. S. 128.

In order to make a suit removable under § 2 of the act of 1887–1888 it must be one which the plaintiff could have brought originally in the United States Circuit Court, to which it would be removed by original process. *Traction Co.* v. *Mining Co.*, 196 U. S. 245; *Mexican Nat. R. R.* v. *Davidson*, 157 U. S. 208; *Tennessee* v. *U. & P. Bank*, 152 U. S. 454; *Metcalf* v. *Watertown*, 128 U. S. 586; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 63; *Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 640; *Cates* v. *Allen*, 149 U. S. 459; *Sweeney* v. *Carter Oil Co.*, 199 U. S. 252; *So. Pac. Co.* v. *Denton*, 146 U. S. 202; *Anderson* v. *Watt*, 138 U. S. 701; *Neel* v. *Penn. Co.*, 157 U. S. 153; *Hanrick* v. *Hanrick*, 153 U. S. 198; *Powers* v. *C. & O. Ry.*, 169 U. S. 99; *M. C. & L. M. Ry.* v. *Swan*, 111 U. S. 379.

The act of 1887 restored the rule of 1789, and as has been heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction. *Cochran* v. *Montgomery County*, 199 U. S. 260, which repudiates *Rome* v. *Hughes*, 130 Fed. Rep. 585.

Plaintiff, not having submitted himself to the jurisdiction of the Circuit Court to which the case has been removed, either by bringing his suit therein or by afterwards, by any act of his, waiving the want of jurisdiction of the court in any way, is at full liberty to object to the total want of jurisdiction of the United States Circuit Court of the cause after its removal and to insist on the same.

The proceeding of removal is an original but indirect proceeding by which the United States Circuit Courts acquire

original jurisdiction of a cause. As to what "original" means see *Com.* v. *Schollinberger,* 156 Pa. St. 213; *Haley* v. *State,* 42 Nebraska, 561; Anderson's Law Dict. 739; Black's Law Dict. 857; *Rich* v. *Husson,* 1 Duer, 620.

The removal is only an indirect mode by which the Federal court acquires original jurisdiction. *Virginia* v. *Rives,* 100 U. S. 337; *Railway Co.* v. *Whitton,* 13 Wall. 287.

Clause 2 of § 2 gives the right only to remove into a court of the proper district and the only districts in which a defendant can be sued under the act of 1888, is that of the residence of the plaintiff, and that of the residence of the defendant. *Smith* v. *Lyon,* 133 U. S. 319; *McCormick* v. *Walthers,* 134 U. S. 44; *Mex. Nat. Bank* v. *Davidson,* 157 U. S. 208; *Shaw* v. *Quincy Mining Co.,* 145 U. S. 448, and such district is, therefore, the only proper district, within the meaning of the first section of the act.

Plaintiff did not sue originally in the Federal court, and thus call on defendant either to object to the jurisdiction or to waive the privilege he has of not being sued in that court and submitting to its jurisdiction. For this reason it does not fall within the principle of the cases which apply when the question of waiver is raised by suit being brought originally in the Federal court. *Central Trust Co.* v. *McGeorge,* 151 U. S. 134; *Shaw* v. *Mining Co.,* 145 U. S. 453.

Although the suit was not removable under § 2, and, therefore, the Circuit Court acquired no jurisdiction of it through the removal, yet, as this want of jurisdiction arose, not from something absolutely essential to vest jurisdiction, but from something in the nature of a personal privilege of the party against whom jurisdiction is being asserted, it can be waived, and if waived, the jurisdiction of the court would become complete and attach independent of the removal, but solely because the waiver brought the cause within the jurisdiction of the court.

Such waiver may be effected by either a general appearance, or any imparlance, answer, plea, or other act whatso-

ever, which recognizes that jurisdiction of the cause exists in the court. *Central Trust Co.* v. *McGeorge*, 151 U. S. 134; *St. Louis Ry.* v. *McBride*, 141 U. S. 131; *Wabash Ry.* v. *Brow*, 164 U. S. 280; *In re Cooper*, 143 U. S. 473; *Interior Const. Co.* v. *Gibney*, 160 U. S. 219; *Texas & P. Ry.* v. *Saunders*, 151 U. S. 109; *Martin* v. *B. & O. R. R.*, 151 U. S. 688; *French* v. *Hay*, 22 Wall. 238; *Pollard* v. *Dwight*, 4 Cranch, 421; *So. Pac. Co.* v. *Denton*, 146 U. S. 205; 8 Bacon's Abrdgmt. (Prohibition K), citing 2 Mod, 271, 272; *Welthosen* v. *Ormsley*, 3 Durnf. & East, 316.

The Circuit Court to which the case was removed being entirely without jurisdiction, prohibition is proper. 2 Coke's Inst., tit. *Articuli Cleri*, 602; *Carter* v. *Southall*, 3 M. & W. 126; *Re Alix*, 166 U. S. 137; *Re Rice*, 155 U. S. 396, 402; *Smith* v. *Whitney*, 116 U. S. 167, 173; *Ex parte Easton*, 95 U. S. 77; *In re Morrison*, 147 U. S. 36; *In re Fassett*, 142 U. S. 486; *In re Cooper*, 143 U. S. 495; *United States* v. *Hoffman*, 4 Wall. 161; *In re Huguley Mfg. Co.*, 184 U. S. 301; *Ex parte Pennsylvania*, 109 U. S. 175, 176; *Bronson* v. *Lacrosse Ry. Co.*, 1 Wall. 408; Fitzherbert's Natura Breviun (46*a*), side p. 108; *Jones* v. *Owens*, 18 Law J. 2 Q. B. 8; *Ex parte Phœnix Ins. Co.*, 118 U. S. 610.

Petitioner has no other remedy and cannot preserve his rights as by an appearance he would waive them and therefore he is entitled to prohibition as of right.

The action of the Circuit Court complained of is in direct violation of its duty as prescribed by the act in such a case, is in violation of the statute and of the authority of the United States by which it was created and from which it receives its authority. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 65; *Neel* v. *Penn Co.*, 157 U. S. 153; *Tennessee* v. *U. & P. Bank*, 152 U. S. 461; *Colorado Co.* v. *Turk*, 150 U. S. 138, 143; *Hanrick* v. *Hanrick*, 153 U. S. 192, 198.

But even if petitioner had a remedy by appeal or error, yet it must be an adequate remedy to bar it from a right to the writ of prohibition under the facts shown by the petition for

removal and record in the suit involved in this proceeding. *In re Huguley*, 184 U. S. 301; *In re Atlantic Ry. Co.*, 164 U. S. 633.

Mandamus is also a proper remedy for the assumption and exercise of excess of jurisdiction complained of in this proceeding, and more especially for causing the doing of that which it is the court's duty to do under the circumstances by express command of the law and affording affirmative relief. *Virginia* v. *Rives*, 100 U. S. 323; *Ex parte Bradley*, 7 Wall. 377; *Virginia* v. *Paul*, 148 U. S. 123; *Gaines* v. *Rugg*, 148 U. S. 243; *Re Delgado*, 140 U. S. 590; *Re Hohorst*, 150 U. S. 663, 664; *Ex parte Bradley*, 7 Wall. 364.

The remedy must be an adequate remedy. *In re Atlantic City R. R.*, 164 U. S. 633; *Gaines* v. *Rugg*, 148 U. S. 243, and cases cited; *Re Pennsylvania Co.*, 137 U. S. 452; *Re Grossmayer*, 177 U. S. 49; *Re Hohorst*, 150 U. S. 663; *Re Huguley Mfg. Co.*, 184 U. S. 301; *Kentucky* v. *Powers*, 201 U. S. 1.

If there is any appeal or error in such a case, then it is an inadequate remedy for the same reasons above assigned why appeal or error would not in such a case as is involved in this application be an adequate remedy such as ought to prevent prohibition issuing.

Mr. John M. Moore, *Mr. Edward C. Eliot* and *Mr. George H. Williams* for respondent:

The Circuit Court had jurisdiction. *McCormick Machine Co.* v. *Walthers*, 134 U. S. 41; *Davidson* v. *Railway Co.*, 157 U. S. 201; *Ex parte Schollenberger*, 96 U. S. 369; *Railway Co.* v. *McBride*, 141 U. S. 131; *Central Trust Co.* v. *McGeorge*, 151 U. S. 131.

The defendant had the right to remove the case without regard to plaintiff's wishes under the act of 1887–1888. *V. C. Chemical Co.* v. *Insurance Co.*, 108 Fed. Rep. 452.

The cases below sustain defendant's right of removal in this case. *Petroleum Co.* v. *Hughes*, 130 Fed. Rep. 585; *Morris* v. *Clark Construction Co.*, 140 Fed. Rep. 756. And see *Finance*

Co. v. *Boswick*, 151 Massachusetts, 19; *Vinal* v. *Continental Co.*, 34 Fed. Rep. 229.

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

By Article III of the Constitution the judicial power of the United States was "vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

And the judicial power was extended "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."

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; *Sheldon* v. *Sill*, 8 How. 441, 448; *Stevenson* v. *Fain*, 195 U. S. 165, 167. In the latter case we said: "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."

The first section of the act of March 1, 1887, 24 Stat. c. 373, p. 552, as corrected by the act of August 13, 1888, 25 Stat.

c. 366, p. 433, amended sections 1, 2 and 3 of the act of Congress of March 3, 1875, 18 Stat. c. 137, p. 470, as follows:

"That the Circuit Courts of the United States shall 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 interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; . . . But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; . . ."

"SEC. 2. That any suit of a civil nature, at law or in equity arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant

or defendants therein being non-residents of that State; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court, . . .

"Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

Section 3, as amended, provided for petition and bond for "the removal of such suit into the Circuit Court to be held in the district where such suit is pending, . . ."

As it is the non-resident defendant alone, who is authorized to remove, the Circuit Court for the proper district is evidently the Circuit Court of the district of the residence of the plaintiff.

And it is settled that no suit is removable under section 2 unless it be one that plaintiff could have brought originally in the Circuit Court. *Tennessee* v. *Bank*, 152 U. S. 454; *Mexican National Railroad* v. *Davidson*, 157 U. S. 201; *Cochran* v. *Montgomery County*, 199 U. S. 260, 272.

In *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, 446, Mr. Justice Gray, speaking for the court, in disposing of the question whether, under § 1, "a corporation incorporated in one State of the Union, and having a usual place of business in another State in which it has not been incorporated, may be sued in a Circuit Court of the United States held in the latter State, by a citizen of a different State," said:

"This question, upon which there has been a diversity of opinion in the Circuit Courts, can be best determined by a review of the acts of Congress, and of the decisions of this court, regarding the original jurisdiction of the Circuit Courts of the United States over suits between citizens of different States.

"In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies 'between citizens of different States,' Congress, by the Judiciary Act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the Circuit Court of suits of a civil nature, at common law or in equity, 'between a citizen of the State where the suit is brought and a citizen of another State,' and provided that 'no civil suit shall be brought against an inhabitant of the United States, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. 78, 79."

And, after observations in relation to the use of the word "inhabitant" in that act, and referring to the act of May 4, 1858, 11 Stat. c. 27, p. 272, § 1, and the act of March 3, 1875, 18 Stat. 470, c. 137, § 1, Mr. Justice Gray thus continued:

"The act of 1887, both in its original form, and as corrected in 1888, reënacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction of either is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of

either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that "where the jurisdiction is founded upon any of the clauses mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides. *McCormick Company* v. *Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467.

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

In short, the acts of 1887–1888 restored the rule of 1789, as we stated in *Cochran* v. *Montgomery County*, *supra*.

In the present case neither of the parties was a citizen of the State of Missouri, in which State the suit was brought, and, therefore, it could not have been brought in the Circuit Court in the first instance.

Wisner did not, of choice, select the state court as the forum, since he could not have sued in the Circuit Court under the act, because neither he nor Beardsley was a citizen of Missouri. And the question of jurisdiction relates to the time of commencing the suit.

But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties. As we have heretofore remarked: "Jurisdiction as to the subject matter may be limited in various ways as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on." *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 25. In *Central Trust Company* v. *McGeorge,* 151 U. S. 129, it was assumed, however, that the requirement that no suit should be brought in any other district than that of the plaintiff or of the defendant might be waived, where neither resided therein, because in that case the non-resident plaintiff had sued in the Circuit Court and the non-resident defendant had answered on the merits, which showed the consent of both parties and not unnaturally led to the result announced, while in this case there was no such consent. As was stated by Mr. Justice Brewer, in *Kinney* v. *Columbia Savings & Loan Association,* 191 U. S. 78, 82: "A petition and bond for removal are in the nature of process. They

constitute the process by which the case is transferred from the state to the Federal court." When, then, Beardsley filed his petition for removal, he sought affirmative relief in another district than his own. But plaintiff, in resisting the application and moving to remand, denied the jurisdiction of the Circuit Court. In *St. Louis &c. Railway Co.* v. *McBride,* 141 U. S. 127, where the plaintiffs were citizens and residents of the Western District of Arkansas, and commenced their action in the Circuit Court of the United States for the district, and the defendant was a corporation and citizen of the State of Missouri, it was held that, as the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him, on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect.

Our conclusion is that the case should have been remanded, and as the Circuit Court had no jurisdiction to proceed, that mandamus is the proper remedy.

Mandamus awarded; petition for prohibition dismissed.

MR. JUSTICE BREWER concurred in the result.

UNITED STATES *ex rel.* TAYLOR *v.* TAFT, SECRETARY OF WAR.

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

No. 300. Submitted November 19, 1906.—Decided December 10, 1906.

Where a government employé does not deny the authority of the President or his representative to dismiss him, but only contends that his dismissal is illegal because certain rules and regulations of the civil service were not observed, the validity of an authority exercised under the United States is not drawn in question, and under § 233 of the Code of the District of Columbia, 31 Stat. 1189, 1127, this court has no jurisdiction to review the judgment of the Court of Appeals of the District of Columbia.

Writ of error to review 24 App. D. C. 95, dismissed.

Relator was, on May 12, 1902, a clerk in the classified civil service of the United States, and employed in the War Department. On that day an article purporting to be signed by her and making very serious reflections on the President of the United States appeared in a newspaper published at Washington. Some days thereafter the Secretary of War directed that relator be called upon to state whether she was the author of the publication, and, if so, it was ordered that her attention should be invited to section 8 of civil service rule II, and that she be allowed three days in which to submit any answer or statement she might wish to make.

To this relator answered, admitting that she was the author of the article, but insisting that she had not been notified of any charge calling for answer under the rule.

Thereupon the Secretary entered an order dismissing her from the service, and filed a memorandum assigning as reason therefor the publication of the article.

Relator then filed her petition for mandamus in the Supreme Court of the District, to compel the Secretary to restore her. The petition recited sections 3 and 8 of civil service rule II, and assigned as grounds of relief that the procedure was not in conformity with the executive regulations set out, in that no reasons for removal had been furnished relator, and also in that the real reason of her removal was because of her political opinions and the expression of them.

The Secretary answered the petition, setting out the facts in detail, denying that relator was removed on account of her political opinions, and averring that the action was taken because of the publication of the article, containing derogatory and disrespectful statements of and concerning the President of the United States in relation to his conduct as Commander-in-Chief, and which he decided "was prejudicial to order and the efficiency of said War Department, and such offense as rendered the further connection of the petitioner with said service incompatible with the best interests of the same." And while insisting that all acts done or caused to be done by

him were in conformity with the civil service rules, the Secretary submitted that the petitioner showed by her petition "no vested right, title or interest in or to the employment formerly exercised by her in the office of the Adjutant General of the United States Army, and that the relation of such petitioner, as an employé, to the executive civil service, in respect of appointment, promotion and removal, is a matter wholly within the competence and cognizance of the political department, and the action of the head of an executive department in respect thereof is not subject to be reviewed, reversed, set aside or controlled by a court of law, nor can his action in that behalf be commanded, directed or compelled by the writ of mandamus, as the petitioner in her said petition has prayed."

Relator filed a demurrer to the answer, which was overruled, whereupon she elected to stand by the demurrer, and judgment was entered denying the writ. The judgment was affirmed by the Court of Appeals, 24 Apps. D. C. 95, and this writ of error then sued out.

Mr. Noble E. Dawson for plaintiff in error.

The Solicitor General for defendant in error.

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

This case comes before us on a motion to dismiss the writ of error for want of jurisdiction. The right to such a writ is given in section 233 of the Code of the District of Columbia, 31 Stat. 1189, c. 854, 1227, which reads:

"Any final judgment or decree of the Court of Appeals may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in

cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

If this writ of error can be maintained it is on the ground that the validity of an authority exercised under the United States was drawn in question.

The relator did not, however, question the authority of the President or his representatives to dismiss her, if the required formalities had been complied with. What she claimed was that there were certain rules and regulations of the civil service which were not observed in the matter of her dismissal, and that, therefore, such dismissal was illegal.

But this contention did not draw in question the validity of an authority exercised under the United States, but the construction and application of regulations of the exercise of such authority.

As Mr. Justice Gray said, in *South Carolina* v. *Seymour*, 153 U. S. 353, referring to an identical provision of the laws of the District prior to the code: "In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question."

And, prior to that case, we had disposed of the same question in *United States* v. *Lynch*, 137 U. S. 280. That was a petition for a writ of mandamus against the Fourth Auditor and the Second Comptroller of the Treasury, to compel them to audit the account of petitioner, who was an officer in the Navy. It was insisted that by the disallowance of petitioner's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity

of the authority was drawn in question. We held otherwise, and said:

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. . . .

"What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority."

Steinmetz v. *Allen*, 192 U. S. 543, is not to the contrary, for there the validity of a rule constituting the authority of certain officers in the Patent Office was drawn in question.

Writ of error dismissed.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY *v.* LYON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 96. Argued November 13, 1906.—Decided December 10, 1906.

Where the negligence of the master in not supplying proper appliances has a share in causing injuries to an employé, the master is liable notwithstanding the negligence of a fellow servant may have contributed to the accident.

Defendant's objection to the charge on the ground that it should have been more specific as to the distinction between sole and proximate cause cannot be raised by a general exception, nor should it be sustained if the jury had its attention drawn to the proximate cause and was charged that if the negligence of the fellow servant was the proximate cause plaintiff could not recover.

In an action for damages for personal injuries alleged to have been caused by unsafe appliances of a railroad company, the admissibility of expert

testimony is within the reasonable discretion of the trial court, and that discretion is not abused by the admission of testimony of men who had had practical experience on railroads and were familiar with structures of the kind involved in the action.

THE defendant in error, who was plaintiff below, recovered a judgment against the railroad company, plaintiff in error, in a trial court in Arizona Territory, for the negligent killing of her son, which judgment was affirmed by the Supreme Court of the Territory, and the company brings the case here.

The deceased was a brakeman and had been employed by the defendant company as such for a few weeks before the accident occurred in which he lost his life. He acted as one of the brakemen upon the freight train, which was pushed up on a spur track that ran from the main line in the town of Globe, in the Territory, to a mining station, about five hundred yards away. The accident, which resulted in the death of the deceased, occurred on this spur track on July 14, 1900. The grade of the spur, after leaving the main line, was for a short distance level. It then became quite steep upgrade, getting steeper and steeper, until it again became level, under what is termed the tramway house. This was a structure erected over the tracks, and the bottom of it was only two feet above the top of the freight cars, and from that tramway structure to the end of the road the grade was about level, and the distance a little over a hundred feet. The track ended on a trestle, with a buffer at the end, which was not calculated to resist a car pushed by an engine, but only to stop one pushed by hand or by the wind. The trestle ended at the side of a cañon, and there was at that point an abrupt fall to the bottom of the cañon of seventy-five feet. There was a curve on the spur track, which would prevent the engineer from seeing the end of his train, and he would have to obtain signals from others in order to run his engine. The upgrade was so steep that only a few cars could be taken up from the main track at any one time.

On the occasion of the accident the train started from the

main line, and was pushed upgrade by the engine in the rear. The deceased was on top of the front car of the train, being farthest away from the engine at the time the train was being pushed up. The conductor was on the car next to that of the deceased, and by his orders the engineer shoved the train as rapidly as he could, and ran it at the rate of five or six miles an hour, and then after a shove the two cars on which were the deceased and the conductor were detached from the train and passed along at that rate of speed under the tramway house and on to the level portion of the road, which ended in about a hundred feet at the side of the cañon. The deceased was unable to control the speed of the cars with his brakes, and the car on which he was riding passed along and knocked away the buffer and plunged down to the bottom of the cañon. Eyewitnesses of the accident immediately descended the side of the cañon and found at the bottom the car and the dead body of the deceased.

There was evidence tending to show that the spur track was not a safe and proper structure to operate over its length with cars, for the reason that the tramway house was so close to the top of the cars when passing under it that the brakes could not be handled, and there was not sufficient length of road after the train passed under the house during which to get the cars under control and stop them before they arrived at the end of the track and the side of the cañon. The only way in which it ought ever to have been done was to have the engine at all times attached to the train, and even then, if anything got out of order with the engine, the train was not under control of the brakeman, on account of the tramway house. The buffer at the end of the track was also asserted to be insufficient, and witnesses were called who testified that the track was not a reasonably safe one upon which to conduct the business of the road.

The company, on its part, gave evidence tending to show that the track was properly constructed; that the buffer was sufficient for the purpose intended, and that the whole structure

was a reasonably safe place, and that the accident was caused simply by the flagrant negligence of the conductor, in ordering the two cars to be detached from the train, and thus taken away from the control of the engine. It also gave evidence that the buffer was not to be used at the end of the track to stop cars in motion, nor were the handbrakes intended to be so used at that spot, as it was intended that the engine should control the cars and should not be there detached from them. They therefore insist that when the operation was properly performed the matters of the low shed, short track and insufficient buffer were immaterial. It was all predicated upon the fact that the cars should be under the control of the engine and should not be detached therefrom, as these cars were, under the orders of the conductor.

Mr. Frank W. Burnett for plaintiff in error:

The jury should have been instructed to render a verdict for the plaintiff in error. *Callaway* v. *Allen*, 64 Fed. Rep. 297; *C. C. & St. L. R. R.* v. *Brown*, 73 Fed. Rep. 970; *Hussey* v. *Coger*, 112 N. Y. 614; *Hagan* v. *Smith*, 125 N. Y. 774; *Rendall* v. *B. & O. R. R.*, 109 U. S. 478.

It was error to charge that negligence of conductor must have been the sole cause of the accident, to relieve plaintiff in error from liability. *Railroad Co.* v. *Cummings*, 106 U. S. 700; *Elmer* v. *Locke*, 135 Massachusetts, 575; *A., T. & S. F. Ry.* v. *Larmigan*, 42 Pac. Rep. 343; *Morrisey* v. *Hughes*, 27 Atl. Rep. (Vt.) 205; Wood on Master & Servant, 812; *Vizelich* v. *So. Pac. Co.*, 126 California, 587; *Trewatha* v. *Buchanan Co.*, 28 Pac. Rep. (Cal.) 571; *So. Pac. Co.* v. *Yergin*, 109 Fed. Rep. 436; *Whitman* v. *Railway Co.*, 17 N. W. Rep. (Wis.) 124; *C. N. O. & T. P. Ry.* v. *Mealer*, 50 Fed. Rep. 725; *M. & S. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469; *Norfolk & W. Ry. Co.* v. *Brown*, 22 S. E. Rep. (Va.) 496; *Edmondson* v. *Kent, Central Ry. Co.*, 49 S. W. Rep. (Ky.) 200; *Arizona Lumber & Timber Co.* v. *Mooney*, 42 Pac. Rep. (Ariz.) 952; *Little Rock & M. R. Co.* v. *Baxiy*, 84 Fed. Rep. 944.

In addition to the cases already cited as sustaining the position of the plaintiff in error, are the following: *Evansville R. R. Co.* v. *Henderson*, 134 Indiana, 636; *Allen* v. *N. Gas Co.*, L. R. 1 Exch. Div. 251; 45 L. J. Exch. N. S. 668; 34 L. T. N. S. 541; *Conger* v. *Flint R. R.*, 86 Michigan, 76; *Kevern* v. *Providence G. & S. M. Co.*, 70 California, 392; *Whitman* v. *Wisconsin & M. R. Co.*, 58 Wisconsin, 408; *Course* v. *N. Y., L. E. & W. Ry. Co.*, 17 N. Y. S. R. 715; *N. O. & T. P. R. Co.* v. *Mealer*, 50 Fed. Rep. 725; *Grover* v. *Harley*, 53 Fed. Rep. 983; *Morris* v. *Duluth S. S. Co.*, 108 Fed. Rep. 749; *Norfolk & W. Ry. Co.* v. *Brown*, 91 Virginia, 668; *Bull* v. *Mobile & M. R. Co.*, 67 Alabama, 206; *Rose* v. *Gulf & C. R.*, 17 S. W. Rep. 789; *N. Y. &c. R. R.* v. *Perriguey*, 138 Indiana, 414.

Mr. Waters Davis for defendant in error:

The first assignment of error is grounded upon the false assumption that the premises were reasonably safe, when in fact they were far from being so. In answer to this assignment see *Paulmier's Admr.* v. *Railway Co.*, 5 Vroom (34 N. J. L.), 151; *Railway Co.* v. *Cummings*, 106 U. S. 700; *Morrisey* v. *Hughes*, 27 Atl. Rep. (Vt.) 205; *Elmer* v. *Locke*, 135 Massachusetts, 575; *Gonzales* v. *Galveston*, 84 Texas, 6; *Clyde* v. *Railway Co.*, 59 Fed. Rep. 398; *Railway Co.* v. *Cooley's Admr.*, 49 S. W. Rep. (Ky.) 339; *Railway Co.* v. *Jones*, 23 Fed. Rep. 753; *Railway Co.* v. *McDade*, 191 U. S. 64; *Railway Co.* v. *Young*, 49 Fed. Rep. 725; *Railway Co.* v. *Wilson*, 38 N. E. Rep. (Ind.) 343; *Railway Co.* v. *Yeargin*, 109 Fed. Rep. 436.

The second assignment of error that the court erred in denying the motion for a new trial was made upon the ground that the evidence did not sustain the verdict or judgment, but the granting or refusing of a new trial is not subject to review. *Company* v. *Mann*, 130 U. S. 69; *Railway Co.* v. *Railway Co.*, 132 U. S. 191; *Wilson* v. *Everett*, 139 U. S. 616.

The third and fourth assignments of error raise the point that the trial court erred in refusing to submit to the jury certain special interrogatories requested by plaintiff in error.

The Supreme Court of Arizona construed its code with reference to the submission of such interrogatories and held its provisions to be directory and not mandatory, and this court will not reverse the decision of a territorial Supreme Court upon a construction of its code. *Sweeney* v. *Lomme*, 22 Wall. 208.

The question of the admissibility of expert testimony is for the determination of the trial court, and the action of the trial court, will not, except in an extreme case, be disturbed. *Company* v. *Blake*, 144 U. S. 476; *Company* v. *Edgar*, 99 U. S. 645; *Murphy* v. *Railway Co.*, 66 Barb. (N. Y.) 125; *Fort Wayne* v. *Coombs*, 7 N. E. Rep. (Ind.) 743; *Lynch* v. *Grayson*, 25 Pac. Rep. (N. M.) 992; *Railway Co.* v. *Bradley*, 54 Fed. Rep. 632; *Conklin* v. *Railway Co.*, 12 N. Y. Supp. 846; *Ives* v. *Leonard*, 15 N. E. Rep. (Mich.) 463; *Maughan* v. *Burns's Estate*, 23 Atl. Rep. (Vt.) 583.

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

The first question presented by the plaintiff in error is founded upon an exception to the refusal of the court to instruct the jury to render a verdict for the plaintiff in error, on the ground that there was no evidence that the railroad company was guilty of negligence by failing to provide a reasonably safe place for the servants of the company to work in; that the cause of the accident was the gross negligence of the conductor in ordering the cars to be detached from the train and engine, and that such negligence was that of a fellow servant of the deceased, and did not form the basis for a recovery against the defendant. We are of opinion that, taking the whole evidence, enough was proved on the part of the plaintiff below to make it proper to send the case to the jury on the question of the negligence of the company.

The next question arises in regard to the charge of the court upon the proximate cause of the accident, whether it was the

negligence of the defendant company in not furnishing a proper and reasonably safe place for its employés to work, or that it was the negligence of the conductor (a fellow servant of the deceased) in ordering the cars detached from the engine. The court charged that—

"The conductor of the train was a fellow servant of the man who was killed, and if the accident was brought about solely by the negligence of the conductor of the train, then the defendant company is not liable; or if the accident was brought about by the negligence of the conductor and the negligence of the man who was killed, the defendant company is not liable. If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent in not providing such safe place.

"The fundamental question, therefore, for you to determine in this case is, what was the cause of this accident; what brought it about?

"If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man has through his own negligence brought about this accident or contributed to it, then you should find for the defendant, and you should not award any damages in this case.

"On the other hand, if you find that the defendant company was negligent in not providing a reasonably safe place for the performance of the work, you should find for the plaintiff and award her damages, provided that the negligence of the defendant in not providing such a safe place was the cause of the accident or contributed to the accident.

"To find for the plaintiff, it is not enough that you should find that the premises were unsafe, or that the defendant

company was negligent in that respect, in not providing a safe place; you must also find that the place was unsafe, and that the accident was brought about or contributed to by reason of that unsafe place. That is, if you should find that the act of the conductor was the sole, or if you should find that it was the proximate or the procuring cause of the accident, then you should not award damages; but if you find that the accident was caused by the acts of the conductor and also by the negligence of the defendant company in not providing a safe place to do the work, then you should find damages for the plaintiff. In other words, in order to award damages to the plaintiff, you must find, first, that the defendant company was negligent in not providing a safe place to do the work, and that such negligence was the cause of the accident or contributed thereto. If you find the accident was brought about solely by the acts of the conductor, you should not award damages. If the acts of the conductor alone did not cause the accident, but the accident was contributed to by the negligence of the defendant company by not providing a safe place to work, then you should award damages."

Again:

"Was the place where the deceased was working a reasonably safe place for the performance of the work to be done there—a reasonably safe place, considering the character of the work to be done and the character of the premises?

"If you find it was not reasonably safe, and the defendant company was negligent in that respect, did that fact have anything to do with the accident, or was it caused by the negligence of the conductor of the train alone?

"If it was caused solely or procured or brought about by the negligence of the conductor, then the defendant is not liable. If the negligence of the defendant company contributed to the accident, then the defendant is liable, provided the dead man himself was not guilty of any negligence, which contributed to the accident."

The company now finds fault with this charge, on the ground

that it was error to charge that unless the accident was caused solely by the action of the conductor, the defendant was liable; that "sole" cause is not synonymous with "proximate" cause, as the action of the conductor may not have been the sole, although at the same time it may have been the "proximate" cause, and if it was the proximate cause, the company would not be liable. The rule would seem to be that if the negligence of the company had a share in causing the injury to the deceased, the company was liable, notwithstanding the negligence of a fellow servant contributed to the happening of the accident. *Grand Trunk Railway Co.* v. *Cummings*, 106 U. S. 700; *Ellis* v. *Railroad Co.*, 95 N. Y. 546, 552. But, in addition to the main charge above set forth, the court charged the jury at the request of counsel for defendant as follows: That if the manner of throwing the cars, as testified to, were unsafe, and the conductor caused the cars to be so thrown by that unsafe method, and if such act of the conductor was the proximate cause of the accident, and that such unsafe method was adopted by the conductor without the authority or direction of the defendant, the plaintiff cannot recover; that if the jury believed that the accident to the deceased was proximately caused by the negligence of the conductor, it was immaterial whether the deceased had had previous experience as a brakeman, or not; that, although the jury might believe from the evidence that other, better and safer appliances might have been used by the defendant company, yet the defendant was not thereby rendered liable in this action, if the proximate cause of the accident was the negligence of the conductor in the manner in which he conducted the work on the occasion in question; that, as the conductor was the fellow servant of the deceased, the defendant could not be held liable if the accident was proximately caused by negligence on the part of the conductor; that if the jury believed, from the evidence, that the appliances furnished by the defendant company were defective, yet if they further believed, from the evidence, that the conductor was negligent in the manner in which he con-

ducted the work on the occasion, and that such negligence was the proximate cause of the accident, without which such accident would not have happened, then the jury should find for the defendant.

We think the defendant received no prejudice from the charge as given, taken in connection with the defendant's requests to charge, which were complied with. If the defendant had desired to obtain a more specific charge in relation to the distinction between "sole" and "proximate" cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word "sole," and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question. *Spring Co.* v. *Edgar*, 99 U. S. 645, 659. The requests to charge as given show the jury had its attention drawn to the proximate cause, and that if the conductor's negligence were the proximate cause, the plaintiff could not recover.

A third question arises upon the admission of evidence. Certain of the witnesses for plaintiff were called to prove that, in their opinion, the company had not furnished a reasonably safe place for its employés to work in. This was objected to on the ground that the witnesses testifying to it were not properly experts and should not be permitted to testify. One witness, who testified that the buffer was not a reasonably safe and proper one, said that he had been railroading for fifteen years, following the business of trackman during that time; that it was his business to go over the track and see if it was in proper shape, and that he had had something to do with the construction of a railroad; that he was familiar with the construction of tracks, trestles and buffers; that that was what he had had to do; that overhead structures came under another department; that he considered it unsafe for the reason that the buffer would afford an obstruction to the wheels and

that the car would slide off the tracks and go over into the ravine.

Another witness said that he had been working on railroads for twenty years, and that from his experience he had had occasion to become acquainted with structures over tracks, over bridges and highways, and buffers at the end of chutes and tracks, and as to the control of the cars, their operation and the operation of the brakes on the cars, the stopping of cars, the resisting power of buffers, etc. He said that, in his opinion, the tramway house was too close to the top of a car, and that it was an impediment to the operation of the handbrake of the car, and that the buffer at the end was not an effective obstruction. Evidence was given by other witnesses, by depositions, in regard to the structure over the railroad track and the character of the buffer.

In the cases of all the witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with structures and the character of buffers mentioned in the evidence. There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case. *Spring Co.* v. *Edgar*, 99 U. S. 645, 658; *Chateaugay Ore and Iron Co.* v. *Blake*, 144 U. S. 476, 484.

There is no error in the record and the judgment is

Affirmed.

UNITED STATES *ex rel.* LOWRY AND PLANTERS COMPRESS COMPANY *v.* ALLEN, COMMISSIONER OF PATENTS.

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

No. 56. Argued October 24, 25, 1906.—Decided December 10, 1906.

Rule 124 of the Patent Office which provides that no appeal can be taken from a decision of a primary examiner affirming the patentability of the claim or the applicant's right to make the same, is not void as contrary to the provisions of §§ 482, 483, 4904, 4910, 4911, Rev. Stats., or § 9 of the act of February 9, 1893, 27 Stat. 436. Those statutes provide only for appeals upon the question of priority of invention, and appeals on other questions are left under the power given by § 483, Rev. Stat., to the regulation of the Patent Office.

26 App. D. C. 8, affirmed.

The facts are stated in the opinion.

Mr. Oliver Mitchell, with whom *Mr. Edmund Wetmore* was on the brief, for plaintiff in error:

An interference is a proceeding of a judicial character instituted by the Commissioner of Patents between rival applicants to determine priority of invention and patentability and is as much a fundamental question as priority, and under §§ 482 and 4909, Rev. Stat., all matters going to the applicant's right to a patent are appealable and must be adjudicated. *Palmer* v. *Lozier*, 90 Fed. Rep. 732; *Podlesak* v. *McInnerney*, 120 O. G. 2127.

In interpreting any statute in the absence of ambiguity, the ordinary meaning of its words and language control. *Maillard* v. *Lawrence*, 16 How. 251; *United States* v. *Wiltberger*, 5 Wheat. 76; *Ruggles* v. *Illinois*, 108 U. S. 526; *Pitman* v. *Flint*, 27 Massachusetts, 504; *Putnam* v. *Longley*, 28 Massachusetts, 487.

While the intent of Congress must be sought in the statute to be construed, prior legislation on the same subject can be

considered and that indicates that Congress intended appeals to lie as to patentability. See acts of 1870, 1 Stat. 109; of 1793, 1 Stat. 318; of 1836, 5 Stat. 117; of 1839, 5 Stat. 353; of 1849, 9 Stat. 395; of 1852, 10 Stat. 75; of 1861, 12 Stat. 246; those sections of act of 1870 incorporated in Rev. Stat. §§ 440, 476, 482, 483, 4904, 4909, 4910; § 9 of the Patent Act of 1893.

Rule 124 is inconsistent with law because it requires an appeal from the primary examiner to the Commissioner direct, but §§ 482, 4909, Rev. Stat., provide that such appeal shall be to the examiners in chief, the rule thus cutting down the jurisdiction of the latter; because it deprives parties to an interference of the right of review by the examiners in chief; because it forbids to one of the parties any appeal or review from certain decisions of the primary examiner as to the mechanical questions involved. This is not cured by any provisions in Rule 126.

Mr. Assistant Attorney General McReynolds, with whom *Mr. John M. Coit* was on the brief, for defendant in error:

It was not the clear, ministerial duty of the Commissioner to permit plaintiff's appeal and petitioners have not shown they have a clear right to an appeal. *Ex parte Cutting*, 94 U. S. 14; High's Extraordinary Leg. Rem. 248.

The statutes relied on do not provide for interlocutory appeals, and no reasons exist for presuming an intent to make interlocutory rulings in interferences appealable prior to final judgments. *United States* v. *Duell*, 172 U. S. 576; *Westinghouse* v. *Duncan*, 66 O. G. 1009; 2 App. D. C. 131; *Cross* v. *Phillips*, 87 O. G. 1399; 14 App. D. C. 228; *Hulett* v. *Long*, 89 O. G. 1141; 15 App. D. C. 284.

The circumstances surrounding passage of appeal statute show interlocutory motions are not appealable. See § 2 of the act of 1861; Rule 58 of 1869 edition; Rule 59 of July 5, 1870, August 1, 1871, September 1, 1873, April 1, 1875, November 1, 1876; Rules 116, 117, 118, 141 of December 1, 1879. The Patent Office has never permitted appeals to examiners

in chief from the refusal of an interlocutory motion to dissolve an interference.

The rules permit review of interlocutory rulings with the final judgment and are inconsistent with law. *Cross* v. *Phillips*, 14 App. D. C. 228; *Seeberger* v. *Dodge*, 114 O. G. 2382; *Podlesak* v. *McInnerney*, 120 O. G. 2127; 26 App. D. C. 399; *Pohle* v. *McKnight*, 119 O. G. 2519.

Long established practice of the Patent Office is entitled to great weight, and the rules as to appeals in respect to which plaintiff in error complains has been the custom of the office for forty years. *Re Crane and Rogers*, C. D. 1871, August 23, 1871, Leggett, Commissioner; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; 70 O. G. 1633.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a petition for mandamus filed in the Supreme Court of the District of Columbia, requiring the Commissioner of Patents to direct the board of examiners in chief to reinstate and take jurisdiction of the appeal of petitioners from the decision of the primary examiner, refusing to dissolve an interference between a patent granted to him and an application for a patent by one William L. Spoon. The Supreme Court granted the mandamus. Its judgment was reversed by the Court of Appeals.

The question in the case is, whether the rule of the Patent Office which denies an appeal from a ruling of a primary examiner, upon motion to dissolve an interference, is contrary to the Revised Statutes, and therefore void. Rule 124 provides that "from a decision of a primary examiner affirming the patentability of the claim or the applicant's right to make the same, no appeal can be taken."

Plaintiffs in error attack the rule as inconsistent with the sections of the Revised Statutes which provide for interferences. These sections are inserted in the margin.[1]

[1] R. S., SEC. 4904. Whenever an application is made for a patent which,

The facts are as follows: Lowry was granted a patent for a bale of fibrous material January 29, 1897. An interference was declared between his patent and application of one William Spoon, to which interference Lowry was made a party. He

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in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners in chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe.

R. S., Sec. 4909. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners in chief, having once paid the fee for such appeal.

R. S., Sec. 4910. If such party is dissatisfied with the decision of the examiners in chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person.

R. S., Sec. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc.

Sec. 9 (Act of February 9, 1893, 27 Stat. 436, c. 74). That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals.

R. S., Sec. 482. The examiners in chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents, and for reissues of patents, and in interference cases; and, when required by the Commissioner, they shall hear and report upon claims for extensions, and perform such other like duties as he may assign them.

R. S., Sec. 483. The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

moved to dissolve the interference upon the ground, among others, that Spoon's press was inoperative. The primary examiner granted the motion and Spoon appealed to the board of examiners in chief, who confirmed the decision. Upon petition of Spoon the Commissioner of Patents remanded the case to the primary examiner for further consideration, and the latter officer, upon the filing of additional affidavits, decided that Spoon's application disclosed an operative device. From this decision an appeal was taken to the board of examiners in chief, which was dismissed by that board for want of jurisdiction. Thereupon Lowry petitioned the Commissioner to direct the board to issue an appeal. The petition was denied, the Acting Commissioner remarking:

"The rule prohibiting an appeal from a decision upon a motion holding that a party has the right to make the claim of the issue is in accordance with the practice which has prevailed in this office for many years and has the support of all decisions of the courts which have been rendered on the subject. There seems to be no reason for regarding it as inconsistent with the statute. It seems very clear that the decision in this case is not a final adverse decision, since it is not a ruling that Lowry is not entitled to his patent. That is a matter which may be determined in the further proceedings, and, therefore, it is clear that the decision relates to a mere interlocutory matter.

"The petition is denied."

Lowry filed another petition, appealing to the Commissioner "in person," to direct the board of examiners in chief to entertain his appeal. The petition was considered and denied. In passing on the petition the Commissioner said:

"Under the express provisions of Rule 124 there is no appeal to the examiners in chief from such decision rendered on an interlocutory motion. It is believed that there is nothing in that rule inconsistent with law, and that, therefore, it has the force of law. The right of appeal in interferences given in general terms in the statute is a very different thing from the

right of appeal on all motions in the interference. To permit appeals on motions would multiply litigation and extend the proceedings in interferences beyond all reasonable limits. It would work great hardship to parties. The appellate tribunals of this office are no more required to give cases piecemeal consideration than are the appellate courts. The whole case should be ready for appeal when the appeal provided for by the statute is taken.

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"It is to be particularly noted that there has been no decision as to the rival claims of the parties to this interference. It has not been decided which party is entitled to the patent. If it should at any time be decided that Spoon is entitled to the patent, Lowry will have the right of appeal, but until such final decision is rendered the statute gives him no right of appeal.

"It would seem upon general principles of law that Lowry could then present for determination by his appeal any question which in his opinion vitally affects the question which party is entitled to the patent. The only ground upon which he can reasonably claim the right of appeal on this motion is that the question vitally affects his claimed right to a patent, and if it does that, he can raise it at final hearing and contest it before the various appellate tribunals, including the Court of Appeals.

"The refusal to permit the present appeal on motion is therefore not a denial of an opportunity to have the matter reviewed by the several appellate tribunals mentioned in the statute."

And further: "No good reason is seen for changing the provisions in Rule 124 here in controversy, which was adopted and approved by a long line of Commissioners of Patents, among whom have been some of the ablest patent lawyers in the country, and which rule has been acquiesced in by patent attorneys practicing before the office for the last quarter of a century."

There is quite a sharp controversy between the parties as to the effect of the ruling of the Commissioner. Plaintiffs in error are apparently convinced that the ruling of the primary examiner involves a fundamental right which, if not decided on his appeal, will be forever foreclosed to him for review. A different view is expressed by defendant in error. However this may be, we think the question in the case is in quite narrow compass. The statutes involved are not difficult of interpretation. The determining sections are 482, 483, 4904 and 4909. Plaintiffs in error put especial stress upon sections 482 and 4909. Section 482 provides for the appointment of examiners in chief, "whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners . . . in interference cases." Sections 4906, 4909 provide that "every party to an interference, may appeal from the decision of the primary examiner . . . in such case to the board of examiners in chief. . . ." The contention is that this section gives the right of appeal unreservedly and any limitation of it by a rule is void. Such might not be the result, even if there was no qualification of those sections in other sections. As said by the Commissioner, "the right of appeal in interferences given in general terms in the statute is a very different thing from the right of appeal on all motions in the interference." It certainly could not have been the intention to destroy all distinctions in procedure. But we are not left to inference. The statute is explicit. It limits the declaration of interferences to the question of priority of invention. Section 4904 provides that in case of conflict of an application for a patent with a pending application or with an unexpired patent (as in the case at bar), the Commissioner shall give notice thereof, "and shall direct the primary examiner to proceed to determine the question of *priority of invention*." (Italics ours.) And it is provided that the Commissioner shall issue a patent to the party adjudged the prior inventor, unless the adverse party appeals from the decision of the primary ex-

aminer or examiners in chief, as the case may be. The history of the sections and the rules are gone into at length by the Court of Appeals in its opinion. We need not repeat the discussion. It answers the detailed reasoning of plaintiffs in error. We concur with the views expressed, that the statutes provide only for appeals upon the question of priority of invention. Appeals on other questions are left to the regulation of the Patent Office under the grant of power contained in section 483.

Judgment affirmed.

MR. JUSTICE PECKHAM and MR. JUSTICE DAY dissent.

NEW JERSEY v. ANDERSON.

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

No. 49. Argued October 19, 1906.—Decided December 10, 1906.

The requirement of § 64*a* of the bankruptcy law of 1898 in regard to preference of taxes is a wide departure from the act of 1867 and prefers taxes due to any State and not only those due to the State in which proceedings are instituted.

It is the province of the courts to enforce, not to make, laws; and if a law works inequality the redress, if any, must be had from Congress, and arguments directed, not to the construction of the act, but as to the justice of a method of distribution of assets under the bankruptcy law, and the hardship resulting therefrom, cannot influence judicial determination.

Generally speaking, a tax is a pecuniary burden laid upon individuals or property to support the Government, and § 64*a* of the bankruptcy law is very broad and covers all taxes, including yearly license fees imposed by the State on corporations organized under its laws for the privilege of doing business, whether such business is carried on in that or in other States.

A State creating a corporation may fix the terms of its existence and

provide that for the continued existence of its franchise it must yearly pay the State certain sums fixed by the amount of its outstanding stock.

While the state court may construe a statute and define its meaning it cannot conclusively determine that which is not a tax to be a tax within the meaning of a Federal statute; that is a Federal question of ultimate decision in this court.

In this case this court reaches independently the same conclusion as that reached by the state court.

Under the bankruptcy act taxes assessed on returns made prior to the adjudication are legally due and owing and entitled to the preference given by § 64*a* although not collectible until after the adjudication.

137 Fed. Rep. 858, reversed.

This is an appeal from the judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming the order of the District Court, which affirmed the finding of the referee in bankruptcy, denying to the State of New Jersey a preference for alleged franchise taxes from the estate of a bankrupt, the Cosmopolitan Power Company.

On December 21, 1903, the claim for the State was filed, under the provisions of section 64*a* of the bankruptcy law. The claim is set forth as follows:

Tax—1902	$5,750 00
Interest to October 15, 1903	891 25
Costs on injunction proceedings, because of non-payment of taxes	26 15
Tax—1903	2,500 00
Interest to October 15, 1903	87 50
	$9,254 90

The Cosmopolitan Power Company is a corporation organized under the laws of the State of New Jersey on April 30, 1900, for the purpose of dealing in engines, machines, etc. By its charter it had power to do business in any State or Territory of the United States. While it had its principal office in the State of New Jersey, located under the terms of its certificate of incorporation, it had no property in that State, and conducted its business in the State of Illinois.

The capital stock of the corporation on January 1, 1902, was forty millions of dollars, of which there were ten millions

outstanding. On May 13, 1902, its capital stock, pursuant to the laws of New Jersey, was reduced to $2,500,000. The company was adjudicated a bankrupt on April 23, 1903, upon an involuntary petition filed in the District Court for the Northern District of Illinois.

On November 7, 1902, the state board of assessors of New Jersey, the company having failed to make return, levied an assessment for the license or franchise tax in question for the year 1902 in the sum of $5,750.00. On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax on outstanding capital stock in the sum of $2,500.00, in accordance with the return of the company filed on May 1, 1903.

On February 12, 1904, the State of New Jersey filed its motion before the referee for the payment of said taxes as a preferential debt. The referee disallowed the 1903 tax altogether, and allowed the 1902 tax as a general claim against the estate for the sum of $4,945.08. This reduction was made from the assessment for the year 1902, because the state board had made the assessment upon the basis of $40,000,000 of outstanding capital stock, whereas, in fact, only $10,000,000 was then issued and outstanding, upon which basis the referee made the allowance. The District Court affirmed the order of the referee. Upon appeal to the Circuit Court of Appeals that court modified the judgment of the District Court so as to allow the taxes claimed for the year 1903, as a general debt, and in other respects affirmed the District Court. 137 Fed. Rep. 858. The case was then brought here.

Mr. Edward D. Duffield, with whom *Mr. Levy Mayer* and *Mr. Robert H. McCarter* were on the brief, for appellant:

The claim of the appellant is a tax within the meaning of the bankruptcy act and is entitled to priority as such. *Tennessee* v. *Whitworth*, 117 U. S. 129, 136; *State* v. *Evening Journal Assn.*, 47 N. J. L. 36; *State Board of Assessors* v. *Central R. R. Co.*, 48 N. J. L. 146; *Standard Cable Co.* v. *Attorney General*,

46 N. J. Eq. 270; *Pipe Line Co.* v. *Berry*, 52 N. J. L. 308, 311; *Trenton Savings Fund* v. *Richards*, 52 N. J. L. 156; *Honduras Commercial Co.* v. *State Board of Assessors*, 54 N. J. L. 278; *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L. 529; *State* v. *Board of Assessors*, 61 N. J. L. 461; *Hancock, Comptroller*, v. *Singer Mfg. Co.*, 62 N. J. L. 289; *Re Mutual Mercantile Agency*, 8 Am. Bank. Reps. 435; *Myers* v. *Campbell*, 64 N. J. L. 186; *Ches. & O. Ry. Co.* v. *Atlantic Transp. Co.*, 62 N. J. Eq. 751; *Mayor of Newark* v. *State Board*, 51 Atl. Rep. 67; *Arimex Cons. Copper Co.* v. *State Board*, 54 Atl. Rep. 244; *Hardin* v. *Morgan*, 70 N. J. L. 484; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Massachusetts* v. *W. U. Tel. Co.*, 141 U. S. 40, 45; *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264; *Atlantic & Pacific Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Western Union Tel. Co.* v. *Missouri*, 190 U. S. 412; 14 Am. & Eng. Ency. of Law, 2d ed., 6; 27 Am. & Eng. Ency. of Law, 2d ed., 578, 932; *I. C. R. R. Co.* v. *Decatur*, 147 U. S. 190, 199; *City of Camden* v. *Allen*, 26 N. J. L. 398; *First Nat. Bank* v. *Aultman, Miller & Co.*, 12 Am. Bank. Reps. 12; 2 Cook on Corporations, 5th ed., 561. *Re United States Car Co.*, 60 N. J. Eq. 514; *Re Danville Rolling Mill Co.*, 121 Fed. Rep. 432, distinguished.

Mr. Horace Kent Tenney, with whom *Mr. Frederick D. Silber* was on the brief, for appellee, submitted:

The claim is not entitled to any priority. The proper construction of § 64*a* requires that only such taxes be paid as priorities as could be collected from property within the jurisdictional limits of the taxing body at the time the petition was filed. Said section does not provide for the payment of taxes due all States, counties, etc., but due *the* State.

Both the language of the section and the history of the legislation plainly shows that such intention was in the mind of Congress.

The license fee or franchise tax in question is not a tax, according to the decisions of the courts of New Jersey, and other courts. *Re U. S. Car Co.*, 60 N. J. Eq. 514; *Re Ott*, 2

A. B. R. 637; *Re Danville Rolling Mill Co.*, 10 A. B. R. 327; *Re Aultman, Miller & Co.*, 12 A. B. R. 12; *North Jersey Street Ry. Co.* v. *Mayor of Jersey City*, 63 Atl. Rep. 83; 1 Cooley on Taxation, 6; *Singer Mfg. Co.* v. *Heppenheimer*, 58 N. J. L. 634; *Hancock* v. *Singer Mfg. Co.*, 62 N. J. L. 289; *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L. 537; *American Smelting & Refining Co.* v. *People*, 82 Pac. Rep. 531.

The license fee for 1902 never became a valid charge, because the board of assessors had no right under the statute to levy it in November. The statute requiring the levy in June is mandatory and not directory. The court will not give priority to an allowance that never should have been made.

Regardless of any priority, the reduction of the claim for 1902 was proper. The District Court had the right to investigate the legality and amount of the tax for 1902, and to reduce it, under § 64*a*, and the board of assessors had no power to make the charge on any capital stock not issued and outstanding. *Trenton Heat & Power Co.* v. *State Board of Assessors*, 63 Atl. Rep. 1005; *Arimes Copper Co.* v. *State Board*, 69 N. J. L. 121; *Peoples Investment Co.* v. *Assessors*, 37 Vroom, 175.

The claim for 1903 should be disallowed, because said claim was not in existence and did not constitute a debt, at the time the bankruptcy petition was filed, and was not then a tax legally due and owing. *Re Aultman, Miller & Co.*, 12 A. B. R. 12; *Emmerman* v. *Ohio Steel & Iron Co.*, 13 A. B. R. 40; and see forms of this court in bankruptcy, Nos. 31 to 36.

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

The provisions of the bankrupt law governing the payment of taxes are found in section 64*a*, act of 1898 (30 Stat. 563, U. S. Comp. Stat. 1901, p. 3447), which reads:

"SEC. 64*a*. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United

States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

The statute of the State of New Jersey (Gen. Stat. 1895, §§ 251, 252, 257, 258, 260), by its title undertakes to provide for the imposition of state taxes upon certain corporations and for the collection thereof. It requires the corporation to make return to the state board of assessors on or before the first Tuesday in May of each year and to pay an annual license fee or franchise tax of a certain per cent on its capital stock issued and outstanding on January 1 of each year, up to and including $3,000,000; a different per cent on sums in excess of $3,000,000, and not exceeding $5,000,000, and on outstanding capital stock exceeding $5,000,000, $50 per million or any part thereof. In case the corporation shall fail to make return the state board shall ascertain and fix the amount of the annual license fee, or franchise tax, and shall report to the comptroller on or before the first Monday in June the basis and amount of the tax as returned by each company to, or ascertained by the board, which shall then become due and payable, and it shall be the duty of the state treasurer to receive the same. If the tax remains unpaid on July first after the same becomes due it shall thenceforth bear interest at the rate of one per cent per month. That the tax shall be a debt due from the company to the State, for which it may maintain an action at law for recovery thereof, after the same shall have been in arrears for the period of one month, and the tax shall be a preferred debt in case of insolvency, and in cases of arrears for three months the State may apply for an injunction to restrain the company from exercising its corporate franchise; and that if any corporation shall be delinquent for two years its charter shall be void, unless further time be given for the payment of taxes.

It is contended for the appellee that these provisions do not entitle the State to the payment of its claim as a preferred tax within the meaning of the bankrupt act. It is insisted, in the first place, that a proper construction of the act of 1898 does not require the payment of taxes to a State wherein the bankrupt has no property, and the State no means of collecting the tax from property within its jurisdiction. And it is urged that the taxes to be paid are those legally due and owing to the United States, State, county, district or municipality, which does not contemplate payment to any and all States, but only to THE State, which, it is insisted, should be interpreted with the limitation stated.

It is to be noted that there is a very significant difference in this respect, in the act of 1898, from the provisions of the bankrupt act of 1867, 14 Stat. 530, c. 176, the law in force last before, and doubtless in the view of Congress when the present law was drafted. That act, of 1867, gave priority of payment to all debts due to the United States, and all taxes and assessments under the laws thereof, all debts due to the State in which the proceedings in bankruptcy were pending, and all taxes and assessments made under the laws of *such* State, and provided that nothing contained in the act should interfere with the assessment and collection of taxes by the authority of the United States or any State.

The requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the State, county, district or municipality.

An argument is made as to the alleged injustice of this requirement, in that it may take away from the local creditors in the State where the property of the corporation is situated practically all the assets of the corporation in favor of the State where the corporation is organized, but has no business or property. And it is urged that to permit a State under such circumstances to have a preference in the payment of

taxes would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property. But considerations of this character, however properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress.

The question is, is the claim a tax legally due and owing to the State of New Jersey? We have been cited to many cases in the State of New Jersey, some of which it is alleged maintain the theory of the appellant that this is a tax, and some the contrary view.

Without undertaking to analyze these numerous cases or to harmonize the views expressed by different judges, we think the weight of judicial decision in that State favors the view that this is a tax imposed upon the right of the corporation to continue to be a corporation, with power to exercise its corporate franchises, based upon the amount of its capital stock issued and outstanding.

In *Hancock, Comptroller*, v. *Singer Manufacturing Co.*, 62 N. J. L. 289, 335, it was said:

"The act of 1884 (Pamph. L, p. 232) is entitled 'An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof.'

"In that act this imposition is called a yearly license fee or tax.

"In a supplement passed to the act of 1884 (Pamph. L, 1891, p. 150) it is styled 'a tax.'

"In a further supplement, passed in 1892 (Pamph. L, p. 136), it is called 'an annual license fee or franchise tax.'

"It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or 'franchise tax' cannot validate it. It is levied under an act passed 'to authorize the imposition of state taxes,' and it is none the less an interdicted imposition [having reference to the charter

then being considered], and none the less a tax because it is given a new name.

"Although under our adjudications it is not a tax on property in a sense which brings it within article 4, section 7, paragraph 12, of our state constitution, it is a tax on the capital stock of the corporation. Otherwise the act would be manifestly void for want of a title expressing its object, and the State would be deprived of all its revenue under the act of 1892. The franchise of the company is the right to hold property and exercise its corporate privileges. The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. *Wilmington Railroad Co.* v. *Reid*, 13 Wall. 264."

While we take this view of the decisions of the Supreme Court of New Jersey and reach the conclusion that the claim in question is for a tax within the meaning of the law as construed by that court, the bankruptcy act is a Federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true, as was said in the opinion of the learned judge speaking for the Circuit Court of Appeals, in this case, that if the highest court of the State should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the bankruptcy act, would not compel the State to accept a preference from the bankrupt's estate upon a different view of the law. Conceding the doctrine that the meaning of a statute is a state question, except where rights, the subject of adjudication by the Federal courts, have accrued before its construction by the state court, or the question of contract within the protection of the Federal Constitution is involved, still a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact. The section (64*a*) itself declares that in case of disputes as to the amount or legality of any such tax, they

shall be heard and determined by the court. The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this court.

We are of opinion that this claim was for a tax. The language of the act, as we have said, is very broad and includes all taxes. It is not necessary to enter upon a discussion of the different forms which taxes may take. Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government. We think this exaction is of that character. It is required to be paid by the corporation after organization *in invitum.* The amount is fixed by the statute, to be paid on the outstanding capital stock of the corporation each year, and capable of being enforced by action against the will of the taxpayer. As was said by Mr. Justice Field, speaking for the court in *Meriwether* v. *Garrett,* 102 U. S. 472, 513:

"Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County,* reported in 7 Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum.* Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character."

It is urged by the appellee, and upon this ground the case was decided in the Circuit Court of Appeals, that this is in no just sense a tax levied by the State, but is the result of a contract by which the corporation was brought into existence, the consideration being the payment of annual sums for the privileges given it by the State, for which no lien is given upon the property, but only a right of action for their recovery.

But this imposition is in no just sense a contract. The amount to be paid, fixed by the statute, is subject to control and change at the will of the State. It is imposed upon all corporations, whether organized before or after the passage of the act. The corporation is not consulted in fixing the amount of the tax, and under the laws of New Jersey the charter of such corporations as this may be amended or repealed. *Hancock* v. *The Singer Manufacturing Co.*, 62 N. J. L. 289, 328.

The form of the collection of taxes is left to the discretion of the taxing power; sometimes a lien is provided, sometimes a summary method of collection is awarded; in other cases, an action for debt is given, and, as in the present case, with the right of prohibition of the exercise of corporate franchises by injunction for failure to pay.

We think then that, as denominated in the statute, this was a tax imposed by the State upon the corporation for the privilege of existence and the continued right to exercise its franchise.

The State which created this corporation had the right to fix the terms of its existence, and to provide, if it saw fit so to do, that for the continued existence of its franchise the corporation should pay certain sums to the State, fixed by the amount of its yearly outstanding capital stock. *Metropolitan St. Ry. Co.* v. *New York*, 199 U. S. 1, 8, 37 *et seq.*

Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of $40,000,000 of outstanding capital stock, when in fact there was only $10,000,000 of such stock, the assessment by the state board being upon the former sum and made upon the failure of the corporation to report. But we do not think the finding of the state board is conclusive. The tax is to be assessed upon capital actually outstanding. It may well be doubted whether the board had power to tax any other stock. But be that as it may, section 64*a* specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascer-

taining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding.

The amount claimed for the year 1903, it is insisted, had not accrued at the time of the adjudication in bankruptcy, which was on April 23, 1903, the return being made on May 2, 1903, and the assessment was not made until July 1, 1903; but the annual return required to be made to the board, on or before the first Tuesday in May, is upon the basis of the capital stock issued and outstanding the first of January preceding the making of the return. The bankrupt act requires the payment of all taxes legally due and owing. We think the tax thus assessed upon that basis was legally due and owing, although not collectible until after the adjudication.

We reach the conclusion that, under the bankruptcy act these taxes, in the amounts hereinbefore indicated, were entitled to preferential payment in favor of the State of New Jersey, and that the Circuit Court of Appeals erred in reaching a contrary conclusion.

Its judgment will be

Reversed and the cause will be remanded to the District Court for further proceedings in conformity with this opinion.

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

The Chief Justice, Mr. Justice Peckham and myself dissent from the opinion of the court. In our judgment the "taxes" owing by a bankrupt to a State—which section 64*a* of the bankruptcy act provides shall be paid in advance of the payment of dividends to creditors—do not embrace an "annual license fee or franchise tax" (the words of the New Jersey statute), which, strictly, is not a property tax, but only an exaction by the State for the privilege given to a corporation

to do certain business under its charter. We think the bankruptcy act should be so construed. It cannot be otherwise construed without doing gross injustice to those creditors of the bankrupt corporation who have business transactions with it at its place of business. Here the bankrupt corporation did no business in New Jersey. So far as appears, it did not have, nor expect to have, any connection with that State except to become incorporated under its laws. It had its seat of operations and all its tangible property in the State of Illinois. It had no property in New Jersey. Its scheme was to get a charter from New Jersey and then go to another State for purposes of its business. We do not think that Congress intended that in the distribution of the assets of a bankrupt preference should be given to the claims of a State which have their origin in and are wholly based upon a *bargain* with the State whereby certain privileges are granted in exchange for certain payments—privileges which the State may grant or withhold at pleasure. In our opinion the word "taxes" in the bankruptcy act was intended to embrace only burdens or charges imposed *in invitum* and which were in their nature and in reality "taxes," as distinguished from governmental exactions for privileges granted. The claim of New Jersey, whatever its true amount, should not be given priority, but should be placed upon the same footing with claims of other creditors. This view is consistent with the act of Congress.

ALABAMA AND VICKSBURG RAILWAY COMPANY *v.* MISSISSIPPI RAILROAD COMMISSION.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 97. Argued November 13, 14, 1906.—Decided December 17, 1906.

A State may insist upon equality of rates, and although a State may not compel a railroad company to do business at a loss, and even though the company may, against the power of the State, establish rates which afford reasonable compensation, if it voluntarily establishes local rates for some shippers—even though under the guise of a rebilling rate on interstate shipments—it cannot resist the power of the State to enforce the same rate for all shippers—or claim that the rate so fixed by the commission acting under authority of the State deprives it of its property without due process of law.

86 Mississippi, 667, affirmed.

On November 16, 1903, the Railroad Commission of Mississippi, by written order, directed the Alabama and Vicksburg Railway Company, hereinafter called the Vicksburg company, to put into effect, over its line of road from Vicksburg to Meridian, a flat rate of 3½ cents per 100 pounds on grain and grain products. December 3, 1903, an application was made by the railway company to the chancellor of the Fifth Chancery District of the State to restrain the enforcement of this order. July 11, 1904, a temporary injunction issued on the filing of the bill was dissolved and the bill dismissed. On appeal to the Supreme Court of the State this decree of the chancellor was affirmed (86 Mississippi, 667), and thereupon this writ of error was sued out.

Mr. Harry H. Hall for plaintiff in error:

The application for the flat rate of three and one-half cents was made, and its enforcement ordered, solely for the purpose of beating down the fair interstate grain tariff of the railroads operating between Meridian and St. Louis.

The acceptance, whether voluntary or involuntary, of a "rebilling" or "proportionate" interstate rate, is not the acceptance of the same rate as applied to local traffic; and, even though an unremunerative rate were voluntarily adopted by a carrier, such adoption would not justify its imposition by a railroad commission. *Wabash case,* 118 U. S. 557, 576; *Swift & Co.* v. *United States,* 196 U. S. 375 ; *Import Rate case,* 162 U. S. 197; *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447; *L. S. & M. S.* v. *Smith,* 173 U. S. 684-697; *M. & S. L. Ry. Co.* v. *Minn. R. R. Comm.,* 186 U. S. 268.

The rate of three and one-half cents is less than the actual cost of hauling. For a State, under pretense of regulating tariffs, to require a railroad company to carry freight at a loss, would be a taking of private property for public use without compensation and without due process of law. *Minneapolis &c. R. R. Co.* v. *Tompkins,* 176 U. S. 167; *Chicago &c. R. R. Co.* v. *Becker,* 35 Fed. Rep. 883; *Smyth* v. *Ames,* 169 U. S. 466; *Nor. Pac. R.* v. *Keyes,* 91 Fed. Rep. 47; *South Pac. R. Co.* v. *Railroad Com.,* 78 Fed. Rep. 236; *Metropolitan Trust Co.* v. *Houston &c. R. Co.,* 90 Fed. Rep. 683; *Cin. &c. R. Co.* v. *Dey,* 35 Fed. Rep. 866; *St. Louis &c. R. Co.* v. *Gill,* 156 U. S. 649; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362.

To enforce this flat rate of three and one-half cents would be denying to appellant the equal protection of the law. *Cotting* v. *Godard,* 183 U. S. 79; *L. & N. R. R. Co.* v. *McChord,* 103 Fed. Rep. 217.

The order of the Mississippi Railroad Commission directly interferes with interstate commerce. *G., C. & S. F. R. Co.* v. *Hefley,* 158 U. S. 98; *L. & N. R. R. Co.* v. *Eubank,* 184 U. S. 27; *Northern Pac. Ry. Co.* v. *Keyes,* 91 Fed. Rep. 47.

Mr. Hannis Taylor and *Mr. C. H. Alexander,* with whom *Mr. Monroe McClurg* was on the brief, for defendant in error:

A State has power to regulate traffic carried on within its limits, not strictly interstate. *Postal Telegraph-Cable Co.* v. *Charleston,* 153 U. S. 692. A railroad corporation largely en-

gaged in interstate commerce is amenable to state regulation and taxation as to any of its service which is wholly performed within the State, and not as a part of interstate service. *Penna. R. R. Co.* v. *Knight*, 192 U. S. 21; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Kehrer* v. *Stewart*, 197 U. S. 67.

The Supreme Court of Mississippi therefore decreed that the business in question was really intrastate business, and that the order in question made by the Railroad Commission of that State related to a matter within its exclusive jurisdiction. The decree of the lower court was confined to a single subject-matter wholly within the control of the State of Mississippi and not subject to any of the clauses of the Federal Constitution which the plaintiff in error has invoked.

Upon a writ of error this court has no right to review the decision below, upon the ground that the finding was against the evidence or the weight of the evidence. Upon a writ of error, this court cannot review a decision of a question of fact, even where, by the local practice of the State, the law and the facts are tried together by the judge without a jury. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; 6 Ency. of Pl. & Pr. 996.

Even if the commerce in question was interstate, the order of the Railroad Commission prohibiting a discrimination within the State was not illegal.

Plaintiff has failed to overcome the burden which the law puts upon it to establish the fact that the commerce in question is not wholly intrastate. Even if it were otherwise, even if it were clear that the commerce in question was interstate, the order in question which simply undertakes, not to impose a burden, but to remove an unlawful discrimination, is not illegal. Brannon on the Fourteenth Amendment; *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Denver R. R.* v. *Atchison Co.*, 15 Fed. Rep. 650; *Providence Co.* v. *Providence*, 15 R. I. 303; *Shipper* v. *Penna. R. R. Co.*, 47 Pa. St. 338; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650.

The proof in the record does not uphold the contention that

the order in question has had the effect of depriving plaintiff of its property without due process of law, or has deprived it of the equal protection of the law.

When a commission and the officers of a railroad company differ as to the unreasonableness of a rate and there is room for intelligent difference of opinion, the courts will not interfere but will leave it to the test of experience. 23 Am. & Eng. Ency. of Law, 657, citing 29 Florida, 617; 25 Florida, 310.

The presumption of reasonableness is not overcome except by proof of expenses and receipts during an adequate period. 76 Fed. Rep. 186.

Evidence that the rates are lower than that of other points or on other roads is not competent. Conditions may be different. *Interstate Com. Com.* v. *Nashville &c. R. R. Co.*, 120 Fed. Rep. 934.

The case must be a clear one to warrant interfering with rate fixed by the commission. *Chicago* v. *Tompkins, supra.*

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

The facts in this case are few. The company made what it called a "rebilling rate" of 3½ cents per 100 pounds on grain and grain products shipped from Vicksburg to Meridian, that rate, however, being applicable only in case of shipments over the Vicksburg, Shreveport & Pacific Railroad, hereinafter called the Shreveport road. Instead of being enforced as solely a rebilling rate, the Vicksburg merchant who received a carload of grain or grain products over the Shreveport road was permitted to either forward it over the plaintiff's road to Meridian, or at any time within ninety days in lieu thereof send a similar carload, no matter whence received, from Vicksburg to Meridian at the same rate. It was in consequence of this effort on the part of the plaintiff to favor shippers who brought grain to Vicksburg over the Shreveport road that the

Railroad Commission made the order declaring that all grain products shipped from Vicksburg to Meridian should be at the same rate, 3½ cents per 100 pounds. The order of the commission merely meant this: If a Vicksburg merchant who received a carload of grain over the Shreveport road was permitted by the railway company to ship over the Vicksburg road to Meridian any other carload at 3½ cents per 100 pounds, every other merchant in Vicksburg should be permitted to ship at the same rate, although he had had no dealings with the Shreveport company. It is unnecessary to inquire whether the order could be sustained if it appeared that the plaintiff received only 3½ cents as its share of a total rate on through shipments to Meridian from the Northwest by the Shreveport road; for here, under the guise of a rebilling rate, the Vicksburg merchant who dealt with this Western road was given a rate of 3½ per cent on any grain that he might see fit to ship to Meridian. While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate the commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the State may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi-public service. When voluntarily the Vicksburg company established a local rate of 3½ per cent from Vicksburg to Meridian for those who had within 90 days made a shipment over the Shreveport road, it estopped itself from complaining of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not.

We are not unaware of our decision in *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, in which, on review of the Interstate Commerce Act, we held that

a mere inequality of rate was not always proof of undue discrimination, but we were passing upon an act of Congress and seeking to ascertain its intent and scope. There was no intimation that it was not within the power of Congress to prescribe an absolute equality of rate. In the present case we are not construing an act of the State of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters are settled by the decision of the Supreme Court of the State, and the question we have to consider is the power of the State to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a State has such power cannot be doubted, and it cannot be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a State may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the State, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers it cannot resist the power of the State to enforce the same rates for all. The State may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies.

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is

Affirmed.

FREDERIC L. GRANT SHOE COMPANY *v.* W. M. LAIRD COMPANY.

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

No. 63. Argued October 26, 1906.—Decided December 17, 1906.

A judgment of the bankruptcy court that a person against whom a petition has been filed is or is not a bankrupt, based upon the verdict of a jury demanded as of right under § 19 of the bankruptcy law, can only be reviewed by this court by writ of error and not by appeal.

See 125 Fed. Rep. 576; 130 Fed. Rep. 881.

In July, 1903, the W. M. Laird Company of Pittsburg, Pennsylvania, commenced proceedings in the District Court of the United States for the Western District of New York to cause the Frederic L. Grant Shoe Company, a corporation doing business in Rochester, New York, to be adjudicated involuntary bankrupts. The petition was solely made by the Laird Company, it averring, among other things, that the shoe company had less than twelve creditors, and that the petitioner was a creditor and had provable unsecured claims against the shoe company amounting in the aggregate to more than five hundred dollars. The nature of the claim was detailed at length, and showed that it was one for unliquidated damages aggregating $3,732.80, asserted to have been suffered by reason of breaches of an alleged express warranty in the sale of merchandise. The alleged bankrupt answered, denying its insolvency and the commission of any of the acts of bankruptcy averred in the petition, and demanded a trial by jury of the said issues. It also denied being indebted in any amount to the petitioner.

Soon afterwards a motion was made to dismiss the petition on the ground that, because of the nature of the claim held

by the Laird Company, that company was not a creditor and the holder of a provable claim for any amount against the shoe company within the meaning of subdivision *b* of section 19 of the bankruptcy act, and consequently was not entitled to file a petition in bankruptcy against the alleged debtor. The motion to dismiss was denied by the district judge. 125 Fed. Rep. 576. In the order entered it was directed that the claim of the petitioner be liquidated by the jury at the jury trial demanded by the alleged bankrupt for the determination of the issues as to insolvency and the commission of acts of bankruptcy. On the petition of the alleged bankrupt to review this order it was affirmed by the Circuit Court of Appeals for the Second Circuit. 130 Fed. Rep. 881.

A trial of the issues thus raised was had before a jury in May, 1905, and, as recited in the record, "at the close of all the evidence the court having directed the jury to find a verdict that the said alleged bankrupt did, within four months of the filing of the petition herein, commit an act of bankruptcy, in that it transferred a portion of its property to the German-American Bank of Rochester, one of its creditors, with the intent to prefer said German-American Bank over its other creditors, and that at the time of said transfer said alleged bankrupt was insolvent, and that the petitioner has a provable claim against said alleged bankrupt for damages for the breach of warranty in the sale of shoes, and that the amount of such claim of the petitioner is the sum of $3,454.00, the jury found a verdict accordingly." An order was thereupon entered adjudicating the shoe company a bankrupt, and declaring that the claim of the Laird Company was liquidated at the sum of $3,454.00. The present appeal was then taken.

For the purpose of the appeal, and reciting that it was pursuant to the requirements of General Order in Bankruptcy No. 36, the trial judge made and filed findings of fact and conclusions of law. A single question of jurisdiction was also certified as having been raised at the opening of the hearing in September, 1905, by motion to dismiss, substantially

upon the grounds urged in the previous motion to dismiss, which had been passed upon by the Court of Appeals.

Mr. P. M. French for appellant.

Mr. Hiram R. Wood for appellee.

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

Without considering whether the shoe company, appellant in this court, is not concluded by the decision of the Circuit Court of Appeals upon the petition asking a review of the order of the District Court in bankruptcy, denying the original motion to dismiss, we do not pass upon the question presented by this appeal, as we find we are without authority to do so. *Elliott* v. *Toeppner*, 187 U. S. 327. In the cited case, answering a question certified from the United States Circuit Court of Appeals for the Sixth Circuit, it was held that a judgment that a person is not a bankrupt, entered by a court of bankruptcy on a verdict of not guilty in a trial by jury, demanded as of right under section 19 of the bankruptcy act, was reviewable only by writ of error. Section 25*a* of the Bankruptcy Act, which authorizes appeals, as in equity cases, to be taken to the Circuit Court of Appeals, among other cases, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, was expressly considered, and it was held that the provision only applied to judgments adjudging or refusing to adjudge the defendant a bankrupt, "when a trial by jury had not been demanded, and where the court of bankruptcy proceeded on its own findings of fact." The reasoning upon which the decision was based was in substance that as in the character of proceeding under consideration the right to a trial by jury was absolute, such a trial was a trial according to the course of the common law, and judgments therein rendered are revisable only on writ of error (p. 332). As in

the case at bar a jury was demanded, the trial was before such jury, and their verdict determined the questions at issue, it follows that the record should have been brought to this court by writ of error and not by appeal.

Appeal dismissed.

WESTERN UNION TELEGRAPH COMPANY *v.* HUGHES.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 119. Argued December 6, 1906.—Decided December 17, 1906.

Where the highest court of the State dismisses the writ of error to the trial court solely and expressly because of lack of jurisdiction, the result of the ruling is to determine that the trial court is the final court where the question could be decided, and the writ of error from this court should be directed to the trial court, and not to the highest court, although that court may be clothed with jurisdiction of questions of state and Federal constitutionality of state laws, and may have discussed, and found without merit, the constitutional question.

104 Virginia, 240, writ of error dismissed.

THE facts are stated in the opinion.

Mr. Rush Taggart, with whom *Mr. John F. Dillon, Mr. George H. Fearons* and *Mr. Francis Raymond Stark* were on the brief, for plaintiff in error.

There was no appearance for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

By statutes of the State of Virginia a liability to forfeit the sum of one hundred dollars was imposed upon a telegraph company for an omission to promptly transmit and deliver telegrams received by it. Code of Virginia, 1887, secs. 1291,

1292. On November 2, 1903, Hughes, the defendant in error, handed to the Western Union Telegraph Company, at its office in Danville, Virginia, a message to be transmitted by wire to Pocahontas, Virginia, and there delivered to the addressee. In regular course such message would have gone by way of Bluefield, West Virginia. It reached that point, but was not sent further. For failure to make delivery Hughes sued the telegraph company in the Corporation Court of the city of Danville to recover the statutory penalty, and obtained a judgment. Error was prosecuted to the Supreme Court of Appeals of Virginia, upon the contention that the transmission of the message in question was interstate commerce and not subject to the statutory regulations of Virginia, heretofore referred to. The appellate court, however, held (104 Virginia, 240) that the case was ruled by a prior decision, *Western Union Telegraph Co.* v. *Reynolds*, 100 Virginia, 459, and that such decision had not been overruled by the decision of this court in *Hanley* v. *Kansas City So. R. Co.*, 187 U. S. 617, and being of opinion, as recited on its journal, "that the writ of error was improvidently awarded," and that it had "no jurisdiction to entertain the same," dismissed the writ of error.

Treating the order of dismissal as a final judgment, we are now asked on this writ of error to reverse the ruling of the Supreme Court of Appeals of Virginia. This, however, we cannot do. It is immaterial that the Supreme Court of Appeals was vested by the state constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of Virginia or of the United States, or that in the opinion delivered by the court it discussed the Federal question and declared it to be without merit. The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views

in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and, hence, the writ of error should have been directed to that court. *Missouri, K. & T. Ry.* v. *Elliott,* 184 U. S. 530, 539.

Writ of error dismissed.

REARICK *v.* PENNSYLVANIA.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 47. Argued October 18, 19, 1906.—Decided December 17, 1906.

Where orders are given for goods sold in a State by an agent of a person employed to solicit them in another State, and the purchaser is not bound to pay for the goods until delivery and unless according to sample, the goods sent specifically to the customer in fulfillment of such orders are, until actually delivered, within the protection of the commerce clause of the Constitution, and a municipal ordinance requiring a license fee for the solicitation of orders for delivering goods not of the parties' own manufacture is void as an interference with interstate commerce against such an agent.

The facts are stated in the opinion.

Mr. Campbell M. Voorhees for plaintiff in error, submitted: It is a principle established beyond controversy that the negotiation of sales of goods that are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce, and is protected from local interference, burdens, or tax, by clause 3, § 8, Art. I, Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian

tribes. *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Leloup* v. *Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburg* v. *Hennick*, 129 U. S. 140; *McCall* v. *California*, 136 U. S. 104; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Brennan* v. *Titusville*, 153 U. S. 289.

The delivery of goods to a buyer at his residence in one State, that have been sent in pursuance of contract by a seller in another State, is interstate commerce and subject to no state nor local burdens. The right to solicit orders implies the obligation and the right to deliver the goods in the manner called for by the contracts; and the means by which the delivery is made cannot be controlled by the States. *Bowman* v. *Railroad Co.*, 125 U. S. 465, 479; *State Freight Tax*, 15 Wall. 232, 275; *Rhodes* v. *Iowa*, 170 U. S. 412; *Caldwell* v. *North Carolina*, 187 U. S. 622; *N. & W. R. R. Co.* v. *Sims*, 191 U. S. 441; *American Express Co.* v. *Iowa*, 196 U. S. 133.

The ordinance in question is unconstitutional and void as discriminating between persons and denying the equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of § 1 of the Fourteenth Amendment. *State* v. *Whitcomb*, 99 N. W. Rep. 468; *State* v. *Wagner*, 69 Minnesota, 205; *Flatau* v. *Mansfield*, 14 Ohio C. C. 596; *Conolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Mr. Harry S. Knight and *Mr. S. P. Wolverton* for the defendant in error, submitted:

The facts bear every test of a sale in Pennsylvania and none of a sale in Ohio. The sale did not take place until the goods were delivered by Rearick at the residences of the several purchasers, and he, Rearick, received the money therefor. Rearick was therefore selling goods at retail from house to house in Sunbury and was engaged solely in intrastate commerce, and, even though delivery was made in the original package, Rearick and his goods would, nevertheless, under

the decisions in *Woodruff* v. *Parham*, 8 Wall. 123; and *Hinson* v. *Lott*, 8 Wall. 148; and other cases, be subject to a general state tax. *Commonwealth* v. *Holstine*, 132 Pennsylvania, 357; *Commonwealth* v. *Garbracht*, 96 Pennsylvania, 449; *Commonwealth* v. *Hess*, 148 Pennsylvania, 98.

But if Rearick, the plaintiff in error, at the time of delivering the goods was engaged in interstate commerce, still the Sunbury ordinance in question was not an unconstitutional regulation of interstate commerce; and did not violate Clause 3, § 8, Art. I, of the Federal Constitution, providing that Congress shall have power to regulate commerce with foreign nations and among the several States. Cases *supra* and *American Steel & Wire Co.* v. *Speed*, 192 U. S. 518; *Emert* v. *Missouri*, 156 U. S. 296; *Brown* v. *Houstin*, 114 U. S. 622.

The Sunbury ordinance in question does not violate § 1 of the Fourteenth Amendment by discriminating in favor of producers. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here upon a writ of error to the Superior Court of Pennsylvania, an appeal to the Supreme Court of the State having been disallowed by the last-named court. The Superior Court affirmed a conviction of the plaintiff in error for violating an ordinance of the Borough of Sunbury, which made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by travelling from house to house, foreign or domestic goods, not of the parties' own manufacture or production, without a license for which a large fee was required. 26 Pa. Sup. Ct. Rep. 384. In the Court of Quarter Sessions, where the plaintiff in error was convicted, the case was heard upon an agreed statement of facts. Upon these facts the plaintiff in error asked for a ruling that his acts were done in carrying on interstate commerce and that the ordinance was void as to him, under Clause 3, Section 8, Article I, of the

Constitution, the commerce clause; and saved his rights. The Fourteenth Amendment also was relied upon, but it is unnecessary to state details concerning that.

The following is a shortened statement of the facts agreed. An Ohio corporation employed an agent to solicit in Sunbury retail orders to the company for groceries. When the company had received a large number of such orders it filled them at its place of business in Columbus, Ohio, by putting up the objects of the several orders in distinct packages, and forwarding them to the defendant by rail, addressed to him "For A. B.," the customer, with the number of the order also on the package for further identification. The company ultimately kept the orders, but it kept no book accounts with the customers, looking only to the defendant. The defendant alone had authority to receive the goods from the railroad, and when he received them he delivered them, as was his duty, to the customers, for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In that or other cases of non-delivery the defendant returned the goods to Columbus. No shipments were made to the defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms, they were tagged and marked like the other articles, according to the number ordered, but they then were tied together into bundles of about a dozen, wrapped up conveniently for shipment. The defendant had no license, but relied upon the invalidity of the ordinance, as we have said.

If the acts of the plaintiff in error were done in the course of commerce between several States, the law is established that his request for a ruling was right, and that he should have been discharged. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497; *Leisy* v. *Hardin*, 135 U. S. 100; *Caldwell* v. *North Carolina*, 187 U. S. 622. It will be seen from the insertion of the statement concerning the brooms that a ground

relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them, were not in the original packages when delivered, and that therefore the case did not fall within the decisions last cited, but rather within *Austin* v. *Tennessee*, 179 U. S. 343, *May* v. *New Orleans*, 178 U. S. 496, and *Cook* v. *Marshall County*, 196 U. S. 261. In other words, it was contended that the brooms before they were sold had become mingled with, or part of, the common mass of goods in the State, and so subject to the local law. But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing State goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. Hence the prosecution, whatever its assumption on the point last mentioned, sought to show that there was no sale until the goods were delivered and the cash paid for them. The Superior Court contented itself with the suggestion that the contract would have been satisfied by the delivery of articles corresponding to sample, although bought at the next door. The argument submitted to us goes farther, and affirms that the order was not accepted and did not bind the corporation until the delivery took place.

The answer to the latter of the two positions just stated is simple. The fair meaning of the agreed fact that the orders were given to agents employed to solicit them, is that the company offered the goods and that the orders were acceptances of offers from the other side. If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. It is for the prosecution to make out its case. We may mention here in parenthesis that of course it

does not matter to the question before us that the contract was made in Pennsylvania. *Brennan* v. *Titusville*, 153 U. S. 289. The other suggestion, that the company would have been free to deliver any articles equal to sample, as well if bought in Pennsylvania as if coming from Ohio, of course assumes that there was a contract. With regard to this argument it might be an interesting question whether the shipments described amounted to authorized appropriations of the goods to the contracts, notwithstanding the fact that the deliveries were to be only for cash; but we are not required to go into such niceties. The decisions already in the books go as far as it is necessary for us to go in order to decide this case.

"Commerce among the several States" is a practical conception not drawn from the "witty diversities" (Yelv., 33) of the law of sales. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In *Brennan* v. *Titusville*, 153 U. S. 289, pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed. In *American Express Co.* v. *Iowa*, 196 U. S. 133, 143, that question was referred to only to be waived. In *Caldwell* v. *North Carolina*, 187 U. S. 622, the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent on their arrival, and that the pictures, then for the first time, were put into their proper frames, and, for all that appears, then for the first time appropriated to specific purchasers. In the court below all the judges agreed that the title did not pass until delivery. 127 N. Car. 521, 526, 527. This court intimated

nothing to the contrary. On the special verdict it well might be that the sale was by sample, as in *Brennan* v. *Titusville.* It was decided that the intervention of an agent made no difference in the result. The Superior Court distinguished that case as one that necessarily involved interstate commerce because it called for the skill of the seller, but no such fact appears in the case or was referred to as a ground of decision, and there is no sufficient warrant for assuming it to be true.

Some argument was made, to be sure, that even if the defendant was engaged in interstate commerce when he delivered the goods, still the ordinance bound him. *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, was especially relied upon. But that decision did not modify the cases that we have cited. It dealt with a case where a mass of nails and iron wire was collected at Memphis from other States, by a manufacturer, for all purposes; some of the goods to be sold on the spot, some ultimately to be forwarded to purchasers in other States, but no package being consigned to or intended for any special customer, or free from the chance of being sold by a new bargain in Tennessee. Under such circumstances the goods were liable to taxation in that State. The distinction between that case and the present does not need further emphasis. In view of the many decisions upon the matter we deem further argument unnecessary to show that the judgment below was wrong.

Judgment reversed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* McKENDREE.

ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, STATE OF KENTUCKY.

No. 13. Submitted December 14, 1905; Restored to docket December 18, 1906; Resubmitted April 16, 1906.—Decided December 17, 1906.

Where plaintiff bases his claim, not on common-law principles, but solely on violation of an order of a department of the Federal Government and the certificate of the court below clearly shows that defendant by answer and on the trial asserted the unconstitutionality of the statute on which the order was based, and also the illegality of the order, a verdict for the plaintiff necessarily decides that the statute and order were constitutional and legal, and the defendant has raised a Federal question which was decided against him, and which was not imported into the record merely by the certificate, and this court has jurisdiction under § 709, Rev. Stat., to review the judgment of the state court.

Without deciding whether the Cattle Contagious Disease act of February 2, 1903, 33 Stat. 1264, is or is not unconstitutional as delegating power solely vested in Congress to the Secretary of Agriculture, that act confers no power on such secretary to make any regulations concerning intrastate commerce over which Congress has no control.

As Order of the Secretary of Agriculture, No. 107, purporting to fix a quarantine line under the Cattle Contagious Disease act applies in terms to all shipments whether interstate or intrastate it is void as an attempt to regulate intrastate commerce, notwithstanding it is the same line as that fixed for a similar purpose as to intrastate shipments by the State through which it passes.

While in a proper case Federal authorities may adopt a quarantine line adopted by a State, where the secretary makes regulations adopting it as applying to all commerce whether interstate or intrastate, and nothing on the face of the order indicates whether he would have made such an order if limited to interstate commerce, the order is not divisible and this court cannot declare that it relates solely to interstate commerce but must declare it void as an entirety.

Defendant in error, plaintiff below, brought an action against the railroad company as a common carrier operating a railroad through Carlisle County, Kentucky, setting forth

that the plaintiff received certain cars of infected cattle and transported them to Arlington, Carlisle County, Kentucky, where they were unloaded July 13, 1903, and placed in stock-pens, where the cattle of the plaintiff, rightfully running loose upon the commons, could and did come in contact with the infected cattle and contracted Texas cow-fever. That the company knew or could have known, by the exercise of reasonable care, that the cattle had infectious germs when unloaded, having been brought from an infected district, in conflict with well-known quarantine laws.

A general demurrer was interposed by defendant and overruled.

After an answer of general denial the defendant filed an amended answer:

"Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, entitled 'An act to enable the Secretary of Agriculture to more effectually suppress and prevent spread of contagious and infectious diseases of live stock, and for other purposes,' which act is published and contained in volume 32, United States Statutes at Large, beginning at page 791, and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minnesota, beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned, approved February 2, 1903.

"The defendant says that said act of Congress hereinbefore mentioned, and said regulations adopted by the Secretary of Agriculture, as hereinbefore stated, are each and all of them repugnant to and in contravention of the Constitution of the United States of America, and in excess of the powers of Congress and of the Secretary of Agriculture under the Con-

stitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulation, or any of them, and this defendant, as permitted by section 709 of the Revised Statutes of the United States, hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States, to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

A demurrer was filed by the plaintiff to the amended answer.

The plaintiff filed an amended petition, the affirmative allegations of which were controverted.

This amended petition sets forth:

"The plaintiff, J. U. McKendree, comes, and by leave of the court amends his petition, and says that the defendant, Illinois Central Railroad Company, on the thirteenth day of June, 1903, received one car of cattle at Grand Junction, Tennessee, to be transported to the town of Arlington, Kentucky, and on the thirteenth day of said month unloaded them in the stock pens in said town.

"That the town of Arlington is a small town, located on defendant's road in this, Carlisle County, and defendant's stock-pens are located adjacent to the public highway and commons, and that Grand Junction, Tennessee, is located on defendant's road and south of the quarantine line that was established on the fourteenth day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, 'beginning on the Mississippi River at the southeast corner of the State of Missouri at the western boundary of Tennessee. [Here follows a description of the quarantine line through the body of the State of Tennessee, as set forth in amendment No. 4 to B. A. I.,

Order No. 107.] And that the defendants received said cattle south of said quarantine line, and transported them north and out of a quarantine district, and south of the said quarantine line, and transported them north through the State of Tennessee into this county and State, and unloaded them in the town of Arlington, and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow-fever that said cattle had on them when put in the pens as aforesaid; that said stock-pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow-fever from said germs produced from said cattle while in said stock-pens, to the damage of plaintiff.

"Wherefore he prays as in his original petition."

The court sustained the demurrer to the amended answer of the defendant, and upon the issue joined the case was sent to the jury. A verdict and judgment were rendered against the railroad company and in favor of the plaintiff below.

There was no dispute as to the transportation of the cattle from a point south of the quarantine line to a point north thereof, and the placing of them in pens at Arlington. The court, over the defendant's objection, submitted the case to the jury upon the questions of whether the transported cattle were infected, and, if so, whether the plaintiff's cattle contracted the disease from them while they were in the pens of the defendant company at Arlington.

The presiding judge of the Carlisle Circuit Court filed the following certificate:

"I, R. J. Bugg, sole presiding judge of the Circuit Court of Carlisle County, in the State of Kentucky, now and at the time of the trial of the above-entitled cause, do hereby certify:

"That upon the trial of said cause the defendant, Illinois Central Railroad Company, relied for its defense upon certain rights, privileges and immunities specially claimed by it under

the Constitution of the United States of America, and it insisted upon its said rights, privileges and immunities throughout the trial of said action, and in the assertion of them it claimed and contended that the various regulations and orders made and promulgated by the Secretary of Agriculture, and offered in evidence on behalf of the plaintiff herein over the objections of defendant, were unconstitutional, null and void, as being in excess of the powers conferred, or which could be conferred, by act of Congress upon the Secretary of Agriculture under the Constitution of the United States of America, and that the said act of Congress approved February 2, 1903, under which the Secretary of Agriculture assumed to promulgate said orders and regulations, was itself unconstitutional, null and void, as being in conflict with the Constitution of the United States of America and in excess of the powers conferred by it upon the Congress.

"Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agriculture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said regulations or orders, on the ground that the said regulations or orders did not assume or attempt to give, and that the said act of Congress did not assume or attempt to give, to the plaintiff herein, or to any other in like situation, a remedy by way of civil action against the defendant herein for its alleged breach of any of said regulations or orders made or promulgated by the Secretary of Agriculture, and throughout the trial of said action the defendant, Illinois Central Railroad Company, specially set up and claimed, even if said act of Congress and said regulations and orders were valid under the Constitution and laws of the United States, still it had a right, privilege or immunity under the said act of Congress or the said regulations or orders from any liability to the plain-

tiff, J. U. McKendree, in a civil action for damages claimed on account of its alleged breach of said regulations or orders.

"In allowing the said regulations or orders of the Secretary of Agriculture to be given in evidence before the jury and in overruling the motion of defendant to peremptorily instruct the jury to return a verdict in its favor, the Carlisle Circuit Court disallowed the various contentions made as above stated on behalf of the Illinois Central Railroad Company, and denied the claims made by it of the rights, privileges or immunities specially claimed by it as above stated, and held that the various claims made by it were not well founded in law under the Constitution and laws of the United States of America, and the claims of the plaintiff herein were established and a judgment in his favor rendered solely by reason of defendant's alleged breach of said regulations and orders."

The testimony tended to show that the cows of the plaintiff came in contact with cattle transported by the railroad company from a point south of the quarantine line set forth in the amended petition.

On March 13, 1903, the Secretary of Agriculture, acting under cover of the act of February 2, 1903, 32 Stat. 791, entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," established a quarantine line from west to east throughout the United States, from California to Maryland, and forbidding the transportation of cattle from points south of the line to points north of the line, except in the manner in the said order specified.

Section 9 of the order provided: "9. Violation of these regulations is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

By amendment of March 14, 1904, the Secretary of Agriculture adopted as a quarantine line a line running from west

to east in the State of Tennessee, from the south of which the cattle said to have infected those of the plaintiff were transported and placed in pens in a manner not in conformity with the order.

Mr. J. M. Dickinson, Mr. Edmund F. Trabue and *Mr. Blewett Lee*, for plaintiff in error:

Congress had no power to delegate to an executive officer, or any other officer, the right to prescribe an offense against the United States or a penalty for commission of such offense.

Congress being entrusted by the Constitution with the legislative power of the United States, must exercise, and not delegate it; if it could delegate the power, it could not confide it to an executive officer. See *Hayburn's case*, 2 Dallas, 410; *Morrill* v. *Jones*, 106 U. S. 466; *Field* v. *Clark*, 143 U. S. 649, 692; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Waters*, 133 U. S. 208, 213; *Ex parte Kollock*, 165 U. S. 526, 538; *United States* v. *Blasingame*, 116 Fed. Rep. 654; *Dent* v. *United States*, 71 Pac. Rep. 920; *Adams* v. *Burdge*, 95 Wisconsin, 390; *King* v. *Concordia Fire Ins. Co.*, 103 N. W. Rep. 616.

If Congress had power to delegate such authority to an executive officer it must be exercised within the constitutional limits of congressional power, which in this instance is circumscribed by the limits of the authority of Congress to regulate commerce among the several States.

Assuming the power of Congress to clothe the Secretary of Agriculture with the legislative power which he assumed to exercise in the premises, and treating the Secretary's regulation as a law, the action of the Secretary in adopting a quarantine line, theretofore established by the State of Tennessee, extending through the State from west to east, and forbidding transportation from points south to points north of the line, is invalid because an attempt to regulate purely intrastate commerce. When a provision of an act of Congress in assuming to regulate commerce covers as well intrastate as interstate

commerce, the act of Congress on the two classes of commerce, being inseparable, fails *in toto*.

Where a statute is couched in terms so broad as to exceed the limits of the power of the legislature to enact it, the court will not by construction limit the statute to the scope which might constitutionally be given it by the legislature, but will hold the statute unconstitutional. *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82, 98; *Allen* v. *Louisiana*, 103 U. S. 80, 85; *United States* v. *Harris*, 106 U. S. 629, 641; *Poindexter* v. *Greenhow*, 114 U. S. 270, 305; *Spreigue* v. *Thompson*, 118 U. S. 90, 94; *Baldwin* v. *Franks*, 120 U. S. 678, 685; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *James* v. *Bowman*, 190 U. S. 127, 140; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82, 98, 99.

A just construction of the acts of Congress above cited under the regulations of the executive officers aforesaid enacted pursuant to such acts of Congress, if valid at all, are enforceable only through the imposition of penalties, and confer no right of private action upon any individual supposed to be injured by violation of such statutes or regulations.

No private right of action for damages supposed to have been sustained by violation of the acts or regulations is conferred by Congress. None, therefore, exists. When Congress intends private action for damages to exist it so provides, as in the interstate act. The right of action arising out of an act of Congress is a Federal right, and must be conferred by Congress or it does not exist. The courts will not imply for doing an act forbidden by act of Congress a penalty not therein provided by adjudicating the existence of a private right of action in favor of someone supposed to be injured by the act done.

The rule in the Federal courts is that where a statute changing the common law prescribes a penalty, no civil action can be maintained for doing the acts which give rise to the penalty. *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 238;

Haycraft v. *United States*, 22 Wall. 81, 98; *Pollard* v. *Bailey*, 20 Wall. 520, 527; *Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *Nat. Bank*, 98 U. S. 555; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Carter* v. *Carusi*, 112 U. S. 478, 483; *McBrown* v. *Scottish Investment Co.*, 153 U. S. 318, 325; *Central Stock Yards* v. *L. & N. R. Co.*, 112 Fed. Rep. 823, 826.

The Attorney General and *The Solicitor General* for the United States, at the suggestion of the court, there being no brief filed for defendant in error:

Under the decisions of this court the alleged Federal question referred to in the certificate was not raised in the court below at the proper time and in the proper way. *Speer* v. *Illinois*, 123 U. S. 181; *Lawler* v. *Walker*, 14 How. 152; *Brooks* v. *Missouri*, 124 U. S. 394; *Leeper* v. *Texas*, 139 U. S. 467; *Powell* v. *Brunswick County*, 150 U. S. 439; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 69; *Yazoo and Mississippi Railroad Co.* v. *Adams*, 180 U. S. 41; *Chapin* v. *Fye*, 179 U. S. 127.

Defendant's alleged right, under the act of February 2, 1903, to be exempt from a civil action by an individual for special damages occasioned him by a violation of the regulations of the Secretary of Agriculture made in pursuance thereof, is frivolous and fictitious, and made solely for the purpose of obtaining a review by this court of the constitutional questions involved. *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 533.

A real, not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87.

The act of February 2, 1903, so far as it is necessary to be considered, is constitutional and valid. It gives specific authority to the Secretary of Agriculture to do as he did in B. A. I. order, No. 107, dated March 13, 1903, namely, designate an area within the United States which he believed to

be infected, and make rules and regulations concerning the transportation of cattle therefrom in interstate or foreign commerce.

This is no unconstitutional delegation of authority. In furtherance of the clearly expressed purpose of the act, that the spread of contagious and infectious diseases of live stock should be effectually suppressed, Congress authorized the Secretary of Agriculture to make rules and regulations concerning the transportation in interstate and foreign commerce of live stock coming from places within the United States which he believed to be infected, and declared that such rules and regulations should have the force of law. In necessary effect this was a prohibition upon the transportation in interstate or foreign commerce of cattle coming from such infected areas, except in accordance with the rules and regulations prescribed by the Secretary.

The power conferred upon the Secretary to make such rules and regulations is only administrative. *Buttfield* v. *Stranahan*, 192 U. S. 470, which sustained an act of Congress forbidding, in broad terms, the importation of tea inferior in purity, quality, and fitness for consumption to the standards authorized to be fixed by the Secretary of the Treasury.

The regulations of the Secretary of Agriculture, being confined to the subject of interstate commerce, were constitutional and valid.

It is immaterial whether a quarantine line established by Congress or under its authority for the regulation of interstate commerce runs through the center of a State, so long as interstate transportation is alone intended to be affected. In order adequately to police and protect interstate commerce Congress may regulate and control intrastate commerce going through the channels of interstate commerce. That question is not, however, presented in this case, since § 1 of the act of Congress only directed the Secretary of Agriculture to make rules and regulations covering the transportation in interstate commerce and foreign commerce of live stock coming from

infected areas, and the regulations, properly construed, are also limited to interstate transportation.

In the original order of March 13, 1903, the quarantine line established by the Secretary was confined to state boundaries, hence interstate commerce alone was regulated thereby.

By necessary implication the rules and regulations prescribed by the order in question were intended to apply, in case the quarantine line should be changed so as to run through a State, only to interstate commerce, as in the case of the original line. This was the practical interpretation put upon said order and its amendments by the Department. In the present case the cattle in question were brought from Grand Junction, Tennessee, a point below the quarantine line, to Arlington, in Kentucky, and hence were being transported in interstate commerce.

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

The Government objects to the jurisdiction of this court to entertain the writ of error, upon the ground that no Federal question is raised within the intent and meaning of section 709 of the Revised Statutes. But we are of opinion that such questions were raised, and that we are required upon this record to review the judgment of the state court.

An inspection of the record shows that the case as made by the plaintiff below upon the amended petition was to recover damages for the infection of his cattle, because of coming in contact with cattle transported by the railroad company from a point south to a point north of the quarantine line established by the Secretary of Agriculture, in a manner violative of regulations for the transportation and keeping of cattle established by the Secretary's order.

It was not an action to recover for negligence upon common-law principles. The complaint was amended in such form as to count upon the supposed right of action accruing to the

plaintiff because of the violation of the department's order. The demurrer of the plaintiff to the answer of the railroad company, setting forth the unconstitutionality of the law and the action of the Secretary thereunder, was sustained.

The certificate of the court below is given as to the extent and character of the Federal rights and immunities claimed by the defendant, and clearly states that the defendant alleged the unconstitutionality of the statute and order, that the order was in excess of the power given the Secretary, and that the statute gave no remedy in damages.

The court left the case to the jury under instructions to find a verdict for the plaintiff if it had been shown that the plaintiff's cattle were infected by coming in contact with those transported by the railroad company. It therefore necessarily decided that the act was constitutional and gave a right to recover damages for breach of the requirements of the Secretary made in pursuance thereof, and that the Secretary's order was not in excess of the statutory power given. The amended complaint, as we have said, counted upon the liability in this form. The traverse of the amended complaint made the issue. The certificate did not originate the Federal question. "It is elementary that the certificate of a court of last resort may not import a Federal question into a record where otherwise such a question does not arise; it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists." *Rector* v. *City Deposit Bank,* 200 U. S. 405, 412; *Marvin* v. *Trout,* 199 U. S. 212, 223.

This case comes within the principle decided in *Nutt* v. *Knut,* 200 U. S. 12, in which the court said:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his ad-

versary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. *Logan County Nat. Bank* v. *Townsend,* 139 U. S. 67; *Railroads* v. *Richmond,* 15 Wall. 3; *Swope* v. *Leffingwell,* 105 U. S. 3; *Anderson* v. *Carkins,* 135 U. S. 483, 486; *McNulta* v. *Lochridge,* 141 U. S. 327; *Metropolitan Nat. Bank* v. *Claggett,* 141 U. S. 520; *McCormick* v. *Market Nat. Bank,* 165 U. S. 538, 546; *California Nat. Bank* v. *Kennedy,* 167 U. S. 362."

To the same effect is *Rector* v. *City Deposit Bank,* 200 U. S. *supra.*

Upon this record, read in the light of the certificate, we think the defendant raised Federal questions as to the constitutionality of the law, and, if constitutional, whether the Secretary's order was with the power therein conferred, and the right to a personal action for damages in such manner as to give this court jurisdiction of them under section 709, Rev. Stat.

The railroad company, by the proceedings and judgment in this case, was denied the alleged Federal rights and immunities specially set up in the proceedings, in the enforcement of a statute and departmental orders averred to be beyond the constitutional power of Congress and the authority of the Secretary of Agriculture, and in the rendition of a judgment for damages in an action under the statute and order, in opposition to the insistence of the defendant that, even if constitutional, the statute did not confer such power or authorize a judgment for damages.

The constitutional objections urged to the validity of the statute of February 2, 1903, and the Secretary's order, No. 107, purporting to be made under authority of the statute, raise questions of far-reaching importance as to the power of Congress to authorize the head of an executive department of the Government to make orders of this character, alleged to be an attempted delegation of the legislative power solely vested by the Constitution in Congress. These questions, it is suggested by the counsel for the Government, have become

academic by reason of the passage of the later act of March 3, 1905, to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes. 33 Stat. 1264, U. S. Comp. Stat., 1901, Supplement of 1905, p. 617.

But we are of opinion that it is unnecessary to determine them in this case. We think the defendant was right in the contention that, if the act of February 2, 1903, was constitutional, and rightfully conferred the power upon the Secretary of Agriculture to make orders and regulations concerning interstate commerce, there was no power conferred upon the Secretary to make regulations concerning *intra*state commerce, over which Congress has no control, and concerning which we do not think this act, if it could be otherwise sustained, intended to confer power upon him. Assuming, then, for this purpose, that the Secretary was legally authorized to make orders and regulations concerning interstate commerce, we find that on March 13, 1903, he adopted, in the Order number 107, the following regulation:

"2. Whenever any State or Territory located above or below said quarantine line, as above designated, shall duly establish a different quarantine line, and obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of said State or Territory, and said last above-mentioned line and the measures taken to enforce it are satisfactory to the Secretary of Agriculture, he may, by a special order, temporarily adopt said State or Territory line.

"Said adoption will apply only to that portion of said line specified, and may cease at any time the Secretary may deem it best for the interests involved, and in no instance shall said modification exist longer than the period specified in said special order; and, at the expiration of such time, said quarantine line shall revert, without further order, to the line first above described.

"Whenever any State or Territory shall establish a quarantine line, for above purposes, differently located from the above described line, and shall obtain by legislation the necessary laws to enforce the same completely and strictly, and shall desire a modification of the Federal quarantine line to agree with such State or Territory line, the proper authorities of such State or Territory shall forward to the Secretary of Agriculture a true map or description of such line and a copy of the laws for enforcement of the same, duly authenticated and certified."

And afterward, on March 14, 1903, the Secretary adopted the quarantine line agreed to be established by the State of Tennessee, and said to run about the middle of the State, and from the south of which the cattle in this case were transported, and provided:

"And whereas said quarantine line, as above set forth, is satisfactory to this Department, and legislation has been enacted by the State of Tennessee to enforce said quarantine line, therefore the above line is adopted for the State of Tennessee by this Department for the period beginning with the date of this order and ending December 31, 1903, in lieu of the quarantine line described in the order of March 13, 1903, for said area, unless otherwise ordered."

The terms of Order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that State; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the State by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to inter-

state and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single, and indivisible. In *United States* v. *Reese*, 92 U. S. 214, 221, upon this subject, this court said:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction,

unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

And the court declined to make such limitation.

And in *Trade-Mark cases*, 100 U. S. 82, 99, the court said: "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. Cooley, Const. Lim., 178, 179; *Commonwealth* v. *Hitchings*, 5 Gray (Mass.), 482."

And see *United States* v. *Ju Toy*, 198 U. S. 253, 262, 263.

We think these principles apply to the case at bar, and that this order of the Secretary, undertaking to make a stringent regulation with highly penal consequences, is single in character, and includes commerce wholly within the State, thereby exceeding any authority which Congress intended to confer upon him by the act in question, if the same is a valid enactment. We, therefore, find it unnecessary to pass upon the other questions which were thought to be involved in the case at bar.

The judgment of the state court will be

Reversed and the cause remanded to it for further proceedings not inconsistent with this opinion.

MR. JUSTICE McKENNA concurs in the result.

ILLINOIS CENTRAL RAILROAD COMPANY v. EDWARDS.

ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, STATE OF KENTUCKY.

No. 12. Submitted December 14, 1905; Restored to docket December 18, 1906; Resubmitted April 16, 1906.—Decided December 17, 1906.

Decided on authority of *Illinois Central Railroad* v. *McKendree, ante*, p. 514.

Mr. J. M. Dickinson, Mr. Edmund F. Trabue and *Mr. Blewett Lee* for plaintiff in error.[1]

The Attorney General and *The Solicitor General* for the United States at the suggestion of the court, there being no brief filed for defendant in error.[1]

THIS case involves the same questions upon similar facts as No. 13, just decided. Counsel filed a written stipulation that it shall be controlled and determined by the ruling made in that case. The judgment is reversed, and cause remanded to the state court for further proceedings not inconsistent with this opinion.

MR. JUSTICE MCKENNA concurs in the result.

GATEWOOD v. NORTH CAROLINA.

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

No. 105. Argued November 16, 1906.—Decided December 24, 1906.

In determining the constitutionality of a state statute this court must follow the construction given thereto by the highest court of the State; and a ruling by that court that the provisions of a statute prohibiting the purchasing of a commodity on margin, and the carrying on of "bucket

[1] For abstracts of arguments see *ante*, pp. 520 *et seq.*

shops" for dealing in such commodity are separable is conclusive on this court, and refutes the contention of one convicted of carrying on a "bucket shop" that the law is void as to him because certain presumptions created by the statute in regard to the prohibitions of purchasing on margins may be repugnant to the Fourteenth Amendment; nor will this court determine that the creation of certain presumptions of guilt by a state statute is repugnant to the due process clause of the Fourteenth Amendment when the record does not show that the conviction sought to be reviewed was based on these presumptions and could not have been based on independent evidence.

138 N. Car. 149, affirmed.

THE facts are stated in the opinion.

Mr. Robert W. Winston, with whom *Mr. Victor S. Bryant* was on the brief, for plaintiff in error:

The question presented is whether the act of 1905 of North Carolina is valid or invalid. Plaintiff in error contends that § 7 vitiates the entire act, it being inconsistent with the Constitution of the United States because it declares that the act shall not be construed so as to apply to any person, firm, corporation or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business. Also that the presumptions created in the act are within the prohibition against the deprivation of property without due process of law. *Connolly* v. *Union Pipe Co.*, 184 U. S. 540.

The act evidently means that a wholesale merchant or manufacturer or his agent, when engaged in purchasing or selling commodities required in the ordinary course of his business, is not liable to the provisions of such legislation. That is the conduct of a wholesale merchant, or his agent, buying or selling on margin, is not criminal or presumptively so, while another, in the like circumstances, is presumably guilty of a crime. The North Carolina Court declares that there may be good reasons for this discrimination, and whether good and sound or the contrary, that courts have no veto power upon such exercise of the police power. *State* v. *Barrett*, 50 S. E.

Rep. 506. The police power of the State does not extend so far as this. The *Barrett case, supra,* cited as authority for this position, fails to sustain it.

Section 7 is in the nature of a proviso to each of the other sections; and such connection is established by its phraseology. It qualifies section 1 and renders lawful for the excepted classes to do any of the prohibited acts as well as to buy and sell on margin.

The other sections of the act are concerned with the establishment of proof alone, and the creating of certain artificial and arbitrary presumptions from certain predicaments of fact, but § 7 is also to be appended to each as a proviso. Hence, notwithstanding the admission of any of the facts specified in these sections of the act by the manufacturer, or wholesale merchant, no presumption of guilt arises and he is relieved from the burdensome and disgraceful presumption of crime which is cast upon all the other people under like circumstances. This conclusion cannot be avoided, because of the language of the law itself.

As to the unconstitutionality of the act by reason of the exemptions provided for therein, see *Union Co. Nat. Bank* v. *Ozan Lumber Co.,* 127 Fed. Rep. 211; *Brown* v. *Jacobs Pharmacy Co.,* 115 Georgia, 453; *State* v. *Mitchell,* 79 Maine, 66; *Matthews* v. *People,* 202 Illinois, 389; *Standard Oil Co.* v. *Spartanburg,* 66 S. Car. 37; *Kellyville Coal Co.* v. *Harrier,* 207 Illinois, 624; *Greenwich Ins. Co.* v. *Carroll,* 125 Fed. Rep. 129; *Ballard* v. *Mississippi Cotton Oil Co.,* 81 Mississippi, 507; *In re Pell,* 181 N. Y. 48; *People* v. *Orange Co. Road Co.,* 175 N. Y. 84; *Texas* v. *Shippers' Compress &c. Co.,* 93 Texas, 603.

It is plain that the act of 1889 was a dead letter until the act of 1905 vitalized it by making certain innocent things presumptive evidence of guilt. By express legislative enactment, the act of 1905 is incorporated into the act of 1889, so that a retail merchant, under § 1 of the act of 1889, cannot recover if he sue upon a contract where he has put up a margin, but a wholesale merchant can recover under like conditions.

If only § 7 of the act of 1905 is a discrimination in favor of the manufacturer and wholesale dealer, in so far as it relates to § 5 of the act, then the whole act is just as effectually void as if the Supreme Court of the State had held all of said sections to be discriminative.

The act of 1905 is unusual in its artificial presumptions and in the manner in which it is engrafted upon the act of 1889 and it is not in harmony with the letter or spirit of the Constitution. The following cases are illustrative of the point at issue. *Munn* v. *Illinois*, 94 U. S. 113; *Lawton* v. *Steele*, 152 U. S. 133; *Colon* v. *Lisk*, 153 N. Y. 188.

Presumptions of guilt attempted to be raised by acts of legislatures are void. *People* v. *Lyon*, 27 Hun, 180; *State* v. *Beswick*, 13 R. I. 218; *State* v. *Beach*, 43 N. E. Rep. 951; *Cummings* v. *Missouri*, 4 Wall. 328; *Wynehamer* v. *People*, 13 N. Y. 446; *San Mateo* v. *Railroad Co.*, 13 Fed. Rep. 722.

Mr. Walter Clark, Jr., by special leave of the court, with whom *Mr. Robert D. Gilmer*, Attorney General of the State of North Carolina, was on the brief, for defendant in error:

The State contends that § 7 of the act of 1905 does not in any way conflict with any provision of the Constitution of the United States or of the Fourteenth Amendment thereto. If it had read "this act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising," this might have been class legislation, exempting certain persons, and therefore unconstitutional. But this is not the whole of the section. It contains also "in the purchase or sale of the necessary commodities required in the ordinary course of their business." This gives these classes no right not given to everyone else. This section was added out of superabundant caution. It simply gives these classes the right to buy or sell for actual future delivery. The act does not prevent anyone from buying for actual future delivery, but makes it criminal for any person, firm, etc., to buy on margin for future delivery

when no actual delivery is intended. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, distinguished.

Under the construction put upon this act by the Supreme Court of North Carolina there is no Federal question presented, as by this construction the act is clearly constitutional. *State* v. *McGinnis*, 138 N. Car. 724; *State* v. *Clayton*, 138 N. Car. 732, followed in the present case in a *per curiam* order.

MR. JUSTICE WHITE delivered the opinion of the court.

North Carolina in 1889 enacted "An act to suppress and prevent certain kinds of vicious contracts." Laws N. Car., 1889, ch. 221. This law was thus summarized by the Supreme Court of that State in *State* v. *McGinnis*, 138 N. Car. 724:

"Section one made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section two enacted that when the defense provided by that act is set up in a verified answer, the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment for the transaction. Section three made the parties to such contract, and agents concerned therein, indictable, and section four made persons while in this State, consenting to become parties to such contract, made in another State, and all agents in this State, aiding and furthering such contract, made in another State, indictable."

In 1905 there was adopted "An act . . . to prevent the dealing in futures." This law contains seven sections. The first and second made it "unlawful for any person, corporation or other association of persons, either as principal or agents, to establish or open an office or other place of business . . . for the purpose of carrying on or engaging in any such business as is forbidden in this act or in chapter 221

of the Public Laws of North Carolina of 1889," and affixed a penalty for so doing. The law of 1889, referred to, is the one of which we have just previously given a summary.

The acts made punishable by the first and second sections of the act of 1905 were thus defined in *State* v. *McGinnis*, *supra:*

"The business forbidden by the act of 1905 is—to avoid a *paraphrasis*, and following the usual American method of describing an act by a word or a phrase—the business of running a 'bucket shop,' which is defined by the Century Dictionary as 'an establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in.' "

The third section provided that no person should be excused from testifying in any prosecution under the act of 1889, or its amendments, on the ground of self-incrimination, the section granting immunity to such persons so obliged to testify. It was declared by the fourth, fifth and sixth sections of the act that in all prosecutions for a violation of the provisions of the act of 1889, or the act of 1905, a *prima facie* presumption of guilt should arise from the proof of certain facts stated in the sections in question. These sections are reproduced in the margin.[1] The seventh and last section of the act contained

[1] SEC. 4. That in all prosecutions under said act and amendment, proof that the defendant was a party to a contract as agent or principal to sell and deliver any article, thing or property specified or named in said act, chapter 221, Public Laws of 1889, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association, or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made, upon the difference in value of said article, thing, or property, shall constitute against such defendant *prima facie* evidence of guilt.

SEC. 5. That proof that anything of value agreed to be sold and delivered

provisions concerning dealing in futures by those engaged in the business of manufacturing or wholesale merchandising, which we do not presently reproduce, as we shall hereafter consider the section.

Gatewood, plaintiff in error, was indicted for the offense of establishing and keeping an office and place of business for the purpose of carrying on or engaging in the character of business made unlawful by the first section of the act of 1905; that is, the opening and carrying on a "bucket shop." The indictment, moreover, in an additional paragraph alleged the doing of certain acts, as though it was intended to charge them as distinct offenses from the one charged in the first paragraph. The two things thus alleged were as follows: First. That, on a date named, the accused "unlawfully and willfully did post and publish, from information received over his wires, the fluctuations in prices of grain, cotton, provisions, stocks, bonds and other commodities, contrary to the form of statute in such case made and provided," the acts so charged being those from the proof of which it was provided in the sixth section of the act of 1905 that a *prima facie* presumption of guilt would arise as to the commission of the acts forbidden by the first section of that act. Second. That, on a date named, the accused "unlawfully and willfully did take and receive from E. T. Lea an order or contract to purchase on margin 100 bales of cotton for future delivery, to wit, August delivery, at 7 56.100 per pound, and that said Lea did deposit with said

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was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such an agreement deposited or secured, or agreed to deposit or secure what are commonly called "margins," shall constitute *prima facie* evidence of a contract declared void by chapter 221 of the Public Laws of 1889.

SEC. 6. That proof that any person, corporation or other association of persons, either principals or agents, shall establish an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities or of any one or more of the same shall constitute *prima facie* evidence of being guilty of violating section 1 of this act and of chapter 221 of the Public Laws of 1889.

defendant at said time in said county the sum of $50.00 by way of margin fluctuations in said cotton, and that settlement between said parties for said cotton was agreed to be made upon the difference in value of said cotton at said date and the date of its delivery, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State." The acts thus charged being among those from which, when proved, there would arise a *prima facie* presumption of a guilty violation of certain of the provisions of the act of 1889.

The case was tried to a jury, and, as stated in the record, after proof and hearing, a special verdict was returned. By this verdict it was separately found that the defendant had committed the several acts separately charged in the indictment; that is, in separate numbered paragraphs the jury returned that the defendant had kept an office for the unlawful dealing in futures forbidden by the first section of the act of 1905, that he had posted and published in such office the fluctuating prices of grain, etc., and, that he had made the contract for future delivery upon margin with Lea. The evidence at the trial upon which the jury acted is not in the record. The court then directed a general verdict of guilty, and judgment was entered thereon. A motion for a new trial was made, "because the act of 1905, chapter —, is in conflict with the Fourteenth Amendment, section 1, of the Constitution of the United States, to wit, the guarantee of equal protection of the laws." The new trial having been refused, and a fine of five dollars and costs having been imposed, the case was taken to the Supreme Court of North Carolina. That court affirmed the conviction. The reasoning by which the action of the court was controlled was stated as follows: "Upon the authority of *State* v. *McGinnis*, at this term, there is no error." And in the judgment of affirmance there was embodied the record and opinion in *State* v. *McGinnis*, and such record and opinion are contained in the transcript before us.

The assignments of error and the argument in support thereof involve three general contentions, viz.: the asserted repugnancy of the statute to the equal protection of the law clause of the Fourteenth Amendment, and the alleged want of power of the State to enact the statute, because its provisions not only abridge the privileges and immunities of the plaintiff in error as a citizen of the United States, but also deprive him of his property without due process of law, in violation of the same Amendment. The contention that the statute denied the equal protection of the laws rests upon the terms of the seventh section, reading as follows:

"SEC. 7. That this act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business."

The alleged repugnancy of section 7, and consequently of the entire act to the equality clause of the Fourteenth Amendment, is sought to be sustained upon two grounds. First, because it is asserted that those engaged in the business of manufacturing or wholesale merchandising are permitted to commit without offense the act or acts which are made criminal by the laws of 1889 and 1905, when done by any other person; and, second, because, even if the terms of the seventh section do not effect such a result, the section nevertheless operates to produce an unlawful inequality, since it creates a *prima facie* presumption of guilt from the proof of certain acts as against all persons but those engaged in the business of manufacturing and wholesale merchandising.

It suffices to say, as to the first of these propositions, that the Supreme Court of the State, in the case upon the authority of which it placed its decision in this, expressly decided that the statute did not operate the asserted discrimination. Thus, after expressly holding that the effect of section 7 was not to relieve those engaged in manufacturing and wholesale merchandising from the operation of the provisions of section 1 of

the act of 1905, prohibiting the opening and keeping of a place for gambling dealings in futures, denominated by the court a "bucket shop," the court came to consider whether the provisions of section 7 operated to relieve manufacturers or wholesale merchants from the prohibitions of the act of 1889, concerning the making of gambling contracts for future delivery. Considering this subject, the court in express terms decided that the seventh section did not have that effect, since the dealings which were prohibited by the acts of 1889 were alike prohibited as to all, including manufacturers and wholesale merchants. The court said:

"Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

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"But a purchase for actual future delivery of necessary commodities, required in the ordinary course of business and not for 'wagering' or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturers and wholesale mercantile establishments as authorized to make *bona fide* dealings in 'futures,' this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon anyone else or any other business to buy commodities for future delivery *bona fide* in the 'ordinary course of such business,' when not for speculative or gambling purposes. That no other businesses or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on 'margin,'

is not an implied restriction upon others to do an act not forbidden by any statute."

In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect it reads out the provisions of section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the Fourteenth Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view. *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Smiley* v. *Kansas*, 196 U. S. 447, 455, and cases cited.

As to the second proposition, viz., the asserted discrimination, because of inequality produced by the engendering a *prima facie* presumption of guilt from the proof of certain acts when done by persons generally, and not raising such *prima facie* presumption from the same acts when done by those engaged in manufacturing or wholesale merchandising, we think the question is not open on this record. As we have stated, the indictment distinctly charged the commission of the offense prohibited by the first section of the act of 1905, viz., the keeping a place for gambling in futures, and at the same time in a separate paragraph charged the doing of acts from which the presumption of guilt was authorized by certain sections of the act of 1905. Upon the indictment so framed a special verdict was returned, finding that the prohibited place of business had been opened and kept as charged, and that the other acts separately charged in the indictment had been committed. Now, as the evidence upon which the jury acted is not in the record, and as there is nothing in the verdict tending to show that the separate conclusion as to the commission of the act forbidden by section 1 of the statute of 1905, viz., the keeping of a place for gambling in futures was found by the jury, because of the presumptions authorized by the statute, it cannot be affirmed that the finding of the jury

as to the keeping of the place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by the act of 1905. And this conclusion becomes irresistible when it is considered that there is nothing in the record disclosing any request made to the trial court for instructions concerning the effect of the presumption created by the act of 1905, or that any express rulings on that subject were made by the court.

The contention that the judgment of conviction should be reversed, even although it does not appear that the same was based upon the presumptions authorized by the act of 1905, because of the inseparability of the alleged unequal presumptions is without merit. In *State* v. *McGinnis*, *supra*, after expressing an opinion as to the right of a State under its police power, without violating the Fourteenth Amendment, to create presumptions of guilt as to some classes of persons which would not be applicable to the same acts when done by other classes, the court said:

"But aside from what we have already said, the defendant is indicted for carrying on a 'bucket shop' business. The legislature had unquestioned power to make such business indictable. *Booth* v. *Illinois*, 186 Illinois, 43, and other cases cited, *supra*. The facts found are that the defendant was carrying on the forbidden business. It can in nowise affect the validity of the statute making such business indictable that the purchase of commodities by others upon 'margin,' shall under certain circumstances raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence, as to certain purchases, upon 'margin,' were null, because not applying to all purchases upon 'margin,' this would in nowise invalidate that part of the statute which forbids carrying on the business of running a 'bucket shop.' The defendant is not indicted for buying commodities for future delivery upon a 'margin;' nor are manufacturers and

wholesale merchants, nor anyone else, exempted from the prohibition of carrying on the 'bucket shop' business. Upon the special verdict the defendant was properly adjudged guilty."

This ruling as to the separability of the statute is conclusive, and refutes the contention that the entire law is void even upon the hypothesis that the creation of presumptions as to one class not applicable to another class or classes was repugnant to the Fourteenth Amendment.

It remains only to consider the contentions that the statute upon which the conviction was had was repugnant to the due process clause of the Fourteenth Amendment, and was, moreover, void because it abridged the privileges and immunities of the plaintiff in error as a citizen of the United States. As the first rests solely upon the proposition that there was a want of due process of law, because the State was without power to authorize a presumption of guilt on proof of the doing of certain acts specified in the statute, it is disposed of by what we have already said. And as the second was not pressed in argument, and is not shown by the record to have been raised or even suggested in the court below, we need not further consider it.

Affirmed.

CAHEN *v.* BREWSTER, TAX COLLECTOR.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 91. Argued November 9, 1906.—Decided December 24, 1906.

While under former decisions of this court the nature of inheritance taxes has been defined, those decisions do not prescribe the time of their imposition. To have done so would have been to usurp a legislative power not possessed by this court.

A State may exercise its power to impose an inheritance tax at any time during which it holds the property from the legatee; and the Louisiana

inheritance tax law is not void as a deprivation of property without due process of law within the meaning of the Fourteenth Amendment as to legatees of decedents dying prior to its enactment but whose estates were still undistributed.

A statute imposing a succession tax is not void as against estates not closed, as denying equal protection of the laws, because it does not affect estates which had been actually closed at the time of its enactment.

When the state court which has delivered two decisions declares that the later does not overrule, but distinguishes, the earlier, which it states was decided on considerations having no application to the later one, both decisions must be considered as correct interpretations of the statute construed, and it is not the province of this court to pronounce them contradictory or one to be more decisive than the other.

THE facts are stated in the opinion.

Mr. Charles Rosen and *Mr. Gustave Lemle* for the plaintiffs in error:

That an inheritance tax is not a tax on property, but on the privilege or right of inheriting, is no longer open to question. *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41; *Plummer* v. *Coler*, 178 U. S. 115; 27 Am. & Eng. Ency. of Law, 338.

That the rights of these heirs and legatees vested at the moment of the death of the ancestor is also beyond dispute. Black on Constitutional Prohibitions (1887), 239; Cooley, Const. Lim., 6th ed., 439; Prof. McGehee, Due Process of Law (1906), 142, 144; *Calvitt* v. *Mulhollam*, 12 Rob. (La.) 258; *Womack* v. *Womack*, 2 La. Ann. 339; *Adams* v. *Hill*, 5 La. Ann. 114; *Glassock* v. *Clark*, 33 La. Ann. 584; *Ware* v. *Jones*, 19 La. Ann. 428; *Page* v. *Gas Light Co.*, 7 Rob. (La.) 184; *Addison* v. *Bank*, 15 Louisiana, 527; *Succession of Prevost*, 12 La. Ann. 577; *Armand Heirs* v. *Executors*, 3 Louisiana, 336.

As to the universal legatees, the inheritance of property by them took place at the moment of their testator's death. This privilege or right of inheritance was not exercised subsequently; and, there being no inheritance after the tax was levied, no tax is due.

The prohibition that formerly applied, under the Fifth Amendment, only to the United States, now applies with

equal force, under the Fourteenth Amendment, to the States. They, no more than the United States, can, under the guise of taxation, or other legislation, take private property for public purposes without compensation, or pass retroactive laws that divest vested rights.

This law is not merely retroactive. Remedial legislation that is retrospective is unobjectionable. Retroactive legislation that does not divest vested rights is not in violation of the Federal Constitution. But retroactive legislation that divests vested rights, that interferes with rights already acquired, that imposes a tax for the privilege of inherison where such privilege has been long since exercised, and, therefore, requires payment of such tax merely because it has the physical power to do so by reason of the fact that the owner is, from some delay or other accidental cause, not yet in possession, is a clear taking of property, a clear deprivation of property, without due process of law. Cooley, Const. Lim., 6th ed., 436; *Norman* v. *Heist*, 5 W. & S. 171; *Beall* v. *Beall*, 8 Georgia, 210; *Case of Pell*, 171 N. Y. 48; *Case of Lansing*, 182 N. Y. 238.

The Supreme Court of Louisiana, in holding that as the inheritance was property within the limits of the State, the State could tax it, for the purpose mentioned, until it had passed out of the succession of the testator, erred.

Confusing the tax on the right to inherit with a tax on property, although the property was still within the State, the right of inheritance or succession did not still remain to be exercised.

The clause in question is a denial of the equal protection of the laws.

So far as the tax discriminates between descendants and collaterals, there is no objection. This was expressly decided in the *Magoun case*, but after having first made a class of collaterals or strangers, it taxes some and exempts others—and these, too, inheriting under the same conditions, by the same title, on the same day. This is not classification, and is a denial of the equal protection of the laws.

Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. *Railroad Co.* v. *Ellis*, 165 U. S. 150; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 108; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Railroad & Tel. Co.* v. *Bd. of Equalizers*, 85 Fed. Rep. 302; *Connelly case*, 184 U. S. 540.

Mr. F. C. Zacharie for defendants in error:

This court will not review or reverse the decision of the court of Louisiana on any question as to the construction of laws of that State, even though this court might differ in that regard from the opinion and decision of the highest court of that State, in construing its own constitution and laws. 22 Ency. of Pl. & Pr., 326, and cases cited in note 3.

The inheritance or succession tax provided for by the Louisiana constitution, and the act 45 of 1904, passed in pursuance of the power conferred by that instrument, are in nowise in contravention of the provisions of the Constitution of the United States, and the judgment and decree of the Supreme Court of Louisiana should be affirmed and the claim of plaintiffs in error be rejected at their cost. *Carpenter* v. *Pennsylvania*, 17 How. 456; *Orr* v. *Gilman et al.*, 183 U. S. 278.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case involves the validity, under the Constitution of the United States, of a burden imposed under the inheritance tax law of the State of Louisiana, passed June 28, 1904.

Mathias Levy, a resident of New Orleans, died in that city May 26, 1904. He was unmarried and left no ascendants, and was, therefore, without forced heirs. He left a last will and testament of the date of December 23, 1903, in which he named executors and made sundry particular bequests to charitable institutions. He bequeathed the balance of his estate, in equal shares, to his two nieces, Camille Cahen and

Julie Cahen, constituting them thereby his universal legatees and instituted heirs.

The will was duly probated in the Civil District Court for the Parish of Orleans, May 30, 1904. An inventory of his estate was taken June 9, 1904, and a supplementary inventory August 3, 1904. The inventories showed the total appraised value of the estate to be $64,676.05. Of this amount, after deducting the debts and charges of the estate and particular legacies, there was left, as the portion going to the universal legatees, $42,927.94.

The final accounting and tableau of distribution was filed August 3, 1904, and approved and homologated by judgment August 16, and the funds ordered to be distributed.

October 16 a motion was made for a rule on the executors to show cause why they should not pay over the legacies as ordered. In answer to which the executors replied that they were willing to do so, but that it was announced to them by the president of the school board of the parish that he intended to claim in behalf of said board a tax under the inheritance tax law of the State on the funds in their hands "and the shares coming to said movers." The executors also alleged the unconstitutionality of the tax and prayed that the school board of the parish, through its president, Andrew H. Wilson, be made a party to the proceedings. Wilson appeared and averred that the taxes were due the State and not to the school board, and were collectible by the state tax collector, and "that this suit and the matters at issue herein should be litigated contradictorily with the state tax collector for the district in which the deceased resided when he departed this life."

The tax collector appeared. The agents and attorneys in fact of the legatees answered the demand of the school board to be paid the tax that $10,000 of the estate was in United States bonds, and not subject to taxation by the State, and averred that an inheritance tax was not due "to said board for the reason that said act has no application to the property

under this succession or the legacies due to said movers in the motion aforesaid; that to give it such application would be to make said act retroactive and divest the vested rights of the said movers in said rule, which would be in violation of the constitution of this State, and especially article 166 thereof, and in violation of the Constitution of the United States of America, and especially section 9 of article I, and the Fifth and Fourteenth Amendments thereof, and in violation of the laws of the State and of the land; that it would be a deprivation of property without due process of law and a denial of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America."

Judgment was rendered in favor of the tax collector, condemning the executors to pay the tax, less the amount of United States bonds, and less the charitable and religious bequests. The judgment was affirmed by the Supreme Court of the State.

The law imposes a tax of three per cent "on direct inheritances and donations to ascendants or descendants," and ten per cent upon donations or inheritances to collaterals or strangers. It is provided that the tax is "to be collected on all successions not finally closed and administered upon, and all successions hereafter opened." [1]

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[1] SECTION 1. Be it enacted by the General Assembly of the State of Louisiana; That there is now, and shall hereafter be levied, solely for the support of the public schools, a tax upon all inheritances, legacies, and donations; provided, no direct inheritance, or donation, to an ascendant or descendant, below ten thousand dollars in amount or value, shall be so taxed; a special inheritance tax, of three per cent on direct inheritances and donations to ascendants or descendants and ten per cent for collateral inheritances and donations to collaterals or strangers; provided bequests to educational, religious or charitable institutions shall be exempt from this tax and provided further that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance; this tax to be collected on all successions not finally closed and administered upon and on all successions hereafter opened.

It will be observed that when Levy died, May 26, 1904, and when the will was probated, May 30, 1904, there was no inheritance tax in Louisiana. The act in controversy was passed June 28, 1904.

In support of the attack made upon the law, it is contended that an inheritance tax is not a tax on property but on the right or privilege of inheriting, and that the right in the case at bar had been exercised at the moment of the testator's death under the then existing law, and "to pass a law exacting such a tax and make it retroactive so as to divest a right previously acquired under then existing laws, is a deprivation of property already acquired, without due process of law, prohibited by the Fourteenth Amendment of the Constitution of the United States."

To sustain their propositions the plaintiffs in error cite certain articles of the Louisiana Civil Code.[1] And it is urged

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[1] Article 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

Article 941. The right mentioned in the preceding article is acquired by the heir, by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus, children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they may be merely seized of right and not in fact.

Article 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession.

Article 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

Article 945. The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place, as well for his rights as his obligations.

as indubitable that, under the law of Louisiana, a succession is acquired by the legal heir immediately after the death of the deceased, and by the express terms of the code this rule applies to testamentary heirs, to instituted heirs and universal legatees. In other words, that the acquisition of the succession by plaintiffs in error was at the very moment of Levy's death, and, therefore, necessarily before the act imposing inheritance taxes was passed. To sustain their view plaintiffs in error cite a number of cases decided prior to the decision of the case at bar, and the case of *Tulane University of Louisiana* v. *Board of Assessors et al.*, 115 Louisiana, 1026, decided since the decision in the case at bar. Having established, as it is contended, that by operation of law the property is transmitted immediately from the testator to the heirs, it is also contended that from the very definition of an inheritance tax none could be imposed on plaintiffs in error as legatees of Levy.

For definitions of an inheritance tax plaintiffs in error adduce *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41. The tax was defined in the *Perkins case* to be "not a tax upon the property itself, but upon its transmission by will or descent;" and in the *Magoun case*, "not one on property, but one on the succession." In *Knowlton* v. *Moore* it was said that such taxes "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or

ARTICLE 1609. When, at the decease of the testator, there are no heirs, to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seized of right of the effects of the succession, without being bound to demand the delivery thereof.

intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess. There is nothing, therefore, in those cases which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee. "It is not," we said in the *Perkins case*, "until it has yielded its contribution to the State that it becomes the property of the legatee." See also *Carpenter et al.* v. *Commonwealth of Pennsylvania*, 17 How. 456.

We must turn back, therefore, to the law of Louisiana for the solution of the questions presented in the case at bar. But we are not required to reconcile the Louisiana decisions. We accept that in the case at bar as a correct interpretation of the code of the State. Nor may we regard *Tulane University* v. *Board of Assessors* as irreconcilable with it. That case was brought to enjoin the collection of state and city taxes which had been assessed against the succession of A. C. Hutchinson. The plaintiff university was the universal legatee of Hutchinson, and its property was exempt from taxation under the constitution of the State. It is true the court said that the code of the State "left no room for doubt or surmise as to the fact of the property of a deceased person being transmitted directly and immediately to the legal heir, or, in the absence of forced heirs, to the universal legatee, without any intermediate stage, when it would be vested in the successive representative or in the legal abstract, called 'succession.'"

But the decision in the case at bar was not overruled, but distinguished as follows: "The case of succession of Levy was decided from considerations peculiar to an inheritance tax, and which can have no application to the instant case. This inheritance tax was held to be due notwithstanding that, under the provisions of the code, the ownership of the prop-

erty passed to the heirs. The maxim, '*Le mort saisit le vif*,' was expressly recognized." Both decisions, therefore, must be considered as correct interpretations of the code of the State. It is not our province to pronounce one more decisive than the other, or to pronounce a contradiction between them, which the court which delivered both of them has declared does not exist. We must assume that the *Tulane case* approved the view expressed in the case at bar of the rights of legatees, as follows: "Furthermore, we have said, the legatees acquired no vested right to the property bequeathed which could enable them to successfully defend their inheritance against the demand of the State for the inheritance tax. It was property within the limits of the State, which the State could tax, for purposes mentioned, until it had passed out of the succession of the testator."

Plaintiffs in error also contended that the statute denied them the equal protection of the laws. This contention is based on the following provision of the statute: "This tax to be collected on all successions not finally closed and administered upon, and on all successions hereafter opened."

Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made between heirs whose rights have become fixed and vested on the same day. Counsel say: "The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is one on the right of inheritance." But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, "until it had passed out of the succession of the testator." It was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid. In

other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed.

Judgment affirmed.

BOARD OF EDUCATION OF THE KENTUCKY ANNUAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 103. Argued November 14, 1906.—Decided December 24, 1906.

The fact that, as construed by the highest court of that State, the exemptions in the inheritance tax law of Illinois of religious and educational institutions do not apply to corporations of other States, does not render the provisions of the law applicable to foreign religious and educational institutions void as discriminatory and counter to the equal protection clause of the Fourteenth Amendment.

It is not an unreasonable or arbitrary classification for a State to exempt from inheritance taxes only such property bequeathed for charity or educational purposes as shall be bestowed within its borders or exercised by persons or corporations under its control.

THE facts are stated in the opinion.

Mr. Charles H. Aldrich, with whom *Mr. Henry S. McAuley* and *Mr. Lawrence Maxwell, Jr.*, were on the brief, for plaintiff in error:

Appellant, by probating the will through which its succession is derived, appearing before the state appraiser in the inheritance tax proceeding, appealing from the action of such appraiser to the County Court of Cook County, and from its action to the Supreme Court of Illinois, brought itself within the jurisdiction of the State of Illinois, within the meaning of the Fourteenth Amendment. *Black* v. *Caldwell*, 83 Fed. Rep. 880, 885; *Christian Union* v. *Yount*, 101 U. S. 352, 356.

This is especially so as there are no rules prescribed by the laws of Illinois regarding the admission to the State of corporations *not* for pecuniary profit, and the right of such corporations to take and hold property in Illinois is fully established. *Academy* v. *Sullivan*, 116 Illinois, 375; *Christian Union* v. *Yount*, 101 U. S. 352; *Pennsylvania Co.* v. *Bauerle*, 143 Illinois, 459.

The imposition of the succession tax necessarily implies that the person whose right to succeed is so taxed is within the jurisdiction of the State. *Passenger cases*, 7 How. 283, 422; McGehee's Due Process of Law, 218; *Dewey* v. *Des Moines*, 173 U. S. 193, 204; *Louisville* v. *Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204.

The prohibitions of the Fourteenth Amendment extend to all state agencies, whether executive, legislative or judicial. *Scott* v. *McNeal*, 154 U. S. 34, 45; *Chicago &c. Ry. Co.* v. *Chicago*, 166 U. S. 226, 234; *Missouri* v. *Dockery*, 191 U. S. 165, 170; *Huntington* v. *New York*, 118 Fed. Rep. 683, 686.

An inheritance tax is not a tax upon property, but upon the privilege or right of succession to property. *United States* v. *Perkins*, 163 U. S. 625, 628; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283.

A different rule obtains as to claimed exemptions from a general and a special tax, to which latter class the imposition in the case at bar belongs. *Eidman* v. *Martinez*, 184 U. S. 578, 583; *Catlin* v. *Trustees*, 113 N. Y. 133, 140; *Re Swift's Estate*, 137 N. Y. 77, 86; *Gurr* v. *Scudds*, 11 Exch. 190; *United States* v. *Wigglesworth*, 2 Story, 369; *United States* v. *Watts*, 1 Bond, 580.

While the respective States have plenary power to regulate the tenure of property within their respective limits, the modes of its acquisition and transfers, the rules of its descent, and the extent to which a testamentary disposition may be exercised by its owners, that power is subject to the equal rights clauses of the Constitution of the United States. *Mager* v.

Grima, 8 How. 490, 493; *United States* v. *Fox,* 94 U. S. 315; *Magoun* v. *Illinois Trust & Sav. Bank,* 170 U. S. 283, 292, 294; *Atchison, Topeka &c. Ry. Co.* v. *Matthews,* 174 U. S. 96, 105.

The Constitution of the United States was largely the result of the demand that there should be no discrimination between the several States in commercial regulations and rights of persons or property. *Passenger cases,* 7 How. 283, 407, 449, 492; *Crandall* v. *Nevada,* 6 Wall. 35, 43, 48; *Woodruff* v. *Parham,* 8 Wall. 123, 140, 147; *Hinson* v. *Lott,* 8 Wall. 148, 152.

This court has repeatedly denied to the States the right of discrimination in the exercise of their sovereign power of taxation. *Ward* v. *Maryland,* 12 Wall. 418, 430; *Welton* v. *State of Missouri,* 91 U. S. 275; *Tiernan* v. *Rinker,* 102 U. S. 123; *Webber* v. *Virginia,* 103 U. S. 344; *Walling* v. *Michigan,* 116 U. S. 466.

Corporations are not "citizens" within Article IV, Section 2, and the Fourteenth Amendment of the Constitution. *Blake* v. *McClung,* 172 U. S. 239, 259; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, 561.

Corporations are "persons" within the Fourteenth Amendment. *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 189; *Home Ins. Co.* v. *New York,* 134 U. S. 594, 606; *Charlotte &c. R. R. Co.* v. *Gibbes,* 142 U. S. 386, 391; *Covington &c. Turnpike Co.* v. *Sandford,* 164 U. S. 578, 592; *Gulf &c. R. Co.* v. *Ellis,* 165 U. S. 150, 154; *Smyth* v. *Ames,* 169 U. S. 466, 522.

The right of a State to prescribe the terms and conditions upon which foreign corporations may transact business within its borders or to exclude such corporations altogether, is conceded, subject to the limitation that unconstitutional requirements cannot be made. This case is to be distinguished from the general principle, however, in that Illinois has not attempted through any agency to prescribe conditions upon which a foreign, religious or charitable corporation may succeed to property in Illinois. See *Insurance Co.* v. *Morse,* 20 Wall. 445; *Doyle* v. *Continental In. Co.,* 94 U. S. 535; *Barron*

v. *Burnside*, 121 U. S. 186; *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 306; *Dayton Coal & Iron Co.* v. *Barton*, 183 U. S. 23; *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246.

When the corporation or the property is within the jurisdiction of the State, it is entitled to the equal protection of the laws, and different rates of taxation, either upon property or succession to property, cannot be applied as between foreign or domestic corporations. *Philadelphia Fire Assn.* v. *New York*, 119 U. S. 110; *Erie Railway Co.* v. *State*, 2 Vroom, 531; *S. C.*, 86 Am. Dec. 226, 236; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606; *Pembina Consolidated M. Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *New York* v. *Roberts*, 171 U. S. 658, 663; *Blake* v. *McClung*, 172 U. S. 239, 255; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 566; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369.

Mr. Edward M. Ashcraft, with whom *Mr. William H. Stead*, Attorney General of the State of Illinois, was on the brief, for defendant in error:

If plaintiff in error seeks to reverse the judgment below on the ground that its construction of the amendatory act of 1901 is erroneous and repugnant to the Constitution of the United States, without drawing into question the validity of the act, then there is no Federal question involved, this court is without jurisdiction and the writ of error should be dismissed. Sec. 709, Rev. Stat.; *Santa Cruz* v. *Railroad Co.*, 111 U. S. 361; *Balt. & Pot. R. R. Co.* v. *Hopkins*, 130 U. S. 210; *United States* v. *Lynch*, 137 U. S. 280; *Sage* v. *Louisiana Board of Liquidation*, 144 U. S. 647; *Morley* v. *L. S. & M. S. Ry. Co.*, 146 U. S. 162; *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Union National Bank* v. *Louisville &c. Ry. Co.*, 163 U. S. 325; *Turner* v. *Wilkes County*, 173 U. S. 461; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491.

If plaintiff in error seeks to reverse the judgment below

because the amendatory act of 1901, as construed by the state court, is invalid because repugnant to the Fourteenth Amendment to the Constitution of the United States, in determining the validity of the act of 1901, this court should follow the construction placed upon that act by the Supreme Court of Illinois. *Machine Co.* v. *Gage*, 100 U. S. 676; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Missouri Pacific R. R. Co.* v. *Nebraska*, 164 U. S. 403; *Ludeling* v. *Chaffe*, 143 U. S. 301; *Morley* v. *L. S. & M. S. Ry. Co.*, 146 U. S. 162; *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142; *Noble* v. *Mitchell*, 164 U. S. 367; *Osborne* v. *Florida*, 164 U. S. 650; *New York State* v. *Roberts*, 171 U. S. 658; *Covington* v. *Kentucky*, 173 U. S. 231; *Turner* v. *Wilkes County*, 173 U. S. 461; *Gulf & Ship Island R. R. Co.* v. *Hewes*, 183 U. S. 66; *West. Un. Tel. Co.* v. *Gottlieb*, 190 U. S. 412.

The construction of the amendatory act of 1901 by the Supreme Court of Illinois is correct. *Catlin* v. *Trustees*, 113 N. Y. 133; *Prime's Estate*, 136 N. Y. 347; *Balleis' Estate*, 144 N. Y. 134; *Minot* v. *Winthrop*, 162 Massachusetts, 113; *Alfred University* v. *Hancock*, 46 Atl. Rep. (N. J.) 178; *United States* v. *Perkins*, 163 U. S. 625; *People* v. *Western S. F. Society*, 87 Illinois, 246; *Theological Seminary* v. *Illinois*, 188 U. S. 662.

The amendatory act of 1901, as construed by the State, is not repugnant to the Fourteenth Amendment. *Blake* v. *McClung*, 172 U. S. 239; *Kochersperger* v. *Drake*, 167 Illinois, 122; *Billings* v. *People*, 189 Illinois, 472; *S. C.*, 188 U. S. 97; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *United States* v. *Perkins*, 163 U. S. 625; *Blackstone* v. *Miller*, 188 U. S. 189; *Kidd* v. *Alabama*, 188 U. S. 730; *Giozza* v. *Tiernan*, 148 U. S. 657; *Davidson* v. *New Orleans*, 96 U. S. 97; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461; *Bells Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *United States* v. *Fox*, 94 U. S. 315; *Humphreys* v. *State*, 70 Ohio St. 67; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Marchant* v. *Pennsylvania Railroad Co.*, 153 U. S. 380; *Campbell* v. *California*, 200 U. S. 87.

If the amendatory act, as construed by the state court, is

repugnant to the Fourteenth Amendment, then the judgment of the Supreme Court of Illinois should be affirmed.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is directed to a judgment of the Supreme Court of the State of Illinois sustaining a tax assessed against plaintiff in error under the inheritance tax law of that State, passed June 15, 1895, entitled "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same." Laws of 1895, p. 301.

The facts are as follows: Fanny Speed, a citizen and resident of Kentucky, died seized of certain real estate in the city of Chicago. She devised a one-half interest to plaintiff in error to be used as part of its educational fund, "to be held, invested and administered" as other properties forming a part of that fund. The will was probated in the Probate Court of Cook County, State of Illinois. An inheritance tax of $6,280.50 was assessed by the county judge against plaintiff in error, based on the value of the interest devised.

Plaintiff in error was incorporated by an act of the legislature of the State of Kentucky to form an educational fund for the promotion of literature, education, art, morality and religion. Its funds are held and used exclusively for such purposes and are required to be wholly expended within the State of Kentucky. It is not permitted to make dividends or distribution of profits or assets among its members or stockholders. It does not have or maintain an office in the State of Illinois or engage in educational or religious work therein.

From the action of the county judge imposing the tax, plaintiff in error appealed to the County Court of Cook County and assigned as grounds of appeal: (1) That by reason of its organization and the purposes of its organization, as shown by the record, it was exempt from such tax under the act of May 10, 1901, amending the act of June 15, 1895. (2) For that the imposition of such tax upon it (the plaintiff in error), when

corporations organized for like purposes under the laws of the State were exempt therefrom, was in conflict with the constitution of the State of Illinois, and rendered said act void as to plaintiff in error, as in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it abridged the privileges and immunities of plaintiff in error, who was a citizen of the United States, and denied to it the equal protection of the laws. The County Court sustained the tax and the Supreme Court affirmed the judgment. This writ of error was then sued out.

The assignment of errors in this court, omitting the specification of error based on the constitution of the State, is the same as that in the state courts.

It is enough for our purpose to say that section one of the act of 1895, subjects to a tax all property situated within the State, which shall by will or by the intestate laws pass from any person who may die seized or possessed of the same. The act was amended in 1901 by adding thereto the following section:

"When the beneficial interest of any property or income therefrom shall pass to or for the use of any hospital, religious, educational, bible, missionary, tract, scientific, benevolent or charitable purpose, or to any trustee, bishop, or minister of any church or religious denomination, held and used exclusively for the religious, educational or charitable uses and purposes of such church or religious denomination, institution or corporation, by grant, gift, bequest or otherwise, the same shall not be subject to any such duty or tax, but this provision shall not apply to any corporation which has the right to make dividends or distribute profits or assets among its members."

The Supreme Court decided that this amendment did not apply to "corporations created under the laws of a sister State." And also decided, as so construed, the amendment was not repugnant to the Constitution of the United States. The court said:

"A clear distinction exists between domestic corporations

and corporations organized under the laws of other States. Such corporations fall naturally into their respective classes. Over the one—that which the State has created—the State has certain powers of control, and the other is beyond its jurisdiction. Those of its own creation have been endowed with corporate powers for the purpose of subserving the interests of the State and its people; those which have been given life by the laws of a sister State have entirely different ends and objects to accomplish. The lawmaking power would find many weighty considerations authorizing the classification of foreign and domestic corporations into different classes and justifying the creation of liability on the part of foreign corporations to pay a tax on the right to take property by descent, devise or bequest, under the laws of the State, and at the same time leaving the right of a domestic corporation so to take free of any such exaction."

It will be seen by a reference to the assignment of errors that the ground of the attack by the plaintiff in error on the validity of the tax assessed against it is that the imposition of the tax upon it, while other corporations organized for like purposes under the laws of Illinois are exempt, renders the act of May 10, 1901, void, as to plaintiff in error. And, in their argument, counsel say: "It is the effect given by the Supreme Court of Illinois to this amendment (the act of 1901) that violates the rights claimed by the plaintiff in error under the Constitution of the United States." The construction of the act by the Supreme Court we must accept as determining the meaning of the act. In other words, we must regard the act as if the legislature had, in explicit language, excluded from its provisions foreign corporations. If this renders the act void plaintiff in error, whether its argument be tenable or untenable, seems to be put in the dilemma urged by the defendant in error, and an affirmance of the judgment is required. If the act of May 10, 1901, is invalid it cannot give exemption from taxation to either domestic or foreign corporations, and plaintiff in error was rightly taxed under the act of June 15, 1895.

Plaintiff in error, of course, does not desire to take exemption from domestic corporations. It desires to remove the discriminatory effect of the amendment of May 10, 1901, by including in its bounty foreign corporations. Can this be done? May a court by construction put into a law that which the legislature has left out? There is a difference between burdens and benefits, and it may well be that a law which confers the latter upon some persons, and thereby increases burdens on others, may be declared invalid by the courts. But if the courts may strike down privileges may they extend favors and make objects of bounty those whom the legislature has excluded? The questions raise important considerations, but we may pass them, because the contention that the act of 1901 is invalid encounters an insuperable obstacle in the power of the State to classify objects of legislation and discriminate between classes. This power is not unconstitutionally exercised by legislation which exempts the religious and educational institutions of the State from an inheritance tax and subjects educational and religious institutions of other States to the tax. Regarding alone the purposes of the institutions, no difference may be perceived between them, but regarding the spheres of their exercise, and the benefits derived from their exercise, a difference is conspicuous. It is this benefit that may have constituted the inducement of the legislation.

Plaintiff in error contests the classification of the act of 1901 and the conclusions deduced from it in an able argument. We do not reply to the argument in detail, because we have defined so often the principles of classification that we must regard repetition as unnecessary. An observation or two, however, may be worth while. It is contended that the exemption of the amendment of 1901 "is not limited by the decision of the Supreme Court to corporate takers or users," and that the decision, by treating the act "as a grant of privileges and immunities to corporations," ignored "the test of use found in the inquiry 'To what purpose is the beneficial

interest in the property devoted?' " and the consideration that there was no necessity for corporate agency in that connection. The result of this is, it is urged, that the court made the "power of state visitation and control" over corporations "the test of taxability or non-taxability upon the right of succession." Denying this to be the test, and contending that the test should be the use to which the property is devoted and the question of tax or freedom from tax determined thereby, and asserting that plaintiff became a person within the jurisdiction of the State by going there to take title to property there situated, and by probating the will of Mrs. Speed as evidence of such title, it is deduced that it was not competent for the State to tax the property of plaintiff in error at one rate and the property of corporations, organized under her laws, at another rate.

It must be kept in mind that the controversies in this case depend upon the power of the State over inheritances and the conditions she may put upon them in the exercise of that power. And this is prominent in the decision of the Supreme Court. In considering this power, and classification in the exercise of this power, the court took into account the greater control and direction the State had over domestic than over foreign corporations. It did not put out of view the uses of property expressed in the act of 1901 nor ignore the consideration that there was no necessity for a corporate agency to execute those uses. The case presented especially a comparison of the rights of corporations, but the decision was broad enough to consider natural persons. "In laying such a tax" (an inheritance tax), the court said, "the legislature may consider the relation which the person or corporation given the right of succession sustains to the deceased, to the property or to the State, and may regulate the amount of the tax to be required in view of such relation, and in exercising this power may lay a tax on the right of one class of persons or corporations to take, and may deem it wise to impose no tax upon the right of other classes of persons or corporations to

take." A Federal court would hesitate indeed to put impediments on this power or declare invalid any classification of persons or corporations that had reasonable regard to the purposes of the State and its legislation. And it cannot be said that if a State exempts property bequeathed for charitable or educational purposes from taxation it is unreasonable or arbitrary to require the charity to be exercised or the education to be bestowed within her borders and for her people, whether exercised through persons or corporations.

Judgment affirmed.

UNITED STATES v. SHIPP.

INFORMATION IN CONTEMPT.

No. 12, Original. Argued December 4, 5, 1906.—Decided December 24, 1906.

Even if the Circuit Court of the United States has no jurisdiction to entertain the petition for *habeas corpus* of one convicted in the state court, and this court has no jurisdiction of an appeal from the order of the Circuit Court denying the petition, this court, and this court alone, has jurisdiction to decide whether the case is properly before it, and, until its judgment declining jurisdiction is announced, it has authority to make orders to preserve existing conditions, and a willful disregard of those orders constitutes contempt.

Where the contempt consists of personal presence and overt acts those charged therewith cannot be purged by their mere disavowal of intent under oath.

In contempt proceedings the court is not a party; there is nothing that affects the judges in their own persons and their only concern is that the law should be obeyed and enforced.

After an appeal has been allowed by one of the justices of this court, and an order entered that all proceedings against appellant be stayed and his custody retained pending appeal, the acts of persons having knowledge of such order, in creating a mob and taking appellant from his place of confinement and hanging him, constitute contempt of this court, and it is immaterial whether appellant's custodian be regarded as a mere state officer or as bailee of the United States under the order.

THE facts are stated in the opinion.

The Solicitor General with whom *The Attorney General* was on the brief, for the United States:

There is no right to a trial by jury in contempt cases. *Eilenbecker* v. *Plymouth County*, 134 U. S. 31; *Ex parte Terry*, 128 U. S. 289; *Ex parte Savin*, 131 U. S. 267; *Ex parte Cuddy*, 131 U. S. 280; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 489; *In re Debs*, 158 U. S. 564.

The Circuit Court had jurisdiction of the *Johnson case*, and this court had jurisdiction on appeal. Sec. 753, Rev. Stat.; *Ex parte Royall*, 117 U. S. 241; *In re Terry*, 128 U. S. 289; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1; *In re Wood*, 104 U. S. 278; *In re Burrus*, 136 U. S. 586; *Cook* v. *Hart*, 146 U. S. 183; *In re Frederich*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89; *Whitten* v. *Tomlinson*, 160 U. S. 240; *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S. 101; *Davis* v. *Burke*, 179 U. S. 399. In the *Royall case* the court laid down, and the later cases amplified, certain rules as to the exercise of this jurisdiction. The court has thus guided the jurisdiction, but has never doubted or restricted it.

That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment. See *Royall's case*, *Whitten* v. *Tomlinson* and *In re Burrus*, *supra*. The Circuit Court is not bound to discharge, because it may and does remand, and that means that it may validly take jurisdiction of a case where the claim of violation of Federal right is not established; it has jurisdiction to consider and decide either way. The opposing argument really means that if upon deliberate examination the court concludes that the claim of alleged violation of Federal law is without merit, then the court was without jurisdiction *ab initio*. That is wholly untenable.

In this class of appeals this court has always affirmed or reversed the judgment below, and has never dismissed for want of jurisdiction in the Circuit Court.

As to the jurisdiction of this court. An appeal may be taken to the Supreme Court in the case of any person alleged to be restrained of his liberty in violation of the Constitution, etc. Secs. 763, 764, Rev. Stat.; act of March 3, 1885, 23

Stat. 437. This right has not been taken away because the language of § 5 of the Circuit Court of Appeals act is "involves the construction or application of the Constitution of the United States." *Cross* v. *Burke*, 146 U. S. 82; *Ex parte Lennon*, 150 U. S. 393; *Craemer* v. *State*, 168 U. S. 124. The appeal here is matter of right. The court was bound to allow it. When a claim under the Constitution of the United States is properly alleged, however unfounded it may turn out to be, this court deliberately considers the claim and retains the case in its grasp and under its power in all respects and for all purposes until final judgment dismissing, affirming or reversing has been rendered and the mandate thereon executed. If an appeal is technically frivolous, it is for this court to say so. A case which ultimately goes out of this court on that ground is completely here within the jurisdiction until it does go. The proposition that when the question of jurisdiction is doubtful, individuals and communities need not respect the court's orders and mobs may do as they please is self-destructive.

The right of appeal may be abused; an appeal may be frivolous and without merit; the delays of the law are often exasperating; but none of these considerations is the slightest excuse for speculating about the court's jurisdiction, or anticipating its judgment, or disobeying its command.

Power to punish for contempts is inherent in all courts for the purpose of enforcing judgments and orders and compelling submission to lawful mandates, as well as for the purpose of preserving order and imposing respect and decorum in the presence of the court. *Anderson* v. *Dunn*, 6 Wheat. 204; *Cooper's case*, 33 Vermont, 253; *Ex parte Robinson*, 19 Wall. 505; *Ex parte Terry*, 128 U. S. 289, and authorities cited. The power and dignity of this court are paramount. This court is preëminent as speaking the last word for the judicial power, and looks to the Constitution, not only for its origin in general, but for its express creation, while the inferior Federal courts look to Congress for their actual being, functions and jurisdiction. It may be doubted whether Congress could

limit the authority of this court over contempts, and whether the restrictions of § 725, Revised Statutes, apply to this court, although professing to apply to all courts of the United States. This court had expressed that doubt. An act of Congress controls the courts of its own creation, but not this court, if thereby its organic authority and jurisdiction under the Constitution are curtailed. The general and inherent authority of this court, of whatever nature, does not need any statutory grant of power and is not subject to statutory restrictions. Comparison of the statutory language suggests reasons for thinking that the phrase "courts of the United States" does not always include this court. Secs. 9-17, Judiciary Act of 1789; §§ 716, 724-726, Rev. Stat.; *Ex parte Robinson,* 19 Wall. 505. Compare *In re Tampa Suburban R. R. Co.,* 168 U. S. 583, and *In re Vidal,* 179 U. S. 126, suggesting that an inherent general power of the court may go further than statutory authority.

But this case is clearly within § 725, which extends the power of punishment to the disobedience or resistance by any party, etc., "*or other person* to any lawful . . . order . . . or command of the said courts." This was not a contempt in the face of the court, or constructively in its presence. *Ex parte Terry,* 128 U. S. 289; *Savin, Petitioner,* 131 U. S. 267. It is one of the "matters that arise at a distance," 4 Bl. Com., 286, and accordingly a rule to show cause issued instead of an instant attachment. The vital matter of refusing to obey the court's command is as serious in the remotest corners of the country as in the courtroom.

Eilenbecker v. *Plymouth Co., supra,* emphasizes the proposition that although the power to punish in contempt is restricted by § 725, the necessary and fundamental power to enforce obedience to lawful orders or to punish for disobeying them is left untouched. The power of a court to make an order carries with it the equal power to punish for a disobedience of that order. *Debs case,* 158 U. S. 594; and the power is summary. *In re Savin,* 131 U. S. 267, 276.

This was murder by a mob, and was an offense against the State as well as against the United States and this court; but the same act may be a crime both against the State and the United States, and the United States has complete power to punish, whether the State does or not. *Cross* v. *North Carolina*, 132 U. S. 131; *Pettibone* v. *United States*, 148 U. S. 197; *Crossley* v. *California*, 168 U. S. 640.

As to purgation under oath,—the old rule was that if one charged in contempt deny upon oath, he is discharged of the contempt, but may be prosecuted for perjury if he has foresworn himself. *King* v. *Sims*, 12 Mod. 511; *King* v. *Vaughan*, 2 Doug. 516. The rule is followed in modern times, e. g., the *May case*, 1 Fed. Rep. 737, but it is held in applying it that the question in every case is whether the facts are consistent with an honest intent, and sound judicial discretion controls. *In re Perkins*, 100 Fed. Rep. 950. The rule in equity is different; testimony will be heard to contradict as well as support the statements of one charged with contempt. *Underwood's case*, 2 Humph. 46; *Thompson* v. *Pennsylvania R. R. Co.*, 48 N. J. Eq. 105; *United States* v. *Anonymous*, 21 Fed. Rep. 761; *Debs case*, 64 Fed. Rep. 724; *United States* v. *Sweeney*, 95 Fed. Rep. 434. But the distinction between the rule in law and equity does not seem to be entirely approved in modern times. *Underwood's case, ut supra; Cartwright's case*, 114 Massachusetts, 230. In *Savin, Petitioner*, 131 U. S. 267, 278, 279, the person charged testified under oath on his own behalf, but his oath did not clear him; he had an opportunity to make his defense, but he had to make it and was adjudged guilty. And see also *In re Watts & Sachs*, 190 U. S. 1, 15. The cases which apply the rule relate to relatively trifling matters and to matters where there was no intentional disrespect, or contempt and where the respondents were excused rather than acquitted. *People* v. *Few*, 2 Johns. 289; *Matter of Moore*, 63 N. Car. 397; *In re Walker*, 82 N. Car. 95; *State* v. *Earl*, 41 Indiana, 464; *Burke* v. *State*, 47 Indiana, 528; *Haskett* v. *State*, 51 Indiana, 176; *Oster* v. *People*, 192 Illinois, 473.

There are numerous well-considered authorities in the state courts refusing to follow the rule. *Hughes* v. *People,* 5 Colorado, 436; *State* v. *Simmons,* 1 Arkansas, 265; *Matter of Snyder,* 103 N. Y. 178; *Wise* v. *Chaney,* 67 Iowa, 73; *Crow* v. *State,* 24 Texas, 12; *Watson* v. *Bank,* 5 S. Car. 159; *Huntington* v. *McMahon,* 48 Connecticut, 174; *State* v. *Matthews,* 37 N. H. 450.

It is not necessary to go into the confusions and distinctions between direct and constructive, remedial and punitive contempts and the other classifications. This was aggravated, and that is enough. There are many contempts as aggravated as those directed at the court itself in open court. See instances noted in *United States* v. *Anonymous,* 21 Fed. Rep. 769, 770.

This contempt was the crime and sin of murder, but because the proceeding is by contempt and not by indictment, a criminal may not deny his crime and then be liable to the bare possibility of the lighter charge of perjury. A contempt committed by a crime is none the less a crime because it is a contempt. *Debs case,* 64 Fed. Rep. 753. The anomaly and anachronism of "trying a man on his own oath," which Blackstone excuses in favor of liberty (4 Comm. 287) ought not to survive into these days.

Whether the court's order constituted the sheriff an officer *pro hac vice* of this court, is not material. The order went to the sheriff with sovereign force in whatever capacity he is regarded, having in fact the legal custody of the prisoner. A state officer having prisoners committed to his custody by a court of the United States is an officer of the United States. *Randolph* v. *Donaldson,* 9 Cr. 86; *In re Birdsong,* 39 Fed. Rep. 599.

Mr. Judson Harmon, Mr. Lewis Shepherd, Mr. G. W. Chamlee and *Mr. Robert B. Cooke,* with whom *Mr. Robert Pritchard, Mr. Martin A. Fleming* and *Mr. T. P. Shepherd* were on the brief, for defendants:

While the appellate jurisdiction of this court is derived

from the Constitution, it is "with such exceptions and under such regulations as Congress shall make." Art. III., Sec. 2; *Nat. Exchange Bank* v. *Peters*, 144 U. S. 570; *Cross* v. *United States*, 145 U. S. 571; *In re Glaser*, 198 U. S. 171.

The right of appeal here must be found, if at all, in the fifth clause of section 5 of the Circuit Court of Appeals Act of March 3, 1891, "in any case that involves the construction or application of the Constitution of the United States." *In re Lennon*, 150 U. S. 393, 398.

The mere allowance of an appeal is insufficient to give the court jurisdiction of a case which from its nature is not appealable.

It is proposed to make the order allowing the appeal and the alleged acts of the defendants in preventing the court from hearing the case the basis of affirmative penal action against them, so that the question is fundamental whether the case in which the order was made was one which in fact came within the limited appellate jurisdiction of the court; whether Johnson really had the right, of which the defendants are charged with depriving him, to have this court hear his case; because if an order be made without jurisdiction there can be no punishment for contempt. *Ex parte Rowland*, 104 U. S. 604, 612; *Ex parte Fisk*, 113 U. S. 713; *In re Sawyer*, 124 U. S. 200. Johnson's proceeding in *habeas corpus* in the Circuit Court did not in fact constitute a "case that involves the construction or application of the Constitution of the United States." This being so this court had no jurisdiction of it and should now so hold for the purposes of this proceeding, just as it would have done if the State of Tennessee had raised the question on the pretended appeal. *Rogers* v. *Peck*, 199 U. S. 425; *In re Lennon*, 150 U. S. 393, 399; *Carey* v. *Houston & T. C. Ry.*, 150 U. S. 170, 181; *Carter* v. *Roberts*, 177 U. S. 496; *C. H. & D. Ry.* v. *Thiebaud*, 177 U. S. 615, 620.

The exceptional cases in which resort may be had to *habeas corpus* in the Federal courts, instead of to the highest court of the State, are only those of public, and not mere private,

emergency, where the operations of the Government are affected, as by the imprisonment of an officer. *Whitten* v. *Tomlinson*, 160 U. S. 231, 242, 247; *Kohl* v. *Lehlback*, 160 U. S. 293.

The constitutional question must be real and substantial. *Storti* v. *Massachusetts*, 183 U. S. 138; *Bradley* v. *Lightcap*, No. 3, 195 U. S. 25; *Wilson* v. *North Carolina*, 169 U. S. 586.

The Federal question cannot be first raised in the assignment of errors, but there must have been a definite claim of a right under the Constitution or laws of the United States. *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430; *Ansbro* v. *United States*, 159 U. S. 695; *Chicago & N. W. Ry.* v. *Chicago*, 164 U. S. 454.

The claims of Johnson that he was deprived of constitutional rights were not real and substantial, but were absolutely frivolous and wholly without foundation. *Storti* v. *Massachusetts*, 183 U. S. 138.

The case here presented involves neither a denial of justice, whether by the laws of Tennessee, or by the mode in which they were administered, nor the invasion of a right secured by the Federal Constitution. It was, therefore, not a case of which the Circuit Court or this court was authorized to take cognizance.

The contempt charged in this case belongs to the class known as criminal or constructive contempts in which the answer of the contemnor is conclusive. *Rex* v. *Vaughan*, 2 Doug. 516; *Rex* v. *Sims*, 12 Mod. 511; *United States* v. *Dodge*, 2 Gall. (U. S.) 313; *In re May*, 1 Fed. Rep. 737; *Haskett* v. *State*, 51 Indiana, 176; *Burke* v. *State*, 47 Indiana, 528; *State* v. *Earle*, 41 Indiana, 464; *People* v. *Few*, 2 Johns. 290; *Matter of Walker*, 82 N. Car. 95; *Matter of Moore*, 63 N. Car. 397; *Thomas* v. *Cummings*, 1 Yates (Pa.), 40; *Underwood's case*, 2 Hump. (Tenn.) 46.

The defendants having severally answered and fully denied the contempts charged against them are, therefore, under the foregoing authorities, entitled to their discharge.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an information charging a contempt of this court and is to the following effect. On February 11, 1906, one Johnson, a colored man, was convicted of rape upon a white woman, in a criminal court of Hamilton County, in the State of Tennessee, and was sentenced to death. On March 3 he presented a petition for a writ of *habeas corpus* to the United States Circuit Court, setting up, among other things, that all Negroes had been excluded, illegally, from the grand and petit juries; that his counsel had been deterred from pleading that fact or challenging the array on that ground, and also from asking for a change of venue to secure an impartial trial, or for a continuance to allow the excitement to subside, by the fear and danger of mob violence; and that a motion for a new trial and an appeal were prevented by the same fear. For these and other reasons it was alleged that he was deprived of various constitutional rights, and was about to be deprived of his life without due process of law.

On March 10, after a hearing upon evidence, the petition was denied, and it was ordered that the petitioner be remanded to the custody of the sheriff of Hamilton County, to be detained by him in his custody for a period of ten days, in which to enable the petitioner to prosecute an appeal, and in default of the prosecution of the appeal within that time to be then further proceeded with by the state court under its sentence. On March 17 an appeal to this court was allowed by Mr. Justice Harlan. On the following Monday, March 19, a similar order was made by this court, and it was ordered further "that all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal."

The sheriff of Hamilton County was notified by telegraph of the order, receiving the news before six o'clock on the same day. The evening papers of Chattanooga published a full account of what this court had done. And it is alleged that

the sheriff and his deputies were informed, and had reason to believe, that an attempt would be made that night by a mob to murder the prisoner. Nevertheless, if the allegations be true, the sheriff early in the evening withdrew the customary guard from the jail, and left only the night jailer in charge. Subsequently, it is alleged, the sheriff and the other defendants, with many others unknown, conspired to break into the jail for the purpose of lynching and murdering Johnson, with intent to show contempt for the order of this court, and for the purpose of preventing it from hearing the appeal and Johnson from exercising his rights. In furtherance of this conspiracy a mob, including the defendants, except the sheriff Shipp and the night jailer, Gibson, broke into the jail, took Johnson out and hanged him, the sheriff and Gibson pretending to do their duty, but really sympathizing with and abetting the mob. The final acts as well as the conspiracy are alleged as a contempt.

The defendants have appeared and answered, and certain preliminary questions of law have been argued which it is convenient and just to have settled at the outset before any further steps are taken. The first question, naturally, is that of the jurisdiction of this court. The jurisdiction to punish for a contempt is not denied as a general abstract proposition, as, of course, it could not be with success. *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303. But it is argued that the Circuit Court had no jurisdiction in the *habeas corpus* case, unless Johnson was in custody in violation of the Constitution, Rev. Stat. § 753, and that the appellate jurisdiction of this court was dependent on the act of March 3, 1891, c. 517, § 5, 26 Stat. 827, *In re Lennon*, 150 U. S. 393, and by that act did not exist unless the case involved "the construction or application of the Constitution of the United States." If the case did not involve the application of the Constitution, otherwise than by way of pretense, it is said that this court was without jurisdiction, and that its order might be contemned with impunity. And it is urged

that an inspection of the evidence before the Circuit Court, if not the face of the petition, shows that the ground alleged for the writ was only a pretense.

We regard this argument as unsound. It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. *In re Sawyer*, 124 U. S. 200; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. See *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 387. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. Rev. Stat. § 766; act of March 3, 1893, c. 226, 27 Stat. 751. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it. Of course the provision of Rev. Stat. § 766, that until final judgment on the appeal further proceedings in the state court against the prisoner shall be deemed void, applies to every case. There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed.

It is proper that we should add that we are unable to agree with the premises upon which the conclusion just denied is based. We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. The murder of the petitioner has made it impossible to decide

that case, and what we have said makes it unnecessary to pass upon it as a preliminary to deciding the question before us. Therefore we shall say no more than that it does not appear to us clear that the subject matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied.

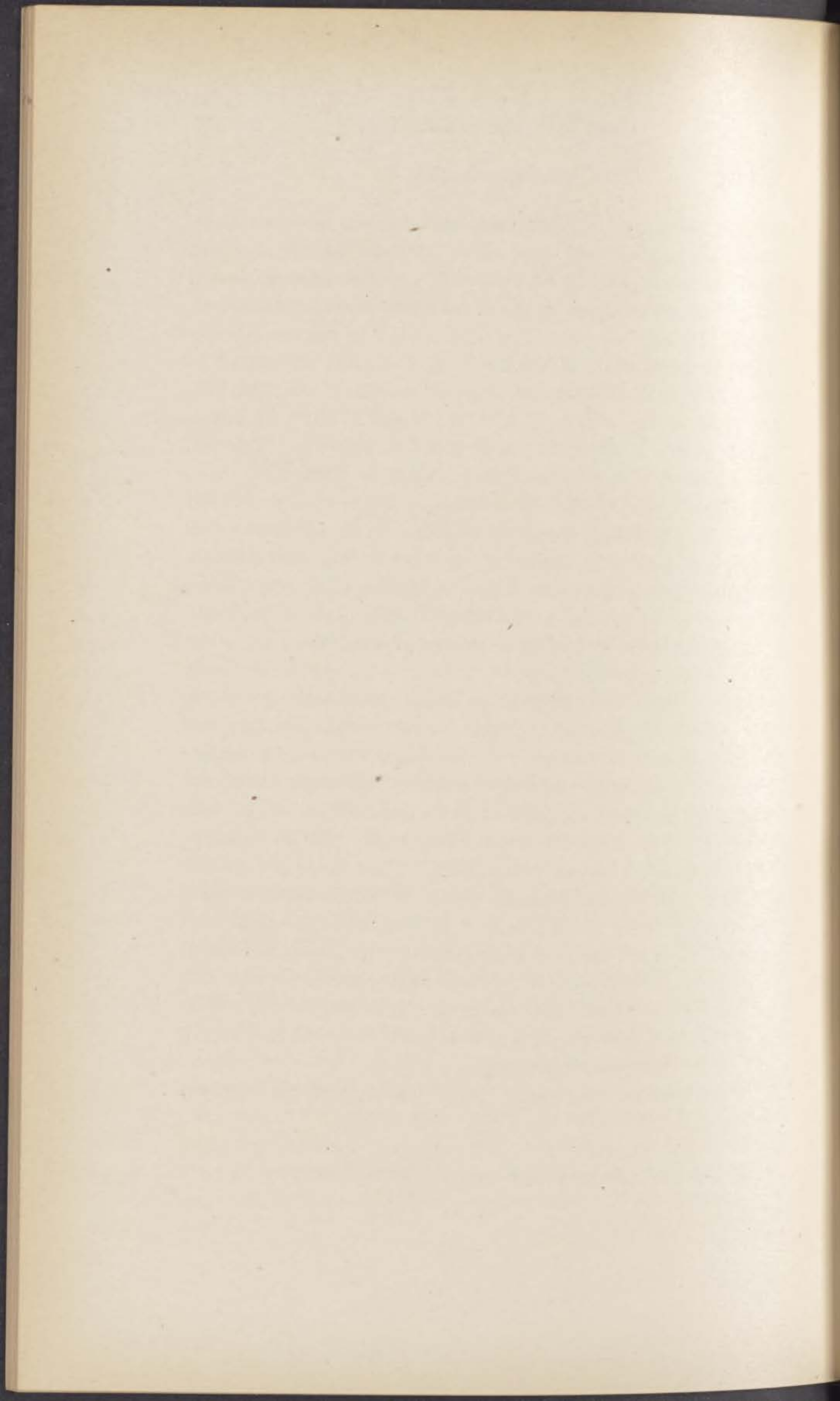
Another general question is to be answered at this time. The defendants severally have denied under oath in their answer that they had anything to do with the murder. It is urged that the sworn answers are conclusive, that if they are false the parties may be prosecuted for perjury, but that in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the court is a party and therefore leaves the fact to be decided by the defendant. But this is a mere afterthought to explain something not understood. The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law, as is suggested by the propounding of interrogatories and the very phrase, purgation by oath (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole, and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent. And when the acts alleged consist in taking part in a murder it cannot be admitted that a general denial and affidavit should dispose of the case. The outward facts

are matters known to many and they will be ascertained by testimony in the usual way. The question was left open in *Ex parte Savin*, 131 U. S. 267, with a visible leaning toward the conclusion to which we come, and that conclusion has been adopted by state courts in decisions entitled to respect. *Huntington* v. *McMahon*, 48 Connecticut, 174, 200, 201; *State* v. *Matthews*, 37 N. H. 450, 455; *Bates's case*, 55 N. H. 325, 327; *Matter of Snyder*, 103 N. Y. 178, 181; *Crow* v. *State*, 24 Texas, 12, 14; *State* v. *Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873. See *Wartman* v. *Wartman*, Taney, 362, 370; *Cartwright's case*, 114 Massachusetts, 230; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31. Whether or not Rev. Stat. § 725 applies to this court, it embodies the law so far as it goes. We see no reason for emasculating the power given by that section, and making it so nearly futile as it would be if it were construed to mean that all contemnors willing to run the slight risk of a conviction for perjury can escape.

The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry, whether, after the order made by this court, the sheriff was to be regarded as bailee of the United States or still held the prisoner in the name of the State alone. Either way, the order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

These preliminaries being settled the trial of the case will proceed.

MR. JUSTICE MOODY took no part in the decision.



OPINIONS PER CURIAM, ETC., FROM OCTOBER 8 TO DECEMBER 24, 1906.

No. —, Original. *Ex parte:* In the Matter of The Seneca Nation et al., Petitioners. Submitted October 9, 1906. Decided October 15, 1906. *Per Curiam.* Motion for leave to file petition for a writ of mandamus denied. *Mr. Chester Howe* for petitioners. *Mr. W. H. Robeson, Mr. J. J. Hemphill, Mr. A. B. Browne* and *Mr. Alexander Britton* for respondents. *Mr. Assistant Attorney General Van Orsdel* for the United States.

No. 297. Frank D. Zell, Plaintiff in Error, *v.* The Judges of the Circuit Court of the United States for the Eastern District of Virginia. In error to the United States Circuit Court of Appeals for the Fourth Circuit. Motions to dismiss or affirm, etc., submitted May 21, 1906. Decided October 15, 1906. *Per Curiam.* Order affirmed with costs. *Mr. Charles L. Frailey, Mr. Reynolds D. Brown, Mr. Malcolm Lloyd, Jr., Mr. A. S. Worthington* and *Mr. Charles H. Burr* for plaintiff in error. *Mr. D. Lawrence Groner, Mr. Tazewell Taylor* and *Mr. Hampton L. Carson* for defendants in error.

No. 339. The Graham and Morton Transportation Company, Appellant, *v.* Craig Shipbuilding Company. Appeal from the District Court of the United States for the Northern District of Illinois. Submitted October 9, 1906. Decided October 15, 1906. *Per Curiam.* Decree affirmed with costs, on the authority of *People's Ferry Company* v. *Beers*, 20 How. 393; *Roach* v. *Chapman*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532; *The Robert W. Parsons*, 191 U. S. 17, and cases cited.

Mr. Charles E. Kremer for appellant. *Mr. Harvey D. Goulder*, *Mr. S. H. Holding* and *Mr. Frank S. Masten* for appellee.

No. 19. JOSEPH J. WATERS, ADMINISTRATOR OF ROBERT JACKSON, DECEASED, PLAINTIFF IN ERROR, *v.* GEORGE E. EMMONS AND J. PAUL SMITH. In error to the Court of Appeals of the District of Columbia. Submitted October 11, 1906. Decided October 22, 1906. *Per Curiam.* Judgment affirmed with costs. See 19 App. D. C. 250; 25 App. D. C. 146. *Mr. Joseph J. Waters* for plaintiff in error. *Mr. William F. Mattingly* for defendants in error.

No. 26. J. A. AXTELL ET AL., PLAINTIFFS IN ERROR, *v.* CYRUS WEBBER. In error to the Supreme Court of the State of Minnesota. Argued October 16, 1906. Decided October 22, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Beaupre* v. *Noyes*, 138 U. S. 397; *National Life Insurance Company* v. *Scheffer*, 131 U. S. App. C. C. III. *Mr. Albert R. Allen*, *Mr. C. M. O'Neil* and *Mr. George E. Clarke* for plaintiffs in error. *Mr. Thomas J. Knox* and *Mr. Andrew C. Dunn* for defendant in error.

No. 29. DANIEL SULLIVAN, PLAINTIFF IN ERROR, *v.* ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY. In error to the Circuit Court of the United States for the Southern District of Texas. Argued October 16, 1906. Decided October 22, 1906. *Per Curiam.* Judgment affirmed with costs. *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore and Michigan Southern Railway Company*, 197 U. S. 541. *Mr. Floyd McGown* and *Mr. L. G. Denman* for plaintiff in error.

Mr. Reagan Houston and *Mr. A. W. Houston* for defendant in error.

No. 35. North American Transportation and Trading Company, Plaintiff in Error, *v.* W. B. Gill. In error to the Supreme Court of the State of Washington. Submitted for plaintiff in error October 18, 1906. Decided October 22, 1906. *Per Curiam.* Judgment affirmed with costs. *Leon* v. *Galceran,* 11 Wall. 185; *American Steamboat Company* v. *Chase,* 16 Wall. 522; *The Robert W. Parsons,* 191 U. S. 17, 36. *Mr. Frederick Bausman* for plaintiff in error. No appearance for defendant in error.

No. 38. W. J. Laffoon, Plaintiff in Error, *v.* J. F. Kerner et al. In error to the Supreme Court of the State of North Carolina. Submitted for plaintiff in error October 18, 1906. Decided October 22, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *California Consolidated Mining Company* v. *Manley, Sheriff, et al., post,* and cases cited. *Mr. Louis M. Swink* for plaintiff in error. No appearance for defendants in error.

No. 148. California Consolidated Mining Company, Plaintiff in Error, *v.* Charles Manley, Sheriff of Shoshone County, State of Idaho, et al. In error to the Supreme Court of the State of Idaho. Motion to dismiss submitted October 15, 1906. Decided October 22, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Green* v. *Van Buskirk,* 3 Wall. 448; *Union Mutual Life Insurance Company* v. *Kirchoff,* 160 U. S. 374; *Haseltine* v. *Central Bank of Springfield, Mo.* (No. 1), 183 U. S. 130; *Schlosser* v. *Hemphill,*

198 U. S. 173; *Clark* v. *Roller,* 199 U. S. 541, 544. *Mr. Myron A. Folsom* for plaintiff in error. *Mr. J. H. Forney* for defendants in error.

No. 360. W. W. Rose, Plaintiff in Error, *v.* The State of Kansas on the Relation of C. C. Coleman, Attorney General. In error to the Supreme Court of the State of Kansas. Motions to dismiss or affirm submitted October 15, 1906. Decided October 22, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Smiley* v. *Kansas,* 196 U. S. 447; *Nonconnah Turnpike Company* v. *Tennessee,* 131 U. S. App. Cl. VIII; *Newport Light Company* v. *Newport,* 151 U. S. 527; *Harrison* v. *Morton,* 171 U. S. 38. *Mr. Frederic D. McKenney* for plaintiff in error. *Mr. C. C. Coleman* for defendant in error.

No. 208. Ferdinand Eidman, Collector, etc., Petitioner, *v.* Frederick B. Tilghman et al., Executors, etc. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Argued October 15, 1906. Decided October 29, 1906. *Per Curiam.* Judgment affirmed with costs by a divided court and cause remanded to the Circuit Court of the United States for the Southern District of New York. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Robb* for petitioner. *Mr. Edward B. Whitney* for respondents.

No. 6. Thomas F. Wilson (on Behalf of the Territory of Arizona), Appellant, *v.* N. O. Murphy et al. Appeal from the Supreme Court of the Territory of Arizona. Submitted October 11, 1906. Decided October 29, 1906. *Per*

Curiam. Decree affirmed with costs. *Mr. Eugene S. Ives* for appellant. *Mr. C. F. Ainsworth* for appellees.

No. 7. THOMAS F. WILSON (ON BEHALF OF THE TERRITORY OF ARIZONA), APPELLANT, *v.* GEORGE W. VICKERS ET AL. Appeal from the Supreme Court of the Territory of Arizona. Submitted October 11, 1906. Decided October 29, 1906. *Per Curiam.* Decree affirmed with costs. *Mr. Eugene S. Ives* for appellant. *Mr. C. F. Ainsworth* for appellees.

No. 241. HAIGHT & FREESE COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* BEVERLY R. ROBINSON, RECEIVER, ETC. In error to the Circuit Court of the United States for the Southern District of New York. Motion to dismiss submitted October 22, 1906. Decided October 29, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Alexander* v. *United States*, 201 U. S. 117, 122; *Nelson* v. *United States*, 201 U. S. 92; *Hardee* v. *Wilson*, 146 U. S. 179; *Masterson* v. *Herndon*, 10 Wall. 416; *Beardsley* v. *Railway Company*, 158 U. S. 123. *Mr. Albert I. Sire* for plaintiffs in error. *Mr. Roger Foster* for defendant in error.

No. 62. FREDERICK H. VOGT, APPELLANT, *v.* MATILDA S. VOGT, BY HER GUARDIAN AD LITEM, PAULINE VOGT. Appeal from the Court of Appeals of the District of Columbia. Argued for appellant October 25 and 26, 1906. The court declined to hear further argument. Decided October 29, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173; *California Consolidated Mining Company* v. *Manley*, *ante*, p. 579, and cases cited. *Mr. John*

C. Gittings for appellant. *Mr. Leon Tobriner* and *Mr. J. J. Darlington* for appellee.

No. 36. Hugh P. Strong et al., Plaintiffs in Error, *v.* Buffalo Land and Exploration Company. In error to the Supreme Court of the State of Minnesota. Submitted October 18, 1906. Decided October 29, 1906. *Per Curiam.* Judgment affirmed with costs on the authority of *Midway Company* v. *Eaton,* 183 U. S. 602. *Mr. J. M. Vale, Mr. John Brennan, Mr. Moses E. Clapp* and *Mr. Newel H. Clapp* for plaintiff in error. *Mr. William C. White* for defendant in error.

Nos. 45 and 46. The Dakota, Wyoming and Missouri River Railroad Company et al., Plaintiffs in Error, *v.* Charles D. Crouch et al., Trustees. In error to the Supreme Court of the State of South Dakota. Argued for defendants in error and submitted for plaintiffs in error October 23, 1906. Decided October 29, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Hardee* v. *Wilson,* 146 U. S. 179; *Sipperley* v. *Smith,* 155 U. S. 86; *Mason* v. *United States,* 136 U. S. 581; *Grand Island &c. Railroad Company* v. *Sweeney,* 103 Fed. Rep. 342; *S. C.,* 95 Fed. Rep. 396; *Sweeney* v. *Grand Island &c. Railroad Company,* 61 Fed. Rep. 3; *Eustis* v. *Bolles,* 150 U. S. 361; *Speed* v. *McCarthy,* 181 U. S. 269; *Pennsylvania Railroad Company* v. *Hughes,* 191 U. S. 477; *Telluride Power &c. Company* v. *Rio Grande &c. Railway Company,* 175 U. S. 639; *Telluride Power &c. Company* v. *Rio Grande &c. Railway Company,* 187 U. S. 569; case below, 18 S. Dak. 540; 101 N. W. Rep. 722. *Mr. Wm. T. Coad* for plaintiffs in error. *Mr. Frederick C. Bryan* and *Mr. Charles W. Brown* for defendants in error.

No. 68. W. S. KEEL, JR., ET AL., APPELLANTS, *v.* E. E. DOUVILLE. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. Argued October 29 and 30, 1906. Decided November 5, 1906. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Cornell* v. *Green*, 163 U. S. 75, and cases cited. *Mr. Wm. R. Harper, Mr. D. W. Harper* and *Mr. E. M. Barber* for appellants. *Mr. Walter J. Gex* and *Mr. E. J. Bowers* for appellee.

No. 392. J. G. RAWLINS, APPELLANT, *v.* J. F. PASSMORE, SHERIFF OF LOWNDES COUNTY, GA. Appeal from the District Court of the United States for the Southern District of Georgia. Argued for appellant and submitted for appellee October 29, 1906. Decided November 5, 1906. *Per Curiam.* Final order affirmed with costs. *Rawlins* v. *Georgia*, 201 U. S. 638; *S. C.*, 52 S. E. Rep. 1; *Craemer* v. *Washington*, 168 U. S. 124, 128, 129. *Mr. John Randolph Cooper* for appellant. *Mr. John C. Hart* and *Mr. W. E. Thomas* for appellee.

No. 93. KATIE MOESCHEN, PLAINTIFF IN ERROR, *v.* THE TENEMENT HOUSE DEPARTMENT OF THE CITY OF NEW YORK. In error to the Supreme Court of the State of New York. Argued November 9, 1906. Decided November 12, 1906. *Per Curiam.* Judgment affirmed with costs. *Boston Beer Company* v. *Massachusetts*, 97 U. S. 25, 32; *Powell* v. *Pennsylvania*, 127 U. S. 678; *United States* v. *Des Moines &c. Company*, 142 U. S. 510, 544; *Holden* v. *Hardy*, 169 U. S. 366; *Atkin* v. *Kansas*, 191 U. S. 207; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Gardner* v. *Michigan*, 199 U. S. 325; case below, 89 App. Div. 526; 179 N. Y. 325. And see *Health Department* v. *Rector &c.*, 145 N. Y. 32; *Harrington* v. *Board of Aldermen*,

20 R. I. 233; *Commonwealth* v. *Roberts*, 155 Massachusetts, 281. *Mr. Adolph Bloch* for plaintiff in error. *Mr. Theodore Connoly* for defendant in error.

No. 109. THE JAMES MCCREERY REALTY CORPORATION, PLAINTIFF IN ERROR, *v.* THE EQUITABLE NATIONAL BANK. In error to the City Court of the city of New York. Submitted November 16, 1906. Decided November 19, 1906. *Per Curiam.* Judgment affirmed with costs. *Dower* v. *Richards*, 151 U. S. 658; *McCormick* v. *Market National Bank*, 165 U. S. 538; *California National Bank* v. *Kennedy*, 167 U. S. 367. *Mr. Eugene G. Kremer* for plaintiff in error. *Mr. Charles A. Hess* for defendant in error.

No. 110. DAVID LAMAR, PLAINTIFF IN ERROR, *v.* ALBERT G. SPALDING. In error to the Court of Errors and Appeals of the State of New Jersey. Argued for defendant in error and submitted for plaintiff in error November 16, 1906. Decided November 19, 1906. *Per Curiam.* Judgment affirmed with costs. *Louisville and Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230. Case below, 68 N. J. Eq. 686. *Mr. Alan H. Strong* and *Mr. Harry Allen Mendelson* for plaintiff in error. *Mr. Edmund Wilson* for defendant in error.

No. 111. CARL S. REYNOLDS, PLAINTIFF IN ERROR, *v.* THE STATE OF CONNECTICUT. In error to the Supreme Court of Errors of the State of Connecticut. Argued for plaintiff in error and submitted for defendant in error November 16, 1906. Decided November 19, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Schlosser* v. *Hemphill*,

198 U. S. 173; *California Consolidated Mining Company* v. *Manley*, decided October 22, and cases cited. *Mr. Clayton B. Smith* for plaintiff in error. *Mr. H. A. Hull* for defendant in error.

No. 60. GRANVILLE STUART, PLAINTIFF IN ERROR, *v.* SAMUEL T. HAUSER ET AL. In error to the Supreme Court of the State of Idaho. Argued November 15, 1906. Decided December 3, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Swafford* v. *Templeton*, 185 U. S. 487; *Butler* v. *Gage*, 138 U. S. 52; *Home for Incurables* v. *City of New York*, 187 U. S. 155; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148; *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75; *Bausman* v. *Dixon*, 173 U. S. 113; *Gableman* v. *Peoria &c. Railway Company*, 179 U. S. 335; *City of New Orleans* v. *New Orleans Water Company*, 142 U. S. 79; *Beals* v. *Cone*, 188 U. S. 184; *Speed* v. *McCarthy*, 181 U. S. 269. Case below, 9 Idaho, 53. *Mr. George B. Colby* and *Mr. Charles W. Dayton* for plaintiff in error. *Mr. S. M. Stockslager* and *Mr. W. E. Borah* for defendants in error.

No. 114. ANNIE CAMP FIELD ET AL., PLAINTIFFS IN ERROR, *v.* BARBER ASPHALT PAVING COMPANY. In error to the Supreme Court of the State of Missouri. Argued for the plaintiffs in error and submitted for defendant in error November 16, 1906. Decided December 3, 1906. *Per Curiam.* Judgment affirmed with costs. *Field* v. *Barber Asphalt Paving Company*, 194 U. S. 618; *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557. Case below, *Barber Asphalt Paving Company* v. *Field*, 188 Missouri, 182. *Mr. Richard H. Field* for plaintiffs in error. *Mr. Wm. C. Scarritt* and *Mr. E. L. Scarritt* for defendant in error.

No. 131. ROBERT D. KINNEY, PLAINTIFF IN ERROR, *v.* JAMES T. MITCHELL. In error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Argued for defendant in error and submitted for plaintiff in error December 13, 1906. Decided December 17, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Robert D. Kinney pro se. Mr. Marlin E. Olmsted* and *Mr. Samuel Dickson* for respondent.

No. —, Original. *Ex parte:* IN THE MATTER OF FRANK D. ZELL, PETITIONER. Submitted December 13, 1906. Decided December 17, 1906. *Per Curiam.* Motion for leave to file petition for writs of prohibition or mandamus denied. *Mr. Charles L. Frailey, Mr. Charles H. Burr, Mr. Reynolds D. Brown* and *Mr. Malcolm Lloyd, Jr.,* for petitioner.

No. 124. PEARL H. SMITH, APPELLANT, *v.* SAMUEL G. IVERSON AS STATE AUDITOR, ETC. Appeal from the Circuit Court of the United States for the District of Minnesota. Argued December 12, 1906. Decided December 17, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Hohorst* v. *Hamburg-American Packet Company,* 148 U. S. 262; *In re Hohorst,* 150 U. S. 653; *McLish* v. *Roff,* 141 U. S. 661; *Bowker* v. *United States,* 186 U. S. 135, 138. *Mr. H. H. Grace, Mr. John Brennan* and *Mr. T. D. O'Brien* for appellant. *Mr. Coryate S. Wilson* and *Mr. Edward T. Young* for appellee.

No. 239. HIRAM T. CHAPMAN, PLAINTIFF IN ERROR, *v.* FLORENCE ELLIOTT CHAPMAN. In error to the Supreme Court of the State of Nebraska. Motion to dismiss submitted De-

cember 10, 1906. Decided December 17, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Haseltine* v. *Central Bank,* 183 U. S. 130; *Schlosser* v. *Hemphill,* 198 U. S. 173. *Mr. William E. Gantt* and *Mr. Herbert L. Baker* for plaintiff in error. *Mr. E. F. Colladay, Mr. J. W. Woodrough* and *Mr. W. F. Gurley* for defendant in error.

Decisions on Petitions for Writs of Certiorari from October 8 *to December* 24, 1906.

No. 413. THE ATLANTIC TRUST COMPANY, PETITIONER, *v.* EDGAR C. CHAPMAN, RECEIVER, ETC., ET AL. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Edward B. Whitney* and *Mr. Stanley W. Dexter* for petitioner. *Mr. Edgar C. Chapman* for respondents.

No. 433. HENRY ARNOLD RICHARDSON, AS TRUSTEE, ETC., PETITIONER, *v.* JOHN M. SHAW ET AL. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. John Brooks Leavitt* for petitioner. *Mr. E. S. Theall* for respondents.

No. 142. THE EAGLE ORE SAMPLING COMPANY, PETITIONER, *v.* DUNCAN CHISHOLM, TRUSTEE. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. M. Teller* for petitioner. *Mr. Joel F. Vaile, Mr. C. A. Brandenburg* and *Mr. E. C. Brandenburg* for respondent.

No. 298. M. P. Reeve, Petitioner, *v.* North Carolina Land and Timber Company et al. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. H. Ingersoll* for petitioner. *Mr. R. E. L. Mountcastle* for respondents.

No. 305. Arthur Weinreb et al., Petitioners, *v.* Joseph H. Fink. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. F. M. Czaki* for petitioners. *Mr. Adolph Bloch* for respondent.

No. 322. Carmelo Greco, Petitioner, *v.* The Steamship Sarnia, etc. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wilford H. Smith* for petitioner. *Mr. Percy S. Dudley* for respondent.

No. 330. The Delaware, Lackawanna and Western Railroad Company, Petitioner, *v.* William W. Rutter et al., Executors, etc. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William D. Guthrie* and *Mr. Henry D. Hotchkiss* for petitioner. *Mr. Augustus Van Wyck* for respondents.

No. 337. David McKenzie, Petitioner, *v.* James Pease, Sheriff, etc. October 15, 1906. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Robert G. Dyrenforth* for petitioner. *Mr. Harris F. Williams* for respondent.

No. 397. The Saginaw Match Company, Petitioner, *v.* The Diamond Match Company. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ralzemond A. Parker* and *Mr. Charles F. Burton* for petitioner. *Mr. John R. Nolan* for respondent.

No. 436. Cumberland Telephone and Telegraph Company, Petitioner, *v.* Mayor and City Council of Nashville, Tenn. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William L. Granbery* for petitioner. No appearance for respondent.

No. 441. New York Evening Journal Publishing Company, Petitioner, *v.* Joseph Simon. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward T. Fenwick* and *Mr. Clarence J. Shearn* for petitioner. *Mr. Edward K. Jones* for respondent.

No. 442. The Atlantic Transport Company, Claimant, etc., Petitioner, *v.* Frances M. Barnes. October 15, 1906. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for petitioner. *Mr. Louis H. Porter* for respondent.

No. 443. JAMES P. STEWART ET AL., PETITIONERS, *v.* H. S. WRIGHT. October 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John M. Thurston* and *Mr. W. R. Robertson* for petitioners. *Mr. John W. Halliburton* for respondent.

No. 350. THE OLD DOMINION STEAMSHIP COMPANY, OWNER, ETC., PETITIONER, *v.* PRIMUS GILMORE, ADMINISTRATOR, ETC. October 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Harrington Putnam* for petitioner. *Mr. J. Parker Kirlin* and *Mr. George Whitfield Betts, Jr.*, for respondent.

No. 165. ELBERT R. ROBINSON, PETITIONER, *v.* THE AMERICAN CAR AND FOUNDRY COMPANY. October 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Gray Lucas*, *Mr. Judson W. Lyons* and *Mr. Mason N. Richardson* for petitioner. *Mr. Thomas A. Banning* and *Mr. Ephraim Banning* for respondent.

No. 318. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* MATTIE J. STUTTS, ADMINISTRATRIX, ETC. October 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Milton Humes* for petitioner. *Mr. Richard W. Walker* for respondent.

No. 366. ABRAM ROSENBERGER, PETITIONER, *v.* JOSEPH H. HARRIS. October 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. J. Darlington* and *Mr. James C. Jones* for petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Robb* for respondent.

No. 414. MORITZ EISNER ET AL., PETITIONERS, *v.* EMILIE SAXLEHNER. October 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Leopold Wallach, Mr. Charles G. Coe* and *Mr. Charles K. Allen* for petitioners. *Mr. Antonio Knauth* for respondent.

No. 409. JAMES W. DONNELL, PETITIONER, *v.* HERRING-HALL-MARVIN SAFE COMPANY ET AL. October 29, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. George Peck Merrick* and *Mr. S. S. Gregory* for petitioner. *Mr. Charles H. Aldrich* and *Mr. Lawrence Maxwell, Jr.*, for respondents.

No. 462. HERRING-HALL-MARVIN SAFE COMPANY, PETITIONER, *v.* HALL'S SAFE COMPANY ET AL. October 29, 1906. Petition and cross-petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Lawrence Maxwell, Jr.*, and *Mr. Charles H. Aldrich* for petitioner. *Mr. Judson Harmon* and *Mr. William C. Cochran* for respondent.

No. 460. ALEXANDER D. SHAW ET AL., PETITIONERS, *v.* THE UNITED STATES. October 29, 1906. Petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward S Hatch* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 465. Rosa M. Cole, Executrix, etc., Petitioner, *v.* The City of Indianapolis et al. October 29, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ferdinand Winter* and *Mr. Alexander C. Ayres* for petitioner. *Mr. Frederick E. Matson, Mr. Henry Warrum* and *Mr. Merrill Moores* for respondents.

No. 423. George R. Finch et al., Petitioners, *v.* Maryland Casualty Company. November 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. P. J. McLaughlin* for petitioners. *Mr. Emerson Hadley* for respondent.

No. 453. C. H. Scott et al., Petitioners, *v.* Charles P. Guice, an Infant, etc. November 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Holmes Conrad* and *Mr. C. H. Scott* for petitioners. No appearance for respondent.

No. 483. The Chesapeake and Ohio Steamship Company, Limited, Petitioner, *v.* Edward Morris. November 19, 1906. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for petitioner. *Mr. Wm. S. Opdyke* for respondent.

No. 490. MERCANTILE TRUST COMPANY ET AL., PETITIONERS, *v.* SAMUEL P. WHEELER, RECEIVER, ETC. November 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Philip Barton Warren* and *Mr. Bluford Wilson* for petitioners. No appearance for respondent.

No. 491. GEORGE W. CRICHFIELD, PETITIONER, *v.* JUAN P. JULIA. November 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. L. Laflin Kellogg* for petitioner. *Mr. W. Benton Crisp* and *Mr. Henry W. Herbert* for respondent.

No. 459. MICHIGAN STEAMSHIP COMPANY, PETITIONER, *v.* HUGH MCGILL ET AL. December 3, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. Parker Kirlin, Mr. C. R. Hickox* and *Mr. A. B. Browne* for petitioner. *Mr. William Denman* for respondent.

No. 486. THE OHIO TRANSPORTATION COMPANY ET AL., PETITIONERS, *v.* DAVIDSON STEAMSHIP COMPANY. December 3, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

Mr. Harvey D. Goulder, Mr. S. H. Holding, Mr. Frank S. Masten and *Mr. Wm. E. Church* for petitioner. *Mr. Charles E. Kremer* and *Mr. F. H. Canfield* for respondent.

Nos. 502 and 503. WILLIAM MCCOACH, COLLECTOR, ETC., PETITIONER, *v.* THE PHILADELPHIA TRUST, SAFE DEPOSIT AND INSURANCE COMPANY, EXECUTORS, ETC., ET AL.; and No. 504. WILLIAM MCCOACH, COLLECTOR, ETC., PETITIONER, *v.* GEORGE W. NORRIS ET AL., EXECUTORS, ETC. December 10, 1906. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. H. Gordon McCouch* for respondents.

No. 505. THE UNITED STATES, PETITIONERS, *v.* THE MARION TRUST COMPANY, TRUSTEE, ETC. December 10, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. E. W. Bradford* for respondent.

No. 466. WILLIAM SOBEY, PETITIONER, *v.* WILFORD H. HOLSCLAW. December 10, 1906. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Melville Church, Mr. George P. Fisher, Jr.*, and *Mr. James H. Peirce* for petitioner. *Mr. Edgar M. Kitchin* and *Mr. Edward T. Fenwick* for respondent. *Mr. Albert G. Davis* for the General Electric Company, filed a brief as *amicus curiæ*.

No. 473. The First National Bank of Vandalia, Ill., et al., Petitioners, *v.* Edward Flickinger. December 10, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. C. Herron* and *Mr. John N. VanDeman* for petitioners. *Mr. T. E. Powell* for respondent.

No. 489. De Wane B. Smith, Petitioner, *v.* Dexter G. Look et al. December 10, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Milton E. Robinson* for petitioner. *Mr. Fred L. Chappell* for respondents.

No. 498. Edward B. Leigh, Petitioner, *v.* Kewanee Manufacturing Company. December 10, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John P. Ahrens* and *Mr. David S. Geer* for petitioner. *Mr. Joseph H. Defrees* and *Mr. William Brace* for respondent.

No. 506. The United States, Petitioner, *v.* R. Hoe & Co. December 17, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* and *The Solicitor General* and *Mr. W. Wickham Smith* for petitioner. *Mr. Albert H. Washburn* for respondents.

No. 507. The United States, Petitioner, *v.* James C. Morgan. December 17, 1906. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. No appearance for respondent.

No. 519. Eva A. Ingersoll, Administratrix, etc., Petitioner, *v.* Joseph A. Coram et al. December 24, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. E. N. Harwood, Mr. Hannis Taylor, Mr. Hollis R. Bailey* and *Mr. John H. Hazelton* for petitioner. *Mr. Louis D. Brandeis* and *Mr. Wm. H. Dunbar* for respondents.

No. 487. Clara Chaison et al., Petitioners, *v.* Lawrence Hyde et al. December 24, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George C. Greer* for petitioners. *Mr. Wm. Hepburn Russell* and *Mr. Wm. Beverly Winslow* for respondents.

No. 509. George F. Vietor et al., Petitioners, *v.* Benjamin Levi et al. December 24, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Abram I. Elkus* for petitioners. No appearance for respondents.

No. 511. Myron W. Andrus, Petitioner, *v.* The Berkshire Power Company. December 24, 1906. Petition for a writ of certiorari to the United States Circuit Court of Ap-

peals for the Second Circuit denied. *Mr. C. Walter Artz* for petitioner. *Mr. Wm. Waldo Hyde* and *Mr. Arthur L. Shipman* for respondent.

No. 521. CHARLES THORLEY, PETITIONER, *v.* THE PABST BREWING COMPANY. December 24, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. F. Sheehan* and *Mr. Joseph Fettretch* for petitioner. *Mr. A. S. Gilbert* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 8 TO DECEMBER 24, 1906.

No. 61. ROBERT A. MILLER, AS SPECIAL MASTER, ET AL., PLAINTIFFS IN ERROR, *v.* NORTHERN ASSURANCE COMPANY. In error to the District Court of the United States for the District of Porto Rico. October 9, 1906. Dismissed, per stipulation, on motion of *Mr. Frederic D. McKenney* for the defendant in error. *Mr. Fritz von Briesen* for plaintiffs in error. *Mr. Frederic D. McKenney* and *Mr. F. H. Dexter* for defendant in error.

No. 95. AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR, *v.* JUAN MATIAS FERNANDEZ. In error to the District Court of the United States for the District of Porto Rico. October 9, 1906. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. Frederic D. McKenney, Mr. J. S. Flannery* and

Mr. F. H. Dexter for plaintiff in error. No appearance for defendant in error.

No. 5. THE NEWPORT NEWS AND OLD POINT RAILWAY AND ELECTRIC COMPANY, PLAINTIFF IN ERROR, *v.* HAMPTON ROADS RAILWAY AND ELECTRIC COMPANY ET AL. In error to the Supreme Court of Appeals of the State of Virginia. October 9, 1906. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. S. Gordon Cumming* and *Mr. Fred Harper* for plaintiff in error. *Mr. R. G. Bickford* for defendants in error.

Nos. 161 and 162. THE ALLIANCE GAS AND ELECTRIC COMPANY, APPELLANT, *v.* THE CITY OF ALLIANCE. Appeals from the Circuit Court of the United States for the Northern District of Ohio. October 9, 1906. Dismissed with costs, on motion of counsel for the appellant. *Mr. William B. Sanders* for appellant. No appearance for appellee.

No. 183. THE COVINGTON AND CINCINNATI BRIDGE COMPANY, PLAINTIFF IN ERROR, *v.* THE CITY OF COVINGTON. In error to the Court of Appeals of the State of Kentucky. October 9, 1906. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. S. D. Rouse* for plaintiff in error. No appearance for defendant in error.

No. 203. OKLAHOMA GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR, *v.* MYRTLE LUKERT. In error to the Supreme Court of the Territory of Oklahoma. October 9, 1906. Dis-

missed, per stipulation. *Mr. D. T. Flynn* and *Mr. C. B. Ames* for plaintiff in error. *Mr. Chester Howe* for defendant in error.

No. 22. UNION PACIFIC RAILROAD COMPANY, APPELLANT, *v.* ROBERT O. FINK, TREASURER, ETC., ET AL. Appeal from the Circuit Court of the United States for the District of Nebraska. October 9, 1906. Dismissed with costs, on motion of *Mr. Maxwell Evarts* for the appellant. *Mr. Maxwell Evarts* and *Mr. John N. Baldwin* for appellant. *Mr. Norris Brown* for appellees.

No. 23. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, APPELLANT, *v.* A. F. CARLSON ET AL. Appeal from the Circuit Court of the United States for the District of Nebraska. October 9, 1906. Dismissed with costs, on motion of *Mr. Maxwell Evarts* in behalf of counsel for the appellant. *Mr. Charles J. Greene* and *Mr. R. W. Breckenridge* for appellant. *Mr. Norris Brown* for appellees.

No. 452. GEORGE D. COLLINS, PLAINTIFF IN ERROR, *v.* THOMAS F. O'NEIL, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, CAL. ET AL. In error to the Superior Court of the city and county of San Francisco, State of California. October 9, 1906. Docketed and dismissed with costs, on motion of *Mr. William Hoff Cook* for the defendant in error. No one opposing.

No. 39. C. W. BUSTER ET AL., APPELLANTS, *v.* J. GEORGE WRIGHT, UNITED STATES INDIAN INSPECTOR, ET AL. Appeal

from the United States Circuit Court of Appeals for the Eighth Circuit. October 17, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. Wm. T. Hutchings* for appellants. *The Attorney General* for appellees.

No. 20. WILLIAM J. GALLAGHER, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF ILLINOIS. In error to the Supreme Court of the State of Illinois. October 22, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles H. Soelke* for plaintiff in error. *Mr. Erasmus C. Lindley* for defendants in error.

No. 65. JAMES VAN BUREN, APPELLANT, *v.* P. F. HENNESSEY, TESTAMENTARY EXECUTOR, ETC., ET AL. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. October 24, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. Branch K. Miller* for appellant. *Mr. William J. Hennessey* for appellees.

No. 348. JULIAN CASTILLO SLAUGHTER ET AL., APPELLANTS, *v.* CECILE R. LOEB, EXECUTRIX, ETC. Appeal from the Court of Appeals of the District of Columbia. October 29, 1906. Dismissed with costs, on motion of *Mr. Charles L. Frailey* in behalf of counsel for the appellants. *Mr. Wilton J. Lambert* for appellants. No appearance for appellee.

No. 274. WILLIAM F. HOLTZMAN ET AL., APPELLANTS, *v.* IRWIN B. LINTON, EXECUTOR, ETC. Appeal from the Court

of Appeals of the District of Columbia. November 5, 1906. Dismissed with costs, on motion of counsel for appellants. *Mr. A. S. Worthington* and *Mr. E. Hilton Jackson* for appellants. *Mr. Irwin B. Linton* and *Mr. J. Altheus Johnson* for appellee.

No. 4, Original. THE UNITED STATES, COMPLAINANT, *v.* THE STATE OF MICHIGAN. November 19, 1906. Dismissed, on motion of *The Solicitor General* for the complainant. *The Attorney General* for complainant. *Mr. Horace M. Oren* and *Mr. Charles A. Blair* for defendant.

No. 113. STEPHEN R. WIGHTMAN, PLAINTIFF IN ERROR, *v.* THE STATE OF CONNECTICUT. In error to the Supreme Court of Errors of the State of Connecticut. December 3, 1906. Dismissed with costs, per stipulation. *Mr. Samuel Park* for plaintiff in error. *Mr. H. A. Hull* for defendant in error.

No. 205. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* D. ROY MUMFORD. In error to the Supreme Court of the State of Iowa. December 3, 1906. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. Robert Mather* for plaintiff in error. *Mr. N. D. Ely, Mr. Arthur G. Bush* and *Mr. Charles F. Wilson* for defendant in error.

No. 135. SAM LEE ET AL., APPELLANTS, *v.* HERBERT E. ELLIS. Appeal from the Supreme Court of the Territory of

Oklahoma. December 10, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. S. H. Harris* for appellants. *Mr. Fred Beall* for appellee.

No. 336. ALBERT T. PATRICK, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF NEW YORK. In error to the Court of General Sessions of the Peace for the County of New York. December 13, 1906. Dismissed with costs, on motion of *Mr. William Lindsay* for the plaintiff in error. *Mr. William Lindsay* for plaintiff in error. No appearance for defendants in error.

No. 524. PETRONA DEL CARMEN GONZALEZ RESTO, APPELLANT, *v.* PETRONA RESTO Y NEGRÓN ET AL. Appeal from the Supreme Court of Porto Rico. December 17, 1906. Docketed and dismissed with costs, on motion of *Mr. Perry Allen* for the appellees. No one opposing.

No. 529. RICHARD HYNES, APPELLANT, *v.* LEO V. YOUNGWORTH, UNITED STATES MARSHAL, ETC.; and No. 530. A. H. HEDDERLY, APPELLANT, *v.* LEO V. YOUNGWORTH, UNITED STATES MARSHAL, ETC. Appeals from the Circuit Court of the United States for the Southern District of California. December 24, 1906. Docketed and dismissed with costs, on motion of *The Solicitor General* for the appellee. No one opposing.

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ACTIONS.

1. *Limitation of actions brought under* § 7 *of the act of July* 2, 1890.

The five year limitation in § 1047, Rev. Stat., does not apply to suits brought under § 7 of the act of July 2, 1890, but by the silence of that act the matter is left under § 721, Rev. Stat., to the local law. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 390.

2. *Limitation of actions for injuries to property under Tennessee Code.*

The three year limitation in § 2773, Tennessee Code, for actions for injuries to personal or real property, applies to injuries falling upon some object more definite than the plaintiff's total wealth, and the general ten year limitation in § 2776 for all actions not expressly provided for controls actions of this nature brought under § 7 of the act of July 2, 1890. *Ib.*

3. *Right of city to maintain action under Sherman Anti-trust Law.*

By express provision of the act of July 2, 1890, 26 Stat. 209, a city is a person within the meaning of section 7 of that act, and can maintain an action against a party to a combination unlawful under the act by reason of which it has been forced to pay a price for an article above what it is reasonably worth. *Ib.*

See Constitutional Law, 26;
Jurisdiction, B 1.

ACTS OF CONGRESS.

Anti-Trust Act of July 2, 1890 (see Actions): *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 390.

Bankruptcy, Act of 1898 (see Courts, 6): *New Jersey* v. *Anderson*, 483. Act of 1898, § 19 (see Appeal and Error, 3): *Grant Shoe Co.* v. *Laird Co.*, 502; § 25*b* (see Bankruptcy, 1, 2): *Conboy* v. *First Nat. Bank*, 141; § 64*a* (see Bankruptcy, 4, 5, 6): *New Jersey* v. *Anderson*, 483. Act of 1867 (see Bankruptcy, 4): *Ib.*

Cattle Contagious Disease Act of February 2, 1903, 33 Stat. 1264 (see Commerce, 7, 8, 9): *Illinois Central R. R.* v. *McKendree*, 514.

Cherokee Indians, Acts relating to citizenship and distribution of tribal property (see Statutes, A 2): *Cherokee Intermarriage Cases*, 76.

Chippewa Indians, Treaty of 1819 (see Treaties): *Francis* v. *Francis*, 233.

Civil Rights, Rev. Stat. §§ 1978, 1979, 5508, 5510 (see Jurisdiction, D 2): *Hodges* v. *United States*, 1.

DISTRICT OF COLUMBIA, Code, § 233, 31 Stat. 1189, 1127 (see Federal Question, 4): *Taylor* v. *Taft*, 461.

FLORIDA LAND CLAIMS, Act of June 22, 1860, § 3, and act of May 23, 1828, 4 Stat. 284 (see Jurisdiction, C): *United States* v. *Dalcour*, 408.

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LIMITATION OF ACTIONS FOR PENALTIES, Rev. Stat. § 1047 (see Actions, 1): *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 390.

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ALIENATION OF LAND.

See CONVEYANCES.
INDIANS.

AMENDMENTS TO CONSTITUTION.

Generally, See CONSTITUTIONAL LAW, 21, 22, 23;
PRACTICE AND PROCEDURE, 2.

Fifth Amendment, See CONSTITUTIONAL LAW, 15;
JURISDICTION, F 1.

Seventh Amendment, See INSURANCE.

Tenth Amendment, See Constitutional Law, 18.
Eleventh Amendment, See Constitutional Law, 26.
Thirteenth Amendment, See Constitutional Law, 16, 18;
Jurisdiction, D 2.
Fourteenth Amendment, See Constitutional Law;
Federal Question, 3.
Fifteenth Amendment, See Constitutional Law, 16, 18.

AMOUNT IN CONTROVERSY.

See Jurisdiction, A 1, 2.

ANTI-TRUST ACT.

See Actions.

APPEAL AND ERROR.

1. *Habeas corpus—Appeal from Federal court whose jurisdiction improperly invoked.*

Although, regularly, one seeking relief by *habeas corpus* in the state courts should prosecute his appeal to, or writ of error from, the highest state court, before invoking the jurisdiction of the Circuit Court on *habeas corpus*, where the case is one of which the public interest demands a speedy determination, and the ends of justice will be promoted thereby, this court may proceed to final judgment on appeal from the order of the Circuit Court denying the relief. *Appleyard* v. *Massachusetts*, 222.

2. *Habeas corpus—Review of final order of Supreme Court of Philippine Islands.*

A proceeding in *habeas corpus* is a civil, and not a criminal, proceeding, and as final orders of Circuit or District Courts of the United States in such a proceeding can only be reviewed in this court by appeal, under § 10 of the act of July 1, 1902, 32 Stat. 691, a final order of the Supreme Court of the Philippine Islands in *habeas corpus* is governed by the same rules and can be reviewed by appeal and not by writ of error. *Fisher* v. *Baker*, 175.

3. *Mode of review of judgment of adjudication in bankruptcy.*

A judgment of the bankruptcy court that a person against whom a petition has been filed is or is not a bankrupt, based upon the verdict of a jury demanded as of right under § 19 of the bankruptcy law, can only be reviewed by this court by writ of error and not by appeal. *Grant Shoe Co.* v. *Laird Co.*, 502.

4. *Mode of review of judgment of territorial court.*

The proper way to review judgments in actions at law of the Supreme Court of the Territory of Oklahoma where the case was tried without a jury is by writ of error, not by appeal. *National Live Stock Bank* v. *First Nat. Bank*, 296.

5. *Right of appeal from Circuit Court to Circuit Court of Appeals and thence to Supreme Court.*

Where complainant not only sets up diverse citizenship but also a con-

stitutional question he has the right to appeal from the judgment of the Circuit Court to the Circuit Court of Appeals, and from its decision an appeal or writ of error may be taken to this court. (*Field* v. *Barber Asphalt Co.*, 194 U. S. 618, distinguished.) *Mississippi R. R. Comm.* v. *Illinois Central R. R.*, 335.

See Bankruptcy, 1, 2, 3; Bonds, 2; Contempt of Court, 2; Federal Question; Jurisdiction; Practice and Procedure.

APPEARANCE.

See Jurisdiction, F 3.

APPLIANCES.

See Master and Servant, 2, 4.

ASSESSMENT AND TAXATION.

See Practice and Procedure, 3; Taxes and Taxation.

ASSIGNMENT.

See Local Law (Kan.); Mortgages and Deeds of Trust, 1, 2.

ATTACHMENT.

See Jurisdiction, D 3; F 2.

BANKRUPTCY.

1. *Appeals; time for taking.*

Congress having provided by section 25*b* of the Bankruptcy Act that appeals may be had under such rules and within such time as may be prescribed by this court, the thirty day limitations in General Order in Bankruptcy XXXVI has the same effect as if written in the statute and the allowance of an appeal taken thereafter on certificate by the Circuit Court of Appeals cannot operate as an adjudication that it is taken in time. *Conboy* v. *First National Bank*, 141.

2. *Appeals; running of limitations—Appeals do not lie from orders denying petitions for rehearing.*

The time within which an appeal should be taken under section 25*b* of the Bankruptcy Act and General Order in Bankruptcy XXXVI runs from the entry of the original judgment or decree and not of the order denying petition for rehearing. Appeals do not lie from orders denying petitions for rehearing which are addressed to the discretion of the court to afford it an opportunity to correct its own errors. *Ib.*

3. *Appeals; time not extended by petition for rehearing or arrested by order of court.*

The time for appeal cannot after it has expired be extended by an ap-

plication for rehearing or arrested by an order of the court, even though the application be made during the same term at which judgment was entered. *Ib.*

4. *Preference of taxes.*
The requirement of § 64*a* of the bankruptcy law of 1898 in regard to preference of taxes is a wide departure from the act of 1867 and prefers taxes due to any State and not only those due to the State in which proceedings are instituted. *New Jersey* v. *Anderson*, 483.

5. *Preference of taxes.*
Generally speaking, a tax is a pecuniary burden laid upon individuals or property to support the Government, and § 64*a* of the bankruptcy law is very broad and covers all taxes, including yearly license fees imposed by the State on corporations organized under its laws for the privilege of doing business, whether such business is carried on in that or in other States. *Ib.*

6. *Preference of taxes.*
Under the bankruptcy act taxes assessed on returns made prior to the adjudication are legally due and owing and entitled to the preference given by § 64*a*, although not collectible until after the adjudication. *Ib.*

See Appeal and Error, 3.

BEQUESTS.

See Taxes and Taxation, 1.

BILL OF REVIEW.

See Practice and Procedure, 7.

BILLS AND NOTES.

See Mortgages and Deeds of Trust, 1;
Patents, 2.

BONDS.

1. *Obligation of sureties.*
The obligation of sureties upon bonds is *strictissimi juris* and not to be extended by implication or enlarged construction of the terms of the contract entered into. *Crane* v. *Buckley*, 441.

2. *Supersedeas; right of recovery on.*
Sureties on a supersedeas bond given by defendant to answer, in case of his failure to prosecute his appeal to effect, to plaintiff for loss in use and possession of premises, which, under decree of Circuit Court, plaintiff was entitled to reënter on a date therein specified in default of payment by defendant of balance of purchase price, *held* not liable on the bond where the Circuit Court affirmed the decree as to plaintiff's right to reënter in case of non-payment, but modified it by giving

defendant until a later date to make the final payment, thereby also extending his right of possession until that date. *Ib.*

"BUCKET SHOP."

See Practice and Procedure, 2.

BURDEN OF PROOF.

See Federal Question, 2.

CARRIERS.

Power of State to augment or lessen carrier's liability.

In the absence of action by Congress a State may by statute determine, and either augment or lessen a carrier's liability, and such a statute limiting the right of recovery of certain classes of persons does not deprive a person injured thereafter of a vested right of property. (*Pennsylvania Railroad Co.* v. *Hughes*, 191 U. S. 477, followed.) *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 284.

See Commerce.

CASES DISTINGUISHED.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, distinguished in *Mississippi R. R. Comm.* v. *Illinois Central R. R.*, 335.

CASES EXPLAINED.

Rhodes v. *Iowa*, 170 U. S. 412, explained in *Heyman* v. *Southern Ry. Co.*, 270.

CASES FOLLOWED.

Allen v. *Riley*, 203 U. S. 347, followed in *John Woods & Sons* v. *Carl*, 358.

Illinois Central Railroad v. *McKendree*, 203 U. S. 514, followed in *Illinois Central Railroad* v. *Edwards*, 531.

Patapsco Guano Co. v. *North Carolina Board of Agriculture*, 171 U. S. 345, followed in *McLean* v. *Denver & Rio Grande R. R.*, 38.

Pennsylvania R. R. Co. v. *Hughes*, 191 U. S. 477, followed in *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 284.

Pettibone v. *Nichols*, 203 U. S. 192, followed in *Moyer* v. *Nichols*, 221.

West Chicago Railway v. *Chicago*, 201 U. S. 506, followed in *Fair Haven & Westville R. Co.* v. *New Haven*, 379.

CATTLE.

See Courts, 1.

CATTLE CONTAGIOUS DISEASE ACT.

See Commerce, 7, 8.

CHATTEL MORTGAGE.

See Local Law (Kan.);
Mortgages and Deeds of Trust.

CHEROKEE INDIANS.

See INDIANS, 6;
STATUTES, A 2.

CHILDREN.

See JURISDICTION, A 4.

CITIZENSHIP.

See INDIANS, 3, 6;
JURISDICTION;
STATUTES, A 2.

CIVIL SERVICE.

See FEDERAL QUESTION, 4.

CLASSIFICATION FOR TAXATION.

See TAXES AND TAXATION, 1.

COMBINATIONS.

See ACTIONS, 3;
TORTS, 1.

COMMERCE.

1. *Interstate; when goods cease to be.*

In the absence of Congressional legislation goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package. *Heyman* v. *Southern Railway Co.*, 270.

2. *Word "arrival" in Wilson Act defined.*

The word "arrival" as used in the Wilson law means delivery of the goods to the consignee, and not merely reaching their destination, and expressions to that effect in *Rhodes* v. *Iowa*, 170 U. S. 412, are not *obiter.* *Ib.*

3. *Attachment of power of State over intoxicating liquors under the Wilson Act.*

The power of the State over intoxicating liquors from other States in original packages after delivery and before sale given by the Wilson law does not attach before notice and expiration of a reasonable time for the consignee to receive the goods from the carrier; and this rule is not affected by the fact that under the state law the carrier's liability as such may have ceased and become that of a warehouseman. *Ib.*

4. *Interst te; interference by municipal ordinance requiring license fee.*

Where orders are given for goods sold in a State by an agent of a person employed to solicit them in another State, and the purchaser is not bound to pay for the goods until delivery and unless according to sample, the goods sent specifically to the customer in fulfillment of such orders are, until actually delivered, within the protection of the commerce clause of the Constitution, and a municipal ordinance requiring a license fee for the solicitation of orders for delivering goods not of the parties' own manufacture is void as an interference with

interstate commerce against such an agent. *Rearick* v. *Pennsylvania*, 507.

5. *Validity of state or territorial inspection law affecting interstate commerce.*
A State or Territory has the right to legislate for the safety and welfare of its people, which is not taken from it because of the exclusive right of Congress to regulate interstate commerce; and an inspection law affecting interstate commerce is not for that reason invalid unless it is in conflict with an act of Congress or an attempt to regulate interstate commerce. (*Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345); *McLean* v. *Denver & Rio Grande R. R.*, 38.

6. *Right of state railroad commission to order stoppage of interstate trains.*
While a state railroad commission may, in the absence of congressional legislation, order a railroad company to stop interstate trains at stations where there is only an incidental interference with interstate commerce, based on a legal exercise of the police power of the State exerted to secure proper facilities for the citizens of the State, where the railroad company has—as in this case—furnished all proper and reasonable facilities, such an order is an improper and illegal interference with interstate commerce and void as a violation of the commerce clause of the Constitution. *Mississippi R. R. Comm.* v. *Illinois Central R. R.*, 335.

7. *Intrastate; Federal interference with.*
As Order of the Secretary of Agriculture, No. 107, purporting to fix a quarantine line under the Cattle Contagious Disease act applies in terms to all shipments whether interstate or intrastate it is void as an attempt to regulate intrastate commerce, notwithstanding it is the same line as that fixed for a similar purpose as to intrastate shipments by the State through which it passes. *Illinois Central Railroad* v. *McKendree*, 514.

8. *Intrastate; Federal interference with.*
Without deciding whether the Cattle Contagious Disease act of February 2, 1903, 33 Stat. 1264, is or is not unconstitutional as delegating power solely vested in Congress to the Secretary of Agriculture, that act confers no power on such secretary to make any regulations concerning intrastate commerce over which Congress has no control. *Ib.*

9. *Intrastate; invalidity of order of Secretary of Agriculture affecting.*
While in a proper case Federal authorities may adopt a quarantine line adopted by a State, where the secretary makes regulations adopting it as applying to all commerce whether interstate or intrastate, and nothing on the face of the order indicates whether he would have made such an order if limited to interstate commerce, the order is not divisible and this court cannot declare that it relates solely to interstate commerce but must declare it void as an entirety. *Ib.*

See CARRIERS;
CONSTITUTIONAL LAW, 1, 6, 7, 8.

COMMISSIONS, RAILROAD.

See Commerce, 6;
Constitutional Law, 6, 7, 8, 26;
Courts, 5.

COMPULSORY SERVICE.

See Constitutional Law, 22.

CONDEMNATION OF PROPERTY.

See Constitutional Law, 20;
Federal Question, 2.

CONGRESS, POWERS OF.

To authorize recovery for acts done within State.

Where Congress has power to make acts illegal it can authorize a recovery for damage caused by those acts although suffered wholly within the boundaries of one State. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 390.

See Commerce, 1, 5, 8, 9;
Constitutional Law, 11, 23;
Courts, 6, 7;
Indians, 2.

CONSPIRACY.

See Jurisdiction, D 2.

CONSTITUTIONAL LAW.

1. *Commerce—Burdens on interstate commerce—Hide inspection law of New Mexico.*

The law of March 19, 1901, of the Territory of New Mexico, making it an offense for any railroad company to receive, for shipment beyond the limits of the Territory hides, which had not been inspected as required by the law, is not unconstitutional as an unwarranted regulation of, or burden on, interstate commerce. *McLean* v. *Denver & Rio Grande R. R.*, 38.

See Commerce, 4, 6;
Supra, 11.

2. *Due process of law; property rights of corporation entitled to protection of.*

The property of which a corporation cannot be deprived without due process of law under the Fourteenth Amendment does not include the mere right of a foreign corporation to extend its business and membership in a State which otherwise may exclude it from its boundaries. *National Council* v. *State Council*, 151.

3. *Due process and equal protection of laws not denied by state law relative to service of process on foreign corporations.*

A State has power to regulate its own creations and *a fortiori* foreign corporations permitted to transact business within its borders. The act of West Virginia, putting all non-resident domestic corporations having their places of business and works outside the State, and all foreign corporations coming into the State, on the same footing in respect to service

of process, and making the state auditor their attorney in fact to accept process, is a reasonable classification and not unconstitutional as denying equal protection of the laws, because that provision does not apply to all corporations; nor does it deprive such corporations, without due process of law, of their liberty of contract; nor does the requirement that they pay such auditor an annual fee of ten dollars for services as such attorney amount to a taking of property without due process of law. *St. Mary's Petroleum Co.* v. *West Virginia*, 183.

4. *Due process and equal protection of laws—Effect of state law restricting defenses by insurance companies.*

The provisions of §§ 7890, 7891, Revised Statutes of Missouri, which as construed by the highest court of that State cut off any defense by a life insurance company based upon false and fraudulent statements in the application, unless the matter represented actually contributed to the death of the insured, and which apply alike to domestic and foreign corporations, is not repugnant to the Fourteenth Amendment, and does not deprive a foreign corporation coming into the State of its liberty or property without due process of law, nor deny to it the equal protection of the laws. *Northwestern Life Ins. Co.* v. *Riggs*, 243.

5. *Due process of law; deprivation of liberty; application.*

The liberty referred to in the Fourteenth Amendment is the liberty of natural, not artificial, persons. *Ib.*

6. *Due process of law; deprivation of property; railroad rates.*

Where the state law provides that rates established by the railroad commission are to be taken in all courts as *prima facie* just and reasonable, and there is nothing in the record from which a reasonable deduction can be made as to the cost of transportation, or the amount transported of the single article in regard to which an intrastate rate has been established and complained of, or how that rate will affect the income of the railroad company, this court will not disturb the finding of the highest court of the State that the rate was reasonable, and hold that it amounted to a deprivation of the company's property without due process of law. *Atlantic Coast Line* v. *Florida*, 256.

7. *Due process of law; deprivation of property; railroad rates.*

Where the record does not disclose why an order of a state railroad commission was made applicable only to certain local and intrastate rates, but the state law provides that rates so fixed are to be considered in all courts as *prima facie* just and reasonable, and the effect of the order was to equalize rates, this court will not hold the judgment of the highest court of the State sustaining the rate, was erroneous. A State may insist upon equality of intrastate railroad rates, the conditions being the same, without depriving the railroad company of its property without due process of law. *Seaboard Air Line* v. *Florida*, 261.

8. *Due process of law; deprivation of property; railroad rates.*

It will be presumed that a state railroad commission acts in fixing an in-

trastate railroad rate with full knowledge of the situation, and where the record does not disclose all the evidence, a rate sustained by the highest court of the State will not be held by this court to be confiscatory and depriving the railroad company of its property without due process of law where it appears by the report of the company that the rate exceeds the average rate received by the company during the previous year. *Ib.*

9. *Due process of law—Validity of law requiring street railways to repair streets and assessing them therefor.*

A general law requiring street railways to keep a certain space between and outside their tracks paved and repaved and assessing them therefor amounts, in respect to companies whose charters contain other provisions, to an amendment thereof, and as such a purpose is consistent with the object of the grant it falls within the reserved power of the State to alter, amend or repeal the original charter, and if imposed in good faith and not in sheer oppression the act is not void either as depriving the company of its property without due process of law or as impairing the contract obligations of the original grant. So *held* as to law of 1899 of Connecticut. *Fair Haven & Westville R. R. Co.* v. *New Haven*, 379.

10. *Due process of law—Validity of Louisiana inheritance tax law.*

A State may exercise its power to impose an inheritance tax at any time during which it holds the property from the legatee; and the Louisiana inheritance tax law is not void as a deprivation of property without due process of law within the meaning of the Fourteenth Amendment as to legatees of decedents dying prior to its enactment but whose estates were still undistributed. *Cahen* v. *Brewster*, 543.

See Practice and Procedure, 2;
Taxes and Taxation, 2.
Supra.

11. *Equal protection and due process of law not violated by limitation of right of recovery against railroad.*

The Pennsylvania statute of April 4, 1868, P. L. 58, providing that any person, not a passenger, employed in and about a railroad but not an employé, shall in case of injury or loss of life have only the same right of recovery as though he were an employé, is not void, either because contrary to the power delegated to Congress to establish post offices and post roads; or because repugnant to the commerce clause of the Constitution; or in conflict with the due process or equal protection clauses of the Fourteenth Amendment; or because it abridges the privileges and immunities of citizens of the United States. *Martin* v. *Pittsburg & Lake Erie R. R.*, 284.

12. *Equal protection of laws—Validity of classification by State of users of railroads—Rights of citizens in respect of interstate travel.*

Although a citizen of the United States has a right to travel from one State

to another, in the absence of Congressional action, he does not possess as an incident of such travel the right to exert in a State in which he may be injured a right of recovery not given by the laws thereof, although that right may be given by the laws of other States including the one in which suit is brought. A classification with a railroad company's employés of all persons, including railway postal clerks, not passengers, but so employed in and about the railroad as to be subject to greater peril than passengers, is not so arbitrary as to deprive the railway postal clerk of the equal protection of the laws within the meaning of the Fourteenth Amendment. *Ib.*

13. *Equal protection of laws—Validity of succession tax law discriminating between estates closed and not closed.*

A statute imposing a succession tax is not void as against estates not closed, as denying equal protection of the laws, because it does not affect estates which had been actually closed at the time of its enactment. *Cahen* v. *Brewster*, 543.

14. *Equal protection of laws—Validity of Illinois inheritance tax law.*

The fact that, as construed by the highest court of that State, the exemptions in the inheritance tax law of Illinois of religious and educational institutions do not apply to corporations of other States, does not render the provisions of the law applicable to foreign religious and educational institutions void as discriminatory and counter to the equal protection clause of the Fourteenth Amendment. *Board of Education* v. *Illinois*, 553.

Extradition of fugitives from justice. See EXTRADITION.

15. *Fifth Amendment—Organization of grand jury.*

The Fifth Amendment requiring the presentment or indictment of a grand jury does not take up unto itself the local law as to how the grand jury shall be made up, and raise the latter to a constitutional requirement. *Matter of Moran*, 96.

16. *Fourteenth and Fifteenth Amendments—Remedy for wrongs committed on persons of African descent.*

The Fourteenth and Fifteenth Amendments operate solely on state action and not on individual action. Unless the Thirteenth Amendment vests jurisdiction in the National Government, the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases. *Hodges* v. *United States*, 1.

17. *Full faith and credit—Decree in equity reforming policy of insurance not a denial as to judgment at law against recovery on policy rendered in another State.*

An adjudication in an action at law on a policy of insurance that the insured cannot recover on the policy as it then stood is not an adjudi-

cation that the contract cannot be reformed; and a court of another State does not fail to give full faith and credit to such a judgment because in an equity action it reforms the policy and gives judgment to the insured thereon as reformed. *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 106.

18. *Governmental powers.*

Notwithstanding the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment is not shorn of its vitality. *Hodges* v. *United States*, 1.

19. *Impairment of contract obligation; existence of contract.*

A benefit association incorporated under a state law and styling itself a National Council granted charters to various voluntary organizations in other States, styled State Councils, for similar purposes under conditions expressed in the charters. A dominant portion of the members of a State Council procured a charter from the state legislature granting the corporation so formed under the same name powers, in some respects exclusive in that State, to carry on a similar work, but saving any rights of property possessed by the National Council. In a suit, brought by the latter, *held* that whatever relations may have existed between the National Council and the voluntary State Council there was no contract between the former and the incorporated State Council which was impaired, and the act of incorporation was not void within the impairment clause of the Federal Constitution. *National Council* v. *State Council*, 151.

20. *Impairment of contract obligation—Validity of condemnation under state law of minority shares of stock in railroad.*

It is within the power of a State to provide for condemnation of minority shares of stock in railroad and other corporations where the majority of the shares are held by another railroad corporation if public interest demands; and the improvement of the railroad owning the majority of stock of another corporation may be a public use if the state courts so declare, and the condemnation under §§ 3694, 3695, Public Laws of Connecticut, of such minority shares of a corporation is not void under the impairment clause of the Constitution either because it impairs the obligation of a lease made by the corporation to the corporation obtaining the shares by condemnation, or because it impairs the contract rights of the stockholder. *Offield* v. *New York, N. H. & H. Railroad Co.*, 372.

See Federal Question, 3;
Ante, 9.

21. *Judiciary; Federal courts; power under Seventh Amendment to examine judgment based on verdict of jury.*

Whether in view of the Seventh Amendment a Federal court sitting in equity may inquire into whether a judgment based on a verdict was

obtained by fraud and if so found set the verdict aside argued, but not decided. *Fidelity Mutual Life Ins. Co.* v. *Clark*, 64.

See JURISDICTION, A 3.

Self incrimination. See JURISDICTION, F 1.

22. *Slavery and involuntary servitude defined.*
Slavery and involuntary servitude as denounced by the Thirteenth Amendment mean a condition of enforced compulsory service of one to another; and while the cause inciting it was the emancipation of the colored race, that amendment reaches every race and every individual. *Hodges* v. *United States*, 1.

23. *Slavery and involuntary servitude; effect of amendments.*
The result of the amendments to the Constitution adopted after the Civil War was to abolish slavery, and to make the emancipated slaves citizens and not wards of the Nation over whom Congress retained jurisdiction. This decision of the people is binding upon the courts. and they cannot attempt to determine whether it was the wiser course. *Ib.*

24. *State contravention of sec.* 10, *Art. I, of Constitution relative to imposts, etc.*
The provision in Section 10, Article I, of the Constitution of the United States, that States shall not lay imposts and duties on imports and exports is not contravened by a state inspection law applicable only to goods shipped to other States, and not to goods directly shipped to foreign countries. *McLean* v. *Denver & Rio Grande R. R.*, 38.

25. *States; power to compel equality of railroad rates.*
A State may insist upon equality of rates, and although a State may not compel a railroad company to do business at a loss, and even though the company may, against the power of the State, establish rates which afford reasonable compensation, if it voluntarily establishes local rates for some shippers—even though under the guise of a rebilling rate on interstate shipments—it cannot resist the power of the State to enforce the same rate for all shippers—or claim that the rate so fixed by the commission acting under authority of the State deprives it of its property without due process of law. *Alabama & Vicksburg Ry. Co.* v. *Mississippi R. R. Comm.*, 496.

26. *States; suits against state railroad commission not a suit against State.*
A commission created by the law of a State for the purpose of supervising and controlling the acts of railroad companies operating within the State is subject to suit, and a suit brought by a company of another State in the Circuit Court of the United States against the members of the commission is not a suit against the State within the prohibitions of the Eleventh Amendment. *Mississippi R. R. Comm.* v. *Illinois Central R. R.*, 335.

CONSTRUCTION.

Of Contracts. *See* CONTRACTS.
Of Statutes. *See* CUSTOMS DUTIES;
STATUTES, A.
Of Wills. *See* WILLS.

CONTEMPT OF COURT.

1. *Court as party.*

In contempt proceedings the court is not a party, there is nothing that affects the judges in their own persons and their concern is that the law should be obeyed and enforced. *United States* v. *Shipp*, 563.

2. *Disregard of order of this court staying proceedings below constitute contempt.*

After an appeal has been allowed by one of the justices of this court, and an order entered that all proceedings against appellant be stayed and his custody retained pending appeal, the acts of persons having knowledge of such order, in creating a mob and taking appellant from his place of confinement and hanging him, constitutes contempt of this court, and it is immaterial whether appellant's custodian be regarded as a mere state officer or as bailee of the United States under the order. *Ib.*

3. *Disregard of orders of this court, pending decision as to its jurisdiction, constitute contempt, irrespective of whether or not the court has jurisdiction of the cause.*

Even if the Circuit Court of the United States has no jurisdiction to entertain the petition for *habeas corpus* of one convicted in the state court, and this court has no jurisdiction of an appeal from the order of the Circuit Court denying the petition, this court, and this court alone, has jurisdiction to decide whether the case is properly before it, and, until its judgment declining jurisdiction is announced, it has authority to make orders to preserve existing conditions, and a willful disregard of those orders constitutes contempt. *Ib.*

4. *Purgation by disavowal of intent under oath.*

Where the contempt consists of personal presence and overt acts those charged therewith cannot be purged by their mere disavowal of intent under oath. *Ib.*

CONTRACTS.

1. *Effect on title of word "sell" in agreement affecting real estate.*

The word "sell" in an agreement affecting, but not in terms granting or conveying, real estate, will not be given any more effect upon the title than is necessary to accomplish the purpose of the transaction stated in the agreement; and under the circumstances of this case, the agreement held not to be a conveyance, but a power of attorney to sell at the specified price and subject to revocation, not being coupled with an interest. *Taylor* v. *Burns*, 120.

2. *Phrase "coupled with an interest" in power of attorney, defined.*

The phrase "coupled with an interest," in connection with a power of attorney, does not mean an interest in the exercise of the power, but an interest in the property on which the power is to operate. (*Hunt* v. *Rousmanier's Administrator*, 8 Wheat. 174, followed.) *Ib.*

See Bonds; Constitutional Law, 3, 9, 19, 20; Courts, 2; Jurisdiction, B 4; D 2.

CONVEYANCES.

See Contracts, 1; Treaties.

CORPORATIONS.

See Bankruptcy, 5; Constitutional Law, 2, 3, 9, 20; States, 1, 2.

COURTS.

1. *Judicial notice.*

This court will take judicial notice of the fact that cattle run at large in the great stretches of country in the West, identified only as to ownership by brands, and of the necessity for, and use of, branding of such cattle, and will not strike down state or territorial legislation, essential for prevention of crime, requiring the inspection of hides to be shipped without the State, although the act does not require such inspection of hides not to be so shipped. *McLean* v. *Denver & Rio Grande R. R.*, 38.

2. *When Federal Supreme Court will ignore state court's decision as to effect of state statute.*

It is only where an irrepealable contract exists that it is the duty of this court to decide for itself irrespective of the decisions of the state court whether a subsequent act impairs the obligation of such contract. *Wicomico County* v. *Bancroft*, 112.

3. *Interference by Federal court on habeas corpus by party held by State for crime.*

The duty of a Federal court, to interfere, on *habeas corpus*, for the protection of one alleged to be restrained of his liberty in violation of the Constitution or laws of the United States must often be controlled by the special circumstances of the case, and except in an emergency demanding prompt action, the party held in custody by a State, charged with crime against its laws, will be left to stand his trial in the state court, which, it will be assumed, will enforce, as it has the power to do equally with a Federal court, any right asserted under and secured by the supreme law of the land. *Pettibone* v. *Nichols*, 192.

4. *Right of one wrongfully arrested and deported into demanding State to resort to Federal court for release on habeas corpus.*

Even if the arrest and deportation of one alleged to be a fugitive from

justice may have been effected by fraud and connivance arranged between the executive authorities of the demanding and surrendering States so as to deprive him of any opportunity to apply before deportation to a court in the surrendering State for his discharge, and even if on such application to any court, state or Federal, he would have been discharged, he cannot, so far as the Constitution or the laws of the United States are concerned—when actually in the demanding State, in the custody of its authorities for trial, and subject to the jurisdiction thereof—be discharged on *habeas corpus* by the Federal court. It would be improper and inappropriate in the Circuit Court to inquire as to the motives guiding or controlling the action of the Governors of the demanding and surrendering States. *Ib.*

5. *Status of state railroad commission as a court, within prohibition of* § 720, *Rev. Stat., relative to interference by Federal courts.*

The Railroad Commission of Mississippi is not, as has been determined by the highest court of that State, a court, but a mere administrative agency of the State, and the prohibitions of § 720, Rev. Stat., against injunctions from United States courts to stay proceedings in state courts are not applicable thereto; and even though the Commission might, under the state law, resort to the state courts to aid it in enforcing its orders the proceeding cannot be regarded as one in the state courts within the meaning of § 720, Rev. Stat. *Mississippi R. R. Comm.* v. *Illinois Central R. R.*, 335.

6. *Province of courts distinguished from that of Congress.*

It is the province of the courts to enforce, not to make, laws; and if a law works inequality the redress, if any, must be had from Congress, and arguments directed, not to the construction of the act, but as to the justice of a method of distribution of assets under the bankruptcy law, and the hardship resulting therefrom, cannot influence judicial determination. *New Jersey* v. *Anderson*, 483.

7. *Usurpation of legislative power.*

While under former decisions of this court the nature of inheritance taxes has been defined, those decisions do not prescribe the time of its imposition. To have done so would have been to usurp a legislative power not possessed by this court. *Cahen* v. *Brewster*, 543.

See Appeal and Error;
Bankruptcy, 2, 3;
Constitutional Law, 16, 21, 23;
Contempt of Court;
Extradition, 1;
Federal Question;
Jurisdiction;
Master and Servant, 4;
Practice and Procedure;
Remedies;
Taxes and Taxation, 2.

CRIMINAL LAW.

Place of trial.

Under § 10 of the Organic Act of Oklahoma of May 2, 1890, 26 Stat. 85, the place of trial of a crime committed in territory not embraced in

any organized county is in the county to which such territory shall be attached at the time of trial, although it might have been attached to another county when the crime was committed. *Matter of Moran*, 96.

See CONSTITUTIONAL LAW, 15; COURTS, 3, 4; CONTEMPT OF COURT; EXTRADITION; JURISDICTION, E; F 1.

CUSTODY OF CHILDREN.

See JURISDICTION, A 4.

CUSTOMS DUTIES.

Construction of par. 313 of Tariff Act of 1897.

Under par. 313, as construed in connection with pars. 306, 307 of the Tariff Act of July 24, 1897, figured cotton cloth is subject not only to the specific duties imposed by par. 313, but also to the *ad valorem* duty imposed by pars. 306, 307. The evident purpose of these paragraphs precludes the application of the rule that any doubt as to the construction of a tariff statute should be resolved in favor of the importer. *United States* v. *Riggs*, 136.

DEFENSES.

See CONSTITUTIONAL LAW, 4.

DELEGATION OF POWER.

See COMMERCE, 8;
JURISDICTION, A 2.

DEPARTMENTAL PRACTICE.

See PRACTICE AND PROCEDURE, 14.

DIVERSE CITIZENSHIP.

See JURISDICTION, B.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW;
PRACTICE AND PROCEDURE, 2;
TAXES AND TAXATION, 2.

DUTIES.

See CUSTOMS DUTIES.

ELEVENTH AMENDMENT.

See CONSTITUTIONAL LAW, 26.

EMINENT DOMAIN.

See CONDEMNATION OF PROPERTY.

EQUAL PROTECTION OF LAWS.

See Constitutional Law.

EQUITY.

See Constitutional Law, 21.

ESTATES.

See Wills.

EVIDENCE.

See Federal Question, 2;
Master and Servant, 4.

EXCEPTIONS.

See Master and Servant, 3.

EXECUTIVE ORDERS.

See Commerce, 7, 9;
Indians, 4.

EXEMPTIONS.

See Indians, 2, 3;
Practice and Procedure, 3;
Statutes, A 3;
Taxes and Taxation, 1.

EXPERT TESTIMONY.

See Master and Servant, 4.

EXTRADITION.

1. *Nature of Constitutional provision—Duty and obligation of Federal courts.*

The constitutional provision relating to fugitives from justice is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States and its faithful and vigorous enforcement is vital to their harmony and welfare; and while a State should protect its people against illegal action, Federal courts should be equally careful that the provision be not so narrowly interpreted as to enable those who have offended the laws of one State to find a permanent asylum in another. *Appleyard* v. *Massachusetts*, 222.

2. *Fugitive from justice defined.*

A person charged by indictment, or affidavit before a magistrate, within a State with the commission of a crime covered by its laws and who leaves the State, no matter for what purpose nor under what belief, becomes from the time of such leaving and within the meaning of the Constitution and laws of the United States, a fugitive from justice; and in the absence of preponderating or conceded evidence of absence from the demanding State when the crime was committed it is the

duty of the other State to surrender the fugitive on the production of the indictment or affidavit properly authenticated. *Ib.*

3. *Right of accused to opportunity to test liability to removal.*
No obligation is imposed by the Constitution or laws of the United States on the agent of a demanding State to so time the arrest of one alleged to be a fugitive from justice and so conduct his deportation from the surrendering State as to afford him a convenient opportunity, before some judicial tribunal, sitting in the latter State, upon *habeas corpus* or otherwise, to test the question whether he was a fugitive from justice and as such liable, under the act of Congress, to be conveyed to the demanding State for trial there. *Pettibone* v. *Nichols*, 192.

See Courts, 4.

FEDERAL QUESTION.

1. *Status and rights of postal clerk.*
Whether a railway postal clerk is a passenger or whether his right of recovery is limited by such statute is not a Federal question. *Martin* v. *Pittsburg & Lake Erie R. R.*, 284.

2. *Question of burden of proof as to validity of state tax.*
Whether under the constitution and laws of the State the burden of showing the invalidity of a tax is on the taxpayer, is not a Federal question. *Security Trust Co.* v. *Lexington*, 323.

3. *Contentions that a condemnation is unnecessary and not for public use and that proceedings violate due process clause of Constitution.*
Where plaintiff in error contends that the purpose for which his property has been condemned is not a public use; that the condemnation is unnecessary in order to obtain the desired end; and that the proceedings and state statute on which they are based violate the due process clause of the Fourteenth Amendment and impair contract rights, Federal questions are involved and, if not frivolous, the writ of error will not be dismissed. *Offield* v. *New York, N. H. & H. R. R. Co.*, 372.

4. *Contention that rules and regulations of Civil service not observed does not involve Federal question.*
Where a government employé does not deny the authority of the President or his representative to dismiss him, but only contends that his dismissal is illegal because certain rules and regulations of the civil service were not observed, the validity of an authority exercised under the United States is not drawn in question, and under § 233 of the Code of the District of Columbia, 31 Stat. 1189, this court has no jurisdiction to review the judgment of the Court of Appeals of the District of Columbia. *Taylor* v. *Taft*, 461.

5. *Question of what is a tax within meaning of Federal statute.*
While the state court may construe a statute and define its meaning it cannot conclusively determine that which is not a tax to be a tax

within the meaning of a Federal statute; that is a Federal question of ultimate decision in this court. *New Jersey* v. *Anderson*, 483.

6. *Involution of Federal question giving this court jurisdiction to review judgment of state court.*

Where plaintiff bases his claim, not on common-law principles, but solely on violation of an order of a department of the Federal Government and the certificate of the court below clearly shows that defendant by answer and on the trial asserted the unconstitutionality of the statute on which the order was based, and also the illegality of the order, a verdict for the plaintiff necessarily decides that the statute and order were constitutional and legal, and the defendant has raised a Federal question which was decided against him, and which was not imported into the record merely by the certificate, and this court has jurisdiction under § 709, Rev. Stat., to review the judgment of the state court. *Illinois Central Railroad* v. *McKendree*, 514.

See Practice and Procedure, 5;
Jurisdiction.

FELLOW SERVANTS.

See Master and Servant, 2, 3.

FIFTEENTH AMENDMENT.

See Constitutional Law, 16, 18.

FIFTH AMENDMENT.

See Constitutional Law, 15;
Jurisdiction, F 1.

FOURTEENTH AMENDMENT.

See Constitutional Law;
Federal Question, 3;
Practice and Procedure, 2.

FUGITIVE FROM JUSTICE.

See Courts, 4;
Extradition.

FULL FAITH AND CREDIT.

See Constitutional Law, 17.

GENERAL ORDERS IN BANKRUPTCY.

See Bankruptcy, 1, 2.

GOVERNMENTAL POWERS.

See Constitutional Law, 18.

GOVERNMENT OF THE UNITED STATES.

See CONSTITUTIONAL LAW, 18.

GRAND JURY.

See CONSTITUTIONAL LAW, 15.

HABEAS CORPUS.

See APPEAL AND ERROR, 1, 2; EXTRADITION;
COURTS, 3, 4; JURISDICTION, A 4;
TERRITORIES.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 19, 20;
COURTS, 2;
JURISDICTION, B 4.

IMPORTS AND EXPORTS.

See CONSTITUTIONAL LAW, 24;
CUSTOMS DUTIES.

IMPOSTS.

See CONSTITUTIONAL LAW, 24.

INDIANS.

1. *Alienation of allotted lands; removal of restrictions.*

Where a State by statute makes the allotted lands of Indians alienable the same as lands of citizens, and Congress by statute postpones the operation of the state statute for a definite period, when that period has expired all restriction upon alienation both voluntary and involuntary by operation of law, such as taxation and levy and sale thereunder, ceases. *Goudy* v. *Meath*, 146.

2. *Alienation of allotted lands; exemptions.*

Although Congress may by statute give Indians a right of voluntary alienation of allotted lands but exempt such lands from levy, sale and forfeiture such an exemption cannot exist by implication but must be clearly manifested. *Ib.*

3. *Taxation of property.*

By the act of February 8, 1887, allottee Indians became citizens and their property, unless clearly exempted by statute, is subject to taxation in the same manner as that of other citizens. *Ib.*

4. *Effect of patent of land to—Power of President to impose restrictions against alienation.*

A patent to an Indian of land reserved to him by a treaty simply locates the land, the title to which passed under the treaty, and in the absence of any provision of the treaty, or any act of Congress, a restriction in

the patent against alienation without the consent of the President is ineffectual, the President having no authority by virtue of his office to impose such a restriction. *Francis* v. *Francis*, 233.

5. *Acquisition by prescription of title to lands conveyed to.*
Title to lands conveyed to an Indian in fee and which the Indian has power to alienate may be acquired by prescription. *Ib.*

6. *Rights of white persons intermarrying with Cherokee Indians.*
Judgment of the Court of Claims affirmed to effect that all those white persons who married Cherokee Indians by blood subsequently to the enactment of the Cherokee law, which became effective November 1, 1875, and which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation, had due notice of the limitations set upon their rights and privileges as citizens; and that those white persons who married Cherokee citizens by blood prior to said date did acquire rights as citizens in the lands belonging to the Nation, and held and owned as national lands, except such of them as lost their rights as Cherokee citizens by abandoning their Cherokee wives or by marrying other white or nontribal men or women having no rights of citizenship by blood in said Cherokee Nation. *Cherokee Intermarriage Cases*, 76.

See Statutes, A 1, 2;
Treaties.

INDICTMENT.

See Constitutional Law, 15.

INFRINGEMENT.

See Trade-Marks.

INHERITANCE TAX.

See Constitutional Law, 10, 13, 14;
Courts, 7;
Taxes and Taxation, 1.

INJUNCTION.

See Courts, 5.

INSPECTION LAWS.

Grounds for objection to fee prescribed.
A state or territorial inspection law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and will only present a valid objection if it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. *McLean* v. *Denver & Rio Grande R. R. Co.*, 38.

See Commerce, 5;
Constitutional Law, 1, 2, 4;
Courts, 1.

INSURANCE.

Right of insurer to recover from distributees of money paid into court in satisfaction of judgment, after discovery of fraud—Effect of notice by virtue of insurer's defense to action on policy.

A man and his sister conspired to defraud an insurance company; the former having insured his life disappeared and the latter as beneficiary filed proof of death, brought suit, and recovered judgment after verdict by a jury; the company defended on ground that insured was alive and claim was fraudulent. The judgment was affirmed and the company paid the money into court; in order to have the suit prosecuted the beneficiary had made contingent fee contracts with attorneys which had been filed and the money was distributed from the registry of the court to her and the various parties holding assignments of interests therein. The insurance company, having afterwards found the insured was alive, sued in equity the beneficiary and also her counsel and their assignees to recover the money received by them respectively. No charge of fraud was made against anyone except the beneficiary, but notice of the fraud was charged against all by virtue of the company's defense. The defendants claimed that under the Seventh Amendment the question of death of person insured could not again be litigated. The bill was dismissed as to all except the beneficiary. *Held,* as to the defendants other than the beneficiary, that as the action was prosecuted in good faith whatever notice they may have had by virtue of the company's defense was purged by the verdict, and although they had received their respective shares from the proceeds paid into court it was same in law as though they had been paid in money directly by the judgment creditor and it could not be recovered. *Fidelity Mutual Life Ins. Co.* v. *Clark,* 64.

See CONSTITUTIONAL LAW, 4, 17.

INSTRUCTIONS TO JURY.

See MASTER AND SERVANT, 3.

INTERSTATE COMMERCE.

See CARRIERS; CONSTITUTIONAL LAW, 1, 12;
COMMERCE; COURTS, 1;
INSPECTION LAWS.

INTERSTATE RENDITION.

See COURTS, 4;
EXTRADITION.

INTOXICATING LIQUORS.

See COMMERCE, 3.

INTRASTATE COMMERCE.

See COMMERCE, 7, 8, 9;
CONSTITUTIONAL LAW, 6, 7, 8.

INVOLUNTARY SERVITUDE.

See Constitutional Law, 22.

JUDGMENTS AND DECREES.

See Appeal and Error;
Constitutional Law, 17, 21;
Jurisdiction, D 3; F 2, 3.

JUDICIAL NOTICE.

See Courts, 1.

JUDICIAL POWERS.

See Constitutional Law, 26;
Courts, 6, 7;
Master and Servant, 4.

JURISDICTION.

A. Of This Court.

1. *Amount in controversy—Right measurable in money.*

The right of a shipper to have his goods transported by a common carrier is a valuable right measurable in money, and an appeal involving such a right of which this court otherwise has jurisdiction under § 2 of the act of March 3, 1885, will not be dismissed because no sum or value is involved. *McLean* v. *Denver & Rio Grande R. R.*, 38.

2. *Appeal from Supreme Court of Territory under* § 2 *of act of March* 3, 1885.

The right to legislate in the Territories being conferred under constitutional authority, by Congress, the passage of a territorial law is the exertion of an authority exercised under the United States, and the validity of such authority is involved where the right of the legislature to pass an act is challenged; and, in such a case, if any sum or value is in dispute an appeal lies to this court from the Supreme Court of a Territory under § 2 of the act of March 3, 1885, 23 Stat. 443, even though the sum or value be less than $5,000. *Ib.*

3. *Derivation of jurisdiction of this court and Circuit Court.*

The Supreme Court of the United States alone possesses jurisdiction derived immediately from the Constitution and of which the legislative power cannot deprive it; that of the Circuit Court depends on some act of Congress. *Ex parte Wisner*, 449.

4. *Of appeal from order of territorial court awarding custody of child.*

A *habeas corpus* proceeding involving the care and custody of a child of tender years is not decided on the legal rights of the petitioner, but upon the court's view, exercising its jurisdiction as *parens patriæ*, of the best interest and welfare of the child; such a proceeding does not involve the question of personal freedom, and an appeal will not lie to this court, under § 1909, Rev. Stat., from the order of the Supreme Court

of a Territory awarding the custody of a child of three years of age to one of several rival claimants therefor. *New York Foundling Hospital* v. *Gatti*, 429.

5. *Of appeals from adverse decisions of District Court in cases to establish land titles in Florida.*

Section 6 of the act of March 3, 1891, 26 Stat. 826, recognizes that there are exceptions other than those enumerated therein in which appeals to this court at that time provided for by law were saved; and this applies to the appeal by the United States under § 11 of the act of June 22, 1860, 12 Stat. 87, from adverse decisions of the District Court of the United States in cases to establish land titles in Florida. *United States* v. *Dalcour*, 408.

6. *Sufficiency of involution of findings of fact by lower court.*

The objection that the Supreme Court of Oklahoma found no facts upon which a review can be had by this court is untenable, where it appears that the case was before that court a second time and that in its opinion it referred to and adopted its former opinion in which it had made a full statement and findings of fact. *National Live Stock Bank* v. *First Nat. Bank*, 296.

See FEDERAL QUESTION.

B. OF CIRCUIT COURTS.

1. *Of action to wind up affairs of a national bank.*

An action for rent of premises for unexpired term of a lease brought by the lessor against the stockholders' agent to whom the comptroller has released the assets of a national bank is a suit to wind up the affairs of the bank of which the Circuit Court of the United States has jurisdiction. *International Trust Co.* v. *Weeks*, 364.

2. *Test of jurisdiction of cause sought to be removed.*

No suit which could not have been originally brought in the Circuit Court of the United States can be removed therein from the state court. *Ex parte Wisner*, 449.

3. *Of case sought to be removed from state court where parties are non-residents of that State and citizens of different States.*

Under §§ 1, 2, 3, of the act of March 3, 1875, 18 Stat. 470, as amended by the act of March 1, 1887, 24 Stat. 552, corrected by the act of August 13, 1888, 25 Stat. 433, an action commenced in a state court, by a citizen of another State, against a non-resident defendant who is a citizen of a State other than that of the plaintiff cannot be removed by the defendant into the Circuit Court of the United States. *Ib.*

4. *Sufficiency of involution of Federal question.*

Where the bill of the trustee of bondholders of a water company, claiming an exclusive contract with a municipality, shows that an act of the legislature and an ordinance of the city have been passed under which

the city shall construct its own water works, and that during the life of the contract the source of the ability of the water company to pay interest on, and principal of, its bonds will be cut off, a case is presented involving a constitutional question, and irrespective of diverse citizenship, the Circuit Court of the United States has jurisdiction to determine the nature and validity of the original contract, and whether the subsequent legislation and ordinance impaired its obligations within the meaning of the Federal Constitution. *Mercantile Trust Co.* v. *Columbus*, 311.

5. *Sufficiency of showing of diverse citizenship—Citizen and subject.*

A declaration that plaintiff is a resident of a State of the Union and a citizen of a foreign country under a monarchical form of government is sufficient to show the meaning of the pleader and the nationality of the plaintiff, and there is no merit in an objection to the jurisdiction of the Circuit Court, diverse citizenship existing, because plaintiff was not a citizen but a subject of the foreign power. *Nichols Lumber Co.* v. *Franson*, 278.

6. *Power to issue writs of mandamus.*

Circuit Courts of the United States, until Congress shall otherwise provide, have no power to issue a writ of mandamus in an original action for the purpose of securing relief by the writ, although the relief sought concerns an alleged right secured by the Constitution of the United States. *Covington Bridge Co.* v. *Hager*, 109.

C. Of District Courts.

Of claim for lands which had been rejected by public officers acting under authority of Congress.

The provision in § 3 of the act of June 22, 1860, that no claims for lands in Florida could be presented to the District Court of the United States that had been theretofore presented before any board of commissioners or other public officers acting under authority of Congress and rejected as being fraudulent, *held* to bar a claim which had been presented to a judge of the Superior Court of Florida under the act of May 23, 1828, 4 Stat. 284, and by him refused and rejected on the ground of an unwarranted alteration of the register of the grant in a particular material to its validity. *United States* v. *Dalcour*, 408.

D. Of Federal Courts Generally.

1. *Effect of designation of place of trial where there are no county or court buildings.*

Where the order of the court having authority to designate the place of trial for a newly organized county in Oklahoma is as precise as circumstances permit, the fact that it merely names the town, there being no county or court buildings at the time of trial, does not affect the jurisdiction of the court, where it does not appear that the party complaining lost any opportunities by reason of no building being named. *Matter of Moran*, 96.

2. *Of charge of conspiracy to prevent citizens of African descent, because of race and color, from carrying out contracts to labor.*

The United States court has no jurisdiction under the Thirteenth Amendment or §§ 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a State to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor. *Hodges* v. *United States*, 1.

3. *Scope of jurisdiction on removal from state court—Sufficiency of service of process.*

After a case has been removed from the state court to the Federal court the latter has full control of the case as it was when the state court was deprived of its jurisdiction, and property properly attached in the state court is still held to answer any judgment rendered against the defendant, and publication of the summons in conformity with the state practice is sufficient as against the property attached. But a judgment entered on such service by publication can be enforced only against property attached. *Clark* v. *Wells*, 164.

E. Of Territorial Courts.

Jurisdiction of territorial court to try person for crime committed in part of Territory not open for settlement.

Courts of Oklahoma Territory have jurisdiction to try a person for crime although committed in a part of the Territory not then opened for settlement, it appearing from the acts of Congress that title had passed to the Territory, and Congress was only exercising control so far as settlement was concerned. *Matter of Moran*, 96.

See ante, D 1.

F. Generally.

1. *Effect on jurisdiction of trial court of compelling accused to walk before jury, and of observation by jury during recess.*

Whether a person on trial is compelled to be a witness against himself contrary to the Fifth Amendment because compelled to stand up and walk before the jury, or because the jury was stationed during a recess so as to observe his size and walk, not decided, but *held* that it did not affect the jurisdiction of the trial court, and render the judgment void. *Matter of Moran*, 96.

2. *Of court to enter judgment absolute on its face, which is collectible only from property attached.*

Where a judgment collectible only from property attached is absolute on its face, the court entering it exceeds its jurisdiction and the judgment will be modified and made collectible only from such property. *Clark* v. *Wells*, 164.

3. *Sufficiency of service of process and appearance.*

No valid judgment *in personam* can be rendered against a defendant without personal service or waiver of summons and voluntary appear-

ance; an appearance for the sole purpose of obtaining a removal to a Federal court of defendant, not personally served but whose property has been attached in a suit in a state court, does not submit the defendant to the general jurisdiction or deprive him of the right to object, after the removal of the case, to the manner of service. *Ib.*

See Practice and Procedure, 6.

LABOR.

See Jurisdiction, D 2.

LANDLORD AND TENANT.

Duty of lessor, after reëntry for breach of covenant, to relet premises.

Under a provision in a lease that in case of reëntry for breach of covenant the lessors may relet the premises at the risk of lessee, who shall remain for the residue of the term responsible for the rent reserved and shall be credited with such amounts only as shall by the lessors be actually realized, as the same has been construed by the highest court of Massachusetts, the lessor has not the absolute discretion, after entry, to relet or not to relet the premises, but it is his duty to prevent unnecessary loss or diminution of rent, and, in the absence of a reasonable effort to relet the premises, cannot recover. *International Trust Co.* v. *Weeks,* 364.

LEASE.

See Jurisdiction, B 1;
Landlord and Tenant.

LEGISLATIVE POWERS.

See Congress, Powers of.

LEVY AND SALE.

See Indians, 2.

LIBERTY OF CONTRACT.

See Constitutional Law, 3, 5.

LICENSE FEES.

See Bankruptcy, 5; Constitutional Law, 3;
Commerce, 4; States, 2.

LIENS.

See Mortgages and Deeds of Trust.

LIFE INSURANCE.

See Constitutional Law, 4.

LIMITATION OF ACTIONS.

See Actions;
Bankruptcy, 1, 2.

LIQUORS.

See COMMERCE, 3.

LOCAL LAW.

Arkansas. Sale of patent rights (see Patents, 2); *John Wood & Sons* v. *Carl*, 358.

Cherokee Nation. Law of November 1, 1875; Rights of whites intermarrying with Indians (see Indians, 6); *Cherokee Intermarriage Cases*, 76.

Connecticut. Public Laws, §§ 3694, 3695 (see Constitutional Law, 20); *Offield* v. *New York, N. H. & H. R. Co.*, 372. Law of 1899, requiring street railways to repair streets (see Constitutional Law, 9); *Fair Haven & Westville R. R. Co.* v. *New Haven*, 379.

District of Columbia. Code, § 233 (see Federal Question, 4); *Taylor* v. *Taft*, 461.

Illinois. Inheritance tax law (see Constitutional Law, 14); *Board of Education* v. *Illinois*, 553.

Kansas. As to recording assignments of chattel mortgages. Under the law of Kansas there is no statute making it necessary to record or file the assignment of a chattel mortgage in order to protect the rights of the assignee thereof. *National Live Stock Bank* v. *First Nat. Bank*, 296. Transfer of patent rights (see Patents); *Allen* v. *Riley*, 347.

Louisiana. Inheritance tax law (see Constitutional Law, 10); *Cahen* v. *Brewster*, 543.

Michigan. Titles (see Treaties); *Francis* v. *Francis*, 233.

Missouri. Revised Statutes, §§ 7890, 7891, relative to life insurance companies (see Constitutional Law, 4); *Northwestern Life Ins. Co.* v. *Riggs*, 243.

New Mexico. Law of March 19, 1901, relative to inspection of hides (see Constitutional Law, 1); *McLean* v. *Denver & Rio Grande R. R.*, 38.

Oklahoma. Organic Act of May 2, 1890, § 10; place of trial of crime (see Criminal Law); *Matter of Moran*, 96.

Pennsylvania. Act of April 4, 1868, P. L. 58, relative to railroad liability for injuries to person (see Constitutional Law, 11); *Martin* v. *Pittsburg & Lake Erie R. R.*, 284.

Tennessee. Code §§ 2773, 2776, limitation of actions (see Actions, 2); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 390.

West Virginia. Regulation of non-resident and foreign corporations (see Constitutional Law, 3); *St. Mary's Petroleum Co.* v. *West Virginia*, 183.

Generally. See Actions, 1; Constitutional Law, 15; Practice and Procedure, 1.

MANDAMUS.

See JURISDICTION, B 6;
REMEDIES.

MASTER AND SERVANT.

1. *Liability of master for torts of servant.*

While one carrying on private business may be answerable for the torts

of another to whom he entrusts part of the work, he is not answerable for the torts of one whom he cannot select, control or discharge. *Guy v. Donald*, 399.

2. *Liability of master where negligence of fellow servant contributes to accident.*

Where the negligence of the master in not supplying proper appliances has a share in causing injuries to an employé, the master is liable notwithstanding the negligence of a fellow servant may have contributed to the accident. *Gila Valley R. R. v. Lyon*, 465.

3. *Sufficiency and mode of raising objection to charge, in action against master, as to proximate cause of accident, where negligence of fellow servants contributes to accident.*

Defendant's objection to the charge on the ground that it should have been more specific as to the distinction between sole and proximate cause cannot be raised by a general exception nor should it be sustained if the jury had its attention drawn to the proximate cause and was charged that if the negligence of the fellow servant was the proximate cause plaintiff could not recover. *Ib.*

4. *Admissibility of expert testimony as to safety of appliances furnished servant.*

In an action for damages for personal injuries alleged to have been caused by unsafe appliances of a railroad company, the admissibility of expert testimony is within the reasonable discretion of the trial court, and that discretion is not abused by the admission of testimony of men who had had practical experience on railroads and were familiar with structures of the kind involved in the action. *Ib.*

MOOT QUESTION.

See PRACTICE AND PROCEDURE, 9.

MORTGAGES AND DEEDS OF TRUST.

1. *Lien of mortgage not affected by failure to record assignment thereof.*

The endorsement and delivery before maturity of a note secured by a chattel mortgage by the payee transfers not only the note but by operation of law the ownership of the mortgage which has no separate existence; and such a chattel mortgage if recorded, although the assignment thereof was not recorded, remains a lien on the property, superior to that of subsequent mortgages even though the original payee may, without authority and after the transfer, have released the same, if the law of the State in which the mortgage was given does not require the assignment of chattel mortgages to be recorded. *National Live Stock Bank v. First Nat. Bank*, 296.

2. *Effect of failure by assignee to record or file mortgage.*

An assignee does not lose his rights under a mortgage by not recording or filing it, unless there is a law which either in express terms or by implication provides therefor; where there is no such statute it is not

necessary, nor is it the duty of the assignee to record or file a mortgage. *Ib.*

3. *Law governing rights of holder of chattel mortgage.*
The rights of the holder of a chattel mortgage over the property after the same has been removed to another State are determined by the law of the State where the property was when the mortgage was given. *Ib.*

See LOCAL LAW (KAN.).

MUNICIPAL ORDINANCE.
See COMMERCE, 4.

NATIONAL BANKS.
See JURISDICTION, B 1.

NEGLIGENCE.
See MASTER AND SERVANT;
PILOTAGE.

NEGOTIABLE INSTRUMENTS.
See MORTGAGES AND DEEDS OF TRUST, 1;
PATENTS, 2.

NEGROES.
See CONSTITUTIONAL LAW, 16;
JURISDICTION, D 2.

NOTICE.
See INSURANCE.

OKLAHOMA.
See APPEAL AND ERROR, 4;
CRIMINAL LAW;
JURISDICTION, D 1; E.;
TERRITORIES.

PARTIES.
See CONTEMPT OF COURT, 1;
PRACTICE AND PROCEDURE, 7, 12.

PARTNERSHIP.
See PILOTAGE.

PATENTS.

1. *Power of State to regulate transfers of patent rights.*
While a State may not pass any law prohibiting the sale of patents for inventions or nullifying the laws of Congress regulating their transfer, it has the power, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud; and a requirement in the laws of Kansas

that before sale or barter of patent rights, an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the clerk of the county within which the rights are sold is not an unreasonable regulation. *Allen* v. *Riley*, 347.

2. *Power of State to regulate transfer of patent rights.*

Allen v. *Riley*, *ante*, p. 347, followed as to power of a State to require one selling patent rights to record the letters patent and applied to a law of Arkansas, which also makes a note void if given for a patent right, if the note does not show on its face for what it was given. *John Woods & Sons* v. *Carl*, 358.

See Indians, 4;
Practice and Procedure, 4;
Public Lands, 2.

PATENT OFFICE.

See Practice and Procedure, 14.

PILOTAGE.

Liability of members of pilotage association as partners, to owners of piloted vessels for negligence of each other.

The members of a pilot association recognized by state statute and to which every pilot licensed by the State belongs, are not to be held liable as partners to owners of piloted vessels for the negligence of each other, because the association collects the fees for pilotage and after paying certain expenses distributes them to those on the active list according to the number of days they have been on duty. So *held* as to Virginia Pilot Association. *Guy* v. *Donald*, 399.

PLACE OF TRIAL.

See Criminal Law;
Jurisdiction, D 1.

PLEADING.

See Jurisdiction, B 5;
Practice and Procedure.

POLICE POWER.

Validity of exercise having the effect to levy tax on property.

The exercise of the police power may and should have reference to the peculiar situation and needs of the community and is not necessarily invalid because it may have the effect to levy a tax upon the property affected, if its main purpose is to protect the people against fraud and wrong. *McLean* v. *Denver & Rio Grande R. R.*, 38.

See Commerce, 6.

POST OFFICES AND POST ROADS.

See Constitutional Law, 11, 12.

POWER OF ATTORNEY.

See Contracts, 1, 2.

POWERS OF CONGRESS.

See Congress, Powers of;
Constitutional Law, 23.

PRACTICE AND PROCEDURE.

1. *Binding effect of state court's decision as to whether statutory exemption has been repealed.*

In the absence of a contract protected by the impairment clause of the Federal Constitution, whether a statutory exemption has been repealed by a subsequent statute is a question of state law in which the decisions of the highest court of the State are binding. *Wicomico County* v. *Bancroft*, 112.

2. *Binding effect of state court's decision as to whether statutory exemption has been repealed.*

Even though Federal courts might exercise independent judgment, in this case the decisions of the Supreme Court of Maryland are followed to the effect that an act directing a new assessment of property in the State and expressly declaring that property of every railroad in the State be valued and assessed, amounted to a repeal of prior exemptions from taxation where there was no irrepealable contract. *Ib.*

3. *Following construction by state court of state statute.*

In determining the constitutionality of a state statute this court must follow the construction given thereto by the highest court of the State, and a ruling by that court that provisions of statute prohibiting the purchasing of a commodity on margin, and the carrying on of "bucket shops" for dealing in such commodity are separable, is conclusive on this court, and refutes the contention of one convicted of carrying on a "bucket shop" that the law is void as to him because certain presumptions created by the statute in regard to the prohibitions of purchasing on margins may be repugnant to the Fourteenth Amendment; nor will this court determine that the creation of certain presumptions of guilt by a state statute is repugnant to the due process clause of the Fourteenth Amendment when the record does not show that the conviction sought to be reviewed was based on these presumptions and could not have been based on independent evidence. *Gatewood* v. *North Carolina*, 531.

4. *Binding force of state court's decision as to effect to be given to a patent.*

When the conclusions of the highest court of a State reversing the trial court are in harmony with the general rule as to the effect to be given to a patent of the United States, this court is not justified in setting the judgment aside upon a presumption of what might have been the testimony upon which the trial court made its findings. *Andrews* v. *Eastern Oregon Land Co.*, 127.

5. *Raising Federal question—Resort to opinion of state court to disclose Federal question.*

Although the opinion of the highest court of a State may be resorted to for the purpose of showing that the court actually dealt with a Federal question presented by the record, or that a right asserted in general terms was maintained and dealt with on Federal grounds, where the record discloses no Federal question until the assignment of errors in this court, it comes too late and the writ will be dismissed. *Burt* v. *Smith*, 129.

6. *As to showing of how question of jurisdiction was raised.*

While under the Judiciary Act of 1891, in case of direct review on question of jurisdiction, when the record does not otherwise show how the question was raised, the certificate of the Circuit Court may be considered for the purpose of supplying such deficiency, when the elements necessary to decide the question are in the record the better practice, in every case of direct review on question of jurisdiction, is to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised, and passed on, and also the elements upon which the question was decided. *Nichols Lumber Co.* v. *Franson*, 278.

7. *Timeliness of objection as to parties to bill of review.*

An objection that a person should have been made a party to a bill of review comes too late when the existence of that person does not appear of record. *Landram* v. *Jordan*, 56.

8. *Unavailability of objection not taken below.*

Whether the obligation of the contract was impaired by a statute as construed is not open in this court if that objection was not taken below. *Northern Assur. Co.* v. *Grand View Building Asso.*, 106.

9. *Moot question not considered.*

When an application on *habeas corpus* is denied because the writ had been suspended, and thereafter, and before appeal taken is allowed, the suspension is revoked, the question of power of the authorities to suspend the writ becomes a moot one not calling for determination by this court. *Fisher* v. *Baker*, 175.

10. *As to province of this court to pronounce contradictory and decisive one of two decisions of state court.*

When the state court which has delivered two decisions declares that the later does not overrule, but distinguishes, the earlier, which it states was decided on considerations having no application to the later one, both decisions must be considered as correct interpretations of the statute construed, and it is not the province of this court to pronounce them contradictory or one to be more decisive than the other. *Cahen* v. *Brewster*, 543.

11. *Effect of failure of record to disclose how facts on which state court's finding was based were brought to its knowledge.*

Although the record of a case here on writ of error may fail to show how the facts on which the highest court of a State set aside the findings of the trial court, were brought to its knowledge, this court cannot ignore the recitals of what it considered, if it appears that testimony was taken and preserved. *Andrews* v. *Eastern Oregon Land Co.*, 127.

12. *Right of one not appealing.*

One not appealing cannot, in this court, go beyond supporting the judgment and opposing every assignment of error. *Landram* v. *Jordan*, 56.

13. *When writ of error should be to trial court and not to higher court.*

Where the highest court of the State dismisses the writ of error to the trial court solely and expressly because of lack of jurisdiction, the result of the ruling is to determine that the trial court is the final court where the question could be decided, and the writ of error from this court should be directed to the trial court, and not to the highest court, although that court may be clothed with jurisdiction of questions of state and Federal constitutionality of state laws, and may have discussed, and found without merit, the constitutional question. *Western Union Telegraph Co.* v. *Hughes*, 505.

14. *Validity of rule of Patent Office as to appeals.*

Rule 124 of the Patent Office which provides that no appeal can be taken from a decision of a primary examiner affirming the patentability of the claim or the applicant's right to make the same, is not void as contrary to the provisions of §§ 482, 483, 4904, 4910, 4911, Rev. Stats., or § 9 of the act of February 9, 1893, 27 Stat. 436. Those statutes provide only for appeals upon the question of priority of invention, and appeals on other questions are left under the power given by § 483, Rev. Stat., to the regulation of the Patent Office. *Lowry* v. *Allen*, 474.

See Appeal and Error, 1.

PREFERENCES.

See Bankruptcy, 4, 5, 6.

PRESCRIPTION.

See Indians, 5.

PRESUMPTIONS.

See Practice and Procedure, 2, 4.

PRIVILEGES AND IMMUNITIES.

See Constitutional Law, 11, 12.

PROBABLE CAUSE.

See Trade-Mark.

PROCESS.

See Constitutional Law, 3;
Jurisdiction, D 3; F 3.

PROHIBITION.

See Remedies.

PROPERTY RIGHTS.

See Carriers;
Constitutional Law.

PUBLICATION.

See Jurisdiction, D 3.

PUBLIC LANDS.

1. *Title to pueblo lands in California.*

In California, pueblo lands, which were simply ancillary to the execution of the public trust and in which the pueblo never had an indefeasible proprietary interest, and which were subject to the supreme political dominion of the former Mexican government, became, on the change of government, equally subject to the sovereignty of the State of California through its legislature, and the title to such lands did not pass to the United States. *City of Monterey* v. *Jacks*, 360.

2. *Title to pueblo lands in California.*

The title of one holding under a deed to pueblo lands from a city in California, ratified by the legislature, sustained as against the city claiming to hold under a subsequent patent from the United States. *Ib.*

PUEBLO LANDS.

See Public Lands.

RAILROADS.

See Commerce;
Constitutional Law, 1, 6, 7, 8, 9, 11, 12, 20, 25, 26;
Federal Question;
Master and Servant, 4;
Practice and Procedure, 3.

RAILROAD COMMISSIONS.

See Commerce, 6;
Constitutional Law, 6, 7, 8, 26;
Courts, 5.

RAILWAY POSTAL CLERKS.

See Constitutional Law, 12;
Federal Question, 1.

RATES.

See Constitutional Law, 6, 7, 8, 25.

RECORDATION.

See Local Law (Kan.);
Mortgages and Deeds of Trust, 1, 2;
Patents.

REMEDIES.

Mandamus to compel Circuit Court to remand case improperly removed.
Where the Circuit Court refuses to remand to the state court a case removed to it, but over which it has no jurisdiction, mandamus from this court is the proper remedy and not prohibition. *Ex parte Wisner*, 449.

See Actions, Appeal and Error, 2;
Constitutional Law, 16.

REMOVAL OF CAUSES.

See Jurisdiction, B 2, 3; D 3; F 3;
Remedies.

REVISED STATUTES.

See Acts of Congress.

SALES.

See Patents;
Torts, 1.

SELF-INCRIMINATION.

See Jurisdiction, F 1.

SERVICE OF PROCESS.

See Jurisdiction, D 3; F 3.

SEVENTH AMENDMENT.

See Constitutional Law, 21;
Insurance.

SHERMAN ANTI-TRUST ACT.

See Actions, 1, 2, 3.

SLAVERY.

See Constitutional Law, 22, 23.

STATES.

1. *Right to exclude and expel foreign corporations.*
A State has the right to exclude a foreign corporation and forbid it from constituting branches within its boundaries, and this power extends to a corporation already within its jurisdiction. A single foreign corporation may be expelled from a State by a special act if the act does not deprive it of property without due process of law. *National Council* v. *State Council*, 151.

2. *Power to fix sums payable by corporation during existence of franchise.*

A State creating a corporation may fix the terms of its existence and provide that for the continued existence of its franchise it must yearly pay the State certain sums fixed by the amount of its outstanding stock. *New Jersey* v. *Anderson*, 483.

3. *Rights as to highways.*

One of the public rights of great extent of the State is the establishment, maintenance and care of its highways. (*West Chicago Railway* v. *Chicago*, 201 U. S. 506.) *Fair Haven & Westville R. R. Co.* v. *New Haven*, 379.

See CARRIERS;
COMMERCE, 3, 5, 6;
CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 2, 3, 4, 7, 9, 10, 12, 16, 20, 24, 25, 26;
COURTS, 4;
EXTRADITION;
LOCAL LAW;
PATENTS;
POLICE POWER;
PUBLIC LANDS, 1;
TAXES AND TAXATION.

STATUTES.

A. CONSTRUCTION OF.

1. *Indians favored as against whites.*

It is a settled rule of construction that as between the whites and the Indians the laws are to be construed most favorably to the latter. *Cherokee Intermarriage Cases*, 76.

2. *Interpretation of language used—Qualification of words.*

The rule that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and that the words used may be qualified by their surroundings and connections, applied to the construction of the acts of Congress relating to citizenship in, and distribution of tribal property of, the Cherokee Nation. *Ib.*

3. *Legislative intent.*

A proviso in a state statute taxing all property of railroads that no irrepealable contract of exemption shall be affected construed as expressing the legislative intent to repeal all exemptions not protected by binding contracts beyond legislative control. *Wicomico County* v. *Bancroft*, 112.

See PRACTICE AND PROCEDURE, 1, 2, 3, 10, 14.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STREETS AND HIGHWAYS.

See CONSTITUTIONAL LAW, 9;
STATES, 3.

STREET RAILWAYS.

See Constitutional Law, 9.

SUIT AGAINST STATE.

See Constitutional Law, 26.

SUPERSEDEAS BOND.

See Bonds, 2.

SURETIES.

See Bonds, 1, 2.

STOCK.

See Constitutional Law, 20.

TAXES AND TAXATION.

1. *Classification for taxation—Reasonableness of exemptions from inheritance tax.*

It is not an unreasonable or arbitrary classification for a State to exempt from inheritance taxes only such property bequeathed for charity or educational purposes as shall be bestowed within its borders or exercised by persons or corporations under its control. *Board of Education* v. *Illinois*, 553.

2. *Right of taxpayer to be heard before enforcement of assessment—Assumption by court of legislative function.*

Before a special assessment, levied by legislative authority of a State—in this case providing for back taxes in Kentucky—can be actually enforced, or during the process of its enforcement, the taxpayer must have an opportunity to be heard as to its validity and extent; but this rule is met where the state court has afforded the taxpayer full opportunity to be heard on both of those questions, and after such opportunity has rendered a judgment providing for the enforcement of such amount of the tax as it finds actually due. In so determining the amount due and reducing the amount assessed the state court does not assume the legislative function of making an assessment, but merely, after hearing, judicially decides the amount of an assessment, made by the assessor under color of legislative authority. *Security Trust Co.* v. *Lexington*, 323.

See Bankruptcy, 4, 5, 6;
Constitutional Law, 9, 10, 13, 14;
Federal Question, 2, 5;
Indians, 3;
Police Power;
Practice and Procedure, 3;
Statutes, A 3.

TENTH AMENDMENT.

See Constitutional Law, 18.

TERRITORIES.

Acts of, as laws of United States.

Acts of the legislature of Oklahoma are not laws of the United States within the meaning of § 753, Rev. Stat. *Matter of Moran*, 96.

See COMMERCE, 5; CONSTITUTIONAL LAW, 1; CRIMINAL LAW; JURISDICTION, A 2; D 1; E.

TERRITORIAL COURTS.

See APPEAL AND ERROR; JURISDICTION, A 4.

THIRTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, 16, 18, 22; JURISDICTION, D 2.

TITLE TO PROPERTY.

See CONTRACTS, 1; INDIANS; JURISDICTION, A 5; PUBLIC LANDS, 1, 2; TREATIES.

TORTS.

1. *Unlawful combination affecting a sale so as to constitute a wrong.*

Although a sale may not have been so connected with an unlawful combination as to be unlawful, the motives and inducements to make it may be so affected by the combination as to constitute a wrong. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 390.

2. *Injuries to property.*

A person whose property is diminished by a payment of money wrongfully induced is injured in his property. *Ib.*

See MASTER AND SERVANT.

TRADE-MARKS.

1. *Infringement—Probable cause.*

A mistaken view of the law may constitute probable cause in some instances—probable cause does mean sufficient cause—so *held* as to a suit for infringement of registered trade-mark. *Burt* v. *Smith*, 129.

TRANSFER OF PATENT RIGHTS.

See PATENTS.

TREATIES.

Conveyance of title by.

A title in fee may pass to an individual by a treaty without the aid of an act of Congress; and this rule having become a rule of property in the State of Michigan in regard to lands reserved for Indians specified in

the Chippewa treaty of 1819, will not be disturbed, it not appearing that the treaty has been misinterpreted. *Francis* v. *Francis*, 233.

See INDIANS, 4.

TRIAL.

See CRIMINAL LAW;
JURISDICTION, D 1.

TRUSTS AND TRUSTEES.

Effect of failure of general trust on validity of special trust.

Testator created a trust for his children including therein all of his property except one parcel, the income whereof was to go to a niece for life, the trustees to make such income up to a specified sum from the property in the general trust. The general trust was declared void as creating a perpetuity but not the trust for the niece. The children appealed claiming that the trust for the niece was also void. *Held* that the trust for the niece was not illegal, and was not so intimately connected with the failing trust as to fail with it; but the decree was modified so that the income could only be made up to the specified sum from income from property in the jurisdiction. *Landram* v. *Jordan*, 56.

See WILLS.

UNLAWFUL COMBINATIONS.

See ACTIONS, 3;
TORTS, 1.

VERDICT.

See CONSTITUTIONAL LAW, 21;
INSURANCE.

VESSELS.

See PILOTAGE.

VESTED RIGHTS.

See CARRIERS.

WILLS.

Intent of testator not to be defeated by rigid construction of word.

A trust in a will in favor of testator's four daughters and "from and after their death" for the "children of each of them," and in which the idea of provision for the grandchildren is especially prominent, will not be construed, by rigidly giving plurality to the pronoun "their," as creating a joint tenancy so that the last surviving daughter takes all the income to the exclusion of the children of her sisters previously deceased. *Cruit* v. *Owen*, 368.

See TRUSTS AND TRUSTEES.