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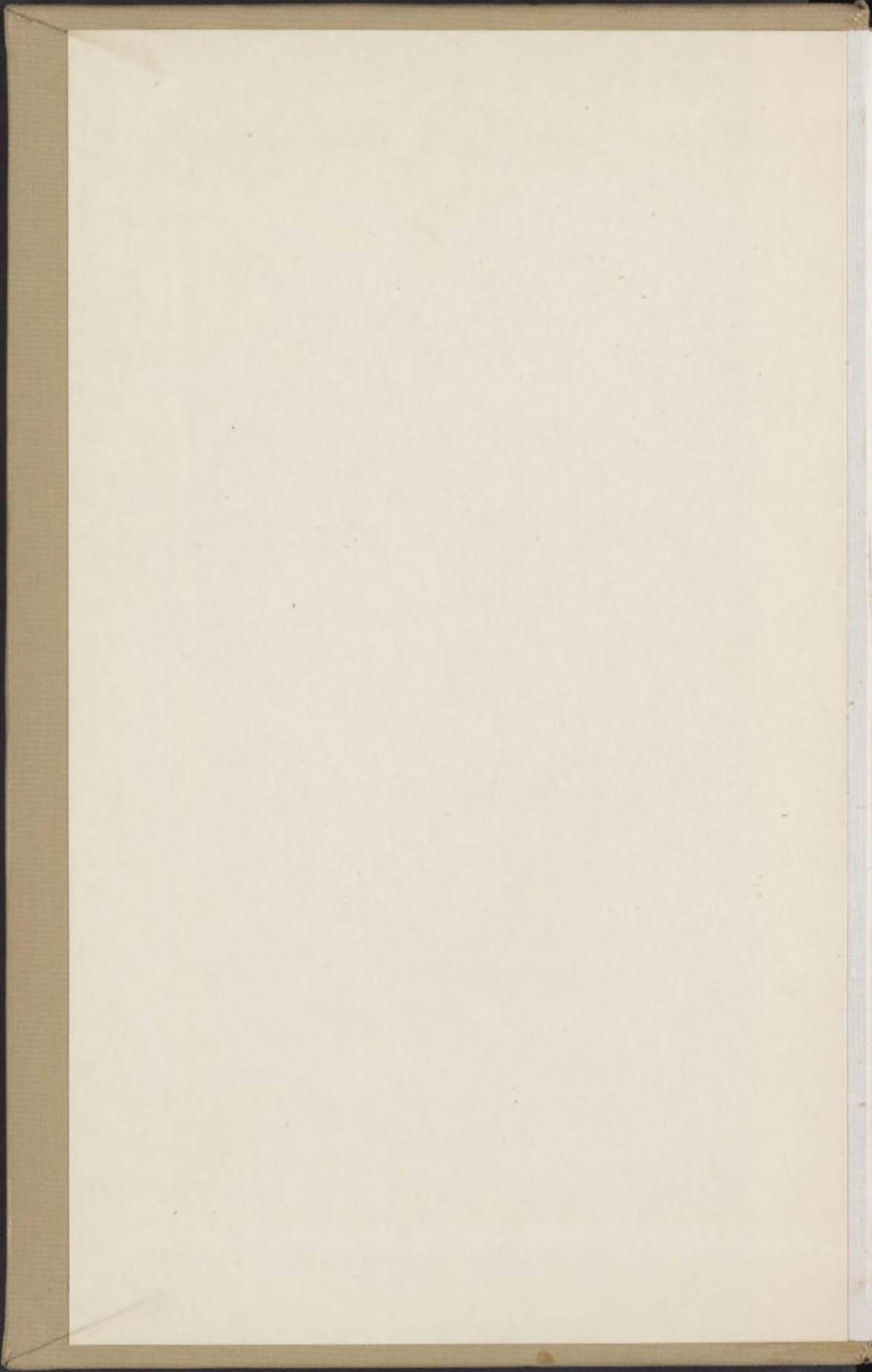
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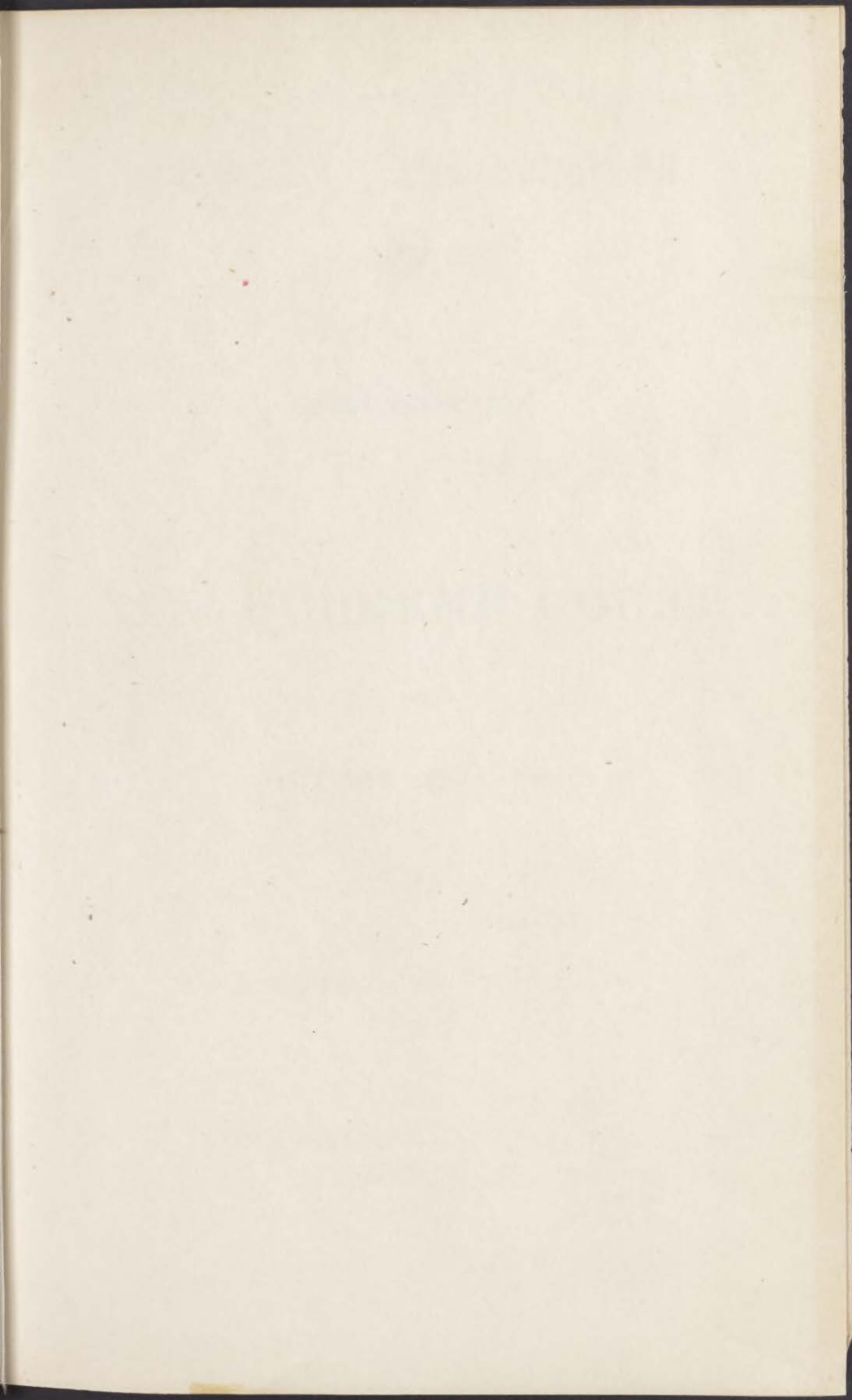
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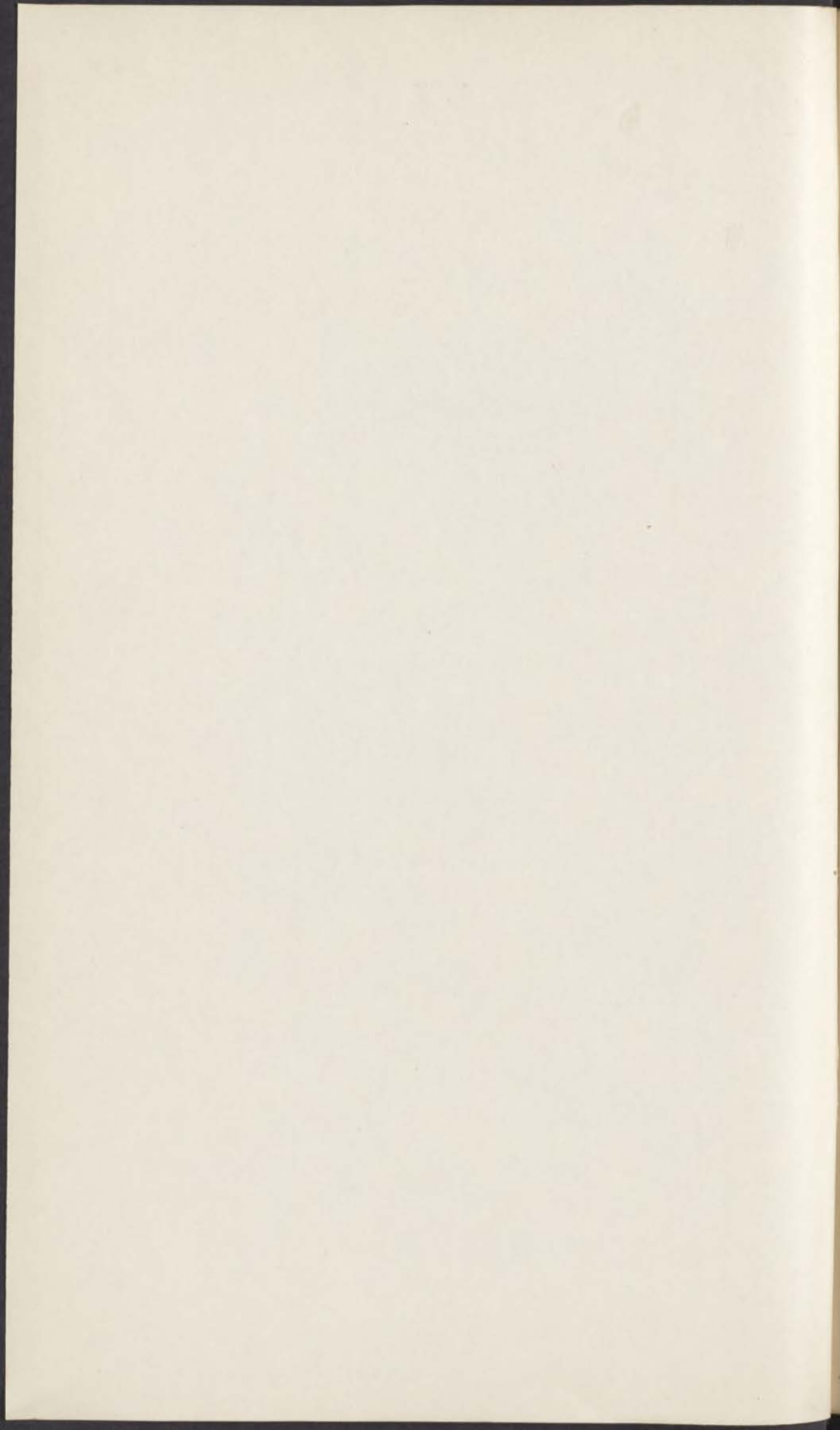
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UNITED STATES REPORTS

VOLUME 205

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1906

CHARLES HENRY BUTLER

REPORTER

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1907

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J U S T I C E S
OF THE
S U P R E M E C O U R T¹

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, CHIEF JUSTICE.
JOHN MARSHALL HARLAN, ASSOCIATE JUSTICE.
DAVID JOSIAH BREWER, 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.
WILLIAM HENRY MOODY, ASSOCIATE JUSTICE.²

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 Appointed December 17, 1906; took no part in any of the decisions reported in this volume argued or submitted prior to that date, or in any decisions in suits in which he had appeared for the United States as Attorney General.

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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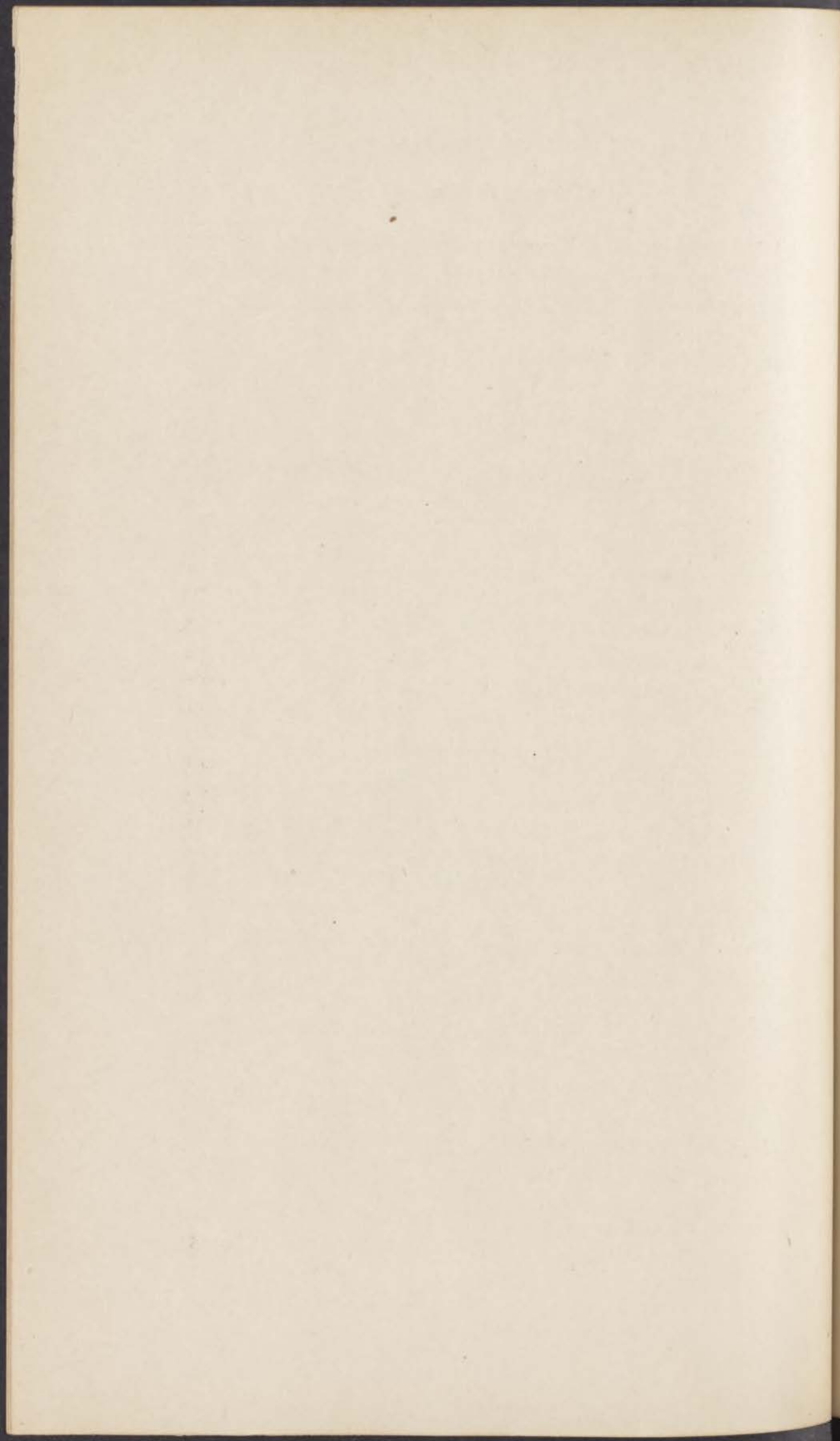


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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES,
AT
OCTOBER TERM, 1906.

SCHLEMMER v. BUFFALO, ROCHESTER AND PITTS-
BURG RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 41. Argued January 18, 21, 1907.—Decided March 4, 1907.

Statements of a witness although based on hearsay constitute evidence in the cause unless seasonably objected to as hearsay.

The provisions of § 2 of the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, declaring it to be unlawful for any common carrier engaged in interstate commerce to haul or permit to be hauled or used on its line any car used in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, relate to all kinds of cars running on the rails, including locomotives and steam shovel cars. *Johnson v. Southern Pacific Co.*, 196 U. S. 1.

The object of that statute was to protect the lives and limbs of railroad employes by rendering it unnecessary for men operating the couplers to go between the ends of the cars, and the words "used in moving interstate traffic" occurring therein are not to be taken in a narrow sense.

In a suit based upon the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, the plaintiff is not called upon to negative the proviso of § 6 of said act, either in his pleadings or proofs. Such proviso merely creates an exception and if the defendant wishes to rely thereon the burden is upon it to bring itself within the terms of the exception; those who set up such an exception must establish it.

Where a Federal question is duly raised at the proper time and in a proper manner in the state court and the judgment of the state court neces-

sarily involves the decision of such question this court on writ of error will review such judgment although the state court in its opinion made no reference to the question. And if it is evident that the ruling of the state court purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review.

Assumption of risk as extended to dangerous conditions of machinery, premises and the like, obviously shades into negligence as commonly understood. The difference between the two is one of degree rather than of kind.

Section 8 of the Automatic Coupler Act having exonerated the employé from assumption of risk under specified conditions, the employé's rights in that regard should not be sacrificed by charging him with assumption of risk under another name, for example, with contributory negligence.

In this case the so-called contributory negligence of the deceased employé was so involved with and dependent upon erroneous views of the statute, that the judgment complained of must be reversed.

207 Pa. St. 198, reversed.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney and *Mr. Luther M. Walter*, with whom *Mr. Edward A. Moseley* and *Mr. A. J. Truitt* were on the brief, for the plaintiff in error:

The steam shovel which the deceased, in the performance of his duty as a brakeman, was endeavoring to couple up to the caboose was a "car" within the purview of section 2 of the act of March 2, 1893, commonly known as the "Safety Appliance Act." The purpose of that act was to promote the safety of employés and travelers upon railroads; the act is remedial in its character and should be construed so as best to accomplish the intent and purpose of the Congress. *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Kansas City Co. v. Crocker*, 11 So. Rep. 262; *Thomas v. Railroad Co.*, 38 Georgia, 222; *Perez v. San Antonio &c. Ry. Co.*, 28 Texas Civ. App. 255; *Tex. & Pac. Ry. v. Webb*, 72 S. W. Rep. 1044.

The steam shovel was en route from Limestone, New York, to a point in Pennsylvania. That the steam shovel was bolted to a platform which was supported on trucks running upon the rails does not militate against the conclusion that its

movement across state lines and from a point in one State to a point in another constituted interstate commerce. Though supported by its own trucks and running on its own wheels it nevertheless was freight and was being transported by defendant in error in pursuance of its general business as a common carrier. *Gibbons v. Ogden*, 9 Wh. 1; *Lottery case*, 188 U. S. 321-345; *Peoria & Pekin Union Ry. Co. v. C., R. I. & P. Ry. Co.*, 109 Illinois, 135.

Inasmuch as the steam shovel car was within the purview of the statute, it follows that as it was not equipped with an automatic coupler as required by that statute its movement was in violation of law. Section 8 of the act of March 2, 1893, provides that if any employé of a common carrier subject to the act is injured by any car in use contrary to the provision of the act such employé shall not be deemed to have assumed the risk thereby occasioned.

It is our contention that the doctrine of assumption of risk in this case was so inextricably interwoven with the question of supposed contributory negligence on the part of the deceased that the prime matter for adjudication by the state court was the applicability of the Federal statute to the facts disclosed by the evidence. The refusal of the state court to accord to the statute controlling influence constituted, upon the facts and circumstances shown by the evidence, reversible error.

This court has jurisdiction to review judgments of the Supreme Court of a State when a Federal question has been properly raised in and disposed of by that court. Whether a Federal right was sufficiently pleaded and brought to the attention of the state court is itself a Federal question, and the decision of this court on writ of error is not concluded by the view taken by the highest court of the State. *Carter v. Texas*, 177 U. S. 442, 447, citing *Neal v. Delaware*, 103 U. S. 370, 396-397; *Mitchell v. Clark*, 110 U. S. 633, 645; *Boyd v. Thayer*, 143 U. S. 135, 180.

Where in this court a party asserts that the final judgment

of the highest court of a State denied to him a right or immunity set up and claimed under the Constitution or laws of the United States and the court finds that a Federal question involving such claim was properly raised below, jurisdiction of this court to review that judgment cannot be defeated by the mere failure or the refusal of the highest court of the State to refer to the question so raised. *Erie R. R. Co. v. Purdy*, 185 U. S. 148.

It is immaterial that the state court considered the case to fall within the principles of general law untrammelled by statutory enactments. The grasp of the Federal statute, if any it had, must first have been released before the general law can be given play. The construction, scope, and applicability of the statute invoked to the facts disclosed by the evidence raise Federal questions in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court. *Anderson v. Carkins*, 135 U. S. 483.

While it is conceded that this court cannot enter upon an inquiry as to whether the finding of a jury in a state court is against the evidence, *Missouri, Kansas & Texas R. R. Co. v. Haber*, 169 U. S. 639, nevertheless the question as to the sufficiency, competency, or legal effect of the evidence as bearing upon a question of Federal law raised in the course of the trial to support the conclusion reached by the state court may be reviewed by this court, as the supreme court of error of a State may review the proceedings of inferior courts of original jurisdiction. *Mackey v. Dillon*, 4 How. 447; *Dower v. Richards*, 151 U. S. 658.

Before accepting this steam shovel car it was the defendant's duty to inspect it and to see that it complied with the statute. *Railroad v. Mackey*, 157 U. S. 72; *United States v. Southern Ry.*, 135 Fed. Rep. 122.

The proximate cause of the accident in this case was the failure of the defendant company to require the equipment of the car with automatic couplers. *Railroad Co. v. Holloway*,

205 U. S.

Argument for Plaintiff in Error.

191 U. S. 334; *Elmore v. Seaboard Air Line Ry. Co.*, 41 S. E. Rep. 786.

A violation of a statutory obligation by an employer is negligence *per se*. *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, and cases cited. Contributory negligence will not bar a recovery when the defendant itself has violated a positive requirement of law. *Flint &c. R. Co. v. Lull*, 28 Michigan, 510, 515; *The Pennsylvania*, 19 Wall. 125; *Carterville Coal Co. v. Abbott*, 181 Illinois, 495; *Kansas City, M. & B. R. R. v. Flippo*, 138 Alabama, 487.

The evidence in this case should have been submitted to the jury. It may well be doubted whether there is any evidence of negligence on the part of deceased. It certainly can not be said that all minds, from the evidence, would arrive at the conclusion that deceased had been guilty of negligence causing his own death. The decisions of this court have well settled the law to be that the case must go to the jury wherever there is reasonable ground for ordinary minds to arrive at different conclusions. *Railroad Co. v. Stout*, 17 Wall. 657, 663.

The witnesses as to the occurrence of the accident were employés of the defendant in error and in a sense were interested witnesses; therefore the measure of credence to be given their evidence should have been left to the jury. *Texas & Pac. R. Co. v. Carlin*, 189 U. S. 354, 361.

The defendant in error by refusing to haul the defective car could have avoided the injury to Schlemmer, and although Schlemmer might have been guilty of ordinary want of care and caution, still the defendant in error was liable, since by using reasonable care and prudence it might have avoided the consequences of plaintiff's negligence. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408.

From the mere fact of the occurrence of the injury negligence is not to be presumed. *Northern Pac. R. R. v. Everett*, 152 U. S. 107.

In the courts of Pennsylvania, as well as those of the United States, the trend of decision in the more recent cases is to the

effect that, except in cases in which both the evidence and all inferences which may be drawn therefrom are all one way, questions of negligence and contributory negligence are for the jury. *Esher v. Mineral R. & Min. Co.*, 28 Pa. Super. Ct. 387; *Kilkeary v. Thackery*, 165 Pa. 584; *Hogan v. West Mahony Tp. &c. Co.*, 174 Pa. 352; *Fetterman v. Rush Twp.*, 28 Pa. Super. Ct. 7.

Mr. M. E. Olmsted, with whom *Mr. C. H. McCauley* and *Mr. A. C. Stamm* were on the brief, for defendant in error:

The state court having decided the case upon the ground of contributory negligence, which does not present a Federal question, its judgment would not be reviewable here even though another issue, presenting a Federal question, had been squarely raised.

Even though a Federal question had been squarely raised in the Supreme Court of Pennsylvania, nevertheless, as the defense of contributory negligence was found by that court to be a complete defense, it would have been unnecessary for it to pass upon the Federal question and its failure to do so could not have been assigned as error here. *Adams County v. Burlington & Missouri R. R. Co.*, 112 U. S. 123; *Chouteau v. Gibson*, 111 U. S. 200; *Murdock v. Memphis*, 20 Wall. 590, 636. See also *Jenkins v. Loewenthal*, 110 U. S. 222.

Where the Supreme Court of a State decides a Federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the Federal question. *Hale v. Akers*, 132 U. S. 554; *McManus v. O'Sullivan*, 91 U. S. 578; *Brown v. Atwell*, 92 U. S. 327; *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140; *Chouteau v. Gibson*, 111 U. S. 200; *Adams County v. Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway v. Guthard*, 114 U. S. 133; *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *De Saussure v. Gaillard*, 127 U. S. 216, 234.

The trial judge having declared that upon plaintiff's own

evidence she was not entitled to recover because of the contributory negligence of the deceased; and the Supreme Court of Pennsylvania having affirmed the judgment upon that ground alone, there is nothing to which the jurisdiction of this court can attach.

Assumption of risk and contributory negligence are separate and distinct defenses. The act of 1893 relates to the former only. It does not take away the latter.

Under the law of Pennsylvania, plaintiff would not be entitled to recover even if the deceased had not been guilty of contributory negligence, because it is the law of that State that an employé assumes the risks incident to the discharge of his duties, even though those duties are hazardous, if he has had an opportunity to ascertain their dangerous character. *Patterson v. R. R. Co.*, 76 Pa. St. 389; *Pittsburgh & Connelville R. R. Co. v. Sentmeyer*, 92 Pa. St. 276.

The act of 1893 does not apply to this case at all; but if it did it simply took away from defendant that single ground of defense, namely, the assumption of risk by the employé.

Recovery by a plaintiff is precluded where his or her own negligence has proximately contributed to his or her own injury. *Washington & Georgetown R. R. Co. v. McDade*, 135 U. S. 554; 7 Am. & Eng. Enc. of Law, 371; *Sunney v. Holt*, 15 Fed. Rep. 880; *Motey v. Pickle M. & G. Co.*, 74 Fed. Rep. 155.

Although under the act of 1893, where applicable, an employé will not be deemed to have assumed the risk of the employment, nevertheless he must act in such manner that injury shall not befall him as the result of his own fault or imprudence. The distinction between "assumption of risk" and "contributory negligence" has always been clearly drawn. *C. O. & G. R. R. v. McDade*, 191 U. S. 64; *Narramore v. Ry. Co.*, 96 Fed. Rep. 298; *St. Louis Cordage Co. v. Miller*, 126 Fed. Rep. 495; *Hesse v. R. R. Co.*, 58 Ohio St. 167; *Miner v. R. R. Co.*, 153 Massachusetts, 398.

The provision in the act of 1893 that no employé of a common carrier, who may be injured by any car in use contrary to

the provisions requiring automatic couplers, shall be deemed to have assumed the risk occasioned thereby, can have no effect on the general principle of law that recovery by a plaintiff is precluded where his own negligence has proximately contributed to, and, as in this case, caused, his own injury. *Winkler v. Phila. & R. R. R.*, 53 Atl. Rep. 90; *C. C. C. & St. L. Ry. Co. v. Baker*, 91 Fed. Rep. 224; *D. & R. G. R. R. Co. v. Arrighi*, 129 Fed. Rep. 347; *Narramore v. C. C. C. & St. L. R. R.*, 96 Fed. Rep. 298; *L. E. & W. Ry. Co. v. Craig*, 73 Fed. Rep. 642; *Hodges v. Kimball*, 104 Fed. Rep. 745; *Dixon v. W. U. Tel. Co.*, 68 Fed. Rep. 630; *Kilpatrick v. Grand Trunk Ry. Co.*, 27 Am. & Eng. R. R. Cases, 945.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer, while trying to couple a shovel car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the Supreme Court of the State. The shovel car was part of a train on its way through Pennsylvania from a point in New York, and was not equipped with an automatic coupler in accordance with the act of March 2, 1893, c. 196, § 2, 27 Stat. 531. Instead of such a coupler it had an iron drawbar fastened underneath the car by a pin and projecting about a foot beyond the car. This drawbar weighed about eighty pounds and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end, possibly a foot, so that it should enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel car and to its being so high that it would pass over those on the caboose, the car and caboose would crush any one between them if they came together and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the

shovel car. It was dusk and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed.

The plaintiff in her declaration alleged that the defendant was transporting the shovel car from State to State and that the coupler was not such as was required by existing laws. At the trial special attention was called to the United States statute as part of the plaintiff's case. The court having directed a nonsuit with leave to the plaintiff to move to take it off, a motion was made on the ground, among others, "that under the United States statute, specially pleaded in this case, the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler." The question thus raised was dealt with by the court in overruling the motion. Exceptions were allowed and an appeal taken. Among the errors assigned was one "in holding that the shovel car was not a car used in interstate commerce or any other kind of traffic," the words of the court below. The Supreme Court affirmed the judgment in words that we shall quote. We are of opinion that the plaintiff's rights were saved and that we have jurisdiction of the case, subject to certain matters that we shall discuss.

On the merits there are two lesser questions to be disposed of before we come to the main one. A doubt is suggested whether the shovel car was in course of transportation between points in different States, and also an argument is made that it was not a car within the contemplation of § 2. On the former matter there seems to have been no dispute below. The trial court states the fact as shown by the evidence, and testimony that the car was coming from Limestone, New York, is set forth, which, although based on the report of others, was evidence, at least unless objected to as hearsay. *Damon v. Carrol*, 163 Massachusetts, 404, 408, 409. It was the testimony of the defendant's special agent employed to investigate the matter.

The latter question is pretty nearly answered by *Johnson v.*

Southern Pacific Co., 196 U. S. 1, 16. As there observed, "Tested by context, subject matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives." "The object was to protect the lives and limbs of railroad employ  s by rendering it unnecessary for a man operating the couplers to go between the ends of the cars." These considerations apply to shovel cars as well as to locomotives, and show that the words "used in moving interstate traffic" should not be taken in a narrow sense. The later act of March 2, 1903, c. 976, 37 Stat. 943, enacting that the provision shall be held to apply to all cars and similar vehicles, may be used as an argument on either side, but in our opinion indicates the intent of the original act. 196 U. S. 21. There was an error on this point in the decision below.

A faint suggestion was made that the proviso in    6 of the act, that nothing in it shall apply to trains composed of four-wheel cars, was not negatived by the plaintiff. The fair inference from the evidence is that this was an unusually large car of the ordinary pattern. But, further, if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The word "provided" is used in our legislation for many other purposes beside that of expressing a condition. The only condition expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance it merely creates an exception, which has been said to be the general purpose of such clauses. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 36, 37. "The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it," etc. *Ryan v. Carter*, 93 U. S. 78, 83. *United States v. Dixon*, 15 Peters, 141, 165. The rule applied to construction is applied equally to the burden of proof in a case like this. *United States v. Cook*, 17 Wall. 168; *Commonwealth v. Hart*, 11 Cush. 130, 134.

We come now to the main question. The opinion of the Supreme Court was as follows: "Whether the Act of Congress

. . . has any applicability at all in actions for negligence in the courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject." It is said that the existence of contributory negligence is not a Federal question and that as the decision went off on that ground there is nothing open to revision here.

We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel v. Wilson*, January 7, 1907, 204 U. S. 36. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co. v. Green Bay & Missi. Canal Co.*, 142 U. S. 254. And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis Railroad Co. v. Indiana*, 194 U. S. 579. The application of this rather vague principle will appear as we proceed.

It is enacted by § 8 of the act that any employé injured by any car in use contrary to the provisions of the act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a

conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49, 57, 58. But, at the present time, the notion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 68. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the

servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as controvertible terms. *Patterson v. Pittsburg & Connellsville R. R. Co.*, 76 Pa. St. 389. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound.

To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the Supreme Court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employé takes the risk even of unusual dangers if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with the full knowledge of the danger, and to imply that the defendant was guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel car was not a car within the meaning of § 2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was.

It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are

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clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed.

Judgment reversed.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE PECKHAM, MR. JUSTICE McKENNA and MR. JUSTICE DAY, dissenting.

I dissent from the opinion and judgment in this case and for these reasons:

This was an action in the Common Pleas Court of Jefferson County, Pennsylvania, to recover damages on account of the death of the husband of plaintiff. On the trial the court or-

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dered a nonsuit on the ground of contributory negligence on the part of the decedent, with leave to the plaintiff to move to take the same off. This motion was made and overruled; judgment for the defendant was entered, which was affirmed by the Supreme Court of the State. The decedent was killed while attempting to couple a steam shovel to a caboose. The steam shovel was being moved in interstate transportation and was not equipped with the safety coupler required by act of Congress of March 2, 1893, 27 Stat. 531. The eighth section of that act provides:

"That any employé of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

This, while removing from the employé the burden of any assumption of risk, does not relieve him from liability for contributory negligence. For the rule is well settled that while, in cases of this nature, a violation of the statutory obligation of the employer is negligence *per se*, and actionable if injuries are sustained by servants in consequence thereof, there is no setting aside of the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless that statute is so worded as to leave no doubt that this defense is also to be excluded. *Taylor v. Carew Manufacturing Company*, 143 Massachusetts, 470; *Krause v. Morgan*, 53 Ohio St. 26; *East Tennessee, &c. Railroad Company v. Rush*, 15 Lea (Tenn.), 145, 150; *Queen v. Dayton Coal, &c. Company*, 95 Tennessee, 458; *Reynolds v. Hindman*, 32 Iowa, 146; *Caswell v. Worth*, 85 E. C. L. 849; *Buckner v. Richmond, &c. Railroad Company*, 72 Mississippi, 873; *Victor Coal Company v. Muir*, 20 Colorado, 320; *Holum, Admr., &c. v. Chicago, &c. Railway Company*, 80 Wisconsin, 299; *Kilpatrick v. Grand Trunk Railway*, 74 Vermont, 288; *Denver & R. G. Railroad Company v. Arrighi*, 129 Fed. Rep. 347; *Winkler v. Phila-*

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delphia &c. Railroad Company, 4 Pennewill's Delaware Rep. 80. The Interstate Commerce Commission held this to be the rule in reference to this particular statute. 14th Ann. Rep. 1900, p. 84. Indeed it is not contended by the majority that the defense of contributory negligence has been taken away.

That there is a vital difference between assumption of risk and contributory negligence is clear. As said by this court in *Choctaw, Oklahoma, &c. Railroad Company v. McDade*, 191 U. S. 64, 68: "The question of assumption of risk is quite apart from that of contributory negligence." See also *Union Pacific Railway Co. v. O'Brien*, 161 U. S. 451, 456. This proposition, however, is so familiar and elementary that citation of authorities is superfluous.

In the motion for a nonsuit the second proposition was that "the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel—that this omission was the fault of the deceased exclusively—and that deceased was guilty of contributory negligence and there can be no recovery in this case."

In ordering the nonsuit the trial court said:

"True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employé to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

* * * * *

"It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover."

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The Supreme Court affirmed the judgment in the following *per curiam* opinion:

"Whether the act of Congress in regard to the use of automatic couplings on cars employed in interstate commerce has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject."

That contributory negligence is a non-Federal question is not doubted, and that when a state court decides a case upon grounds which are non-Federal and sufficient to sustain the decision this court has no jurisdiction is conceded.

While sometimes negligence is a mixed question of law and fact, yet in the present case, whether the decedent in attempting to make the coupling, after the warning given by the conductor, lifted his head unnecessarily and negligently, is solely a question of fact, and in cases coming on error from the judgment of a state court the findings of that court on questions of fact have always been held conclusive on us. See *Chrisman v. Miller*, 197 U. S. 313, 319, and the many cases cited in the opinion.

It would seem from this brief statement that the case ought to be dismissed for lack of jurisdiction. Escape from this conclusion can only be accomplished in one of these ways: By investigation of the testimony and holding that there was no proof of contributory negligence. If the case came from one of the lower Federal courts we might properly consider whether there was sufficient evidence of contributory negligence; but, as shown above, a very different rule obtains in respect to cases coming from a state court. We said this very term, in *Bachtel v. Wilson*, 204 U. S. 36, 40, in reference to a case coming from a state court to this: "Before we can pronounce this judgment in conflict with the Federal Constitution it must be made to appear that this decision was one necessarily in con-

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flict therewith, and not that possibly or even probably it was." Before then we can disturb this judgment of the Supreme Court of Pennsylvania it must (paraphrasing the language just quoted a little) be made to appear that its decision of the question of contributory negligence was one necessarily in disregard of the testimony and not that possibly or even probably it was.

It cannot be said that there was no evidence of negligence on the part of the decedent. The plaintiff's testimony (and the defendant offered none) showed that deceased was an experienced brakeman; that the link and pin coupling was in constant use on other than passenger coaches; that before the deceased went under the car the pin had already been set; that as he was going under the car he was twice notified to be careful and keep his head down, and yet, without any necessity therefor being shown, he lifted his head and it was crushed between the two cars; that all he had to do was to guide the free end of the drawbar into the slot, and while the drawbar weighed seventy-five to eighty pounds, it was fastened at one end, and the lifting and guiding was only of the other and loose end; that the drawheads were of the standard height and the body of the shovel car higher than that of the caboose. Immediately thereafter the coupling was made by another brakeman without difficulty. If an iron is dangerously hot, and one knows that it is hot and is warned not to touch it, and does touch it without any necessity therefor being shown, and is thereby burned, it is trifling to say that there is no evidence of negligence.

A second alternative is that this court finds that the Supreme Court of Pennsylvania recognizes no difference between assumption of risk and contributory negligence. But that is not to be imputed in view of the rulings in the lower court, affirmed by the Supreme Court, to say nothing of the recognized standing and ability of that court.

Or we may hold that the Pennsylvania courts intentionally, wrongfully and without any evidence thereof found that there

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was contributory negligence in order to avoid the binding force of the Federal law. During the course of the argument, in response to an interrogation, counsel for plaintiff in error bluntly charged that upon those courts. Of course this court always speaks in respectful terms of the decisions it reviews, but the implication of the most courteous language may be as certain as a direct charge.

It is intimated that the Pennsylvania courts confuse assumption of risk and contributory negligence—in other words, are unmindful of the difference between them, and *Patterson v. Pittsburg, &c. Railroad Company*, 76 Pa. St. 389, is cited as authority. That case was decided more than thirty years ago, and might, therefore, fairly be considered not an expression of the present views of those courts. But on examination of the case, in which a judgment in favor of the railroad was reversed by the Supreme Court, we find this language which is supposed to indicate the confusion (pp. 393, 394):

“In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous, that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident.”

Curiously enough in *Narramore v. Cleveland, &c. Railway Company*, 37 C. C. A. 499, 505, a recent decision of the Court of Appeals of the Sixth Circuit, in the opinion announced by Circuit Judge Taft is language not altogether dissimilar:

“Assumption of risk and contributory negligence approxi-

mate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it."

For these reasons I dissent from the opinion and judgment, and am authorized to say that MR. JUSTICE PECKHAM, MR. JUSTICE MCKENNA and MR. JUSTICE DAY concur in this dissent.

TINSLEY *v.* TREAT, UNITED STATES MARSHAL.

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

No. 369. Argued December 3, 4, 1906.—Decided March 4, 1907.

A district judge of the United States on application to remove from the district where defendant is arrested to that where the offense is triable acts judicially and the provision of § 1014, Rev. Stat., that the proceedings are to be conducted agreeably to the usual mode of process in the State against offenders has no application to the inquiry on application for removal.

While in a removal proceeding under § 1014, Rev. Stat., an indictment constitutes *prima facie* evidence of probable cause it is not conclusive, and evidence offered by the defendant tending to show that no offense triable in the district to which removal is sought had been committed is admissible; and its exclusion is not mere error but the denial of a right secured under the Federal Constitution.

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Argument for Appellants.

THE facts are stated in the opinion.

Mr. John J. Vertrees and Mr. John S. Miller, with whom Mr. Henry A. M. Smith, Mr. James C. Bradford, Mr. James P. Helm, Mr. Marcellus Green and Mr. Garner Wynn Green were on the brief, for appellants in this case and in numbers 370-379, argued simultaneously herewith: ¹

In *habeas corpus* removal proceedings instituted to prevent the removal of an "offender" under § 1014, Rev. Stat., when a certified copy of the indictment is the only evidence introduced by the Government to show the existence of probable cause, it is the right of the "offender" to present evidence that proves the absence of probable cause; that he is innocent of the offense charged in the indictment, or that the court has no jurisdiction.

This right exists also on the hearing before the judge of the district upon an application to him for an order of removal. *In re Doig*, 4 Fed. Rep. 194, 195; *In re Price*, 83 Fed. Rep. 830; *United States v. Pope*, Fed. Cases, No. 16,069; *In re Wood*, 95 Fed. Rep. 288; *United States v. Fowkes*, 49 Fed. Rep. 50; 53 Fed. Rep. 13; *In re Wolf*, 27 Fed. Rep. 606; *In re Greene*, 52 Fed. Rep. 104; *United States v. Greene*, 100 Fed. Rep. 941; *United States v. Lee*, 84 Fed. Rep. 626; *United States v. Greene*, 108 Fed. Rep. 816; *In re Dana*, 68 Fed. Rep. 886; *Ex parte Rickett*, 61 Fed. Rep. 203; *Price v. McCarty*, 89 Fed. Rep. 84; *United States v. Rodgers*, 23 Fed. Rep. 661; *United States v. Brawner*, 7 Fed. Rep. 86; *In re Buell*, 4 Fed. Cases, No. 2102; *United States v. Voltz*, Fed. Cases, No. 16,627; *United States v. Haskins*, Fed. Cases, No. 15,322; *United States v. Shepard*, Fed. Cases, No. 16,273; *In re Alexander*, Fed. Cases, No. 162; *In re Beshears*, 79 Fed. Rep. 70; *In re Terrill*, 51 Fed. Rep. 213; *In re Corning*, 51 Fed. Rep. 205.

For various questions involved in removals decided by this court, see *Horner v. United States*, 143 U. S. 207; *Greene*

¹ See p. 33, *post*.

v. *Henkel*, 183 U. S. 249; *Beavers v. Henkel*, 194 U. S. 73; *Benson v. Henkel*, 198 U. S. 1; *Hyde v. Shine*, 199 U. S. 62.

Text-writers sustain appellants' contention, Hughes' Crim. Proc., §§ 15-17, p. 29, and so does the Attorney-General of the United States. Ops. Atty. Gen., 1904, p. 3.

The question of jurisdiction under the Federal Constitution is one far-reaching and fundamental. Under the statute, the party accused is to be bound over for trial before such court of the United States as by law has cognizance of the offense. Under the Constitution, the only court of the United States which has cognizance is a court of the United States sitting and trying the case in the State and district wherein the crime shall have been committed. If, therefore, the application to the magistrate be to commit the prisoner for trial in a State and district in which the crime shall not have been committed, it is evident that the application would have to be refused. The injunctions of the law—constitutional and statutory—are imperative. The effect of an indictment found as proof of probable cause before the Commissioner has also been adjudicated by this court. See *Beavers v. Henkel*, 194 U. S. 73; *Hyde v. Shine*, 199 U. S. 84.

From the beginning of the Government the universal holding of the United States courts has been upon the question of innocence or guilt, that the indictment was only probative and *prima facie* and that the accused had the right to submit testimony in rebuttal of its effect as showing probable cause.

A fortiori, could its effect be no greater than merely *prima facie* and the party be entitled to rebut its effect by evidence to the contrary. The rule that a copy of the indictment, nothing else appearing, ought to be accepted as sufficient, is not only convenient for the Government, but does no injustice to the accused. In the absence of exculpatory evidence, a copy of the indictment may well be accepted as equivalent to an affidavit, as sufficient authority for removal. In that sense it is *prima facie* evidence of probable cause. It is treated as evidence, and as being sufficient under such circumstances;

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but when it is said that there must be evidence of probable cause, it means that the court should be satisfied that there is evidence on which a jury may convict. *United States v. Fowkes*, 49 Fed. Rep. 52; or at least proof furnishing good reasons to believe that the crime alleged has been committed by the accused. *United States v. Burr*, 25 Fed. Cas. No. 14,692a.

Mr. Assistant Attorney General McReynolds for appellees:

The action of the court below was correct.

In Virginia one indicted for crime is not entitled to a preliminary examination before being put on trial. Virginia Code Ann. (Pollard) 1904, § 4003 and note; § 4012; *Jones's case*, 86 Virginia, 661.

Before the District Judge no question was raised as to sufficiency of the indictment. After examination it was held valid by both judges below, and in view of their conclusion cannot be said to be obviously bad. In the present proceeding neither this nor the trial court should inquire with great particularity as to technicalities. Such points should be considered and the legal sufficiency of the indictment determined only by the court in which it was found. *Benson v. Henkel*, 198 U. S. 1, 10.

No court on *habeas corpus* can be required to pass upon them in advance of a trial in the court of the indictment. *Horner v. United States*, 143 U. S. 577; *Riggins v. United States*, 199 U. S. 547.

Identity was admitted and no extraordinary facts suggested to indicate bad faith or any peculiar hardships which would result from removal, and the examining judge decided it was his duty to direct the same.

One charged with an offense against the United States must be arrested and committed as though similarly charged with crime against the State. The duties of the Federal judge in reference to removal begin after the accused has been committed and the language of the statute seems to make it obligatory upon him to direct a removal upon application.

It certainly does not in terms require him to hear proof and conduct an inquiry as to guilt or innocence. The removal of witnesses and offenders is put on the same basis. No doubt the Federal judge should inquire into the regularity of arrest and commitment and see that they harmonize with the law of the State; and in extraordinary cases possibly he might go further. If he finds the proceedings entirely regular he should issue the warrant. At most he has a certain discretion, to be sparingly exercised to prevent wrong, and not to be interfered with unless it be in cases of manifest abuse.

The object of § 1014 was to afford an expeditious mode for arresting and bringing one accused to trial under the ordinary safeguards prescribed by state law; and the questions preliminary to arrest and commitment were understood to be within the ability of a justice of the peace to decide. See *Benson v. Henkel*, 198 U. S. 1; *Hyde v. Shine*, 199 U. S. 62; *Benson v. McMahon*, 127 U. S. 457; *Ornelas v. Ruiz*, 161 U. S. 502; *In re Belknap*, 96 Fed. Rep. 614.

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

In May, 1906, the grand jury in the United States Circuit Court for the Middle District of Tennessee returned an indictment against thirty corporations, two partnerships, and twenty-five persons, as defendants. This indictment contained six counts. Generally speaking, the first, second, fourth and fifth charged the defendants with violating section 1 of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies;" and the third and sixth counts charged them under section 5440 of the Revised Statutes. In July, 1906, the Government presented to the District Judge of the Eastern District of Virginia, at Richmond, a complaint made by Morgan Treat, United States Marshal, alleging that he believed James G. Tinsley stood indicted as aforesaid, and

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annexing a certified copy of the indictment as a part of the complaint, and praying that Tinsley might "be arrested and imprisoned and removed or bailed, as the case may be, for trial before the said Circuit Court of the United States for the Middle District of Tennessee, and further dealt with according to law." Tinsley was arrested and taken directly before the district judge, who acted as committing magistrate as well as the judge to order removal. In the proceedings before the district judge, Tinsley admitted that he was one of the defendants named in the indictment. The Government relied on the certified copy of the indictment, and offered no evidence except that; and asked for an order to be made for Tinsley's commitment and removal forthwith.

The record of those proceedings states:

"And thereupon the defendant, J. G. Tinsley, offered himself as witness in his own behalf, and being about to be sworn, the United States, by its counsel, thereupon objected to the witness being sworn or to any testimony being given in rebuttal of the indictment in these proceedings, on the ground that the identity of the defendant being admitted, inasmuch as the indictment on its face charges offenses against the United States committed and triable in the jurisdiction in which the defendant stands indicted, no evidence is admissible here to impeach the indictment, and the order of commitment should be made without other proof.

"The defendant's counsel thereupon offered to prove by the defendant and other witnesses then and there present, that the Circuit Court for the Middle District of Tennessee had no jurisdiction over the person of said defendant touching the offenses charged in said indictment, in that defendant and said other witnesses would, if permitted, testify that defendant is, and has been for many years, a resident and citizen of the city of Richmond, State of Virginia, and that defendant never at any time, or at any place in the State of Tennessee, at the times charged in the indictment, did or performed, or was party to, or engaged in any act or thing in the said indict-

ment charged as having been done and performed in any way whatsoever by this defendant in the said State of Tennessee; nor has defendant done, or performed, or been engaged in, or a party to the same or any of them in any other place or places at any other time or times whatsoever.

"Thereupon counsel for the Government renewed its objections as aforesaid.

"After hearing counsel on both sides, the court announced its conclusions as follows:

"The conclusion reached by the court is that in a proceeding for the arrest and removal of persons charged with a violation of the laws of the United States pursuant to section 1014 of the Revised Statutes of the United States, before a United States District Judge, sitting in the State of Virginia, in which State there no longer exists the right of a preliminary examination upon a crime charged prior to the trial upon the merits, when said judge is called upon to act as well in the matter of the apprehension of such persons, as in their removal to the jurisdiction in which they have been indicted, that upon the government's presentation of a sufficient indictment regularly found by a grand jury in a court of the United States, properly charging the commission of an offense within the district in which such indictment is found, coupled with proof of the identity of the person indicted, it is its duty to properly bail such person for appearance before the court in which he is indicted, or cause him to be removed thereto.' "

It was then ruled that the testimony offered was inadmissible, and the District Judge ordered that the accused either give bail or be held for removal. Tinsley declined to give bond, a warrant directing removal to the Middle District of Tennessee was issued, and he remained in custody pending its execution. No objection was offered to the indictment at any time during the proceedings before the District Judge.

The District Judge should not have allowed himself to be controlled by the statutes of Virginia. In that commonwealth it appears to have been formerly required that after indict-

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ment an examination should be had, but by subsequent legislation it was provided that where an indictment had been found, a *capias* should be issued for the arrest of the defendant, and no inquiry was to be made. But when there was no indictment a person arrested for an indictable offense must be taken before a magistrate for preliminary examination, and it was the magistrate's duty to inquire whether or not there was sufficient cause for charging the accused with the offense. Pollard's Annotated Virginia Code, §§ 3955, 3969, 4003; *Jones v. Commonwealth*, 86 Virginia, 661.

But, as hereinafter seen, the District Judge on application to remove acts judicially, and that part of section 1014 of the Revised Statutes of the United States which says that the proceedings are to be conducted "agreeably to the usual mode of process against offenders in such State," has no relation to the inquiry on application for removal.

Application was then made to the Circuit Court for writs of *habeas corpus* and *certiorari*, which were granted and due returns made. The petition alleged that Tinsley was unlawfully restrained of his liberty by the marshal, under color of authority of the United States by virtue of a warrant for removal claimed to have been issued under section 1014, Revised Statutes. It set forth in full the proceedings taken before the District Judge and the rulings and orders made during the hearing. It was charged that under and by virtue of clause 3, section 2, article 3, of the Constitution, and of the Sixth Amendment he was entitled to be tried, and could only be tried for any alleged offense against the United States in the State and district where the offenses charged in the indictment were committed; that the offenses specified in the indictment were not committed in the Middle District of Tennessee; that none of the acts supposed to have been engaged in by petitioner were done within that district; that the indictment stated no offense and was insufficient and void. It was further alleged that the warrant of removal was in violation of section 2 of article 3, of the Constitution

and of the Sixth Amendment; that the rulings of the District Judge, in holding the certified copy of the indictment conclusive and in refusing to permit the introduction of any evidence on behalf of petitioner, deprived him of rights secured by the Constitution and by section 1014, Revised Statutes; and that he was deprived of his liberty without due process of law.

At the hearing before the Circuit Court, in addition to the record of the proceedings before the District Judge, an offer was made to prove by witnesses the facts set forth in the petition, but the court did not admit the same, because it was held that the certified copy of the indictment, with proof of the identity of the party accused, sufficiently established the existence of probable cause.

In other words, the indictment was in effect held to be conclusive. The Circuit Judge said, it is true, that probable cause must be shown in order to obtain a removal, but he held that inasmuch as the copy of the indictment alone was regarded as sufficient evidence of probable cause in *Beavers v. Henkel*, 194 U. S. 73, it was sufficient in the present case. In that case, however, no evidence was introduced to overcome the *prima facie* case made by the indictment except that evidence was offered as to what passed in the grand jury room and rejected on that ground and not because it went to the merits.

Section 1014 of the Revised Statutes reads as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law

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has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

Obviously the first part of this section provides for the arrest of any offender against the United States wherever found and without reference to whether he has been indicted, but when he has been indicted in a district in another State than the district of arrest, then, after the offender has been committed, it becomes the duty of the District Judge, on inquiry, to issue a warrant of removal. And it has been repeatedly held that in such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. "The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions." Mr. Justice Jackson, then Circuit Judge, *Greene's Case*, 52 Fed. Rep. 104. In the language of Mr. Justice Brewer, delivering the opinion in *Beavers v. Henkel*, 194 U. S. 73, 83:

"It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions

must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial, act."

In *Greene v. Henkel*, 183 U. S. 249, Greene was indicted in the District Court of the United States for the Southern District of Georgia. He was arrested and taken before a commissioner in the State of New York. The commissioner held that the certified copy of the indictment was conclusive evidence of probable cause, and refused to hear any evidence on the part of the defendant; and thereupon application was made to the District Judge of the Southern District of New York for an order of removal. That judge held that the commissioner should have heard evidence, and remanded the case. Evidence was then taken before the commissioner, and he decided that there was probable cause. Application was again made to the District Judge for an order of removal, and he held that the evidence showed the existence of probable cause, and made the order accordingly. Greene thereupon presented his petition to the Circuit Court for a writ of *habeas corpus*, which was denied, and the case brought here on appeal. The evidence before the commissioner and before the District Judge was not annexed to the petition nor brought up on certiorari, so that it formed no part of the record in the *habeas corpus* case. We held that, in the absence of the evidence, we must assume that the finding of probable cause was sustained.

But it was insisted that the offense was only that which was contained in the indictment, and if the indictment were insufficient for any reason that then no offense was charged upon which removal could be had. This court, however,

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ruled that the indictment did not preclude the Government from giving evidence of a certain and definite character concerning the commission of the offense and that the mere fact that there might be lacking in the indictment some averment of time or place or circumstance in order to render it free from technical defects would not prevent the removal if evidence were given on the hearing which supplied such defects and showed probable cause to believe the defendants guilty of the offense defectively stated in the indictment. Mr. Justice Peckham, in delivering the opinion, was careful to say that it was not held that where the indictment charged no offense against the United States or the evidence failed to show any, or, if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the judge would be justified in ordering the removal, because there would be no jurisdiction to commit or any to order the removal of the prisoner. "There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged." On the facts of that case it was not found necessary to express an opinion upon the question whether the finding of an indictment was, in the proceeding under section 1014, conclusive evidence of the existence of probable cause for believing the defendant in the indictment guilty of the charge set forth. Although it may be said that if the indictment were conclusive upon the accused, it would be conclusive upon the Government also.

It was held in *Beavers v. Henkel*, 194 U. S. 73; *Benson v. Henkel*, 198 U. S. 1; *Hyde v. Shine*, 199 U. S. 62, as well as *Greene v. Henkel*, *supra*, that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the

present case and we hold that the indictment cannot be treated as conclusive under section 1014.

This being so, we are of opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course, if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie*, then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial.

The Constitution provides that "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed," (Article III, section 2); and that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed," (Amendment VI); and in order that any one accused shall not be deprived of this constitutional right, the judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitively determines its validity.

Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined that probable cause existed, and such determination could not be revised on *habeas corpus*, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as

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mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution.

This conclusion is fatal to the order and warrant of removal and requires a reversal of the judgment below and the discharge of appellant.

Final order reversed and cause remanded with directions to discharge appellant from custody under the order and warrant of removal without prejudice to a renewal of the application to remove.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MOODY took no part in the disposition of the case.

KESSLER v. TREAT, UNITED STATES MARSHAL.¹

MORGAN v. SAME.

CARPENTER v. SAME.

WHITTLE v. SAME.

WILCOX v. SAME.

BRADEN v. SAME.

ROYSTER v. SAME.

SMITH v. SAME.

BURROUGHS v. SAME.

McDOWELL v. SAME.

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

Nos. 370, 371, 372, 373, 374, 375, 376, 377, 378, 379. Argued December 3, 4, 1906.—
Decided March 4, 1907.

Decided on authority of *Tinsley v. Treat*, ante, p. 20.

¹ Argued simultaneously with *Tinsley v. Treat*, ante, p. 20; for counsel and abstracts of arguments see ante, pp. 21 et seq.

MR. CHIEF JUSTICE FULLER: The same decrees will be entered in each of these cases as in the foregoing.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MOODY took no part.

HALTER *v.* NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 174. Submitted January 23, 1907.—Decided March 4, 1907.

A long established and steadily adhered to principle of constitutional construction precludes a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void unless it is manifestly so.

Except as restrained by its own fundamental law, or by the supreme law of the land, a State possesses all legislative power consistent with a republican form of government; and it may by legislation provide not only for the health, morals and safety of its people, but for the common good as involved in their well-being, peace, happiness and prosperity. There are matters which, by congressional legislation, may be brought within the exclusive control of the National Government but over which in the absence of such legislation the State may exert some control in the interest of its own people; and although the National flag of the United States is the emblem of National sovereignty and a congressional enactment in regard to its use might supersede state legislation in regard thereto, until Congress does act, a State has power to prohibit the use of the National flag for advertising purposes within its jurisdiction. The privileges of citizenship and the rights inhering in personal liberty are subject in their enjoyment to such reasonable restraints as may be required for the public good; and no one has a right of property to use the Nation's emblem for individual purposes.

A State may consistently make a classification among its people based on some reasonable ground which bears a just and proper relation to the classification and is not arbitrary.

The statute of Nebraska preventing and punishing the desecration of the flag of the United States and prohibiting the sale of articles upon which there is a representation of the flag for advertising purposes is not un-

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constitutional either as depriving the owner of such articles of his property without due process of law, or as denying him the equal protection of the laws because of the exception from the operation of the statute of newspapers, periodicals or books upon which the flag may be represented if disconnected from any advertisement.

THE facts, which involve the constitutionality of the act of Nebraska to prevent and punish the desecration of the flag of the United States, are stated in the opinion.

Mr. Sylvester R. Rush, for plaintiffs in error:

The flag is the emblem of National sovereignty and the property of the people of the United States under the laws and Constitution of the United States. It is not a state emblem, and has never received the attention of the state legislature until the act in question was passed July 9, 1903. Nebraska has never by law adopted a flag of her own. The flag under consideration is, therefore, solely a creation of the Federal law, and neither this nor any other State has a right to prescribe the use that may be made of it by citizens of the United States.

It cannot be said that by reason of the silence of the Federal statute on the use of the flag state legislation is thereby permitted on that subject. *Prigg v. Pennsylvania*, 16 Pet. 539, 618; *Easton v. Iowa*, 188 U. S. 236.

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 County Taxing Dist.*, 120 U. S. 493. See also *Western Union Tel. Co. v. James*, 162 U. S. 655; *United States v. E. C. Knight Co.*, 156 U. S. 11; *Pittsburg &c. Coal Co. v. Bates*, 156 U. S. 588; *In re Rahrer*, 140 U. S. 555; *Leisy v. Hardin*, 135 U. S. 110; *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 336; *Walling v. Michigan*, 116 U. S. 455; *Escanaba &c. Transp. Co. v. Chicago*,

107 U. S. 687; *Welton v. Missouri*, 91 U. S. 282; *Rhea v. Newport News, &c. R. Co.*, 50 Fed. Rep. 22; *Pacific Coast Steam Ship Co. v. Railroad Commissioners*, 18 Fed. Rep. 11; *The Barque Chusan*, 2 Story (U. S.), 455; S. C., 5 Fed. Cas. No. 2,717; *Southern Express Co. v. Goldberg*, 101 Virginia, 621.

The act in question is in conflict with the Fourteenth Amendment to the Federal Constitution. *Ruhrstrat v. People*, 185 Illinois, 133, 145; *People ex rel. McPike v. Van De Carr*, 91 N. Y. Sup. Ct. Rep. 20.

The police power of the State cannot be consistently invoked to sustain such a law. *Smiley v. McDonald*, 42 Nebraska, 5.

The flag law is void for the reason that it attempts to destroy existing property rights. *People ex rel. McPike v. Van De Carr*, 178 N. Y. 425.

The flag law is class legislation, and, therefore, null and void.

This law directly permits the publishers of newspapers and books, the stationer and the jeweler to use the flag in their business, to place it upon their goods and wares, thereby attracting attention to them, advertising them, and by such means increasing their trade and business; but if any other merchant or business man uses the flag in his business, or as a part of a trademark, under which his business is carried on, he thereupon becomes subject to the pains and penalties of this statute.

While there may be a classification of subjects for legislative purposes, such classification must be reasonable, not arbitrary; must arise out of consideration of sound reasons of public policy, not mere whims—advantages extended to one citizen and denied to another. *Lancashire Ins. Co. v. Bush*, 60 Nebraska, 123.

Mr. Norris Brown, Attorney General of the State of Nebraska, for defendant in error:

Under the police power of the State the legislature may enact laws to punish persons who desecrate the National

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emblem or use it for advertising a private business. *Updegraph v. Commonwealth*, 11 Serg. & Rawl. (Pa.) 406; *Vidal v. Girard*, 2 How. 198.

No act of Congress or any provision of the state or of the Federal Constitution prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the State is left free to enact such a law. *Fox v. State*, 5 How. 410.

The flag law is not unconstitutional as destroying existing property rights. *Patterson v. Kentucky*, 97 U. S. 507; *Mugler v. Kansas*, 123 U. S. 623.

The flag law is not unconstitutional as class legislation. *Mugler v. Kansas*, 123 U. S. 660.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed. *Vidal v. Girard*, 2 How. 198; *Ex parte Siebold*, 100 U. S. 389; *Fox v. State*, 5 How. 410; *Patterson v. Kentucky*, 97 U. S. 507; *Mugler v. Kansas*, 123 U. S. 623; *Davis v. State*, 51 Nebraska, 302; *Rosenbloom v. State*, 64 Nebraska, 344.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves the validity, under the Constitution of the United States, of an act of the State of Nebraska, approved July 3d, 1903, entitled "An act to prevent and punish the desecration of the flag of the United States."¹

¹ "§ 2375g. Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed.

The act, among other things, makes it a misdemeanor, punishable by fine or imprisonment, or both, for any one to sell, expose for sale, or have in possession for sale, any article of merchandise, upon which shall have been printed or placed, for purposes of *advertisement*, a representation of the flag of the United States. It expressly excepted, however, from its operation any newspaper, periodical, book, etc., on which should be printed, painted or placed a representation of the flag "*disconnected from any advertisement.*" 1 Cobbey's Ann. Stat. Neb. 1903, c. 139.

The plaintiffs in error were proceeded against by criminal information upon the charge of having, in violation of the statute, unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale a bottle of beer, upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States.

a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words, or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.

"§ 2375*h*. The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, or ensign, of the United States of America.

"§ 2375*i*. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, or any of which shall be printed, painted or placed, said flag, disconnected from any advertisement." 1 Cobbey's Ann. Stat. Neb. 1903, c. 139.

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The defendants pleaded not guilty, and at the trial insisted that the statute in question was null and void, as infringing their personal liberty guaranteed by the Fourteenth Amendment of the Constitution of the United States, and depriving them, as citizens of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed by the Federal Constitution; also, that the statute was invalid in that it permitted the use of the flag by publishers, newspapers, books, periodicals, etc., under certain circumstances—thus, it was alleged, discriminating in favor of one class and against others. These contentions were overruled and the defendants having been found guilty by a jury were severally adjudged to pay a fine of \$50 and the costs of the prosecution. Upon writ of error the judgments were affirmed by the Supreme Court of Nebraska, and the case has been brought here upon the ground that the final order in that court deprived the defendants, respectively, of rights specially set up and claimed under the Constitution of the United States.

It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the act, approved February 20, 1905, authorizing the registration of trade marks in commerce with foreign nations and among the States, it was provided that no mark shall be refused as a trademark on account of its nature "unless such mark . . . consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof or of any State or municipality or of any foreign nation." 33 Stat. 724, § 5.

The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the States of the Union have enacted statutes¹

¹ Ariz., Rev. Stat. 1901, p. 1295; Colo., 3 Mills Anno. Stat., vol. 3, Rev. Supp., 1891-1905, p. 542; Conn., Gen. Stat., 1902, p. 387; Cal. Stat., 1899, p. 46; Del., 22 Sess. Laws, p. 982; Hawaii, Sess. Laws, 1905, p. 20; Idaho, Sess. Laws, 1905, p. 328; Ill., Sess. Laws, 1899, p. 234; Ind., Acts, 1901, p. 351; Kans., Gen. Stat., 1905, p. 499, § 2442; Me., R. S., 1903, p. 911;

substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied—*Ruhrstrat v. People*, 185 Illinois, 133; *People ex rel. McPike v. Van De Carr*, 178 N. Y. 425. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted by the Federal Constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the state and Federal constitutions. In the other case, decided by the Court of Appeals of New York, the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution as depriving the owner of property without due process of law, and as taking private property for public use without just compensation.

In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not

Md., Laws, 1902, p. 720; Mass., 2 Rev. Laws, 1902, p. 1742; Mich., Pub. Acts, 1901, p. 139; Minn., Rev. Laws, 1905, § 5180; Mo., 2 Anno. Stat., 1906, § 2352; Mont., Laws, 1905, p. 143; N. H., Pub. Stat., 1901, p. 810; N. J., Laws, 1904, p. 34; New Mex., Laws, 1903, p. 121; N. Y., Laws, 1905, vol. 1, p. 973; N. Dak., Laws, 1901, p. 103; Ohio, Laws, 1902, p. 305; Ore., Gen. Laws, 1901, p. 286; R. I., Sess. Acts, Jan. & Dec., 1902, p. 65; Utah, Laws, 1903, p. 29; Vt., Laws, 1898, p. 93; Washington, Session Laws, 1901, p. 321; Wis., Laws, 1901, p. 173; Wyo., Laws, 1905, p. 86.

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thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people.

Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States or that it relates to a subject exclusively committed to the National Government. From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

It may be said that as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that in the absence of National legislation the State is without power to

act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. For instance, it is well established that in the absence of legislation by Congress a State may, by different methods, improve and protect the navigation of a waterway of the United States wholly within the boundary of such State. So, a State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. By the statute in question the State has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the Nation. Such an use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that any one has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property

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in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law and subject to the power of Government to prohibit its use for purposes of advertisement.

Looking then at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Another contention of the defendants is that the statute is unconstitutional in that, while applying to representations of the flag placed upon articles of merchandise for purposes of advertisement, it does not apply to a newspaper, periodical, book, pamphlet, etc., on any of which shall be printed, painted, or placed the representation of the flag disconnected from any advertisement. These exceptions, it is insisted, make an arbitrary classification of persons which, in legal effect, denies to one class the equal protection of the laws.

It is well settled that when prescribing a rule of conduct for persons or corporations a State may, consistently with

the Fourteenth Amendment, make a classification among its people based "upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U. S. 150, 159, 160, 165. In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, there was a difference of opinion in the court as to what was necessary to be decided, but all agreed that a state enactment regulating the charges of a certain stock yards company, and which exempted other like companies from its operation, was a denial of the equal protection of the laws and forbidden by the Fourteenth Amendment. In *Connolly v. Union Sewer Company*, 184 U. S. 540, 552, 562, 563, 564, the question arose as to the validity, under the equality clause of the Constitution, as to the validity of a statute of the State of Illinois, forbidding, under penalty, the existence of combinations of capital, skill or acts for certain specified purposes, but exempting from its operation agricultural products or live stock while in the hands of the producer. By reason of this exemption the statute was adjudged to operate as a denial of the equal protection of the laws, and was, therefore, void. The court observed that such a statute was not a legitimate exertion of the power of classification, rested upon no reasonable basis, was purely arbitrary, and therefore denied the equal protection of the laws to those against whom it discriminated. It said: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

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The present case is distinguishable from the *Connolly case*. The classification there involved was of persons alike engaged in domestic trade, which trade, the court said, was of right "open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe." Now, no one can be said to have the right, secured by the Constitution, to use the country's flag merely for purposes of advertising articles of merchandise. If everyone was entitled of right to use it for such purposes, then, perhaps, the State could not discriminate among those who so used it. It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be "disconnected from any advertisement." All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws.

It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.

Without further discussion, we hold that the provision against the use of representations of the flag for advertising articles of merchandise is not repugnant to the Constitution

of the United States. It follows that the judgment of the state court must be affirmed.

It is so ordered.

MR. JUSTICE PECKHAM dissented.

CITIZENS' SAVINGS AND TRUST COMPANY, v. ILLINOIS CENTRAL RAILROAD COMPANY.

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

No. 238. Submitted January 7, 1907.—Decided March 4, 1907.

The repealing section of the Judiciary Act of 1887-1888 did not reach § 8 of the act of March 3, 1875, 18 Stat. 470, and that section is still in force. *Jellinik v. Huron Copper Mining Co.*, 177 U. S. 1, 10.

A suit brought by owners of stock of a railroad company for the cancellation of deeds and leases under and by authority of which the properties of the company are held and managed is a suit within the meaning of § 8 of the act of March 3, 1875, 18 Stat. 470, as one to remove incumbrances or clouds upon rent or personal property and local to the district and within the jurisdiction of the Circuit Court for the district in which the property is situated, without regard to the citizenship of defendants so long as diverse to that of the plaintiff, and foreign defendants not found can be brought in by order of the court subject to the condition prescribed by that section, that any adjudication affecting absent non-appearing defendants shall affect only such property within the districts as may be the subject of the suit and under the jurisdiction of the court.

Non-resident defendants appearing in the Circuit Court under protest for the sole purpose of denying jurisdiction do not waive the condition in § 8 of the act of March 3, 1875, 18 Stat. 470, that any judgment of the court shall affect only property within the district.

THIS suit in equity was brought in the Circuit Court of the United States for the Eastern District of Illinois against the Illinois Central Railroad Company, the Belleville and Southern Illinois Railroad Company, the St. Louis, Alton and Terre

Haute Railroad Company, all Illinois corporations (to be hereafter called, respectively, the Illinois, the Belleville, and Terre Haute companies), and the United States Trust Company, a New York corporation. The last named corporation was never served with process and did not appear in the suit. The case presents a question as to the jurisdiction of the court below.

The plaintiff, an Ohio corporation, is the holder of four hundred shares of the common stock of the Belleville Company, and sues as well in its own as on the behalf of all other stockholders of that company or beneficiaries, who may choose to come in and bear their proportion of the cost and expenses of the proceedings. Assuming the allegations of the bill to be true, the suit is not a collusive one, and could be properly brought by a stockholder of the Belleville Company, making that company a defendant.

The bill refers to various instruments, deeds and leases, as follows: A deed of October 1st, 1895, between the Terre Haute Company, the Illinois Company and the Belleville Company, whereby the railroad and properties of the Belleville Company, then held by the Terre Haute under a lease executed in 1866, were transferred to the Illinois Company for a period of ninety-nine years; a deed of September 10th, 1897, to which the Belleville and Terre Haute Companies were parties and which purported to transfer the title to all the railroad properties of the former to the latter company; a lease of September 15th, 1897, by the Terre Haute Company to the Illinois Central Railroad Company, confirming the above lease of October 1st, 1895, and covering, among other properties, the Belleville railroad, extending from Belleville, in St. Clair County, Illinois, to Duquoin, Perry County, in the same State; and a deed of February 17th, 1904, between the Terre Haute Company and the Illinois Company, purporting to convey to the latter company all the railroad properties, corporate rights and franchises of the former company.

The plaintiff prayed that these leases and deeds, so far as they affect or purport to affect the properties, franchises, rights or liabilities of the Belleville Company be cancelled and declared void, and that that company be required to return and account for whatever consideration it may have received under such leases and deeds to the party or parties from whom the consideration may have moved.

The bill charges, in substance, that said deeds were illegally and fraudulently procured by the Illinois Central Railroad Company, and by means of those instruments, and by various improper schemes, that company has acquired not only complete control over and possession of the Belleville Company, and all its properties but has managed, and is continuing to manage those properties, in its own interest and in total disregard of the rights of holders of the common stock of the Belleville Company. Indeed, it is charged that what the Illinois Central Railroad Company has done, is doing, (and, unless restrained, will continue to do), has practically destroyed the value of such stock.

The plaintiffs also prayed for a decree ordering the defendant, the Illinois Central Railroad Company, to account for and pay over to the Belleville Company, or to a receiver to be appointed for that company, such proportion of the yearly gross earnings as the Belleville Company is entitled to under the lease executed by and between the Belleville Company and the Terre Haute Railroad Company, bearing date October 1st, 1866; such accounting to cover each fiscal year, or part thereof, from the time when the Illinois Central Railroad Company first acquired the railroad properties of The Belleville Company as lessee or sub-lessee under the lease executed on or about the first of April, 1896, up to the time of such accounting; further, for "an order appointing a receiver for The Belleville & Southern Illinois Railroad Company, with the usual powers of such receivers; and that the Illinois Central Railroad Company, through its officers and agents, to be ordered to surrender and deliver to said receiver all the

corporate assets, books, papers and everything that rightfully belongs to The Belleville & Southern Illinois Railroad Company, and that the Illinois Central Railroad Company be ordered to account to such receiver, as is hereinbefore prayed. That the defendant, the Illinois Central Railroad Company, its officers and agents, be restrained from further violating the rights of your orator, and be ordered, directed and restrained in particular from interfering in any way with said receiver, or with the operation of said Belleville Company as an independent and separate railroad company; and for such other and further relief as the equity of the case may require."

Process in the case against the Illinois Company was served upon its ticket agent at East St. Louis, "there being no President, Vice President, Secretary or Treasurer of that Company found" in the District; and against the Belleville and Terre Haute companies, upon a director of each company, at Pinkneyville, Illinois, there being no President, Vice President, Secretary or Treasurer of either of those companies found in the District.

The Belleville Company pleaded—especially appearing under protest for the purposes of its plea and no other—that the court below was without jurisdiction to proceed against it, in that the defendant was an inhabitant of the Northern Division of the Northern District of Illinois, having its residence in that Division and District at Chicago, where its corporate meetings were held and its corporate business transacted.

Similar pleas were filed by the Terre Haute Company and the Illinois Central Railroad Company, each specially appearing under protest for the purpose only of denying the jurisdiction of the court below and each company claiming to be an inhabitant and resident of the Northern District of Illinois.

By its final order the court sustained the pleas to the jurisdiction, and dismissed the suit.

Mr. Edward C. Eliot and Mr. William B. Sanders, for appellant:

The Circuit Court of the Eastern District of Illinois has jurisdiction of this suit, because it is a suit brought to enforce an equitable lien upon or claim to, or to remove an incumbrance or lien or cloud upon the title to real estate within the Eastern District of Illinois, and comes within § 8 of the act of March 3, 1875, 18 Stat. L. 472. *Jellenik v. Huron Copper Co.*, 177 U. S. 1; *Mellen v. Moline Iron Works*, 131 U. S. 352.

Section 738 has never been confined to actions which were strictly local at common law. *McBurney v. Carson*, 99 U. S. 567; *Goodman v. Niblack*, 102 U. S. 556. See also *Evans v. Charles Scribners Sons*, 58 Fed. Rep. 303; *Cowell v. Water Supply Co.*, 96 Fed. Rep. 769; *McGee v. Railroad Co.*, 48 Fed. Rep. 243; *Castello v. Castello*, 14 Fed. Rep. 207; *Single v. Paper Co.*, 55 Fed. Rep. 553.

A suit for the specific performance of a contract for the sale of land may be either a suit *in personam* or a suit *in rem*, or *quasi in rem*.

Section 738 is meant to include more than suits that were local at common law. *Greeley v. Lowe*, 155 U. S. 58, 70; *Adams v. Cowles*, 96 Missouri, 501; *Acker v. Leland*, 96 N. Y. 383.

The present suit is one brought to enforce an equitable claim to, or to remove an incumbrance or cloud upon, the title to real estate within the Eastern District of Illinois. Irrespective of the question, as to whether or not the present suit is local, as determined by the principles of common law, no one will urge that Congress intended to exclude from § 738 any suit which would have been local at common law. At common law the suit brought by complainant would have been local and not transitory. *Chapin v. Dodds*, 104 Michigan, 232; *McKenzie v. Bacon*, 38 La. Ann. 764.

A proceeding *in rem*, strictly construed, is one taken directly against the property, in which the property itself is actually impleaded, as in the case of a libel in admiralty.

But to determine the locality of an action, a proceeding *in rem* is construed more broadly, and embraces many actions brought against individual defendants, proceedings which properly, perhaps, should be called *quasi in rem*. *Pennoyer v. Neff*, 95 U. S. 734.

Mr. J. M. Dickinson and *Mr. Blewett Lee*, for appellees:

In order to determine whether the suit is really one "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought" our only recourse is to the bill itself, and it is clear that the bill is one for an accounting according to the terms of a certain lease, and incidentally for the cancellation of certain instruments and the appointment of a general receiver of corporate assets. The incidental effect of granting all the relief prayed for in the bill might be to clear the supposed title of the Belleville Company to the railroad which it formerly owned, but this relief, like that of appointing a receiver, would be ancillary only. *Ellis v. Reynolds*, 35 Fed. Rep. 394.

The essence of the bill is that a sufficient rental is not realized from the railroad formerly owned by the Belleville Company, and that the common stockholders are not getting any dividends and will not get any under present conditions. To the end that the common stockholders may get dividends, the bill prays that every instrument which stands in the way of that laudable end shall be cancelled, and an accounting rendered upon a basis which will make money for the common stockholders. The general cancellation of leases and conveyances is all for the purpose of an accounting at an adequate rental for the use of the railroad formerly belonging to the Belleville Company. Essentially the bill is one for an accounting and nothing else, and the suggestion that it is one to quiet title is an ingenious afterthought.

While it is possible that upon the facts alleged in the bill

a suit might have been framed in such a way as to be a claim to real estate or to remove an incumbrance or lien upon real estate within the meaning of this statute, the complainant has not elected so to frame his bill. The bill is not one to remove an incumbrance or lien upon the title to real estate, nor is it a bill to remove a cloud upon the title to real estate. In order to file a bill to remove a cloud from title the complainant must be in possession of the premises. *Frost v. Spitley*, 121 U. S. 552, 556; *Florida v. Furman*, 180 U. S. 402, 428.

On the contrary, the bill shows that the railroad formerly of the Belleville Company is in the possession of the Illinois Company and an inspection of the prayer will show that it does not ask that the possession of the railroad be restored to the Belleville Company or to cancel the lease of October 1, 1866, by which the railroad formerly of the Belleville Company was leased to the Terre Haute Company for a period of 999 years. The bill, therefore, is not one to enforce a claim to real estate, nor is it one to enforce an equitable lien upon real estate. While the bill prays for an accounting upon the basis that the lease of the Belleville Company to the Terre Haute Company of October 1, 1866, is still in force, it also prays that the Belleville Company be ordered to return and deliver up and account for whatever considerations it may have received under the various deeds and leases since that time.

In the cases cited by complainant the bill as actually framed and upon all the facts shown was really one to enforce "an equitable lien upon, or claim to, or to remove an incumbrance or lien or cloud upon title to real or personal property within the district where such suit is brought," instead of being, like the present suit, essentially one *in personam*. *Jellinik v. Huron Co.*, 177 U. S. 1; *Goodman v. Niblack*, 102 U. S. 556; *McBurney v. Carson*, 99 U. S. 567; *Mellen v. Moline Iron Works*, 131 U. S. 352; *Greeley v. Lowe*, 155 U. S. 58, and other cases, discussed and distinguished.

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

This case is here upon a certificate as to the jurisdiction of the Circuit Court.

The Eastern District of Illinois was created by the act of Congress approved March 3d, 1905, c. 1427. 33 Stat. 992, 995. The present suit in equity was, as we have stated, instituted in the Circuit Court for that District, but its jurisdiction was denied by the judgment below upon the ground solely that each defendant railroad corporation was shown to be an inhabitant of the Northern District of Illinois, not of the Eastern District, and, therefore, this suit was not local to the latter District.

By the eighth section of the act of March 3d, 1875, determining the jurisdiction of the Circuit Courts of the United States, it was provided: "That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to *remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion,

and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district," etc. 18 Stat. 470, 472, c. 137.

These provisions were substantially those embodied in § 738 of the Revised Statutes, except that the act of 1875 embraced (as § 738 did not) suits in equity "to remove any encumbrance or lien or cloud upon the title to real or personal property." Both section 738 and the act of 1875 related to legal and equitable liens or claims on real and personal property *within the district where the suit was brought*.

The repealing clause of the Judiciary Act of 1887-1888 did not reach the 8th section of the act of 1875. That section is still in force, as was expressly held in *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 10.

We are then to inquire as to the scope of the eighth section of the above act of 1875. And that inquiry involves the question whether this suit is one "to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title, to real or personal property" within the Eastern District of Illinois where the suit was brought.

In *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, we had occasion to examine the provisions of the act of 1875. A question there arose as to the jurisdiction of a Circuit Court of the United States to render a decree annulling a trust deed and chattel mortgage covering property within the district where the suit was brought, in which suit the defendants did not appear, but were proceeded against in the mode authorized by the above act of 1875. This court said: "The

previous statute gave the above remedy only in suits 'to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought,' while the act of 1875 gives it also in suits brought 'to remove any incumbrance or lien or cloud upon the title to' such property. Rev. Stat. § 738; 18 Stat. 472, c. 137, § 8. We are of opinion that the suit instituted by the Furnace Company against the Iron Works and others belonged to the class of suits last described. *The trust deed and chattel mortgage in question embraced specific property within the district in which the suit was brought.* The Furnace Company, in behalf of itself and other creditors of the Iron Works, claimed an interest in such property as constituting a trust fund for the payment of the debts of the latter, and the right to have it subjected to the payment of their demands. In *Graham v. Railroad Company*, 102 U. S. 148, 161, this court said that 'when a corporation became insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of the stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.' See also *Mumma v. Potomac Company*, 8 Pet. 281, 286; *County of Morgan v. Allen*, 103 U. S. 498, 509; *Wabash &c. Railway v. Ham*, 114 U. S. 587, 594; 2 Story's Eq. Jur. § 1252; 1 Perry on Trusts, § 242. The trust deed and chattel mortgage executed by the Iron Works created a lien upon the property, in favor of Wheeler, Carson, Hill, and the Keator Lumber Company, superior to all other creditors. The Furnace Company, in behalf of itself and other unsecured creditors, as well as Wheelock, denied the validity of Hill's lien as against them. That lien was therefore an incumbrance or cloud upon the title, to their prejudice. Until such lien or incumbrance was removed, they could not know the extent of their interest in the property or in the proceeds of its sale. The case made by the original, as well

as cross-suit, seems to be within both the letter and the spirit of the act of 1875."

A recent case is that of *Jellinik v. Huron Copper Mining Co., supra*. That was a suit by stockholders of a Michigan corporation. Its object, as the bill disclosed, was to remove the cloud that had come upon their title to the shares of stock held by them. The issues in the case made it necessary to determine the scope of the above act of 1875, c. 137. This court said: "Prior to the passage of the above act of March 3, 1875, the authority of a Circuit Court of the United States to make an order directing a defendant—who was not an inhabitant of nor found within the district and who did not voluntarily appear—to appear, plead, answer or demur, was restricted to suits in equity brought to enforce legal or equitable liens or claims against real or personal property within the district. Rev. Stat. § 738. But that act extended the authority of the court to a suit brought 'to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought.' One of the objects of the present suit was to remove an incumbrance or cloud upon the title to certain shares of the stock of a Michigan corporation. No question is made as to the jurisdiction of the court so far as it rests upon the diverse citizenship of the parties. The plaintiffs alleged that they were the equitable owners of that stock, although the legal title was in certain of the defendants. The relief asked was a decree establishing their rightful title and ownership; and in order that such a decree might be obtained the defendants referred to were ordered to appear, plead, answer or demur; but as they refused to do so, the Circuit Court decided that it could not proceed further. That court was of opinion that 'the shares of stock in question are not personal property within the district within the purview of the statute of the United States authorizing the bringing in by publication of notice to non-resident defendants who assert some right or claim to the property which is the subject of suit.' 82 Fed.

Rep. 778, 779. The proper forum, the court said, for the litigation of the question involved would be in the State of which the defendants were citizens. The question to be determined on this appeal is, whether the stock in question is personal property within the district in which the suit was brought. If it is, then the case is embraced by the act of 1875, c. 137, and the Circuit Court erred in dismissing the bill." Again: "It is sufficient for this case to say that the State under whose laws the Company came into existence has declared, as it lawfully might, that such stock is to be deemed personal property. That is a rule which the Circuit Court of the United States sitting in Michigan should enforce as part of the law of the State in respect of corporations created by it. The stock held by the defendants residing outside of Michigan who refused to submit themselves to the jurisdiction of the Circuit Court being regarded as personal property, the act of 1875 must be held to embrace the present case, if the stock in question is 'within the district' in which the suit was brought. Whether the stock is in Michigan, so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the Company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicile of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another State, at which a book showing the transfers

of stock may be kept." See, also, *Dick v. Foraker*, 155 U.S. 404.

These decisions, we think, make it clear that this suit comes within the act of 1875, as one to remove an incumbrance or cloud upon the title to real property within the Eastern District of Illinois. The railroad in question is *wholly within that district*, although the defendant corporations, including the Belleville Company, may hold their annual or other meetings in Chicago. The bill seeks the cancellation of the deeds and leases under and by authority of which the properties of the Belleville Company are held and managed in the interest, as is alleged, of the Illinois Central Railroad Company, and to the destruction of the rights of the stockholders of the Belleville Company. The bill also, as we have seen, prays for the appointment of a receiver of the Belleville Company and the surrender and delivery to such receiver of all its corporate assets, books, papers and everything that rightfully belongs to it, and account to such receiver, as prayed; also, that the Illinois Central Railroad Company be restrained from interfering in any way with the receiver, or with the operation of the Belleville railroad as an independent, separate company. In addition, there is a prayer in the bill for general relief. If the deeds and leases in question are adjudged to be void, the entire situation, as to the possession and control of the Belleville railroad properties, will be changed, and the alleged incumbrances upon the properties of the Belleville Company will be removed. We express no opinion upon the question whether, upon its own showing, or in the event the allegations of the bill are sustained by proof, the plaintiff is entitled to a decree giving the relief asked by it. There was no demurrer to the bill as being insufficient in equity. The only inquiry now is whether, looking at the allegations of the bill, the suit is of such a nature as to bring it within the act of 1875, as *one to remove incumbrances or clouds upon real or personal property within the district where the suit was brought, and, therefore, one local to such district*. The court below held

that the suit was not one which could be brought and maintained against the defendant corporations found to be inhabitants of another district and not voluntarily appearing in the suit; and this, notwithstanding the railroad in question is wholly within the district where the suit was brought. 18 Stat. 472; 25 Stat. 436. If the suit was within the terms of the act of 1875, then the Circuit Court of the Eastern District of Illinois, although the defendant corporations may be inhabitants of another district in Illinois, could proceed to such an adjudication as the facts would justify, subject, of course, to the condition prescribed by the eighth section of that act, that any adjudication, affecting absent defendants without appearance, should affect only such property, within the district as may be the subject of the suit and under the jurisdiction of the court.

The plaintiff contends that this condition was waived, and the general appearance of the defendants entered, when their counsel, at the hearing as to the sufficiency of the pleas to the jurisdiction, argued the merits of the case as disclosed by the bill. This is too harsh an interpretation of what occurred in the court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the pleas to the jurisdiction.

We adjudge that the suit is of such a nature as to bring it within the jurisdiction of the Circuit Court for the Eastern District, under the act of 1875. The judgment must, therefore, be reversed and the cause remanded that the plaintiff may proceed, as it may be advised, with the preparation of its case under the act of 1875.

It is so ordered.

WILMINGTON STAR MINING COMPANY *v.* FULTON.ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS.

No. 139. Argued January 7, 1907.—Decided March 4, 1907.

It is an appropriate exercise of the police power of the State to regulate the use and enjoyment of mining properties, and mine owners are not deprived of their property, privileges, or immunities without due process of law or denied the equal protection of the laws by the Illinois mining statute of 1899, which requires the employment of only licensed mine managers and mine examiners, and imposes upon the mine owners liability for the willful failure of the manager and examiner to furnish a reasonably safe place for the workmen.

It is within the power of the State to change or modify, in accord with its conceptions of public policy, the principles of the common law in regard to the relation of master and servant; and, in cases within the proper scope of the police power, to impose upon the master liability for the willful act of his employé.

As construed by the highest court of that State, under the mining act of Illinois of 1899, a mine manager and mine examiner are vice-principals of the owner and engaged in the performance of duties which the owner cannot so delegate to others as to relieve himself from responsibility.

Where two concurring causes contribute to an accident to an employé, the fact that the master is not responsible for one of them does not absolve him from liability for the other cause for which he is responsible.

Where there is no evidence sustaining certain counts in the declaration as to defendant's negligence, he is entitled to an instruction that no recovery can be had under those counts, and where, as it was in this case, the refusal to so instruct is prejudicial error the verdict cannot be maintained, either at law or under § 57 of the Illinois Practice Act.

THE facts are stated in the opinion.

Mr. William P. Sidley, with whom *Mr. Arthur D. Wheeler* and *Mr. Charles S. Holt* were on the brief, for plaintiff in error:

Recovery can be had under this mining statute only when the defendant's act complained of is the proximate cause of the injury. *Odin Coal Co. v. Denman*, 185 Illinois, 418.

This statute in derogation of the common law must be

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strictly construed, and no recovery should be permitted except for a violation of some duty clearly imposed by the act.

The duty of refraining from ordering miners into gaseous portions of the mine is nowhere laid upon the mine manager. On the contrary, § 18*b* would seem to clearly negative such a duty. It was error to charge the jury that the question of proximate cause turned upon whether or not there was gas in the mine which was necessary to his death, and without which his death would not have followed. The gas was merely the instrumentality producing death, equally necessary to that result whether Wilson's or decedent's act was the proximate cause of the explosion.

The jury were still further confused upon this important question by the further instruction of the court that they should take into consideration whether the gas being there or Wilson's order was the greater cause of his death; a comparison which had no proper place in the solution of the question.

As Fulton's act was in spite of a caution, and upon his own volition with knowledge of the conditions producing danger, he was engaged in an unlawful act contrary to the express prohibition of § 31 of the Mining Act, and such unlawful act having contributed to his death, barred the right of recovery herein.

A willful act, as used in the mining statute, means that the person performing the act knows what he is doing and intends to do what he is doing, and is a free agent. An act consciously performed is willfully performed under this statute as construed by the Illinois Supreme Court. *Odin Coal Co. v. Denman*, 185 Illinois, 413; *Carterville Coal Co. v. Abbott*, 181 Illinois, 502. As to construction of "willful," see *Southern Ry. Co. v. Carroll*, 138 Fed. Rep. 638; *Heland v. City of Lowell*, 3 Allen, 407.

There being evidence in the record from which the jury might have found Fulton's act to have been willful and unlawful under the statute, it was the defendant's right to have this question submitted to the jury under the form of instruction requested in that connection.

Defendant is entitled to an instruction to the effect that no recovery could be had if Fulton's death resulted in part from his own reckless disregard of consequences in view of his surroundings and the conditions in the mine as disclosed by the evidence, as such action on his part amounted to a willful act which effectually neutralized the effect of any willful act on defendant's part upon the same principle that ordinary contributory negligence on plaintiff's part is a defense to ordinary negligence on defendant's part.

The evidence did not support the allegation that an accident to the mine machinery had occurred by which the currents of air were obstructed or stopped, as there were no air currents in the mine at the time and no danger to the miners resulted from the occurrence testified to. The Mining Act must be strictly construed, being in derogation of the common law, and cannot be extended to cover the incident in question, the temporary loss of the monkey-wrench, by means of which the fan was customarily started. *Cole v. Mayne*, 122 Fed. Rep. 843; *Hamilton v. Jones*, 125 Indiana, 178; *Shaw v. Railroad Co.*, 101 U. S. 565; *Johnson v. Southern Pacific Co.*, 117 Fed. Rep. 466.

Mr. Arthur J. Eddy, with whom *Mr. P. C. Haley* and *Mr. E. C. Wetten* were on the brief, for defendant in error, submitted:

The case at bar is not subject to the constitutional objection raised by plaintiff in error for the reason that the declaration contains counts based on certain sections of the act obviously not repugnant to the Constitution of the United States even under the theory of plaintiff in error. *Chicago v. Lonergan*, 196 Illinois, 518; *Consolidated Coal Co. v. Scheiber*, 167 Illinois, 539, 543; *C. & A. R. R. Co. v. Anderson*, 166 Illinois, 572, 575; *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, 243, 244; *Lampasas v. Bell*, 180 U. S. 276, 282; *Gibbs v. Crandall*, 120 U. S. 105, 108; *Atarin v. New York*, 115 U. S. 248, 257; *New Orleans v. Benjamin*, 153 U. S. 411,

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424; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 204.

Even if the court should be inclined to hold portions of the mining law unconstitutional, it would not necessarily invalidate the entire act, and if any count is based on a section held to be constitutional, it would be sufficient to sustain the action. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 490; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 617.

The Mining Act of Illinois is not repugnant to the Constitution of the United States. It has always been the policy of that State to guard with great solicitude the persons and lives of men employed in coal mining. The constitution of the State imposes upon the legislature the duty of passing laws to carry out this policy. Sec. 29, Art. 4, Const. of 1870; *Henrietta Coal Co. v. Martin*, 221 Illinois, 460. See also: *Sherlock v. Alling*, 93 U. S. 99; *Coal Co. v. Seniger*, 179 Illinois, 370; *Wells Coal Co. v. Smith*, 65 Ohio St. 70; Huffcut on Agency, 286; *Riverton Co. v. Shepherd*, 207 Illinois, 395; *Schmalstieg v. Coal Co.*, 59 L. R. A. 707.

In construing the Mining Act the Supreme Court of Illinois has sought to effectuate this purpose, and to protect the operative coal miner and to provide for those dependent upon him in case of his death through failure on the part of the mine owner, and his representatives, to fulfill the duties required by the statute. *C. W. & V. C. Co. v. The People*, 181 Illinois, 270, 273; *Carterville Coal Co. v. Abbott*, 181 Illinois, 495, 501; *Deserant v. Cerillos C. R. R. Co.*, 178 U. S. 409, 420; *Odin Coal Co. v. Denman*, 185 Illinois, 413, 417.

In the last case cited the court declared the statute in question was not a penal statute.

The fact that the west roadway was full of gas was the proximate cause of Fulton's death. None of the other acts and omissions complained of would have harmed him had plaintiff in error fulfilled its primary duty in regard to freeing the mine from gas and seeing that it was properly ventilated.

Proximate cause has been defined by the Supreme Court of Illinois in *Pullman Co. v. Laack*, 143 Illinois, 242, 260, 261.

Contributory negligence on the part of Fulton would not defeat the right of defendant in error to recover in this case. *Carterville Coal Co. v. Abbott*, 181 Illinois, 495, 502; *Henrietta Coal Co. v. Martin*, 221 Illinois, 460, 470; *Riverton Coal Co. v. Shepherd*, 207 Illinois, 395, 399; *O'Fallon Coal Co. v. Laquet*, 198 Illinois, 125, 129; *Spring Valley Coal Co. v. Rowatt*, 196 Illinois, 156, 159; *Pawnee Coal Co. v. Royce*, 184 Illinois, 402, 415; *Odin Coal Co. v. Denman*, 185 Illinois, 413, 419; *W. A. C. Co. v. Beaver*, 192 Illinois, 333; *Deserant v. C. C. R. R. Co.*, 178 U. S. 409, 420.

The jury were fully instructed as to the effect of a willful violation of the Mining Act by Fulton.

All the counts of the declaration were supported by evidence, and the issues raised were properly left to the jury, and if the evidence supported one good count of the declaration, that would be sufficient to sustain the action.

MR. JUSTICE WHITE delivered the opinion of the court.

On January 27, 1901, Samuel Fulton, while working as a trackman and mine laborer in a mine operated by the Wilmington Star Mining Company in Grundy County, Illinois, was killed by an explosion of mine gas. Minnie Fulton, the widow, on behalf of herself and children, brought this action against the mining company in a court of the State of Illinois to recover damages for the death of her husband. Because of diversity of citizenship the case was removed to the Circuit Court of the United States for the Northern District of Illinois.

The counts of the petition upon which the cause was ultimately tried were eight in number, and in each was set out a specified act of negligence averred to have been the proximate cause of the accident and to have constituted willful failure to perform specified statutory duties. In count 1 it was alleged that the mining company failed to maintain in the mine currents of fresh air sufficient for the health and safety

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of Fulton. Count 2 charged the failure to maintain cross cuts in the mine at proper distances apart, to secure the best ventilation at the face of the working places. In count 3 the company was charged with having failed to build all necessary stoppings in a substantial manner to close cross cuts connecting the inlet and outlet air courses in the mine. In count 4 the negligence set up was the failure to have the place in the mine where Fulton was expected to pass and to work inspected before Fulton was permitted to enter the mine, to ascertain whether there were accumulations of gas therein. In count 5 it was charged that the mining company, with knowledge of the existence of an accumulation of dangerous gases in the mine and its unsafe condition when Fulton, in the course of his employment, entered the mine on the morning of his death, willfully failed and neglected to prevent Fulton from entering the mine to work therein before the dangerous gases had been removed and the conditions in the mine rendered safe, said Fulton not being then and there under the direction of the mine manager. In count 6 it was charged that the mining company, on the morning of the accident, had knowledge that a valve attachment of a certain steam pipe used to conduct steam generated for the purpose of running a ventilating fan in the mine had become accidentally broken or lost, whereby the air currents in the mine became obstructed and stopped, and a large quantity of dangerous gas was permitted to accumulate in the mine at the place where Fulton was required to pass and to work. And it was further charged that, although having such knowledge, the mining company willfully failed and neglected to order the withdrawal of Fulton from the mine and prohibit his return thereto until thorough ventilation had been established. In count 7 the negligence charged was that the mining company permitted Fulton to enter the mine before the mine examiner had visited it and seen that the air current was traveling in proper course and in proper quantity, and before the accumulation of dangerous gas, then in the mine, had been broken up or removed therefrom. In count 8

it was charged that the mining company had knowledge that accumulations of gas existed in the mine, yet it willfully failed and neglected to place a conspicuous mark at the place in the mine where accumulations of gas existed as a notice to Fulton and other employ  s to keep out, whereby Fulton failed to receive the statutory notice and warning of the existence of accumulated gas, and did not know of the dangerous condition of the mine when he proceeded to work at and near the place in the mine where such dangerous accumulation of gas existed.

To these various counts the defendant plead the general issue. The case was twice tried by a jury. On the first trial, at the close of the evidence for the plaintiff, the jury was instructed to find for the defendant. This judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit. 133 Fed. Rep. 193. The second trial resulted in a verdict for the plaintiff and an entry of the judgment which is here assailed.

On the trial it was testified that the sinking of the shaft in the mine where Fulton met his death was commenced in the month of April or May, 1900. Fulton worked for several months at the mine before the accident, at first assisting in sinking the shaft. The mine is what is known as a long wall mine, in which, it was testified, cross cuts were not employed. Cross cuts are used in what is known as a room and pillar mine. In that class of mines parallel entries are run, and after proceeding a certain distance—usually sixty feet—a road is cut across, connecting the parallel entries to permit of a circulation of air. After going another sixty feet a new cross cut is made and the openings of the prior cross cut are stopped up, thus carrying the circulation of air to the new cross cut. The mine in question was thus intended to be constructed. From the bottom of the main or hoisting shaft towards the north, south, east and west radiated four main headings or roadways, and it was contemplated to construct a circular road connecting the outer ends of these four main roads so as to cause a complete circulation of air around the mine and through the

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roadways. About three hundred feet to the eastward of the main shaft was situated an air or escapement shaft. At the time of the accident the roads radiating north, east and west had been completed, but the circular roadway had only been completed between the outer edges of the east and north roads. Gas usually made its presence known in the west roadway after going fifty or sixty feet from the bottom of the main shaft. For some time before the accident men were employed at or near the end of this road continuing the circular road towards the northeast, and Fulton performed the work of track laying. In consequence of the non-completion of the circular roadway and the absence of natural ventilation in the west roadway, a ventilating fan was used to force air through air boxes to the places where the men were working in that roadway, "so as to give them air and keep the gases out." Whilst there is some confusion in the description of the situation and operation of the ventilating fan we take it that it was as follows: The fan was situated at the bottom of the shaft and was operated by a small engine in close proximity to the fan. The steam to work this engine was carried down from the boilers above, the steam pipe passing down the main shaft to the fan engine at the bottom. To turn on the steam to this engine and set it in motion there was a valve controlled by a wheel. There was another valve by which the accumulation of condensed water could be let off so as to enable the apparatus to be reached by live steam. This valve was intended also to be moved by a wheel, but that appliance had not been put on, and, therefore, in order to turn the valve the use of a wrench was necessary. A wrench used for this purpose was kept near the fan.

The mine manager stopped the fan about four o'clock on Saturday afternoon. On the next day (Sunday) Fulton and the mine manager descended the shaft together. The fan had not started when they reached the bottom of the shaft. The mine manager attempted to start the fan, but could not find the wrench, and there was a delay of a minute or two

while he went up the shaft and secured a wrench. When the fan was started the mine examiner and several other employes who had descended the mine just ahead of Fulton and the mine manager were with the latter in the immediate vicinity of the fan. At that time, as testified to by the mine manager, he believed there was gas in the west roadway. Soon after the starting of the fan Fulton and a helper proceeded along the west roadway with pit lamps—naked lights—on their caps, pushing a car loaded with track material. In a few minutes the explosion occurred which caused the death of Fulton and seriously injured the helper. There was contradictory evidence as to the instructions given by the mine manager to Fulton at the time he started into the west roadway. One version was that Fulton was told to wait awhile, until an examination had been made by the mine manager with a safety lamp. Another version implied from the evidence was that Fulton, entirely of his own volition, proceeded to the place where he was injured; and still another hypothesis was that Fulton was directed to proceed with the work without any caution. At the time of the explosion the mine manager, mine examiner and others were in the south roadway.

After the entry of judgment the cause was brought direct to this court on the ground that a constitutional right was claimed in the court below and denied.

The errors assigned which have been argued at bar present for consideration the following questions:

First, the constitutionality of the Illinois mining act of 1899 upon which this action was founded.

Second, the correctness of instructions to the jury on the subject of the proximate cause of the accident in the event Fulton went into the west roadway by direction of the mine manager.

Third, the correctness of a refusal to instruct the jury to return a verdict for the defendant if they found that "Fulton, at the time he was killed, was engaged in a willful act which endangered the lives or health of persons working in the mine

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with him or the security of the mine or its machinery, and that such willful act on his part contributed to his death."

Fourth, the correctness of a refusal to instruct the jury that if the death of Fulton resulted in part from his reckless disregard of consequences in view of his own surroundings, the plaintiff could not recover.

Fifth, the correctness of the overruling of motions to strike out the second and third counts of the declaration, and of the refusal to instruct the jury that no recovery could be had on these counts, because no evidence had been introduced to support the same.

Sixth, the correctness of the refusal to give the following instructions:

"If you believe from the evidence that the decedent Fulton, just before the time of his death, entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

Seventh, the correctness of the overruling of a motion to strike out the fifth count of the declaration and in refusing to instruct the jury that no recovery could be had under said count, because no basis existed in the evidence for the asserted liability.

Eighth, the correctness of the overruling of a motion to strike out the sixth count of the declaration and a request for an instruction that no evidence had been introduced of any neglect as to the fan or machinery whereby the air currents of the mine became obstructed and stopped.

Before considering these alleged errors, however, we must dispose of a motion to dismiss. It is urged that as the direct appeal to this court rests alone upon the assertion of the repugnancy of the Illinois mining act to the Constitution of the United States, and as the claim of repugnancy is alone based upon certain provisions of that act providing for licensing

mine managers and examiners, defining their duties and compelling mine owners to employ only licensed managers and examiners, the writ of error should be dismissed, because there is ground broad enough to sustain the judgment wholly irrespective of the provisions of the Illinois act just referred to, which are asserted to be repugnant to the Constitution of the United States. This proposition is based upon the contention that the first count of the declaration charges a violation of duty imposed by the statute directly upon the mine owner, irrespective of the requirements of the statute as to licensed employés. But issue is taken on behalf of the plaintiff in error in respect to the correctness of this contention, and it is insisted that the first count is open to the same objections which are urged against the others. We think the motion to dismiss is without merit, because there is color for the contention as to the unconstitutionality of the statute, as well in respect to the first as to the other counts of the declaration.

We come, then, to consider the first assigned error, viz., the constitutionality of the Illinois mining act approved April 18, 1899, in force July 1, 1899, entitled "An act to revise the laws in relation to coal mines and subjects relating thereto, and providing for the health and safety of persons employed therein." Chap. 93, Rev. Stat. of Illinois.

It is conceded that the statute in question has been authoritatively interpreted by the Supreme Court of Illinois as imposing upon mine owners responsibility for the defaults of mine managers and mine examiners, employés who are required by the statute to be selected by the mine owners from those holding licenses issued by the state mining board created by the statute. And it is an alleged incompatibility between such responsibility of the mine owner and the obligation imposed upon the mine owner to employ only persons licensed by the State, and the nature and character of the duties which the statute imposes upon them, upon which is based the asserted repugnancy of the statute to the Fourteenth Amendment.

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Section 29 of article 4 of the Illinois constitution of 1870 is as follows:

"It shall be the duty of the general assembly to pass such laws as may be necessary for the protection of operative miners by providing for ventilation when the same may be required and the construction of escapement shafts, with such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."

In carrying out this constitutional requirement the general assembly of Illinois has from time to time legislated for the protection of miners. The act of 1899, here assailed as repugnant to the Constitution of the United States, as said by the Court of Appeals for the Seventh Circuit, 133 Fed. Rep. 197, grew out of the desire "that every precaution should be taken against the unusual hazards and dangers incident to the inhabitancy of mines. It was intended, and intended rightly, to protect with all known expedients every person whose occupation required him to labor in these subterranean rooms and roadways."

The act is lengthy, covering 47 pages of print in the appendix to one of the briefs. In substance it created a state mining board, authorized that body to examine candidates for the position of state inspector of mines and to certify the names of the successful candidates to the governor, in whom was vested the power of appointment. Moreover, the statute fixed the qualifications of mine managers, hoisting engineers and mine examiners; required candidates for such positions to be examined by the state board and certificates to be furnished to those found competent, and made it unlawful in the operation of a coal mine to employ or suffer any person, other than one possessing the proper certificate, to serve as a mine manager, hoisting engineer or mine examiner. Section 16 prescribed in detail the duties of mine managers and miners; section 17 set forth the duties of hoisting engineers; and by section 18 the duties of mine examiners are prescribed. In-

terspersed, however, throughout the remainder of the act are found in sections relating to the subject of ventilation, powder and blast, place of refuge, etc., requirements to be observed in effect supplementing the sections prescribing in detail the duties to be performed by the employés above mentioned. We think the omissions of duty charged in the various counts in the declaration are embraced in those in terms laid upon the mine manager or mine examiner. Considering this act, the Supreme Court of Illinois, in *Henrietta Coal Company v. Martin*, 221 Illinois, 460, first commented upon the decisions in *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, and *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, which cases dealt with statutes which, in their general purpose, were similar to the Illinois act. The Illinois court declined, however, to hold, as was done in the cases referred to, that where a statute directly imposed duties upon a mine manager the negligence of such mine manager could not be imputed to the owner, and indeed that the owner could not be made responsible for the act of such employé without causing the statute to be unconstitutional. The Illinois court expressly held that under the Illinois mining act a mine manager and mine examiner were vice-principals of the owner, and were engaged in the performance of duties which the owner could not delegate to others in such manner as to relieve himself from responsibility. Observing that in a number of its former decisions the Illinois court had assumed the law to mean what it expressly decided in the *Henrietta case* it did mean, viz., that in respect to the duties devolved upon the mine manager and mine examiner, those persons stood for the mine owner and were vice-principals, performing those duties. The court said:

“The fact that the proprietor, if he employs men to act in these capacities, is required to employ those who have obtained the certificate from the state mining board is without significance. The purpose of that provision was, so far as possible, to guard against the possibility of the proprietor employing

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incompetent, intemperate, negligent or disreputable persons, and not to enable the operator to shift to his employés his responsibility for the management of the mine.

"The object of the mining act, as we gather from its various provisions, is to protect, so far as legislative enactment may, the health and persons of men employed in the mines of the State while they are in the mines. The principal measures prescribed for this purpose require the exercise of greater precaution and care on the part of the mine owner for the safety of the miners than was required by the common law. To hold that he may shift his liability to any person employed by him as examiner or manager who holds the certificate of the state mining board is to lessen his responsibilities and defeat, in great part, the beneficent purposes of the act. To hold him liable for a willful violation of the act, or a willful failure to comply with its provisions on the part of his examiner or manager, is to give force and effect to the statute according to the intent of its makers to prolong the lives and promote the safety and well-being of the miners."

Accepting this interpretation of the Illinois statute, and in view of the ruling in *Consolidated Coal Co. v. Seniger*, 179 Illinois, 370, 374, 375, that it is not obligatory upon a mine owner to select a particular individual or to retain one when selected if found incompetent, we think the act is not repugnant to the Fourteenth Amendment in any particular. In legal effect, duties are imposed upon the mine owner, customarily performed for him by certain employés, duties which substantially relate to the furnishing of a reasonably safe place for the workmen. The subject was one peculiarly within the police power of the State, and the enactment of the regulations counted upon we think was an appropriate exercise of such power. The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the State, certainly the rights, privileges and immunities of a mine owner as a citizen of the United States were not invaded by the regulations in question, and the

imposition of liability upon the owner for the violation of such regulations being an appropriate exercise of the police power, was not wanting in due process. And even although the liability imposed upon the mine owner to respond in damages for the willful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the State to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed also adequately dispose of the contention that by the statute the mine owner was denied the equal protection of the laws.

The asserted error next to be considered relates to instructions to the jury on the subject of the proximate cause of the accident in the event Fulton went into the west roadway by direction of the mine manager. In the course of the charge to the jury the court said:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must determine whether, first, if there was gas there at that time; and whether, if there was, that was or was not the proximate cause of his death. Now by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was

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one, there willfully sending him there, the thing which caused his death; which was the greater cause? That is a question of fact for you to determine.

* * * * *

"I said it was for them to determine what was the proximate cause if there was an order for this deceased to go into the mine, or whether it was the gas being there. Let the instruction be what I stated now, the last time; that covers it."

It is contended that the effect of the definitions of proximate cause, made as above, was to hopelessly confuse the jury. While it must be conceded that the instruction was greatly wanting in clearness, yet we think no prejudicial error was committed. Looking at the criticized instructions in connection with the context of the charge, it is clear that it was understood by all as importing that the mining company was at fault for the existence of the accumulated gas resulting in the explosion which caused the death of Fulton, since to have allowed the gas to accumulate was a disregard of the positive duty towards Fulton imposed by the statute. Now, conceding that the mine manager ordered Fulton into the west roadway, and conceding, further, that such order of the manager was one of the causes of the accident, for which no recovery could be had because not counted on the declaration, what follows? Simply this, that two concurring causes contributed to the death of Fulton—one the order of the mine manager, for which recovery could not be had under the declaration, and the other the neglect by the mine owner to perform his statutory duty to prevent the accumulation of the dangerous gases which led to the accident. But because one of the efficient causes, the order of the mine manager, under the pleadings, did not give rise to a right of recovery, it did not follow that therefore the owner was absolved from responsibility for the cause of the accident for which he was liable. *Washington & G. R. Co. v. Hickey*, 166 U. S. 521.

We next consider two contentions: *a.* That the trial court erred in refusing to instruct the jury to return a verdict for

the defendant if they found that Fulton, at the time he was killed, was engaged in a violation of the statute, which contributed to his death; that is, the doing of a willful act which endangered his life and the lives or health of persons working in the mine with him, and which jeopardized the security of the mine or its machinery; and, *b.* That the court also erred in refusing to instruct that if the death of Fulton resulted in part from his reckless disregard of consequences in view of his known surroundings, the plaintiff could not recover.

Leaving out of view the contention that the first requested instruction was rightly refused because too general, and bearing in mind that in an action to recover damages under the Illinois mining act a mine owner is deprived of the defense of contributory negligence, *Carterville Coal Company v. Abbott*, 181 Illinois, 495, 502, 503, and assuming that the refused instruction might properly have been given if the tendency of the proof justified it, we think the instruction was rightly refused, because we are of opinion that there was no evidence tending to show the doing by Fulton of a willful act of the character contemplated by the statute or a reckless disregard by him of his personal safety. While the evidence might have justified the inference that Fulton before entering the west roadway knew that it had not been cleared of gas, yet it cannot be inferred that Fulton and his helper suspected that gas had so permeated the roadway as to render it perilous to life to go to the point where the explosion occurred. The jury had been instructed that there could be no recovery if the proof established the contention of the mining company that Fulton entered the part of the mine in which he was killed against or contrary to caution given him by the mine manager, and if Fulton was permitted to enter the west roadway without caution it is impossible on this record to infer that the jury would have been justified in finding that it was obvious that to enter the west roadway was so hazardous as to give support to the conclusion that Fulton willfully and recklessly went to his destruction.

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It is asserted that the court erred in refusing to give the following instruction:

"If you believe from the evidence that the decedent Fulton, just before the time of his death, entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

The requested charge was based upon the last paragraph of that portion of section 18 (b) of the Illinois mining act, dealing with the duties of mine examiners, reading as follows:

"To post danger notices. (b) When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager.

"No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe."

We construe this provision of the statute as relating to steps to be taken when a mine or a portion thereof is discovered to be unsafe and as relating to the necessary work to be done in the mine under the immediate supervision and direction of the mine manager to remedy the unsafe condition. As, however, there is no proof tending to show that Fulton in entering and working in the mine came under any of these conditions, we think the instruction was rightly refused.

The remaining assignments assert the commission of error by the trial court in overruling motions to strike out the second, third and sixth counts of the declaration and in refusing to instruct the jury that no recovery could be had under any of those counts, because no evidence had been introduced tending to establish the commission of the particular

acts of negligence charged in those counts. Such counts as we have seen related to the failure to construct cross cuts and stoppings in the mine and to an alleged defect resulting from the absence of a wheel and the consequent necessity of using a wrench for the purpose of opening a valve to allow condensed steam to escape as a prerequisite to the movement of the ventilating fan. We are constrained to the conclusion that prejudicial error was committed in these particulars. We think it is extremely doubtful whether there was any evidence in the record even tending to establish that in a long wall mine of the character of the one here in question cross cuts and stoppings thereof were essential. But be this as it may, certain is it that there is no evidence whatever in the record tending to support the claim that the absence of cross cuts and stoppings in the mine in question was in any wise the cause of the accumulations of gas or the retention of the accumulated gas from the explosion of which Fulton was killed. We are also of opinion that there was nothing in the evidence which would have justified the inference that the absence of the wheel from the valve, forming part of the mechanism to operate the ventilating fan, was the proximate cause of the presence of the gas in the west roadway where Fulton was killed. The uncontradicted testimony showed that but a very brief interval, a minute or two, elapsed before a wrench was obtained, and the distance to the point where the gas had accumulated precludes the possibility of saying that the evidence tended to show that the absence of the wheel could have been the proximate cause of the accident. Under this condition of things we find it impossible to say that prejudicial error did not result. *Maryland v. Baldwin*, 112 U. S. 490, 493. And, of course, in a case like the one we are considering we cannot maintain the verdict, as might be done in a criminal case upon a general verdict of guilty upon all the counts of an indictment. *Goode v. United States*, 159 U. S. 663. Nor does section 57 of the Illinois Practice Act, chap. 110, Rev. Stat. Illinois, support

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the contention that errors of the character of those we have just been considering must be treated as not prejudicial. The section relied upon is as follows:

"When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count, if one or more of the counts be sufficient to sustain the verdict."

This section has been held not to relate to counts which are vitally defective, but as only providing that where a declaration consists of several counts, and some of the counts contain defects not vital and yet subject to be assailed by demurrer, a party cannot wait until after the close of the evidence at the trial and, *a fortiori*, after verdict, and then for the first time question the sufficiency of the counts. *City of Chicago v. Lonergan*, 196 Illinois, 518; *Consolidated Coal Co. v. Scheiber*, 167 Illinois, 539. This statute of course lends no support to the contention here made that where a jury is wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered under such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded.

The judgment of the Circuit Court is therefore reversed, and the case remanded to that court for further proceedings consistent with this opinion.

UNITED STATES *ex rel.* WEST *v.* HITCHCOCK.ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

No. 194. Argued January 30, 1907.—Decided March 4, 1907.

While the promise of the United States to allot 160 acres to each member of the Wichita band of Indians under the act of March 2, 1895, 28 Stat. 876, 895, may confer a right on every actual member of the band, the primary decision as to who the members are must come from the Secretary of the Interior; and, in the absence of any indication in the act to allow an appeal to the courts for applicants who are dissatisfied, mandamus will not issue to require the Secretary to approve the selection of one claiming to be an adopted member of the tribe but whose application the Secretary has denied.

In view of long established practice of the Department of the Interior, and the undoubted power of Congress over the Indians, this court will hesitate to construe the language of §§ 441, 463, Rev. Stat., as not giving the Department of the Interior control over the adoption of whites into the Indian tribes.

Where the Secretary of the Interior has authority to pass on the right of one claiming to be a member of a band of Indians to select land under an agreement ratified by an act of Congress, his jurisdiction does not depend upon his decision being right.

26 App. D. C. 290, affirmed.

THE facts are stated in the opinion.

Mr. William H. Robeson and *Mr. Samuel A. Putman*, with whom *Mr. William C. Shelley* was on the brief, for plaintiff in error:

The duty of the Secretary to identify the individual as a member of the tribe does not involve judicial discretion. It is not material to determine whether this was a ministerial or a judicial duty, because the answer of the Secretary and all the evidence in the case shows that he did find that this relator is a member of the tribe and his only reason for refusing to approve relator's selection of land was because he did not approve of that membership.

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Membership by adoption being conceded, the approval or disapproval by the Secretary of the selection is not a power but a duty; the duty to approve selections made within the requirements of the statute is positive, the duty of disapproving selections applies only to those made in violation of the requirements of the statute, and the performance of the one duty or the other is positively defined by the provisions of the act giving to the Secretary no option whatever whether he shall approve or disapprove a selection.

The allotment of land selected does not constitute a bounty from the Government, but is a partial payment of the consideration for the cession of the lands of the tribe, and the failure of the Secretary to approve this relator's selection is a forcible abatement by that much of the consideration agreed to be paid by the United States.

With the determination of these questions in favor of the proposed allottee, then, if there ever was any judicial discretion or power vested in the Secretary, it was exhausted, and nothing remained to him but the performance of the plain duty to approve the relator's selection. The Secretary cannot capriciously disapprove selections. *Marbury v. Madison*, 1 Cranch, 137.

But when these facts, which the Secretary now admits, are determined in relators' favor, and the Secretary's judicial functions thereby exhausted, the same obligation rests upon him to perform the ministerial duty following upon the exercise of his judgment, as was enforced by the judgment of the court in the case of *United States v. Schurz*, 102 U. S. 378, where, after once passing upon the right of the claimant to a patent, the Secretary was required to deliver it.

If in this case the courts have not power to enforce the plain mandates of this agreement and statute, it will present a condition which has often been said to involve a monstrous absurdity in organized government; that there should be no remedy, though a clear undeniable right is shown to exist. *Kendall v. United States*, 12 Pet. 62.

Mr. Assistant Attorney General Campbell and Mr. Fred H. Barclay, with whom Mr. Jesse C. Adkins was on the brief, for defendant in error:

The allegations in defendant's answer to the petition, that he had, on July 3, 1901, reached and announced a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians and therefore not entitled to an allotment, are sufficient to defeat the application for the writ.

The action of the defendant, as Secretary of the Interior, in refusing to approve the relator's application for an allotment of land, involved a determination by the Secretary of the question whether the relator was within the category of persons entitled to allotment. The Secretary having alleged in his answer that he had decided that relator was not within this category, the writ of mandamus will not issue.

It was for the Secretary to determine whether the relator was an adopted member; and of course it is elementary law that when in such a case the Secretary has determined that, or any question, so committed to him it is immaterial whether his determination is right or wrong; that is a matter which cannot be considered by the courts, and his decision cannot be reviewed by them. *De Cambra v. Rogers*, 189 U. S. 119; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Wisconsin Central R. R. Co. v. Price Co.*, 133 U. S. 496, 511; *Runkle v. United States*, 122 U. S. 543, 557.

Mandamus should not issue in cases of doubtful right, but only when the legal right of the party to that which he demands has been clearly established. *Life and Fire Insurance Co. v. Wilson's Heirs*, 8 Pet. 291, 302; *Reeside v. Walker*, 11 How. 272, 289.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for mandamus to require the Secretary of the Interior to approve the selection and taking of one

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hundred and sixty acres by the relator out of the lands ceded to the United States by the Wichita and affiliated bands of Indians, under an agreement of June 4, 1891, ratified by the Act of Congress of March 2, 1895, c. 188. 28 Stat. 876, 895-897. The petition alleges that the relator is a white man married to a Wichita woman and thereby a member of the tribe, and that his adoption was confirmed and recognized in various ways set forth. By the second article of the agreement, as part of the consideration, the United States agreed that there should be allotted to each member of the said bands, native and adopted, one hundred and sixty acres out of the said lands, to be selected by the members, with qualifications not in question here. The fourth article contains provisions as to the title to allotments when they "shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior." After a demurrer to the petition, which was overruled, 19 App. D. C. 333, the Secretary answered, alleging that he had examined and considered the application of the relator and on July 3, 1901, had reached and announced a decision that the relator was not a member of the tribe, and thereupon had denied the application. The relator moved for a peremptory mandamus, which was denied, and filed a demurrer, which was overruled, and thereupon pleaded that the Secretary did not, by the decision alleged, decide that the relator was not a member of the tribe, and for that reason deny him the allotment. Issue was joined and evidence taken, and after a hearing judgment was entered for the respondent and the petition dismissed. The judgment was affirmed on appeal, 26 App. D. C. 290, and then the case was brought to this court. The issues here are those raised by the plea, the demurrer to the answer and the motion for a peremptory writ.

It is argued that the answer admits the averments of the petition, as it does not deny them in terms, and that therefore it must be taken that there was no question concerning the relator's membership for the Secretary to decide. His

identity was not disputed, nor, it is said, the acts of adoption that took place long before the relator applied to have his selection approved, and, therefore, the Secretary's duty was merely ministerial, to carry out the mandate of the act. But the admission, at most, is only the admission implied by a plea of estoppel by judgment. In truth it hardly goes so far as that; for when a party says that he is the proper person to decide the question raised and that he has decided it against the party raising it, he hardly can be said to admit that his decision was wrong.

The approval of the Secretary required by the agreement must include as one of its elements the recognition of the applicant's right. If a mere outsider were to make a claim, it would have to be rejected by some one, and the Secretary is the natural if not the only person to do it. No list or authentic determination of the parties entitled is referred to by the agreement, so as to narrow the Secretary's duty to identification or questions of descent in case of subsequent death. The right is conferred upon the members of the bands, but the ascertainment of membership is left wholly at large. No criteria of adoption are stated. The Secretary must have authority to decide on membership in a doubtful case, and if he has it in any case he has it in all. Furthermore, as his decision is not a matter of any particular form, his answer saying that he has decided the case is enough; for even if he had not decided it before, such an answer would announce a decision sufficiently by itself.

But the answer was not confined to a general allegation that the Secretary had decided the case. It gave the date of the decision, and the relator, under his plea, put the decision in evidence. It was a letter which seemed to admit that the relator had been adopted by the Indians as a member of their tribe, but assumed that the adoption must have been approved by the Indian Office to be valid, as provided by a regulation of that Department. The relator contends that the validity of the adoption was a matter purely of

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Indian law or custom, and that the Department could not take it under control. Probably it would have been unfortunate for the Indians if such control had not been exercised, as the temptation to white men to go through an Indian marriage for the purpose of getting Indian rights is sufficiently plain. We are disposed to think that authority was conferred by the general words of the statutes. Rev. Stats. §§ 441, 463. By the latter section: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations." We should hesitate a good deal, especially in view of the long-established practice of the Department, before saying that this language was not broad enough to warrant a regulation obviously made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been treated as wards of the Nation. Some such supervision was necessary, and has been exercised. In the absence of special provisions naturally it would be exercised by the Indian Department.

However, it hardly is necessary to pass upon that point. Although the answer gave the decision a date, that did not open it for consideration. If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right. By alleging that he had denied the application he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law, but simply stood on his authority and put forward his decision as final. As we have implied, such an answer affirms not merely the past but the present determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to

the court any statement of those grounds purporting to be exhaustive and complete, and the court cannot make an inquisition into his mental processes to see whether they were correct. See *DeCambra v. Rogers*, 189 U. S. 119, 122.

We doubt if Congress meant to open an appeal to the courts in all cases where an applicant is dissatisfied. Of course the promise of the United States that there shall be allotted one hundred and sixty acres to each member of the Wichita band may be said to confer an absolute right upon every actual member of the band. But some one must decide who the members are. We already have expressed the opinion that the primary decision must come from the Secretary. There is no indication of an intent to let applicants go farther. There are insuperable difficulties in the way of at least this form of suit, and the Department of the Interior generally has been the custodian of Indian rights.

Judgment affirmed.

PEROVICH *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
THIRD DIVISION OF THE TERRITORY OF ALASKA.

No. 405. Submitted January 29, 1907.—Decided March 11, 1907.

While in this case there was no witness to the homicide and the identification of the body found was not perfect, owing to its condition caused by its having been partially burned, yet as the circumstantial evidence was clearly enough to warrant the jury in finding that the body was that of the person alleged to have been murdered and that he had been killed by defendant, the trial court would not have been justified in withdrawing the case from the jury, but properly overruled a motion to instruct a verdict of not guilty for lack of proof of the *corpus delicti*.

In the absence of positive proof, but where there is circumstantial evidence of the *corpus delicti*, it is not error to submit to the jury the question of defendant's guilt with the instruction that the circumstantial evidence

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must be such as to satisfy the jury beyond a reasonable doubt that the *corpus delicti* has been established.

The testimony of a marshal as to conversations between him and the defendant charged with murder which were voluntary, and not induced by duress, intimidation or other improper influences, are admissible.

Whether in a criminal trial the court interpreter should be appointed is a matter largely resting in the discretion of the court, and its refusal so to do is not an error where it does not appear that the discretion was in any way abused.

THE facts are stated in the opinion.

There was no appearance or brief filed for plaintiff in error.

Mr. Assistant Attorney General Cooley, for defendant in error:

The orderly trial of criminal cases would be impossible if the rule of practice contended for in the defendant's first exception were adopted. It is settled law that exceptions to the charge should be taken before the jury retires, in order that the court may correct any error that may have been made. *Norman v. United States*, 20 App. D. C. 494.

The court properly refused, after the Government had rested its case, to instruct the jury to bring in a verdict of not guilty because the *corpus delicti* had not been proved; because the evidence was insufficient; because the evidence in no way connected the defendant with the death of Jacob Jaconi, and for other reasons, is assigned for error. This motion was made after the Government rested its case. It was then denied and an exception allowed. The defense then put in its evidence and the motion was not subsequently renewed.

When, after such a motion, the defendant introduces testimony, an exception to the action of the court in refusing to direct a verdict is waived. *Union Pacific R. R. v. Daniels*, 152 U. S. 684, and cases cited; *Runkle v. Burnham*, 153 U. S. 216, and *Hansen v. Boyd*, 161 U. S. 397.

The grounds upon which the request to strike out the conversations with the deputy marshal was based, were not stated. The motion, therefore, was properly overruled. *Camden v. Doremus*, 3 How. 515; *United States v. McMasters*,

4 Wall. 680; *Burton v. Driggs*, 20 Wall. 125; *Toplitz v. Hedden*, 146 U. S. 252.

As no objection was taken to the ruling of the court sustaining the objection of the district attorney to the appointment of an interpreter, and as it will be seen, by reference to the defendant's testimony that an interpreter was unnecessary, there was no error. The defendant evidently understood the questions that were asked him and answered them intelligently. Moreover, whether or not the appointment of an interpreter is necessary is within the sound discretion of the trial court. *Schall v. Elisner*, 58 Georgia, 190; *State v. Severson*, 78 Iowa, 653.

It is not the law that the *corpus delicti* "must be distinctly proved, either by direct evidence of the fact or by inspection of the body," because that would eliminate proof of the *corpus delicti* by circumstantial evidence. *Commonwealth v. Webster*, 5 Cush. 295; *State v. Williams*, 7 Jones (N. C.), 446.

Moreover, the defendant was not entitled to this instruction in the precise terms prayed, and the court properly refused it. *Catts v. Phalen*, 2 How. 376; *Robinson v. Parker*, 11 App. D. C. 132.

This prayer was also fully covered in part of the court's charge to the jury.

And as the law was there clearly stated to the jury, it was not error to refuse the instruction. *Coffin v. United States*, 162 U. S. 664; *Grand Trunk R. R. Co. v. Ives*, 144 U. S. 408; *Erie Ry. v. Winter*, 143 U. S. 60-74.

The instruction as to reasonable doubt complained of in the eleventh assignment of error is taken verbatim from the charge of Chief Justice Shaw to the jury in *Commonwealth v. Webster*, 5 Cush. 320, and is cited with approval in *Miles v. United States*, 103 U. S. 312.

MR. JUSTICE BREWER delivered the opinion of the court.

On July 17, 1905, Vuko Perovich, now plaintiff in error, was indicted in the United States District Court of Alaska,

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Third Division, for the murder of Jacob Jaconi. The trial, on August 5, 1905, resulted in a verdict of "guilty of murder in the first degree, and that he suffer death." Motions for a new trial and arrest of judgment having been overruled, he was, on September 15, 1905, sentenced to be hanged. To review that judgment this writ of error was sued out. The record was filed in this court on September 24, 1906, and on application the case was advanced for hearing on January 21, 1907. No counsel appeared for plaintiff in error and no brief was or has been filed in his behalf. The case was submitted by the Government on its brief. Although unaided by counsel for plaintiff in error, we have carefully examined the record and considered the assignments of error.

The testimony in the case was circumstantial. No witness saw the killing. Indeed, the first and principal question is whether there was a homicide. Jaconi was a fisherman, living alone in a log cabin covered by a tent, about midway between Fairbanks and Chena, a distance of about four miles from each place. On October 28, 1904, the last time he was seen alive, he was at Fairbanks between 1 and 2 o'clock in the afternoon, and had in his possession several nuggets, a Yukon gold ring, a gold chain watch charm and some money, part of which he deposited in a bank. In the early morning of October 29 the dogs of the deceased were heard barking, and two shots from a gun were heard in the direction of his cabin. On that day about noon one who had been the partner of Jaconi arrived at his camp and found the cabin in which the deceased had lived partially destroyed by fire and the fire still burning. In the rear where the bunk had been he saw the back part of a head, a leg bone and the trunk of a man. The head was sunken on the chest. While the cabin was not totally destroyed, it was burned more towards the back where the bunk had been, and the ground in the vicinity of the bunk was saturated with oil. It appeared that Jaconi had in his cabin about one and one-half gallons of olive oil. On that day or the next several witnesses were at the cabin and saw

the skull and the other parts of the skeleton, still smoking, and the bones so burned that they crumbled to pieces when touched. Some two weeks before the fire the defendant had said to a witness that he was broke but knew where he could get some money if he had a partner to go with him, as there was a man who lived about five miles from Chena who had \$500, a watch and chain, a ring and a gun. On October 15, he was at the cabin of Jaconi about daylight. At that time he said to the former partner of Jaconi, when asked what he wanted, that he was travelling and looking for a job. On October 20, defendant and a witness went to Chena and on their way stopped at the cabin of Jaconi. After leaving defendant told witness that he had been there several times before, and that the deceased had a roll of money, and that he would lick him with an ax some day and throw him in the water, or that he would make a fire and burn everything up. On October 28, the day on which Jaconi was last seen, the defendant was at Fairbanks, and said he was going to the cabin of one of his countrymen to see if he could find anything in it. On October 29, between half past 3 and 4 o'clock in the afternoon, he arrived at a camp about twenty miles from Chena. He had a rifle and a canvas bag in his possession, a Yukon ring and a gold watch and chain. He made different and contradictory statements to witnesses about the watch. On November 5 he was arrested, having in his possession \$50 and a gold watch. He said that he traded a nugget chain with two men for a sack of clothes and the watch. Later a sack of clothes was found where he had left it. He said that he and his partner had made the chain, and that he had bought his partner's interest in it. His partner testified that they owned the nugget chain, and that it had never been out of his possession after it was made. Several of these articles and others found in possession of the defendant were identified as the property of Jaconi. Other circumstances of a similar nature were also shown in evidence.

It is assigned for error that the court overruled a motion

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to instruct the jury to bring in a verdict of not guilty for the reason that the *corpus delicti* had not been proved. This motion was made after the plaintiff had rested, and upon its being overruled the defendant proceeded to offer testimony. The motion was not thereafter renewed. Without resting upon the proposition that introducing testimony after such a motion has been overruled is a waiver of any exception to the action of the court (*Union Pacific Railway v. Daniels*, 152 U. S. 684; *Runkle v. Burnham*, 153 U. S. 216; *Hansen v. Boyd*, 161 U. S. 397), we are of the opinion that neither at that time nor at the close of all the testimony would the court have been justified in withdrawing the case from the jury. While it is true there was no witness to the homicide and the identification of the body found in the cabin was not perfect owing to its condition caused by fire, yet, taking all the circumstances together, there was clearly enough to warrant the jury in finding that the partially burned body was that of Jaconi and that he had been killed by the defendant. Upon this question the case of *Commonwealth v. Williams*, 171 Massachusetts, 461, is closely in point and instructive. While the particular facts are not identical, the character and scope of the testimony are substantially the same.

Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received.

Other matters referred to in the assignment of errors require but slight notice. One is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of such discretion.

Error is also alleged in refusing an instruction as to the

evidence necessary to establish the *corpus delicti*. It is enough, in answer to this objection, to refer to the summary of the testimony we have already given and to note the fact that the court instructed that the evidence must be such as to satisfy the jury beyond a reasonable doubt.

The defense asked one or two instructions, such as this: "The fact that Jacob Jaconi has not been seen since the twenty-eighth day of October, 1904, does not create a presumption of his death." Singling out a single matter and emphasizing it by special instruction as often tends to mislead as to guide a jury. Doubtless the isolated fact that Jaconi had not been seen would not of itself establish the fact of his death. It is only a circumstance which, taken in connection with the other facts in the case, tends to prove the death. It is merely one link in a long chain, and the court is seldom called upon by special instructions to single out any single link in a chain, and affirm either its strength or weakness. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 433; *Rio Grande Western Ry. Co. v. Leak*, 163 U. S. 280, 288.

Objection is made to the instruction in reference to reasonable doubt. This instruction is taken from the charge of Chief Justice Shaw to the jury in *Commonwealth v. Webster*, 5 Cush. 295, 320, and that case has been cited with approval by this court. *Miles v. United States*, 103 U. S. 304, 312.

These are all the questions which we deem it necessary to notice, and while we should have been glad to have had the assistance of counsel for plaintiff in error, yet we are satisfied from our examination of the record that the defendant was properly convicted, and the judgment is

Affirmed.

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DELAMATER v. SOUTH DAKOTA.

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

No. 149. Argued January 10, 11, 1907.—Decided March 11, 1907.

The general power of the States to control and regulate, within their borders, the business of dealing in, or soliciting orders for, the purchase of intoxicating liquors is beyond question.

The purpose of the Wilson act, 26 Stat. 713, as a regulation of interstate commerce was to allow the States to exert ampler power as to intoxicating liquors when the subject of such commerce than could have been exercised before the enactment of that statute, which enabled the States to extend their authority as to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package.

Since the enactment of the Wilson law, which expressly provides that intoxicating liquors coming into a State should be as completely under control of the State as though manufactured therein, the owner of intoxicating liquor in one State cannot, under the commerce clause of the Constitution, go himself or send his agent into another State and, in defiance of its laws, carry on the business of soliciting proposals for the purchase of such liquors.

Although a State may not forbid a resident therein from ordering for his own use intoxicating liquor from another State it may forbid the carrying on within its borders of the business of soliciting orders for such liquor although such orders may only contemplate a contract resulting from final acceptance in another State. *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, distinguished.

The law of South Dakota imposing an annual license charged on travelling salesmen selling, offering for sale, or soliciting orders for intoxicating liquors in quantities of less than five gallons is not unconstitutional because repugnant to the commerce clause of the Constitution of the United States.

The highest court of South Dakota having held that the act imposing a license on travelling salesmen soliciting orders for intoxicating liquors is a police regulation and not a taxing act, it is within the purview of, and not in conflict with, the Wilson act. *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, followed.

104 N. W. Rep. 539, affirmed.

THE facts are stated in the opinion.

Mr. Herbert Jackson for plaintiff in error:

Liquor is a legitimate subject of interstate commerce. *Leisy v. Hardin*, 135 U. S. 100, 110; *In re Rahrer*, 140 U. S. 545; *Rhodes v. Iowa*, 170 U. S. 412, 414; *Bowman v. Railway Co.*, 125 U. S. 465, and the statute complained of is a direct interference with interstate commerce. *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465-524; *Rhodes v. State of Iowa*, 170 U. S. 412-438. And see *American Express Co. v. Iowa*, 196 U. S. 133, 146, holding that liquor shipped C. O. D. from one State to another was interstate commerce; that the title of the goods passed when same was delivered to the carrier, and that any interference by the state authorities with the merchandise was illegal, unless the goods were offered for resale.

The act of the legislature of the State of South Dakota was not a regulation in the interest of the morals of the community—its only purpose being to license and raise revenue. It is not a police regulation.

The case does not come within the rule laid down in *Austin v. Tennessee*, 179 U. S. 343, 388.

Mr. S. M. Howard and Mr. Aubrey Lawrence, with whom Mr. Philo Hall, Attorney General of the State of South Dakota, was on the brief, for defendant in error:

The law is a license law and not a tax law.

The mere fact that a law of this character results in bringing a certain revenue to the State does not necessarily stamp such an act as a revenue or tax law; the real test is as to whether or not the purpose of the act was to secure revenue or regulate and control. 17 Ency. of Law, 2d ed., p. 223, and citations; 21 Ency. of Law, 2d ed., pp. 774, 775.

The interpretation of the South Dakota courts upon the act, which will be considered by this court, is to the same effect. *State v. Beuchler*, 10 S. Dak. 156.

The title of the act is "An act to provide for the licensing, restricting and regulation of the manufacture and sale of

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spirituous and intoxicating liquors." Session Acts, South Dakota, 1901, 246.

The law is one within the police powers of the State, and thus subject to different rules than laws concerning the ordinary goods of commerce. Freund on Police Powers, sec. 10, p. 7.

Regardless of the Wilson act, which more fully placed intoxicating liquors within the police power of the State, this court for many years sustained the doctrine laid down in the *License Cases*, 5 How. 523; and see also *Sherlock v. Alling*, 93 U. S. 99; *Foster v. Kansas*, 112 U. S. 201.

As the State has the constitutional power to prohibit even the manufacture and sale of intoxicating liquors, it must undoubtedly have the power to regulate and restrict the sale of intoxicating liquors, and as a part of that power has the undoubted constitutional right to regulate and control any act in furtherance of such sale, or any offer of sale completed within the state boundaries which would lead up to the sale, which is restricted and controlled by the legislative act. This is not an interference with the interstate commerce clause and cannot be said to act before the goods come within the jurisdiction of the State, because under the facts in the case at bar the person who commits the act in question has voluntarily appeared within the boundaries of the State and submitted himself to the laws of that State, and has voluntarily chosen to come within the State to engage in the business which is restricted and controlled under the constitutional authority of the State.

The act in question does not conflict with the interstate commerce law.

The acts involved are committed by a person within the jurisdiction of the State, who voluntarily engages within the State in an occupation prohibited under the police power of the State.

The taking of the order by the plaintiff for intoxicating liquors was a part of the contract of sale. *Lang v. Lynch*

(N. H.) 4 L. R. A. 831. Drummers are mere solicitors of orders for others and differ in no respect from clerks or salesmen except that they are ambulatory in their operations and do not usually carry or deliver the goods sold. *Ex parte Taylor*, 58 Mississippi, 478. The residence of the person who pursues the business is immaterial. *Bates v. Mobile*, 46 Alabama, 158; *Mason v. Cumberland*, 92 Maryland, 451; *Washington v. McGeorge*, 146 Pa. St. 248. See also *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1.

MR. JUSTICE WHITE delivered the opinion of the court.

A firm established in St. Paul, Minnesota, which was engaged in dealing in intoxicating liquors, employed Delamater, the plaintiff in error, as a traveling salesman. As such salesman Delamater, in the State of South Dakota, carried on the business of soliciting orders from residents of that State for the purchase, from the firm in St. Paul, of intoxicating liquors in quantities of less than five gallons. The course of dealing was this: The orders were procured in the form of proposals to buy, and when accepted by the firm the liquor was shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days' credit. At the time Delamater engaged in South Dakota in the business just stated the law of that State imposed an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within the State, "by any traveling salesman who solicits orders by the jug or bottle in lots less than five gallons." A violation of the statute was made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. Delamater, not having paid the license charge, was prosecuted under the statute. At the trial, although the uncontradicted proof established the carrying on of business within the State, as above mentioned, Delamater requested a binding instruction to the jury in his favor, on the ground that the statute did not apply,

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and if it did, that it was void because repugnant to the commerce clause of the Constitution of the United States. Exception was taken to the refusal to give the instruction. The Federal ground was reiterated in motions to arrest and for a new trial, and the Supreme Court of the State, to which the cause was taken, in affirming the judgment of conviction expressly considered and disposed of such Federal ground. 104 N. W. Rep. 537.

All the assignments of error involve the proposition that the state statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act. 26 Stat. L. 313, chap. 728. For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin,¹ because they concerned only the power of a State to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law.

The general power of the States to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. With the existence of this general power we are

¹ *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502; *Asher v. Texas*, 128 U. S. 129; *Stoutenburg v. Hennick*, 129 U. S. 141; *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 161; *Cruteher v. Kentucky*, 141 U. S. 47; *Brennan v. Titusville*, 153 U. S. 289; *Caldwell v. North Carolina*, 187 U. S. 622; *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441; *Rearick v. Pennsylvania*, 203 U. S. 507.

not, therefore, concerned. We are hence called upon only to consider whether the general power of the State to control and regulate the liquor traffic and the business of dealing or soliciting proposals for the dealing in the same within the State was inoperative as to the particular dealings here in question, because they were interstate commerce, and therefore could not be subjected to the sway of the state statute without causing that statute to be repugnant to the commerce clause of the Constitution of the United States.

It is well at once to give the text of the Wilson act, which is as follows (26 Stat. 713, c. 728):

"That all fermented, distilled, or other intoxicating liquors or liquids 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."

It is settled by a line of decisions of this court, noted in the margin,¹ that the purpose of the Wilson act, as a regulation by Congress of interstate commerce, was to allow the States, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the States over intoxicating liquor, by the Wilson act adopted a special rule enabling the States to extend their authority as to such liquor shipped

¹ *In re Rahrer*, 140 U. S. 545; *Rhodes v. Iowa*, 170 U. S. 412; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438; *American Express Co. v. Iowa*, 196 U. S. 133; *Adams Express Co. v. Iowa*, 196 U. S. 147; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17; *Foppiano v. Speed*, 199 U. S. 501; *Heyman v. Southern Ry. Co.*, 203 U. S. 270.

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from other States before it became commingled with the mass of other property in the State by a sale in the original package.

The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself to this: Albeit the State of South Dakota had power within its territory to prevent the sale of intoxicating liquors, even when shipped into that State from other States, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the State, and the liquors to which they related were also outside the State. This, however, but comes to this, that the power existed to prevent sales of liquor, even when brought in from without the State, and yet there was no authority to prevent or regulate the carrying on the accessory business of soliciting orders within the State. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act. That act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one State can, by virtue of the commerce clause, go himself or send his agent into such other State, there in defiance of the law of the State, to carry on the business of soliciting proposals for the purchase of intoxicating liquors.

Passing from these general considerations let us briefly more particularly notice some of the arguments relied upon.

As we have stated, decisions of this court interpreting the

Wilson act have held that that law did not authorize state power to attach to liquor shipped from one State into another before its arrival and delivery within the State to which destined. From this it is insisted, as none of the liquor covered by the proposals in this case had arrived and been delivered within South Dakota, the power of the State did not attach to the carrying on of the business of soliciting proposals, for until the liquor arrived in the State there was nothing on which the state authority could operate. But this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson act, state authority did not extend over liquor shipped from one State into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by preventing the delivery of liquor embraced by transactions made in such other State. The proposition here relied on is widely different, since it is that, despite the Wilson act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another State. But the business of soliciting proposals in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course if the owner of the liquor in another State had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be bur-

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dened without directly affecting interstate commerce. But, as by the Wilson act, the power of South Dakota attached to intoxicating liquors, when shipped into that State from another State after delivery but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other States, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson act did not exist.

2. Nor is there merit in the arguments based on the ruling in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438. The controversies in that case and the matters therein decided were recapitulated in *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, as follows (p. 25):

"In *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, the operation of a liquor law of South Carolina was considered. By the act in question the State of South Carolina took exclusive charge of the sale of liquor within the State, appointed its agents to sell the same, and empowered them to purchase the liquor which was to be brought into the State for sale. The fact was that by the act in question the State of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The act, in addition, affixed prerequisite conditions to the shipment into South Carolina from other States of liquor to a consumer who had purchased it for his own use, and not for sale. Considering the Wilson act and the previous decisions applying it, in so far as it took charge in behalf of the State of the sale of liquor within the State, and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the state law imposed burdens on the right to ship liquor from another State to a resident of South Carolina, intended

for his own use, and not for sale within the State, the law was held to be repugnant to the Constitution, because the Wilson act, whilst it delegated to the State plenary power to regulate the sale of liquors in South Carolina shipped into the State from other States, did not recognize the right of a State to prevent an individual from ordering liquors from outside of the State of his residence for his own consumption, and not for sale."

It having been thus settled that under the Wilson act a resident of one State had the right to contract for liquors in another State and receive the liquors in the State of his residence for his own use, therefore, it is insisted the agent or traveling salesman of a non-resident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that State orders for liquor to be consummated by acceptance of the proposals by the non-resident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a State to prevent a resident from ordering from another State liquor for his own use and the plenary authority of a State to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another State, even although such orders may only contemplate a contract to result from final acceptance in the State where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court. That a State may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. *Hopper v. California*, 155 U. S. 648. But that this power to prohibit does not extend to preventing a citizen of one State from making a contract of insurance in another State is also settled. *Allgeyer v. Louisiana*, 165 U. S. 578. In *Nutting v. Massachusetts*, 183 U. S. 553, the court was called upon to consider these two subjects—that is, the power of the State on the one

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hand to forbid the making within the State of contracts of insurance with unauthorized insurance companies and the right of the individual on his own behalf to make a contract with such insurance companies in another State as to property situate within the State of residence. The case was brought to this court to review a conviction of Nutting, a citizen of Massachusetts, for having negotiated insurance with a company not authorized to do business in Massachusetts, contrary to the statutes of that State. Briefly, the facts were that Nutting, an insurance broker, solicited in Massachusetts a contract of insurance on property belonging to McKie situated in that State. The proposal was accepted outside of the State of Massachusetts and the policy also issued outside of that State. The contention of the plaintiff in error was that as the contract was consummated outside of Massachusetts, the conviction was repugnant to the Fourteenth Amendment, because the acts done did not fall within the general principle announced in *Hooper v. California*, *supra*, but were within the ruling in *Allgeyer v. Louisiana*. The conviction was affirmed not because the contract was consummated in Massachusetts, but upon the ground that the right of an individual to obtain insurance for himself outside of the State of his residence did not sanction the conduct of Nutting, as an insurance broker, in carrying on the business in Massachusetts of soliciting unauthorized insurance. After reviewing the *Hooper* and *Allgeyer* decisions and pointing out that there was no conflict between the two cases, the court said (p. 558):

"As was well said by the supreme judicial court of Massachusetts: 'While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit, not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons.' 175 Massachusetts, 156; 55 N. E. Rep. 895."

The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the State in respect thereto. As we have seen, the right of the States to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one State into another after delivery and before the sale in the original package. It follows that the authority of the States, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the States to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the State "would not have thought of making," must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor.

3. The contention that the law of South Dakota was a taxing law and not a police regulation, and therefore not within the purview of the Wilson act, is in conflict with the purpose of that law as interpreted by the Supreme Court of South Dakota. *State v. Beuchler*, 10 S. Dak. 156. Besides, the contention is foreclosed by the ruling of this court in *Pabst Brewing Co. v. Crenshaw*, *supra*.

Affirmed.

The CHIEF JUSTICE dissents.

UNITED STATES *v.* BETHLEHEM STEEL COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 188. Argued January 28, 29, 1907.—Decided March 11, 1907.

The rule that prior negotiations are merged in the contract is general in its nature and does not preclude reference to letters between the parties prior to the execution of a contract in order to determine whether from the language used in the contract the parties intended stipulated deductions for delay as a penalty or as liquidated damages.

Where in response to Government advertisements the same party submits different bids, the largest price being for the shortest time of delivery, the acceptance of the bid for the shorter time is evidence that the element of time is of essence, and a stipulated deduction of an amount per day equivalent to the difference between the short and long time for delivery is to be construed as liquidated damages for whatever delay occurs in the delivery, and not as a penalty, although the word penalty may have been used in some portions of the contract.

41 C. Cl. 19, reversed.

THE Bethlehem Steel Company recovered a judgment in the Court of Claims (41 C. Cl. 19) for the sum of \$21,000 against the appellant, from which judgment the United States has appealed to this court.

The company filed its petition in the Court of Claims seeking to recover a balance which it alleged was due from the United States on a contract, which had been entered into by the company with Brigadier General Flagler, Chief of Ordnance, in behalf of and for the United States, for the construction of certain gun carriages, which the company alleged had been constructed according to the contract and for which the Government had failed to pay the full amount which became due upon its performance.

The facts were found by the Court of Claims, from which it appears that the Government on the eighth day of March, 1898, advertised for proposals for the construction of six disappearing gun carriages, and the specifications accompany-

ing the advertisement set forth the character and extent of the work. The claimant, in response to the advertisement, submitted four distinct sealed proposals to the War Department for the construction of such carriages. By the first proposal the company agreed to furnish five or more gun carriages for the sum of \$31,000 each, the first to be delivered within six months of the date of contract, to be followed by two carriages every three months thereafter. By the second proposal the company offered to furnish the same number for the sum of \$33,000 each, the first to be delivered within five months from date of contract, to be followed at the rate of one carriage every month thereafter. By the third proposal the offer was to furnish the same number for the sum of \$35,000 each, the first to be delivered within four months, and the second within five months of date of contract; the remaining carriages to follow at the rate of three carriages every two months thereafter. By the fourth proposal the offer was to furnish the same number for the sum of \$36,000 each, the first to be delivered in four months, the second in five months, and the remaining carriages at the rate of two carriages every month thereafter.

These alternative proposals were made in consequence of a letter written the company by the Chief of Ordnance, dated March 11, 1899, of which the following is a copy:

“Office of the Chief of Ordnance,

“United States Army,

“Washington, March 11, 1898.

“Gentlemen: It is suggested that in making bids for carriages you estimate, first on the price of carriages under the supposition that the works will run for twenty-four hours; second, that later, if it be found advantageous, the ordinary working hours may be observed. It is considered best that bids should be made for carriages by numbers, as, for instance, so much for five 8-inch carriages, for six, eight, etc. Therefore it is considered judicious that bids should be made for rapid

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delivery of a certain number of carriages or for less rapid delivery of the same. It should be understood, however, that time will be considered very important.

"Respectfully,

D. W. FLAGLER,

"Brig. Gen., Chief of Ordnance."

The following are the further findings of the Court of Claims:

"IV. The defendants, through the War Department, accepted proposal No. 4 of the claimant company.

"V. In drawing up the contract between the United States and the claimant company a slight modification of proposal No. 4 was decided upon, which was as follows:

"Whereas in proposal No. 4 claimant company was to deliver five or more carriages, the first in four months, the second in five months, and the remaining ones to follow at the rate of two carriages per month. In drawing up the contract this was changed so as to provide for the delivery of one carriage in four months (as proposed) and five carriages in six months from the date of contract, thus reducing the time of delivery of all the carriages from seven to six months, this reduction of the total delivery being offset by the increased latitude given claimant company as to intermediate deliveries.

"VI. On April 4, 1898, the Ordnance Department transmitted a form of contract of even date to the claimant company for execution and return by letter, as follows:

" 'Office of the Chief of Ordnance,

" 'United States Army,

" 'Washington, April 4, 1898.

" 'The Bethlehem Iron Co., South Bethlehem, Pa.

" 'Gentlemen: I am instructed by the Chief of Ordnance to transmit herewith contract, in quintuplicate, dated the 4th instant, for six 12-inch disappearing gun carriages, model 1896, for execution and return to this office.

" 'Respectfully,

R. BIRNIE,

" 'Capt., Ord. Dept., U. S. A.'

"To this letter the claimant company made reply on April 5, 1898:

" 'The Bethlehem Iron Company,

" 'South Bethlehem, Pa., April 5, 1898.

" 'Chief of Ordnance, U. S. A.,

" 'War Department, Washington, D. C.

" 'Sir: We have examined the contract forms, covering six disappearing gun carriages, model 1896, for 12-inch B. L. rifles, for which we submitted proposals under the date 19th ultimo, and write to call your attention to the third clause, relating to our liability on account of any patent rights granted by the United States, is not struck out, as has been done in the case of previous contracts for carriages.

" 'We also note that the penalty mentioned in the contract for each day of delay in delivery of each carriage is \$75 instead of \$10, as is stipulated in the instructions to bidders and specifications.

" 'We made our bid under the understanding that the penalty for non-delivery was to be \$10 per day, and we respectfully request that the contract forms may be modified in accordance with this understanding.

" 'We return herewith the contract forms, and remain,

" 'Respectfully,

" 'THE BETHLEHEM IRON COMPANY,

" 'R. W. DAVENPORT,

" '*Second Vice President.*'

"Whereupon the claimant company was informed by the Chief of Ordnance, by letter of April 9, 1898, as follows:

" 'Office of the Chief of Ordnance,

" 'United States Army,

" 'Washington, April 9, 1898.

" 'The Bethlehem Iron Company,

" 'South Bethlehem, Pa.

" 'Gentlemen: In reply to your letter of April 5, 1898, returning contract forms, I have the honor to inform you that

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your request in regard to your liability on account of patent rights has been complied with and the third paragraph has been stricken out.

“In regard to the penalty for delay in delivery being \$75 per day instead of \$10 per day, I have to state that the former amount is the average difference in time of delivery between your price recently bid for slow delivery of these carriages and the price under the accepted bid. The department feels it to be just that this average difference should be the prescribed penalty; but, if you should prefer, instead of taking the average difference, that the exact difference per day for each particular carriage should be prescribed, the forms will be altered accordingly.

“The contracts are returned, hoping this explanation will be satisfactory.

“Respectfully,

D. W. FLAGLER,

“*Brigadier General, Chief of Ordnance.*’

“Thereafter it was found that an error had been made in the above computation, in that the \$75 per day deduction provided for should have been \$35 instead, and the claimant company was duly informed of this by letter dated April 16, 1898, which is as follows:

“Office of the Chief of Ordnance,

“United States Army,

“Washington, April 16, 1896.

“The Bethlehem Iron Company,

“South Bethlehem, Pa.

“(Through the Inspector of Ordnance, U. S. A.)

“Gentlemen: Referring to my letter, No. 21985, of the 9th instant, I would invite your attention to the fact that an error was made in the computation in the amount of the deduction in price per day of delay in delivery of 12-inch disappearing carriages, L. F., model of 1896, recently ordered from you, and to inform you that the contract should read that such deduction in price should be \$35 per day of delay in

delivery, in accordance with principle stated in my above-mentioned letter.

“ ‘Respectfully,
D. W. FLAGLER,
“ ‘*Brigadier General, Chief of Ordnance.*’

“ ‘Before signing the contract in its present form the claimant company, by communication on April 20, 1898, requested that the same should be modified in some respects, which request is contained in the following communication:

“ ‘The Bethlehem Iron Company,
“ ‘South Bethlehem, Pa., April 20, 1898.
“ ‘Chief of Ordnance, U. S. A.,
“ ‘War Department, Washington, D. C.

“ ‘Sir: Referring to the forms of contract for six 12-inch disappearing gun carriages, carrying the date of April 4, 1898, which have recently been received, but not yet executed, and to the conversation which the writer had with you on Thursday last, we beg to state that on further carefully considering the possibilities of the case we do not believe that we will be able to deliver the six carriages within six months, as called for by the proposed contract. We will, however, undertake to complete, in accordance with our bid, the delivery of the first carriage in four months, the second within five months, and the remaining four at the rate of two per month, thus making the total time of delivery of the six carriages seven instead of six months, it being understood that no penalty will be charged against us for the one month of delay which will thus accrue on the fifth and sixth carriages.

“ ‘By agreeing to this proposition the department will be the gainer, in that the second carriage will be due at the end of the fifth month, while, as the contract now reads, it would not be due until the end of the sixth month.

“ ‘With the above understanding confirmed, we will execute the contract as it now stands, except as to the amount of penalty for delay in delivery, which, in accordance with your letter of April 16, will be \$35 instead of \$75 per day.

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" 'We return the contract forms in order that the change as regards penalty may be made.

" 'We remain, respectfully,

" 'THE BETHLEHEM IRON COMPANY,

" 'R. W. DAVENPORT,

" 'Second Vice President.'

"To which letter the following reply was made:

" 'Office of the Chief of Ordnance,

" 'United States Army,

" 'Washington, April 25, 1898.

" 'The Bethlehem Iron Company,

" 'South Bethlehem, Pa.

" '(Through Inspector of Ordnance, U. S. A.)

" 'Gentlemen : In reply to your letter of the 20th instant, I have the honor to inform you that the schedule of deliveries of 12-inch disappearing carriages contained therein will, in view of the earlier resulting delivery of the second carriage, be accepted in lieu of the schedule in the contract, without enforcement of penalties which would result from the change of schedule.

" 'The amount of the penalty for delay in delivery is changed from \$75 to \$35 per day in accordance with my letter of the 16th instant, and the contract forms are returned herewith for execution.

" 'Respectfully,

D. W. FLAGLER,

" 'Brigadier General, Chief of Ordnance.'

"The above correction was therefore made in the said contract, and the same was duly signed and executed by the claimant company and immediately transmitted to the War Department. A copy of said contract is annexed to and made part of the petition."

The following are the material portions of the contract:

"Under advertisement dated , 189 , the said parties of the first part do hereby contract and engage with the said

United States to manufacture, for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders as amended, specifications and drawings, all of which are hereto attached and form part of this contract.

"Six (6) disappearing gun carriages, model 1896, for 12-inch B. L. rifles, drawings dated April 27 and June 19, 1896 (latest revision July 14 and December 30, 1897), at thirty-six thousand dollars (\$36,000) each, free on board cars at South Bethlehem, Pa.

"The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract.

"It is further stipulated and agreed that the party of the first part will furnish such limited additional number of these carriages, at the price and rate of delivery stated, as the party of the second part may desire, under available appropriations.

* * * * *

"It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five (\$35) dollars per day from the price to be paid therefor for each day of delay in delivery of each carriage, respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

"All penalties incurred under this contract shall be offset against any payments falling due to the said party of the first part.

"The work must pass the required inspection at all stages of its progress, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

"(Signed by the parties.)

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* * * * *

"VII. Thereupon the Bethlehem Iron Company proceeded to manufacture the said gun carriages, and ultimately delivered them to the United States, and they were accepted by the latter. The following table gives, first, the date fixed by the said contract for the delivery of each one of said carriages; second, the date of its delivery, and, third, the extent of the delay in its delivery.

Number of carriage.	Date for delivery fixed by contract.	Date of delivery (actual).	Extent of delay.
16	August 4, 1898.	January 28, 1899.	177 days.
17	September 4, 1898.	March 6, 1899.	183 "
18	October 4, 1898.	April 13, 1899.	191 "
19	October 4, 1898.	March 18, 1899.	165 "
20	November 4, 1898.	April 29, 1899.	176 "
21	November 4, 1898.	May 27, 1899.	204 "
Total delay.			1,096 days.

"Of the above days of delay, which amounted in the aggregate to 1,096 days, the United States, through the Chief of its Bureau of Ordnance, decided that the Bethlehem Iron Company was responsible for delays to the extent of 100 days upon each of the six disappearing gun carriages, or 600 days in all, but did not charge said company with the balance of said days, or 496 days in all; which, at the stipulated sum of deduction at \$35 per day for each day of delay in the delivery of each gun carriage, amounted to the sum of \$21,000, which sum was deducted from the payments made the claimant company, and the balance, or the sum of \$195,000, was paid over to the claimant company, who receipted for said payment under protest.

"VIII. The court finds as the ultimate fact that the defendants' officers hindered and delayed the claimant in the performance of the work by changes in the plans of construction, as alleged in the petition, and in various other ways; but the court also finds that the claimant contributed to the delay

in the completion of the work by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings; and the court further finds that the transactions in the process of manufacture were so involved and intermerged that it is impossible, on the evidence produced, for the court to ascertain and determine whether the defendants should be charged with a greater proportion of the delays set forth in the foregoing table in Finding VII than those assumed by the defendants' officers, to wit, 496 days out of the total amount of delays, to wit, 1,096 days.

"It does not appear that the defendants were ready to use the gun carriages hereinbefore described at the time when they were finally delivered by the claimant; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth.

"Conclusion of law.

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of twenty-one thousand dollars (\$21,000)."

The Attorney General and Mr. Assistant Attorney General Van Orsdel, with whom Mr. Franklin W. Collins was on the brief, for appellant:

Time was of the essence of the contract. Time may be of the essence of a contract for the sale of property. *Taylor v. Longworth*, 14 Pet. 172; *Jones v. United States*, 96 U. S. 24, *Secombe v. Steel*, 20 How. 94-104; *Brown v. Guaranty Trust Co.*, 128 U. S. 403. In this case it was an all-important consideration, was so represented in the advertisements and the instructions to bidders, and was so treated by the appellee in its proposals and in the contract itself.

The *per diem* deductions were not penalties, and though referred to as such in the contract neither the Government nor the court in its interpretation of the contract is to be concluded by the use of the technical term "penalty." *Davis and Davidson v. United States*, 17 C. Cl. 201; cited with approval in *Halladay v. United States*, 35 C. Cl. 453; also in *Edgar Thompson Works v. United States*, 34 C. Cl. 218.

Courts have frequently held the sum stipulated to be paid on breach of the agreement to be, from the nature of the case, a penalty, notwithstanding the strongest language showing the intention of the parties to be that it should be paid in full as liquidated damages. *Boys v. Ansell*, 5 Bing. (N. Car.) 391; *Davies v. Penton*, 6 B. & C. 216; *Horner v. Flintoff*, 9 M. & W. 678; *Reindel v. Shell*, 4 C. B. (N. S.) 97.

On the other hand, cases are numerous in which the parties have used the term "penalty" which seems on its face to import a forfeiture rather than a valuation of damage, yet the courts have held that the stipulated sum was, from the very nature of the case, to be considered as liquidated damages and recoverable in full. *Sainter v. Ferguson*, 7 C. B. 716; *Leighton v. Wales*, 3 M. & W. 545; *Sparrow v. Paris*, 7 H. & N. 594.

On the other hand, a contract for a "penalty" may appear from the context to be a contract for "liquidated damages," and may be so treated. Page on Contracts, 1905, § 1172; *Robinson v. Aid Society*, 68 N. J. L. 723; *Illinois Central Ry. v. Cabinet Co.*, 104 Tennessee, 568; *Clark v. Barnard*, 108 U. S. 436; *Jacqua v. Heddington*, 114 Indiana, 309.

Where the contract calls for a *per diem* deduction as the measure of injury, in the event of the occurrence of a specified contingency, and the sum agreed upon does not appear unreasonable upon the face of the contract, and the actual damages are impossible of ascertainment, and no fraud or duress has been practiced to induce either party to enter into the contract, and the sources of information are open alike to

both parties, the court should hold that the sum stipulated is the agreed measure of damages.

Mr. James H. Hayden for appellee:

The contract in suit is free from ambiguity and the parties are bound by it. Resort cannot be had to their transactions which occurred while the contract was *in fieri*, for the purpose of showing that they intended something different from the import of the language employed in the instrument. *Simpson v. United States*, 172 U. S. 372, 379; *Brawley v. United States*, 96 U. S. 168, 173; *Van Buren v. Digges*, 11 How. 461, 466; *Harvey v. United States*, 8 C. Cl. 501, 506, 508.

If they were relevant matter, the negotiations of the parties, which preceded the execution of the contract, would not sustain the contention of the United States, to the effect that the stipulation concerning penalty was intended to provide for a deduction, as liquidated damages, or something else.

A review of the preliminary correspondence which passed between the Chief of Ordnance and the Bethlehem Company shows that the parties understood what they were doing when they signed the contract, and that the penal clause providing in terms for the imposition of penalty in case of the contractor's default was framed by the Chief of Ordnance, exactly as he wished it to be framed. The contract was drawn by him, not by the claimant. The liability to be incurred by the contractor for delay in delivering the carriages was referred to by the Chief of Ordnance as *penalty* in letters which he directed to the claimant on April 9, 1898, and April 25, 1898, and was denominated *penalty* by the Bethlehem Company in its letters, written to the Chief of Ordnance on April 5, 1898, and April 20, 1898. There is nothing to indicate that the parties attempted to ascertain what loss the Government would suffer from delay, or that they fixed by agreement the measure of damages to be recovered in case of the company's default.

The contract is to be interpreted as one which provided for a forfeiture or penalty, in case of the contractor's default.

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Opinion of the Court.

The fact that the delay, caused by both parties, did not occasion actual damage and that a deduction made as liquidated damages, at the arbitrary rate of \$35 *per diem* on each carriage, would be extortionate and lead to an unjust result, furnish sufficient reasons to sustain the judgment.

Time was not of the essence of the contract (*Taylor v. Longworth*, 14 Pet. 172, 174; *Jones v. United States*, 96 U. S. 24; *Secombe v. Steele*, 20 How. 94, 104 distinguished), as in those cases it was made so by express stipulation or by implication from the nature of the property and the avowed objects of the seller and purchaser. Aside from naming a period within which the gun carriages should be delivered, the contract in suit contains nothing to indicate that time was of the essence. The penal clause itself shows that the parties contemplated the possibility of delays occasioned by acts of one or both of them. Neither can it be implied from the nature of the property that time was of the essence. The conduct of the parties and the situation of the United States shows that it was not. The progress of the work was hindered by changes ordered by the Chief of Ordnance. The carriages were accepted without complaint long after the date fixed by contract for their delivery. The United States was not ready to make use of them when delivered. It could not have made use of them had they been delivered sooner. It would simply have been put to the expense of storing and caring for them.

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

It is objected on the part of the company that as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to, and it is insisted that under that rule the various letters passing between the

parties prior to the execution of the contract are not admissible.

The rule that prior negotiations are merged in the contract is general in its nature, and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of \$35 per day from the price to be paid for each day of delay in the delivery of each gun carriage, respectively, taken in connection with the subject-matter of the contract, leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. *Simpson v. United States*, 199 U. S. 397-399. In *Brawley v. United States*, 96 U. S. 168-173, the court says: "Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms."

It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that in cases of doubt as to the meaning of language actually used prior negotiations may sometimes be referred to.

There has in almost innumerable instances been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its non-fulfillment, whether the provision therein made was one for liquidated

damages or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty. This contract might be considered as being one of that class where a doubt might be claimed, if nothing but the contract were examined. The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 669, where a large number of authorities upon this subject are referred to. The principle decided in that case is much like the contention of the Government herein. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out. See also *Clement v. Cash*, 21 N. Y. 253, 257; *Little v. Banks*, 85 N. Y. 258, 266.

The Government at the time of the execution of this contract (which was dated April 4, 1898) was making preparation for the expected war with Spain, which was imminent, and which was declared by Congress a few days thereafter. The Government was evidently desirous of obtaining the construction of these gun carriages as early as it was reasonably possible, and it was prepared to pay an increased price for speed. The acceptance of the proposal at the highest price for the delivery of the carriages in the shortest time is also evidence of the importance with which the Government officers regarded the element of speed. There can be no doubt as to its importance in their opinion, or that such opinion was

communicated to the company. In the light of this fact an examination of the language of the contract itself upon the question of deductions for delay in delivery renders its meaning quite plain. It is true that the word "penalty" is used in some portions of the contract, although in the clause providing for the \$35 per day deduction that word is not used, nor are the words "liquidated damages" to be found therein. The word "penalty" is used in the correspondence, even by the officers of the Government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages. It was used simply to provide that the amount named might be deducted if there were a delay in delivery. Either expression is not always conclusive as to the meaning of the parties. *Little v. Banks*, 85 N. Y., *supra*; *Ward v. Hudson River Building Co.*, 125 N. Y. 230. What was meant by the use of the language in question in this case is rendered, as we think, still more certain by the manner in which the \$35 per day was arrived at, as stated in the letters of the officers representing the Government, which were examined and criticised by the company before the signing of the contract. The correspondence shows that the sum was arrived at by figuring the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid, the department saying "that this average difference should be the prescribed penalty."

Having this question before them and the amount stated arrived at in the manner known to both parties, we think it appears from the contract and the correspondence that it was the intention of the parties that this amount should be regarded as liquidated damages, and not technically as a penalty. This view is also strengthened when we recognize the great difficulty of proving damage in a case like this, regard being had to all the circumstances heretofore referred to. It would have been very unusual to allow the company to obtain the

contract for the construction of these carriages, and yet to place it under no liability to fulfill it as to time of delivery, specially agreed upon, other than to pay only those actual damages (not exceeding \$35 per day) that might be proved were naturally and proximately caused by the failure to deliver. The provision under such circumstances would be of no real value. The circumstances were such that it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfill the contract. The fact that not very long after the contract had been signed and the war with Spain was near its end, the importance of time as an element largely disappeared, and that practically no damage accrued to the Government on account of the failure of the company to deliver, cannot affect the meaning of this clause as used in the contract nor render its language substantially worthless for any purpose of security for the proper performance of the contract as to time of delivery.

The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages, as to show that the parties must have intended a penalty and could not have meant liquidated damages. If the contract were construed as contended for by the company, it would receive (as events have turned out) the highest price for the longest time in which to deliver, which could not have been contemplated by either party. This would result from the finding that no damages in fact flowed from the failure to deliver on time.

The eighth finding of the Court of Claims is in effect that the failure to deliver was caused in part by both parties; that the total number of days failure was 1,096 days, of which 496 were caused by the defendant's officers, and it does not mean that the court regarded itself as bound by the decision of the Chief of Ordnance as to the number of days that the claimant or the Government delayed the delivery. It found the number of days as stated, and that the transactions were so involved that

whether the defendant should be charged with a greater proportion of the delays than set forth in the finding, the court could not decide on the evidence produced.

The judgment of the Court of Claims must be reversed and the cause remanded with directions to dismiss the petition.

Reversed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* SLAGHT.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 152. Argued January 11, 1907.—Decided March 11, 1907.

A judgment on demurrer is as conclusive as one rendered upon proof.

The question as to the effect of a judgment as *res judicata* when pleaded in bar of another action is its legal identity with the judgment sought in the second action, and, as a general rule, its extent as a bar is not only what was pleaded or litigated, but what could have been pleaded or litigated.

Where a plaintiff could have pleaded rights to property in addition to those pleaded, he and his grantees are bound by that election, and after an adverse judgment cannot again assert title to the same property against the same parties under a different source of title.

A state statute of limitations does not commence to run against a government patentee until after the patent has been issued to him.

THE facts are stated in the opinion.

Mr. Charles W. Bunn, with whom *Mr. James B. Kerr* was on the brief, for plaintiffs in error in this case and in No. 153 argued simultaneously herewith:¹

The Spokane company in 1886 filed proof of its incorporation as required by the act, and in 1886 and 1887 built its railway while the lands were public lands of the United States free from any claim of record. While the defendant in error had lived on the lands since 1883, he had never entered or attempted to enter them as a homestead, though they were surveyed and were subject to entry. *Hewitt v. Schultz*,

¹ See p. 134, *post*.

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Argument for Plaintiffs in Error.

180 U. S. 139. The Supreme Court of Washington held that the act of 1875 did not operate upon this land (it being subject to a possessory claim) until that claim was condemned or acquired; but plaintiff in error contends that the act attached as a grant *in presenti*, conveying a good title when the road was completed, in so far as the United States had a title to convey and subject to the possessory right. This is the necessary result of the decisions in *Noble v. Union River Logging Co.*, 147 U. S. 165, 172, and *Jamestown and Northern R. R. Co. v. Jones*, 177 U. S. 125. See *Washington and Idaho Railroad v. Osborn*, 160 U. S. 103, and *Spokane Falls and Northern Railway Co. v. Ziegler*, 167 U. S. 65.

Public lands subject to possessory claims are subject to the disposal of Congress. *Northern Pacific Railroad Co. v. Colburn*, 164 U. S. 383, and cases cited. *Simmons v. Ogle*, 105 U. S. 271; *Water and Mining Co. v. Bugbey*, 96 U. S. 165; *Lansdale v. Daniels*, 100 U. S. 113.

The issuing of a patent to Slaght without reservation or exception of the right of way does not operate to free the land from that right.

One occupying public land may protect his *possessory right* before patent. He would be protected by injunction or by any other proper remedy against a railway claiming under the act of 1875. *Washington & Idaho R. R. Co. v. Osborn*, 160 U. S. 103; *Spokane Falls & Northern Ry. Co. v. Ziegler*, 167 U. S. 65; *Brown v. Hartshorn*, 12 Oklahoma, 121; *Woodruff v. Wallace*, 3 Oklahoma, 355, and cases cited; *French v. Cresswell*, 13 Oregon, 418; *Burlington &c. R. R. Co. v. Johnson*, 38 Kansas, 142; *Wendel v. Spokane County*, 27 Washington, 121. See also *Pierce v. Frace*, 2 Washington, 81.

Under *Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 410, the former litigation terminating in *Powers v. Slaght* is not *res adjudicata*. See also *Gilman v. Rives*, 10 Pet. 298; Freeman on Judgments (4th ed.), sec. 267; Van Fleet, Former Adjudication, § 306, *et seq.*

Where the judgment in the former action is upon demurrer

to a complaint, the estoppel extends only to the very point raised in the pleading and does not bar another action based upon other facts. The judgment in the other action was upon demurrer to the complaint and its effect was only to decide against the title specially set forth in that pleading. In this action the right asserted is a perpetual easement or way by virtue of the act of 1875 through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved.

Mr. U. L. Ettinger, Mr. Thomas Neill and Mr. W. E. McCroskey for defendant in error in No. 152, submitted:

The act of March 3, 1875 does not grant to a railroad company a right of way over lands occupied by a settler, without condemnation proceedings. *Railroad Co. v. Osborn*, 160 U. S. 103; *Railroad Co. v. Ziegler*, 167 U. S. 69.

The act was in the nature of an offer to any railroad company, to take effect when accepted. *Railroad Co. v. Sture*, 32 Minnesota, 95; *Denver & R. G. Ry. v. Wilson*, 62 Pac. Rep. 843.

The title under a patent relates back to the date of settlement. Sec. 4, Act of 1880, Supp. Rev. Stat. U. S. 282; *Madrox v. Burham*, 156 U. S. 544; *Nelson v. N. P. R. Co.*, 188 U. S. 108.

As against a subsequent claimant on public lands, the first in time is the first in right. *Shepley v. Cowan*, 91 U. S. 330; *Ard v. Brandon*, 156 U. S. 537.

A settler on public lands, before he has made a filing thereon, is protected by the act of Congress of 1880. *Nelson v. N. P. R. Co.*, 188 U. S. 108.

The court will take judicial notice of the rules and orders of the Land Department. *Caha v. United States*, 152 U. S. 211; *Knight v. United States Land Assn.*, 142 U. S. 161.

The order of withdrawal of this land, the instructions to

local land officers not to accept filings thereon and the order restoring the land to settlement are found in the land decisions.

2 Land Dec. 517; 6 Land Dec. 85 and 131.

The judgment in a former action in which the title to this land was determined is *res adjudicata* of this case. 24 Ency. of Law (2d ed.), 781 and cases cited; *New Orleans v. Citizens Bank*, 167 U. S. 396; *State Exp. v. Tacoma*, 13 Washington, 141; *Insensle v. Auttin*, 15 Washington, 352.

A judgment on a demurrer to the merits is as much an adjudication as if rendered after trial of facts. *Ally v. Nott*, 111 U. S. 472; *Gould v. Railroad Co.*, 91 U. S. 526; *Van Fleet*, Former Adj. § 306; 24 Ency. of Law (2d ed.), 798.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of ejectment brought by defendant in error against plaintiffs in error in the Superior Court in and for the county of Whitman, State of Washington, for land situate in the town of Palouse.

The trial court adjudged defendant in error the owner in fee simple of the land sued for, and that the plaintiffs in error were in the possession and occupation of the portions thereof described in their answers against the will and consent of the plaintiff (defendant in error), and were occupying and in possession thereof without right, except that the Northern Pacific Railway Company, as a public carrier, had a right to hold the possession of a strip of land twenty-five feet wide, "being twelve and one-half feet on each side of the center line between the rails of its main track over and across said land, and also a tract 100 feet square." This tract was described. Defendant in error was adjudged entitled to recover "all the rest of the land described in the amended complaint." And that a writ issue to put him in possession thereof, but not until ninety days from the date of the judgment, and if an appeal should be taken and proceedings stayed then not until ninety days from the time the remittitur from the Su-

preme Court affirming the judgment should be filed; and if, in the meantime, the railway company should commence proceedings in the proper court to condemn the land claimed by it and described in its answer, for railroad purposes, then said writ should not be issued as to such land it might seek to condemn, unless the company should afterwards dismiss such proceedings or fail to prosecute the same to final judgment and pay the award that might be made therein. The Supreme Court affirmed the judgment. 39 Washington, 576.

The facts, as far as necessary to be stated, are that after proceedings in the land office, to which the railway company was a party, a homestead patent was issued to defendant in error April 20, 1897, to lots 10, 11, 14 and 15 of section 1, township 16 N., range 45 E., Willamette meridian. Defendant in error established his residence upon the land in 1883.

In 1886 and the first half of 1887, the Spokane and Palouse Railway Company constructed and completed, at great expense, a railroad over lots 10 and 11, conforming to the survey previously made and staked out, and from and after its completion it was operated daily and continuously in the carrying of freight, passengers and mail. The right of way claimed was one hundred feet wide on either side of the main line of railroad. It would be possible for plaintiff in error, who is the successor of the Spokane company, to carry freight, passengers and mail over a right of way not exceeding twenty-five feet in width, and a space of one hundred feet square would permit of the erection of a depot at the town of Palouse. But great inconvenience would result to the citizens of that town and vicinity and the railway company. For the convenient, prompt and expeditious handling of freight and the erection of elevators for storing grain and wheat a right of way of two hundred feet is necessary. At the time the railroad was surveyed and constructed defendant in error resided upon said lands and knew of its construction and the expenditure of large sums of money therefor. About the

time of the survey he published a notice in the Palouse News, a newspaper published in the vicinity of the land, forbidding all persons from trespassing thereon. This is the only objection he made. In the month of August, 1887, the Northern Pacific Railroad Company, claiming to be the owner of lots 10 and 11, conveyed the same to William S. Powers, and he, on the fourteenth of September, of the same year, conveyed to the Spokane and Palouse Railway Company a right of way two hundred feet wide over lots 10 and 11, being the same then claimed by that company and now claimed by plaintiff in error, the Northern Pacific Railway Company. On the twelfth of May, 1897, the Spokane and Palouse Railway Company, Powers and others, as successors in interest of Powers under the above deed of conveyance from the Northern Pacific Railroad Company, brought a suit against the defendant in error, which will hereafter be referred to and described. The complaint was amended. The date of its filing as amended does not appear. It was sworn to February 19, 1898. A demurrer to the amended complaint was sustained and, the plaintiffs declining to plead further, a judgment was entered June 24, 1898, dismissing the suit. The judgment was affirmed successively by the Supreme Court of the State and by this court. No suit of any kind was commenced by defendant in error to enjoin the construction of or the maintenance of said railroad over said right of way, except the suit at bar, which was brought shortly after the decision of this court above mentioned. The summons was served on the Northern Pacific Railway Company on the ninth of October, 1901, and the complaint was filed on the fourth of June, 1902.

The Spokane and Palouse Railway Company conveyed the right of way in controversy and all of its property on the twenty-first of February, 1899, to the Northern Pacific Railway Company, which has ever since maintained and operated said road from Spokane, Washington, to Lewiston, Idaho, and intervening points.

The Northern Pacific Railway Company (we shall follow counsel's example and treat the Northern Pacific Railway Company as the sole plaintiff in error, the individuals named being its lessees) assigns as error in its brief the ruling of the Supreme Court of the State, that the company "had no right of way under the act of Congress of March 3, 1875," 18 Stat. 482, and the ruling, "that the statute of limitations of Washington could not, because the laws of the United States forbade, commence to run until patent issued." The limitation of the statute is ten years.

The defendant in error opposes as a bar to these defenses the judgment in his favor in the suit brought by the Spokane and Palouse Railway Company and William S. Powers and others, which judgment was affirmed by this court. 180 U. S. 173. Plaintiff in error is the successor in interest of the Spokane and Palouse Railway Company, and is estopped by the judgment if that company would be.

The object of the suit in which the judgment was rendered, as appears from the findings of fact of the trial court, was to have Slaght, defendant in error, "declared a trustee, and as holding the land in trust" for the plaintiffs in the suit, and to require a conveyance from him to them, and to enjoin him from bringing any action to oust them. The amended complaint, which is made part of the findings, averred that the patent to Slaght was "issued under a misconstruction and misinterpretation of the law," and that at the date of the issuance of said patent the land was not, nor was it at the time he applied to enter the same, public land, subject to settlement or entry under the land laws of the United States, other than the act of Congress approved July 2, 1864, granting land to the Northern Pacific Railroad Company. The facts and circumstances from which these conclusions were deduced and justified were set forth with great particularity. It was averred that the Spokane and Palouse Railway Company and other plaintiffs asserted and claimed title to certain portions of the land under and by virtue of certain instruments

duly made and delivered by Powers and his grantees. And it was also averred that the questions involved were of common and general interest to many persons whom it was impracticable to make parties, and that such persons and the plaintiffs were the owners in fee simple and had an indefeasible title, and were in possession of lots 10, 11, 14 and 15 of section 1, township 16 N., range 45 E., Willamette meridian, and that Slaght claimed an interest or estate therein adverse to the plaintiffs, which claim was without any right whatever and that he had no estate, right, title or interest whatever in the land or any part thereof. And it was averred that he threatened to commence suits in ejectment, and, without suit, forcibly to dispossess and eject plaintiffs from said premises or a portion thereof unless enjoined. An injunction was prayed restraining him from selling the land and doing the acts described; that he be required to set forth the nature of his claim, and that his claim be determined; that he be adjudged to have no title or interest whatever to the land or any part thereof, and be enjoined from ever asserting any; "that the title of plaintiffs be decreed good, valid, indefeasible fee simple, and free from all claims of said defendant;" that the patent be declared to have issued under a misconstruction of law, that he be held to be a trustee for the plaintiff, William L. Powers, and his grantees, both direct and through mesne conveyance, and that Slaght be required to convey the land to Powers and his grantees. Slaght demurred to the complaint and the demurrer was sustained. The plaintiffs electing to stand on the demurrer, judgment was entered dismissing the suit. This judgment was affirmed by the Supreme Court of the State and by this court, as we have seen.

The complaint in the suit did not show what land or interest Powers deeded to the Spokane and Palouse Railway Company, but it appears from the findings that the Northern Pacific Railroad Company conveyed lots 10 and 11 to Powers in August, 1887, and in September, 1887, Powers conveyed to the Spokane and Palouse Railway Company the tract of

land then used as its right of way, and that it is the same tract which was occupied by the plaintiff in error as its right of way. The basis of the title alleged in the suit was the grant to the Northern Pacific Railroad Company by act of Congress of July 2, 1864. Rights under the act of Congress of March 3, 1873, or under the statute of limitations of the State, were not set up. The Spokane and Palouse Railway Company, however, alleged that it and the other plaintiffs in the suit had a title in fee simple, and prayed in the most comprehensive and detailed way to have it quieted against the claims of the defendant in error, which, it was alleged, were threatened to be asserted by suits and by force without suit. The question now to be decided is, is the decree in the suit *res adjudicata*? Against this effect of the decree the railway company urges that it was rendered on demurrer and "the estoppel extends only to the very point raised in the pleading, and does not bar another action based upon other facts." The effect of the decree, it is insisted, was only to decide against the title specially set forth in the pleading. And further, "in this action [that at bar] the right asserted is a perpetual easement or way by virtue of the act of 1875 through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved." To sustain these conclusions the following authorities are cited: *Wiggins Ferry Company v. Ohio & Mississippi Company*, 142 U. S. 396, '10; *Gilman v. Reives*, 10 Pet. 297; *Freeman on Judgments* (4th ed.), § 267; *Van Fleet*, Form. Ad., § 306, and following.

The citations are not apposite to the present controversy. It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould v. Evansville & Crawfordsville R. R. Co.*, 91 U. S. 526; *Bissel v. Spring Valley Township*, 124 U. S. 228; *Freeman on Judgments*, section 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only

what was pleaded or litigated, but what could have been pleaded or litigated. There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand, *Cromwell v. County of Sac*, 94 U. S. 351; *Bissel v. Spring Valley Township*, 124 U. S. 225; *New Orleans v. Citizens Bank*, 167 U. S. 371; *Southern Pacific Railroad Company v. United States*, 168 U. S. 1; *Gunter v. Atlantic Coast Line*, 200 U. S. 273; *Deposit Bank v. Frankfort*, 191 U. S. 499, and a distinction between personal actions and real actions is useful to observe. Herman on Estoppel, § 92. It is there said: "Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated."

In *United States v. California & Oregon Land Company*, 192 U. S. 355, this principle was applied. In that case a decree rendered upon a bill in equity brought under an act of Congress to have patents for land declared void, as forfeited, and to establish the title of the United States to the land, was held to be a bar to a subsequent bill brought against the same defendants to recover the same land, on the ground that it was excepted from the original grant as an Indian reservation. And, speaking of the two suits, we said, by Mr. Justice Holmes: "The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer.

Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee." And further: "But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter v. Beale*, 1 Salk. 11; *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed., §§ 238, 241; and, *a fortiori*, he cannot divide the grounds of recovery."

This doctrine has illustrations in suits to quiet title. It was decided in *Lessees of Parrish v. Ferris et al.*, 2 Black, 606, that the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of the defendant. In *Indiana, Bloomington & Western Railway Co. v. Allen*, 113 Indiana, 581, it was held that the railway company could not assert against a judgment decreeing title in the plaintiff in such an action the right to construct and maintain a railway over it. And in *Davis v. Sennen*, 125 Indiana, 185, it was decided that every possible interest of a defendant is cut off. And necessarily every possible interest of the plaintiff is cut off if the judgment is in favor of the defendant. *Parrish v. Ferris, supra*.

The Spokane and Palouse Railway Company alleged a title in fee simple, and the truth of the allegation could be determined as well by demurrer as by proof, and the same legal consequences followed from it. *Clearwater v. Meredith*, 1 Wall. 25; *Goodrich v. The City*, 5 Wall. 566; *Aurora City v. West*, 7 Wall. 82; Black on Judgments, § 707; Freeman on Judgments, 267, and cases hereinbefore cited. The record shows that the demurrer was not upon merely formal or technical defects, but went to the merits. It was directed to the second amended complaint of the plaintiffs. They elected to stand on that complaint, and declined to plead

further. They asserted its sufficiency by an appeal to the Supreme Court of the State and again to this court, and met defeat in both, as we have seen. Whether the Spokane and Palouse Railway Company could have pleaded, in addition to the right it alleged under the deed from Powers, the rights that plaintiff in error contends it acquired under the act of Congress of 1873, or the statute of limitations of the State, we need not determine. See § 97, 120 *et seq.*; Story's Equity Pleading; *Smith et al. v. Swormstedt et al.*, 16 How. 288. It elected between those rights and rights under the Powers deed, and we think its grantee is now bound by that election. The interest that the Spokane and Palouse Railway Company derived from Powers was of the right of way, which is now claimed by plaintiff in error. In other words, plaintiff in error, as successor of the Spokane and Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of *res adjudicata* and the cases enforcing and illustrating that principle declare otherwise.

In the discussion thus far we have assumed, as contended by plaintiff in error, that the statute of limitations could commence to run before the patent issued, and we have also assumed that rights under it were complete in the Spokane and Palouse Railway Company at the time of its suit against Slaght. Lest the latter assumption be questioned it may be well to determine whether the other assumption be true. The Supreme Court decided against it on the authority of *Gibson v. Chouteau*, 13 Wall. 92, and *Redfield v. Parks*, 132 U. S. 239, that is, decided that the statute did not commence to run until the patent issued to Slaght, and that, therefore, this action was not barred. The ruling, we think, was right. The act of Congress of 1875 and the statute of limitations are

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independent defenses, and, being so, the latter comes within the rule announced. Of course, if the act of Congress of 1875 was a grant of the right of way *in presenti*, "conveying a good title when the road was completed," as contended, it needs no aid from the statute of limitations and would be an effectual defense if it were not barred by the judgment which we have considered.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* SLAGHT.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 153. Submitted January 11, 1907.—Decided March 11, 1907.

Decided on authority of *Northern Pacific Railway Co. v. Slaght*, *ante*, p. 122.

Mr. Charles W. Bunn, with whom *Mr. James B. Kerr* was on the brief, for plaintiff in error.¹

No counsel appeared for defendant in error.¹

MR. JUSTICE MCKENNA delivered the opinion of the court.

THIS case was submitted with No. 152, the questions being identical. On the authority of that case the

Judgment is affirmed.

MR. JUSTICE BREWER took no part in the decision of these cases.

¹ See abstracts of arguments in *Northern Pacific Railway Company v. Slaght*, *ante*, p. 122, argued simultaneously herewith.

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Argument for Plaintiffs in Error.

MARTIN v. DISTRICT OF COLUMBIA.

BRANDENBURG v. SAME.

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

Nos. 190, 191. Argued January 29, 1907.—Decided March 11, 1907.

Constitutional rights like others are matters of degree and a street opening statute which has stood for a long time will not be declared unconstitutional as taking property without compensation because in a particular instance the amount assessed under the strict letter of the statute exceeded the value of the property, but the statute should be so interpreted, as is possible in this case, so that the apportionment of damages be limited to the benefit.

THE facts are stated in the opinion.

Mr. E. C. Brandenburg and *Mr. George E. Sullivan*, with whom *Mr. Clarence A. Brandenburg* was on the brief, for plaintiffs in error:

Giving the most liberal construction possible to the law and the acts thereunder it is certainly true that to sustain an assessment on the theory of benefits, there must be an actual finding by the jury that the property assessed is in fact benefited to the extent of the assessment.

In this case the jury found the damages, but made no finding as to benefits. They merely returned that they apportioned the amount of the damages without any suggestion, in fact not a single word, about *benefits*. As they did not make any finding of benefits, and would not, the proceedings are incurably defective.

In this case the assessment for alleged benefits was twice the amount per foot, of the value of the land, and twice the value of the entire land assessed. The jury finds the value of

the land taken, which was part of the lots taken, the frontage in fact, to be worth 25 cents per foot, and allowed for the portion taken at that rate. The lots remaining were 40 feet front by a depth of 60 feet, and contained 2,400 square feet of ground. The value, on the basis of the finding of the jury itself, was \$600. The tax against the property was \$1,200, or exactly twice the value of the land. The assessment per foot as made by the jury was 50 cents, or twice the amount allowed as the value per foot for the property taken. Is that reasonable or can it possibly be valid? As said by the Supreme Court, if the assessment exceeds the value of the land assessed, a different question arises, which means, if it means anything, that such an assessment is invalid.

But the petition goes farther, and in good faith expressly avers, and it is not denied, that with the alleged improvements added, that is to say, after the opening of the street, the lots plus the alleged benefits from the opening of the street with local improvements are worth less than the amount assessed as a tax against the property.

Mr. Francis H. Stephens, with whom *Mr. E. H. Thomas* was on the brief, for defendant in error:

A determination by Congress or by the legislature of a State of the area to be benefited by certain improvements, and the assessment to be laid upon that area, is properly within the function of Congress or the legislature, and cannot be disputed at this late day. Land may be taken for a highway and the cost of the improvement assessed against the property benefited. *Shoemaker v. United States*, 147 U. S. 283; *Bauman v. Ross*, 167 U. S. 548; *Williams v. Eggleston*, 170 U. S. 304, 311.

The only case cited by plaintiff in error is *Norwood v. Baker*, 172 U. S. 269. That case stands alone upon the peculiar facts disclosed therein, and is not to be broadly cited as laying down any new doctrine for the application of special assessment principles. The Court of Appeals in attempting to fol-

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low that decision, declared a great part of the act for the street extensions to be unconstitutional, and that decision was reversed here, thus showing that this court did not intend to enunciate any new principle in the law relating to special assessments. *Wight v. Davidson*, 181 U. S. 900.

Plaintiff in error claims that the assessment exceeded the value of the land, and cites the assessment records to prove this. It is well known that the assessments are far below the real value of the property, below that for what it is usually sold even at auction sales. Moreover, the plaintiff leaves out of the argument the difference between these lots, as fronting on an alley and not available for building purposes, and their value as fronting on a street and capable of being used for the erection of dwellings. Congress has expressly provided in some of the acts passed for condemnation purposes that the jury shall assess the damages for the land taken as of the present value of the land taken, as in the present law, § 4 (Code, § 1608-h), and assess the benefits as of the value of the land as enhanced by the opening of the street or alley. It is obvious, in the present case, that the opening of the street more than doubled the value of the property. The figures cited by the plaintiff prove nothing whatever.

Plaintiff in error attempts to demonstrate, by the assessed values, not by the market values, what the benefits actually were. The jury, however, were the judges of what benefits were received, and they were bound neither by the assessments of record nor by the estimates of the plaintiff. The apportionment was a matter left to their discretion and it is not to be set aside because the plaintiff thinks he has been harshly treated. It is a question of judgment and discretion and not one of mathematics.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are writs of certiorari to test the validity of assessments for the widening of an alley in Washington under the

act of Congress of July 22, 1892, c. 230, 27 Stat. 255, as amended by the act of August 24, 1894, c. 328, 28 Stat. 501. The writs were quashed by the Supreme Court of the District and the judgments affirmed by the Court of Appeals. 26 App. D. C. 140, 146. The principal case is that of Brandenburg, the owner of land taken for the widening. That of Martin raises questions as to the rights of a mortgagee of the same land. The main issue is upon the constitutionality of the act. The statute authorizes the Commissioners of the District to condemn, open, widen, etc., alleys upon the presentation to them of a plat of the same accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, etc., or in certain other cases. After prescribed preliminaries the Commissioners are to apply to the marshal of the District to empanel a jury of twelve disinterested citizens, and the marshal is to empanel them, first giving ten days' notice to each proprietor of land in the square. The jury is to appraise the damages to real estate and also is to "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid," including fixed pay for the marshal and jury, "according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending or straightening such alley," with certain deductions. The amendment authorizes the Commissioners to open minor streets, to run through a square, etc., whenever in the judgment of said Commissioners the public interests require it.

The law is not a legislative adjudication concerning a particular place and a particular plan like the one before the court in *Wight v. Davidson*, 181 U. S. 371. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection

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to the act would not be disposed of by the decision in *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.

But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 344, to reconcile the decision in that case with *Norwood v. Baker*, 172 U. S. 269.

And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in *Wight v. Davidson*, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation (181 U. S. 378, 379), of *Bauman v. Ross*, 167 U. S. 548, when the

same principle was sustained in a general law. 167 U. S. 589, 590. It is true again that in *Bauman v. Ross* the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that on the practical distinction to which we have adverted in connection with *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

In view of the decisions to which we have referred it would be unfortunate if the present act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it "according as each lot or part of lot of land in such square may be benefited by the opening, etc." Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears.

It is clear, however, from the petitions and the returns that the jury did not administer the statute in the way in which we have determined that it should be read. About one-fifth of each lot was taken, and was valued at \$92 and \$75 respectively. That would give a value of \$368 and \$300, at the most, to the remaining portions, before the improvement was made. These lots were assessed \$650 less said \$92, or \$558, and \$550 less said \$75, or \$475. It is most improbable that the widening of an alley could have nearly trebled the value of each lot. We think it apparent, as was assumed by the Court of Appeals,

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that the jury understood their duty to be to divide the whole cost among the landowners, whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. There is nothing in the record sufficient to show that the jury took a different view, or that they limited the assessment to the benefit actually conferred on these lots. For this reason the assessment must be quashed, and it will not be necessary to consider the special objections of the mortgagee.

Judgments reversed.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in the judgment.

WETMORE v. KARRICK.

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

No. 144. Argued January 9, 1907.—Decided March 11, 1907.

Where an action is brought to recover upon a judgment the jurisdiction of the court rendering the judgment is open to inquiry; and the Constitutional requirement as to full faith and credit in each State to be given to the public acts, records and judicial proceedings of every other State does not require the enforcement of a judgment rendered without jurisdiction or otherwise wanting in due process of law.

A judgment rendered *in personam* against a defendant without jurisdiction of his person is not only erroneous but void, and is not required to be enforced in other States under the full faith and credit clause of the Constitution or the act of Congress passed in aid thereof, § 905, Rev. Stat. A court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, cannot, after the term or at a subsequent term, without notice to the defendant, set that judgment aside and render a new judgment against the defendant; a judgment so entered is void and not required to be enforced in

another State under the full faith and credit clause of the Constitution.

In Massachusetts the rule day when a judgment becomes final is equivalent to the end of a term, and in that State the rule is that judgment is final unless set aside within the exceptions for mistake.

Jurisdiction once lost can only be regained by some proper notice to the other party and where, as in this case, had notice been given of the motion to render a new judgment, defendant could have pleaded a discharge in bankruptcy, substantial rights are impaired, and the judgment so rendered without notice is void.

Although a mistake in regard to a judgment may be a clerical one it cannot be corrected after the term without notice, especially where the condition of the parties has changed in view of new rights acquired which render it prejudicial to enter a new judgment.

Whatever remedies may exist as to the judgment in the State where rendered, want of jurisdiction may be pleaded by the judgment debtor wherever the judgment is set up against him in another forum.

THE facts are stated in the opinion.

Mr. William L. Ford for plaintiff in error:

The judgment of dismissal of June 12, 1899, having been entered improvidently through a mistake or oversight as to an entry of record, the Massachusetts court did not thereby lose jurisdiction, and had the power to vacate the dismissal and restore the case to the docket after the term. *The Palmyra*, 12 Wheat. 1; *Alviso v. United States*, 6 Wall. 457. *Rice v. Railroad Co.*, 21 How. 82, distinguished.

In almost every case in which the rule is laid down by this court that judgments cannot be vacated after the term, judgments of dismissal by mistake are excepted. See *Phillips v. Negley*, 117 U. S. 665, and cases therein cited.

Other United States courts recognize the exception contended for by the plaintiff in error. See city of *Manning v. German Ins. Co.*, 107 Fed. Rep. 52.

If the Massachusetts court did not lose jurisdiction by the dismissal by mistake and the lapse of the term, as this court has often held, then of course said court had jurisdiction, and even if under the practice of the Massachusetts courts, which does not appear, and the presumption would be against it, it was requisite to notify the defendant of the motion for

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judgment on the verdict, the failure to give such notice would be a mere irregularity and not a jurisdictional defect.

The judgment of dismissal of June 12, 1899, was founded upon a mere clerical mistake of the clerk, or, at the most, upon a clerical mistake of the judge, and a judgment so entered can be vacated at any time. The power of the Massachusetts court is not limited merely to the correction of clerical errors pure and simple, but extends to the correction of judgments based thereon, even though the judgments were intended. *The Palmyra*, 12 Wheat. 1; *Alviso v. United States*, 6 Wall. 457; *Capen v. Stoughton*, 16 Gray, 364; *City of Manning v. German Ins. Co.*, 107 Fed. Rep. 52; *Phillips v. Negley*, 117 U. S. 665.

The judgment of dismissal of June 12, 1899, being irregular and entered contrary to the practice of the Massachusetts court, said court had the power to set aside said dismissal and reinstate the cause, notwithstanding the expiration of the term.

An irregular judgment is defined to be a judgment that was rendered contrary to the law or practice of the court. 1 Tidd's Pr. 512; *Dick v. McLaurin*, 63 N. Car. 185; see also *Union Bank of Georgetown v. Crittenden*, 2 Cr. C. C. R. 238; *Stacker v. Cooper Circuit Court*, 25 Missouri, 401; *Hunt v. Yeatman*, 3 Ohio, 16.

Defendant in error was not entitled to notice of the vacation of the dismissal and the reinstatement of the original suit to the docket. As the suit had been inadvertently dismissed through mistake and reinstated on the docket by said court for reasons apparent of record, no new thing was brought before the court; and even if notice was required, the absence of it affords no ground for assailing the judgment sued on herein in a collateral proceeding such as the present one. *Odell v. Reynolds*, 70 Fed. Rep. 656.

Notice is only necessary when the nature of the error and the appropriate amendment depend on matters not apparent on the face of the record, but shown aliunde. *Emery v.*

Whitwell, 6 Michigan, 474; see also *Nave v. Todd*, 83 Missouri, 601; *Emery v. Berry*, 48 N. H. 473; *Balch v. Shaw*, 7 Cush. 282.

No notice at all is required where the reason for the correction appears in the record. 17 Am. & Eng. Ency. of Law, 2d ed., 823.

Mr. W. W. Millan and *Mr. J. J. Darlington* for defendant in error:

It is not contended that the jurisdiction of the Massachusetts court was affected by the bankruptcy proceedings in Colorado or that the defendant's discharge in bankruptcy, antedating the Massachusetts judgment, is a bar to an action upon the latter. Neither of these questions is here involved.

The duty of the clerk is to make his record correctly represent the proceedings in the case, and he did not fail so to do in this case. The judgment of dismissal was duly noted and it was stricken out, not on the ground of omission of proper entries, but on the ground of "action having been taken within one year but not discovered." The action taken within one year was action *by the court itself* and duly appearing upon its own minutes.

That the judgment of dismissal entered by the Massachusetts court was a *final* judgment is settled beyond question by the highest court of that State. *Pierce v. Lamper*, 141 Massachusetts, 20; *Wood v. Payea*, 138 Massachusetts, 61.

At common law no amendment of any kind could be made after the term for any purpose. The power to amend for "misprision of clerks" was conferred by Stats. 14 Edw. III, 9 Edw. V and 8 Henry VI. *Makepeace v. Lukens*, 27 Indiana, 435.

A clerical error, as its designation implies, is an "error of the clerk or a subordinate officer in transcribing or entering an official proceeding." *Marsh v. Nichols*, 128 U. S. 605; see also *Leonis v. Leffingwell*, 126 California, 372, and *Villers v. Parry et al.*, 1 Lord Raym. 182.

No final judgment or decree can be amended at a term

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subsequent to its rendition, except for mere clerical misprision or error, which means error of the clerk to make the record speak the truth, or to show what judgment the court actually rendered or intended to render. *Phillips v. Negley*, 117 U. S. 665; *Hume v. Bowie*, 148 U. S. 245; *Trust Co. v. Grant Locomotive Works*, 135 U. S. 224; *American Burial Co. v. Shaughnessy*, 59 Mississippi, 398; *James v. Kirby*, 85 Mo. App. 298; *Hickman v. Fort Scott*, 141 U. S. 418; *In re Wright*, 134 U. S. 143; *Grames v. Hawley*, 50 Fed. Rep. 319; *Jameson v. Hilton*, 85 Mo. App. 398; *Cameron v. McRoberts*, 3 Wheat. 591; *Gibson v. Wilson*, 18 Alabama, 63; *Printing Co. v. Green*, 52 Ohio St. 489; *Railroad Co. v. Holbrook*, 72 Illinois, 419; *United States v. Moss*, 6 How. 31; *Arrowwood v. Greenwood*, 5 Jones, Law, 414.

Even such errors cannot be corrected where, to do so, would be unjust either to the adverse party or to third persons, at least without notice to the parties in interest and opportunity to be heard. *Morgan v. Campbell*, 54 Ill. App. 242; *Swift v. Allen*, 55 Illinois, 303; *Bryant v. Vix*, 83 Illinois, 1; *Board of Commissioners v. Brown*, 14 Indiana, 191; *Jenkins v. Carroll*, 132 Indiana, 95; *Durre v. Brown*, 7 Indiana, 127; *Elsner v. Shirgley*, 80 Iowa, 30; *Montgomery v. Merrill*, 36 Michigan, 97; *Stringer v. Echols*, 46 Alabama, 61; *Harper v. Sugg*, 111 N. Car. 327; *Kenney v. Lyons*, 21 Iowa, 280; 14 Enc. Pl. & Pr. 27; *Hook v. Mercantile Tr. Co.*, 89 Fed. Rep. 410; *Stickney v. Davis*, 17 Pick. 169; *Moore v. Hinnant*, 90 N. Car. 163; *Coughran v. Gates*, 18 Illinois, 390, and *Parker v. Johnson*, 20 Mo. App. 516.

Under modern practice motion and notice take the place of the common law writ of error, *coram vobis*. *City of Manning v. German Ins. Co.*, 107 Fed. Rep. 52.

Any amendment of a different character, made without notice, is void, and may be attacked collaterally. *Elder v. Richmond Mining Co.*, 58 Fed. Rep. 536; *Blake v. McMurtry*, 25 Nebraska, 290; *Insurance Co. v. Duff*, 67 Iowa, 175; *Warren v. Farquarharson*, 4 Baxt. 484.

The action of the court in the *Palmyra* case, 12 Wheat. 1, was declared in the subsequent case of *Rice v. Railroad Co.*, 21 How. 82, to be justified only because the *Palmyra* case was an admiralty cause, and the court refused to recognize it as an authority in a common law cause. *Alviso v. United States*, 6 Wall. 457, does not overrule *Rice v. Railroad Co.*

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Court of Appeals of the District of Columbia to reverse a judgment of that court affirming a judgment of the Supreme Court of the District of Columbia in favor of the defendant in error, overruling a demurrer to the defendant's second plea.

The action was brought on the law side in the Supreme Court of the District of Columbia on December 1, 1903, to recover judgment against Karrick, defendant in error, upon a judgment rendered in the Superior Court for the county of Suffolk, Commonwealth of Massachusetts, on November 20, 1900. Copy of the record in the Massachusetts court is made part of the record in the Supreme Court of the District of Columbia.

This record shows that suit was brought upon certain contracts between the defendant in error and one Charles H. Wetmore, since deceased, plaintiff's intestate. The defendant was personally served with process, appeared and pleaded to the declaration. Trial was had to a jury, and resulted in a verdict against the defendant. Upon his motion the verdict was set aside. Thereupon the plaintiff filed an amendment to his declaration and another trial to a jury was had. On February 21, 1894, by another verdict, special and general, a sum of \$9,169.39 was found in favor of the plaintiff. Motion for a new trial was made by the defendant and overruled March 3, 1894, and exceptions filed. On June 8, 1897, more than three years after the proceedings just recited, the action was dismissed under the general order of the court

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upon the calling of the docket. Two days thereafter, June 10, 1897, the order of dismissal was stricken out and the case restored to the docket.

On June 23, 1897, attorney for the defendant entered an order withdrawing his appearance. On June 13, 1898, an attorney, whose name does not appear elsewhere in the record, withdrew his appearance. The record then shows:

"Thence the case was continued to the July sitting, 1898, when said exceptions having been presented to the court were disallowed as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the questions of law raised by the defendant's exceptions."

Then follows:

"Thence the case was continued from sitting to sitting into the April sitting, 1899, when on the twelfth day of June, 1899, at a calling of the docket under the general order of court, said action was dismissed."

And then the entry:

"And now at this present October sitting, 1900, to wit, on the eighteenth day of said October, 1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered."

On November 17, 1900, there was a motion by plaintiff for judgment on the verdict of the jury, and on November 20, 1900, judgment was entered accordingly against the defendant for the sum of \$12,881.46 and costs.

Two pleas were filed to the declaration in the Supreme Court of the District of Columbia, first, the general issue *nul tiel record*; second, a special plea, wherein the defendant set out that on June 12, 1899, the cause against him in the Massachusetts court was dismissed; that under the rules of court that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms or sittings of the court, and until October 18, 1900; that, in

the meantime, on April 29, 1899, defendant filed his petition in bankruptcy in the District Court of the United States for the District of Colorado, enumerating in his schedule the debt due to said Wetmore, and was, by the said District Court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, including the debt sued on; that subsequently to the discharge, as aforesaid, he made inquiry of the clerk of the court in Massachusetts as to the suit, and was informed that said suit was no longer pending; that relying upon this statement he took no steps to suggest in that court his discharge in bankruptcy; that the action of the court in Massachusetts, restoring the case to the docket, was without summons, citation or notice of any kind to him, or to any one for him, and without his knowledge; that the court had no jurisdiction to render the judgment sued upon.

Issue was joined upon the first plea and to the second plea a demurrer was filed, which was sustained by the Supreme Court of the District of Columbia. From the order sustaining the demurrer special appeal was taken on January 6, 1905, to the Court of Appeals for the District of Columbia, and on April 17, 1905, the judgment below was reversed and the cause remanded. 25 App. D. C. 415.

On May 16, 1905, the Supreme Court of the District of Columbia entered an order overruling plaintiff's demurrer to defendant's second plea and, the plaintiff electing to stand on his demurrer, judgment was entered for the defendant, and the plaintiff appealed to the Court of Appeals of the District of Columbia.

On October 10, 1905, the case was submitted; and, on the twelfth day of the same month, judgment below was affirmed without further opinion.

Before taking up the case in detail it must be regarded as settled by previous decisions of this court that where an action is brought to recover upon a judgment the jurisdiction of the court rendering the judgment is open to inquiry. And the constitutional requirement as to full faith and credit in

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each State to the public acts, records and judicial proceedings of every other State does not require them to be enforced if they are rendered without jurisdiction, or otherwise wanting in due process of law. This principle was so lately asserted by a decision in this court as to render unnecessary more than a reference to the consideration of the subject in *Old Wayne Mutual Life Association of Indianapolis, Indiana, v. McDonough et al.*, decided on January 7, 1907, of the present term. 204 U. S. 8.

It is also an elementary doctrine of this court that a judgment rendered *in personam* against a defendant without jurisdiction of his person is not only erroneous but void. *Pennoyer v. Neff*, 95 U. S. 714. And the same case holds that such judgment is not required to be enforced in another State either by the due faith and credit clause of the Constitution or the act of Congress (Rev. Stat. § 905) passed in aid thereof.

It is apparent from the statement of facts preceding this discussion that the precise question to be determined is, whether a court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, may at any time after the term, and at a subsequent term, no matter how remote from the time of rendering judgment, without motion or proceeding to vacate the judgment, and without notice, set aside the judgment so rendered and render a new judgment against the defendant for the recovery of a sum of money against him.

The general principle is that judgments cannot be disturbed after the term at which they are rendered, and can only be corrected, if at all, by writ of error or appeal, or relieved against in equity in certain cases. There are, it is true, certain exceptions to the rule within which, it is the contention of the plaintiff in error, the present action is brought.

No contention is made in the brief or oral argument of counsel for plaintiff in error that the question for decision in this case is changed or modified because of the fact that terms

of court are abolished by statute in Massachusetts. The statutes of that Commonwealth, Rev. Laws, v. 2, 1382, § 24, provide for "sittings" of the Superior Court at Boston, in the county of Suffolk, for civil business, on the first Tuesdays of January, April, July and October. The exemplified copy of the record in this case shows that the case was dismissed under the general order of the court at the April sitting, 1899, on the twelfth day of June, 1899. At the October sitting, 1900, to wit, on October 18, 1900, the dismissal was stricken off for the reason stated, and on November 12, 1900, the new judgment was rendered.

In *Dalton-Ingersoll Company v. Andrew J. Fiske*, 175 Massachusetts, 15, the Supreme Judicial Court recited the previous cases, holding that terms no longer exist in the Superior Court, and said (p. 22): "When we had terms the practice was to enter judgment, either on the same day in the term upon motion, or, of course, on the last day. Howe, Pract. 267. Since terms have been abolished the practice is regulated by statutes and the rules of court." In the second plea it is averred, and admitted by the demurrer, that under the rules of court the dismissal became final on the first Monday of July, 1899; that is, the first Monday of the following month.

We think this rule day equivalent to the end of a term. It is the time at which, by the rules of court adopted under statutory power, the judgment became final, unless set aside for mistake within the principles to be hereinafter discussed.

Pierce v. Lamper, 141 Massachusetts, 20, was a case where a suit had been dismissed upon the call of the docket under the same rule under which the case against Karrick, defendant in error, was dismissed for want of action within the year, which order should have been followed by an entry of judgment of dismissal, in place of which the clerk simply made a docket entry "dismissed on call." The court held, since it was the duty of the clerk to have entered the dismissal, it was to be deemed in law as actually entered and a final disposition of the case; that at a subsequent term the court had

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no power to vacate it, except by writ of review filed within one year under the statute.

The doctrine that a judgment is final at the term unless set aside within the exceptions for mistake seems fully recognized by other decisions in Massachusetts. *Radclyffe v. Barton*, 154 Massachusetts, 157, where previous cases are cited in the opinion.

At common law a writ of error *coram vobis* brought before the court certain mistakes of fact not put in issue or passed upon, such as the death of a party, coverture, infancy, error in process or mistake of the clerk. This writ is no longer in use, but its objects are attained by motion. *Pickett v. Lergerwood*, 7 Pet. 142, 147.

As in the common law writ of *coram vobis*, so in the proceeding by motion, after a party has been dismissed from the action by judgment he is brought again into the court by notice of the new proceeding. *Ferris v. Douglass*, 20 Wend. 626.

A few of the cases from this court may be noticed which support the general proposition that, at the end of the term at which judgment was rendered, the court loses jurisdiction of the cause. The principle was briefly stated by Mr. Chief Justice Waite, speaking for the court, in *Brooks v. Railroad Co.*, 102 U. S. 107:

"At the end of the term the parties are discharged from further attendance on all cases decided and we have no power to bring them back. After that, we can do no more than correct any clerical errors that may be found in the record of what we have done."

The question underwent a full discussion. Mr. Justice Miller, delivering the opinion of the court in *Bronson v. Schulten*, 104 U. S. 410, on page 415, said:

"But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct

them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks v. Railroad Company*, 102 U. S. 107; *Public Schools v. Walker*, 9 Wall. 603; *Brown v. Aspden*, 14 How. 25; *Cameron v. McRoberts*, 3 Wheat. 591; *Sibbald v. United States*, 12 Pet. 488; *United States v. The Brig Glamorgan*, 2 Curt. C. C. 236; *Bradford v. Patterson*, 1 A. K. Marsh. (Ky.) 464; *Ballard v. Davis*, 3 J. J. Marsh. (Ky.) 656."

In discussing the exceptions to this rule for the correction of judgment by writ of error *coram vobis*, or motion now substituted for the old practice, the only one which has application here is error in the process through the default of the clerk.

We are unable to find in the present record any clerical mistake. The entry of action during the year upon the bill of exceptions appears to have been duly entered upon the minutes of the court; the clerk made no mistake about it. The court erroneously rendered a judgment, believing that no action had been taken, but this was not through mistake or oversight of the clerk within the meaning of the rule. The judgment intended to be entered by the court was, in fact, entered, through misapprehension it is true; but nothing was left out which the court intended to make a matter of record.

In *Hickman v. Fort Scott*, 141 U. S. 415-418, there was a petition to correct by new findings the special findings of fact upon which the court had rendered a judgment at a former term, which findings, it was averred, had been omitted, some unavoidably and others accidentally; but the application was overruled and error was prosecuted to this court, which,

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speaking through Mr. Justice Harlan, said: "The judgment was the one the court intended to enter, and the facts found were those only which the court intended to find. There is here no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of record. The case, therefore, does not come within the rule that a court, after the expiration of the term, may, by an order *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court. *In re Wight, Petitioner*, 134 U. S. 136, 144; *Fowler v. Equitable Trust Company* 141 U. S. 384; *Galloway v. McKeithen*, 5 Iredell (Law), 12; *Hyde v. Curling*, 10 Missouri, 227."

This case from 10 Missouri was quoted with approbation also in the case of *In re Wight, Petitioner*, 134 U. S. 136, 145, as follows: "A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*, but where the court has omitted to make an order which it might or ought to have made it cannot at a subsequent term be made *nunc pro tunc*."

In the case *In re Wight* this court approved an order of the Circuit Court of the United States putting in the record at a subsequent term an order which was made at a previous term of the court, remanding the case to the District Court. "A clerical error, as its designation imports, is an error of a clerk or subordinate officer in transcribing or entering an official proceeding ordered by another." *Marsh v. Nichols, Shepard & Co.*, 128 U. S. 605, 615.

Of another alleged exception to the general rule of finality of judgments, counsel for plaintiff in error says, after conceding the general rule that jurisdiction is lost after the lapse of the term at which judgment is rendered:

"But a well known exception to this general rule is that a judgment of dismissal based upon a mistake or inadvertence, such as appears in this record, can be set aside after the term, and that is the proposition with which this court is concerned in this case. The reason is that jurisdiction is not lost by a

dismissal by a mistake. This is one of the exceptions to the general rule that has been recognized in the decisions of this court for nearly a century."

To support this contention the case of *The Palmyra*, 12 Wheat. 1, is relied upon. In that case, which was one in admiralty, the court found there was no final decree in the court below, and, therefore, it was not appealable. The next term of the court a corrected transcript was adduced, showing there had been a final decree which the clerk, through mistake, had failed to include in the record, and the court permitted the filing of a new transcript. Mr. Justice Story, delivering the opinion of the court, said:

"The difference between a new appeal and a reinstatement of the old appeal after a dismissal, from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators. Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice and is according to the known practice of other judicial tribunals in like cases."

It is to be observed, while the learned justice, speaking for the court in that case, affirmed the "power of this court to reinstate any cause dismissed by mistake," the case had been dismissed at the first hearing, as Mr. Justice Story distinctly says, from a "misprision of the clerk," a recognized exception to the general doctrine of conclusiveness of the judgment after the term, and there is no indication that the correction made in that case was made without notice to the party interested. The adverse party was present and resisted the order, so there was opportunity to be heard.

The Palmyra case has been cited a number of times since in the course of opinions not involving the precise proposition, to the effect that the court "may reinstate a cause at a sub-

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sequent term, dismissed by mistake." *Ex parte Sibbald v. United States*, 12 Pet. 487.

It was cited to the proposition that a court might correct misprision of clerks. *Bank of the United States v. Moss*, 6 How. 30.

In *Rice v. Railroad Company*, 21 How. 82, an opinion delivered by Mr. Chief Justice Taney, it was held that at common law, where a case upon error proceedings had been dismissed for want of jurisdiction, it could not be reinstated at a subsequent term upon a showing that the final judgment below, for want of which the case was dismissed, had been accidentally omitted from the record, as a production of the correct record showed.

In that case *The Palmyra* case was relied upon in support of the motion, but the court declined to follow it in a common law case and limited its application to the jurisdiction of an appellate court in admiralty cases, which the Chief Justice said was much wider than in a case at common law.

In the case of *Alviso v. United States*, 6 Wall. 457, a case dismissed for want of citation at a former term, omitted to be returned from neglect of the clerk, was reinstated upon the authority of *The Palmyra*; but in that case Mr. Justice Nelson, speaking for the court, distinctly stated that the omission in *The Palmyra* case was the error of the clerk in making out the transcript, and there is no reference to the general authority of the court to reinstate a case dismissed by mistake, regardless of the character of the omission or error.

The Palmyra, like every other case, must be read in the light of the point decided in the case, and in considering the language of Mr. Justice Story, who spoke of the general power of the court to reinstate a case dismissed by mistake, it is evident that he had in mind, for he says so, that the first dismissal was for a clerical mistake, which is a well-recognized ground for correcting judgments at subsequent terms, upon notice and proper showing.

The plaintiff in error also cites *Phillips v. Negley*, 117 U. S.

665. That case contains an emphatic statement of the doctrine that a judgment at law cannot be reversed or annulled after the close of the term at which it was entered by the court rendering the judgment, for errors of fact or law, with the exceptions which we have heretofore noted. In that case Negley had been sued in the Supreme Court of the District of Columbia upon a certain order. Negley answered, denying his liability, and asserting that he signed the order only as agent; denied also that plaintiff was the holder of the order, or notice of non-payment. After issue joined on the pleas, on April 3, 1879, Negley not appearing, a jury was called, and verdict found for the plaintiff, upon which judgment was rendered.

On September 4, 1882, Negley filed his motion to vacate the judgment and set aside the verdict rendered against him *ex parte*, because of irregularity, fraud and deceit and the negligence of his attorney. Affidavits were filed in support of this motion, setting forth a denial of Negley's personal liability on the order; that he was served with process when temporarily in Washington, being then and since a resident of Pittsburg; that he employed counsel and filed his defense, but received no further notice from the fall of 1874 until July 26, 1882, when he was sued on the judgment in Allegheny County, Pennsylvania; that plaintiff took no notice of the plea filed in the original case until May 3, 1877; that in the meantime, without defendant's knowledge, his counsel had removed from Washington, leaving him without counsel, as plaintiff and his counsel well knew, and on April 3, 1879, without notice, and while Negley was ignorant of the proceeding, called for a jury and procured the verdict and judgment against him.

Other testimony was taken, and after hearing on December 2, 1882, the Supreme Court of the District set aside the verdict because of "irregularity, surprise, fraud and deceit," and granted a new trial. In this court the judgment of the Supreme Court was reversed for error in entertaining and grant-

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ing the motion to set aside the judgment, and the cause was remanded, without prejudice to Negley's right to file a bill in equity. After citing and quoting from the *Bronson case*, 104 U. S. *supra*, Mr. Justice Matthews, who delivered the opinion of the court, said:

"Although the opinion [*Bronson case*] also shows that upon the facts of that case the action of the Circuit Court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram vobis*, or for the purpose of correcting the record according to the fact where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous decisions in this court, in the point which has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court. 'No principle is better settled,' it was said in *Sibbald v. The United States*, 12 Pet. 487, 492, 'or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes; *Cameron v. McRoberts*, 3 Wheat. 591; *Bank v. Wistar*, 3 Pet. 431; or to reinstate a cause dismissed by mistake, *The Palmyra*, 12 Wheat. 1; from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion.' "

The case just cited is relied upon because of its reference to *The Palmyra*. But the point to which that case is cited was not involved. As we have seen, it had already been limited in *Rice v. Railroad Company*, 21 How. 82, to appeals in ad-

miralty. Further, that case, as we have seen, was one of clerical mistake in making up the record.

We, therefore, find nothing in the previous decisions of this court justifying the contention of the plaintiff in error as to the right to correct the judgment of the previous term, in view of the character of the error sought to be corrected, and more especially in the attempt, under the circumstances shown in this record, to set aside a judgment of a former term and render a new and different judgment without notice to the party who had been dismissed by a former judgment.

As we have seen, the question here involved pertains to a case where no notice is given and a new and different judgment is entered at a subsequent term. It is urged when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the rule that jurisdiction once lost can only be regained by some proper notice, the case at bar is an illustration that such action may impair the substantial right of a party to be heard against the rendition of a new judgment against him. Had notice been given the defendant could have availed himself of his right to plead his discharge in bankruptcy by proper proceedings for that purpose. *Loveland, Bankruptcy*, 783. It may be that he did not lose all right to avail himself of the discharge in some other manner, but he had the right to show that in view of his discharge the judgment in question ought not to be rendered against him.

In *Capen v. Stoughton*, 16 Gray, 364, cited by plaintiff in error, a sheriff's jury in condemnation proceedings by mistake signed a verdict in favor of the municipal corporation instead of the property owners. The court held this a mistake of a merely formal and clerical kind; and "when no action has been taken on an order or judgment, and the rights of parties to the proceeding or those of third persons cannot be affected unjustly by the correction of an error, the court has power to order an action to be brought forward and a judg-

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ment to be vacated in order that an entry may be made in conformity to the truth."

There is no suggestion that such action can be "brought forward" without notice to the adverse party, or a correction made where, as in the present case, the party has lost a valuable right in reliance upon a judgment of dismissal.

And if it be held that the mistake in this case, though not of the clerk, was of a clerical character, and within the rule permitting the correction of such mistakes by the court, a point unnecessary to decide in this case, such correction cannot be made after term without notice, certainly where the changed condition of the parties in view of a new right acquired would render it prejudicial to render a new judgment.

The appellant also relies upon the proposition that the Massachusetts statute, Revised Laws of Massachusetts, chap. 193, sec. 22, provides that if a judgment is rendered in the absence of the petitioner and without his knowledge a writ of review may be granted upon petition filed within one year after the petitioner first had notice of the judgment; otherwise within one year after the judgment was rendered. But we cannot agree that this remedy supplies the want of jurisdiction in the Massachusetts court to render, after the term and without notice, a new and different judgment against the defendant in error. Whatever his remedy may be in the state courts, want of jurisdiction may be pleaded wherever the judgment is set up against him in another forum.

We find nothing in any decision of this court which sanctions any different procedure, and the cases in the state courts which hold that notice is necessary after the term before a judgment can be set aside are numerous. Some of them will be found in the note in the margin.¹

¹ *Murphy v. Farr*, 6 Halstead (N. J.), 186; *Martin et al. v. Bank of State*, 20 Arkansas, 629; *De Witt et al. v. Monroe & Brother*, 20 Texas, 289; *Berthold v. Fox*, 21 Minnesota, 51; *Cobb v. Wood*, 1 Hawkes (N. Car.), 95; *Hill v. Hoover*, 5 Wisconsin, 386; *Perkins et al. v. Hayward*, 132 Indiana, 95, 100; *Bryant v. Vix*, 83 Illinois, 1, 15; *Keeney v. Lyons*, 21 Iowa, 277; *Weed v. Weed*, 25 Connecticut, 337; *Fischchessar v. Thompson*, 45 Georgia, 459, 467.

To sanction a proceeding, rendering a new judgment without notice at a subsequent term, and hold that it is a judgment rendered with jurisdiction, and binding when set up elsewhere, would be to violate the fundamental principles of due process of law as we understand them, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears and condemns only after a party has had an opportunity to present his defense. By the amendment and new judgment the proceedings are given an effect against the defendant in error which they did not have when he was discharged from them by the judgment of dismissal. By the judgment of dismissal the court lost jurisdiction of the cause and of the person of the defendant. A new judgment *in personam* could not be rendered against the defendant until by voluntary appearance or due service of process the court had again acquired jurisdiction over him. As a matter of common right, before such action could be taken he should have an opportunity to be heard and present objections to the rendition of a new judgment, if such existed.

We find no error in the judgment of the Court of Appeals overruling the demurrer to the second plea, and the same is

Affirmed.

MR. JUSTICE BREWER took no part in this case.

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UNITED STATES *v.* MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

No. 180. Argued January 25, 1907.—Decided March 18, 1907.

Section 7 of the act of April 26, 1898, 30 Stat. 364, was not enacted to give increased pay for the discharge of the ordinary duties of the service but to give compensation for the greater risk and responsibility of active military command; and the assignment under orders of competent authority must be necessary and non-gratuitous.

A second lieutenant of the United States army who in the absence of the captain and first lieutenant assumes command of the company in regular course under § 253 of the Army Regulations of 1895, is not exercising under assignment in orders issued by competent authority, a command above that appertaining to his grade within the meaning of § 7 so as to obtain the benefit of the statute, even though a regimental special order may issue directing him to assume the command, and this action may be attempted to be ratified by special order of the commanding general where it is not apparent that any necessity for special direction existed.

Where the United States filed no set-off or counterclaim the court will not overhaul the allowance made to an officer of the army by the auditor of the War Department. An overpayment erroneously made does not determine the legality of the claim.

41 C. Cl. 36, reversed.

THE Court of Claims filed the following findings of fact and conclusions of law:

"I. The claimant, Donn C. Mitchell, was enrolled in the Volunteer Army, during the Spanish war, as second lieutenant of Troop E, First Ohio Volunteer Cavalry, on the 3d day of May, 1898. He served in the grade of second lieutenant until promoted to first lieutenant October 20, 1898. He was mustered out as first lieutenant October 23, 1898. His entire service was within the limits of the United States.

"II. While on duty as second lieutenant of the First Ohio

Volunteer Cavalry at Huntsville, Ala., during the Spanish war, claimant received the following order:

“ ‘Headquarters 1st Ohio Volunteer Cavalry,
“ ‘Camp Wheeler, Huntsville, Ala., August 24, 1898.

“ ‘Special Orders, }
“ ‘No. 44. }

“ ‘I. 1st Lieut. William D. Forsyth, 1st Ohio Volunteer Cavalry, having been ordered before a board for examination for appointment as second lieutenant in the Regular Army, is hereby relieved of the command of Troop E. He will turn over the property, funds, and records of the troop to his successor.

“ ‘II. 2d Lieut. Donn C. Mitchell, 1st Ohio Volunteer Cavalry, is hereby appointed to the command of Troop E. He will receipt to Lieut. Forsyth for the property and funds pertaining to the troop.

“ ‘By order of Lieut. Col. Day:

“ ‘(Signed) A. C. ROGERS,

“ ‘*Captain and Regtl. Adj. 1st Ohio Vol. Cav.*’

“ ‘This order was approved by the commanding general in the field in the following orders:

“ ‘Headquarters Fourth Army Corps,

“ ‘Camp Wheeler, Huntsville, Ala., September 2, 1898.

“ ‘Special Orders, }
“ ‘No. 97. }

* * * * *

“ ‘II. It appearing from evidence that the following-named officers of the First Ohio Volunteer Cavalry have exercised the functions of commanders above that pertaining to the grades held by them from and after the dates set opposite their respective names, the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office, is confirmed, namely:

* * * * *

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" '2d Lieut. Donn C. Mitchell, as captain, from August 24th, 1898.

* * * * *

" 'By command of Major-General Coppinger:

" '(Signed)

CLARENCE K. EDWARDS,

" '*Assistant Adjutant-General.*'

"Under these orders claimant exercised command of Troop E from August 26, 1898, to October 23, 1898, when he was mustered out with his regiment.

"So much of G. O. No. 86, A. G. O., of 1898, as relates to the matter of pay for exercising a higher command, is as follows:

General Orders, {
No. 86. }

" 'Headquarters of the Army,

" 'Adjutant General's Office,

" 'Washington, July 2, 1898.

" 'I. In section 7 of the act "For the better organization of the line of the Army of the United States," approved April 26, 1898, it is provided "That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

" 'The Attorney General has held that this clause "was intended to apply to all instances where the troops of the United States are assembled in separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain," but that "all service in the Army at the present time is not to be considered as operating against an enemy. Troops and their officers on the western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the Army assembled to carry on the war with Spain, would not be within the meaning of the act."

" 'To entitle an officer to the pay of a grade above that

actually held by him the assignment in orders under the clause cited must be by the written order of the commanding general in the field or the Secretary of War, and no pay or allowances of a higher grade than that actually held by an officer will be paid under this provision except when a certified copy, in duplicate, of such order, with statement of service, is filed with the paymaster. . . .

"General Orders, No. 86, was amended by General Orders, No. 155, dated September 27, 1898, by striking out the above portion of the order, and on the same date Circular No. 18, promulgating this order, was amended by striking out the portion above quoted and inserting in lieu thereof the following language, to wit:

"To entitle an officer to the pay of a grade above that actually held by him under section 7 of the act of Congress approved April 26, 1898, he must be assigned in orders issued by competent authority to a command appropriate to such higher grade of troops operating against the enemy." (Circ. No. 39, A. G. O., Sept. 27, 1898.)

"At the time that he assumed and during the time that he exercised command of troop E he was the senior officer present with the troop.

"The Treasury Department, from the decision of the Comptroller of March 31, 1899 (5 Comp. Dec., 641), to the decision of the court in the *Humphreys case* (38 C. Cls. R., 689) on May 25, 1903 (pp. 15-16), recognized this sort of orders, so subsequently confirmed, as sufficient authority for the higher pay. Under similar orders, subsequently affirmed, all officers were paid either by the Pay Department or by the Treasury Department in claims presented after the war.

"III. From August 26, 1898, to October 19, 1898, claimant was originally paid the rate due a second lieutenant of cavalry, and from October 20 to October 23, 1898, he originally received the pay of a first lieutenant of cavalry. He subsequently filed a claim for additional pay for command of the troop and was paid by the Auditor for the War Department,

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October 30, 1899, the pay of a captain for the entire period from August 26, 1898, to October 23, 1898.

"IV. On the 14th day of September, 1898, a furlough of thirty days for said regiment was authorized under General Orders, No. 130, A. G. O., 1898, and amendatory circulars. The above-named claimant did not receive such furlough. From the beginning of the furlough to September 26, 1898, the said claimant was sick in Mount Carmel Hospital, Columbus, Ohio. From September 26, 1898, to the end of the furlough period he was detained for duty and actually performed duty. During the whole furlough period he was at all times subject to the orders of his superior officers until final muster out. Claimant was first taken sick at Huntsville, Ala., before the furlough, but accompanied his regiment to the home station at Columbus, Ohio, where he was placed in the hospital by officers of said regiment, the surgeon being absent. While at the hospital claimant performed some military service by directing a clerk employed by him for that purpose.

"V. If claimant is entitled to retain the pay already received by him, the amount due him as extra pay at the rate due a captain, mounted, is \$166.66.

"If entitled to extra pay at the rate due a second lieutenant, mounted, the amount due is \$125.

"If entitled to extra pay and not entitled to retain the pay of a captain as stated in finding 3, there should be deducted from the extra pay allowed the sum of \$79.44."

The court rendered judgment for the claimant in the sum of \$166.66. 41 C. Cl. 36.

Mr. Assistant Attorney General Van Orsdel, with whom *Mr. George M. Anderson* was on the brief, for appellant:

The Army Regulations provide no command for a subaltern; the lowest officer in rank provided for in that respect is a captain. The claimant, therefore, whose grade was that of a second lieutenant of cavalry, had no command pertaining to his grade, and his case does not come within the purview of

the act. The statute does not say that increased compensation shall be received for exercising higher duties or exercising a command, but for exercising a higher command. It does not refer to the commander, but to the troops which he commands. *Humphreys v. United States*, 38 C. Cl. 689.

The responsibilities of higher command in this case were no greater than in ordinary times of peace. *Truitt v. United States*, 38 C. Cl. 398.

Under General Orders, No. 86, the assignment of the claimant to the command of his company could have been legally ordered only by the commanding general in the field or the Secretary of War, and a certified copy in duplicate should have been filed with the paymaster in order to entitle him to the higher pay. The general order also, from language used, evidently contemplated the issuance of the order of assignment prior to the assumption of the higher command.

The commanding general in the field had no power to delegate his authority to assign an officer to a higher command, nor had he the power to subsequently confirm and ratify such unauthorized action by any officer under his command.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. Clark McKercher* were on the brief, for appellee:

The right to some extra pay is conceded, and the question is, what is the proper rate? The answer of the Court of Claims is that it shall be the rate to which the claimant was entitled and which he received at the time of his muster out and discharge from the service as well as for about two months previous. This includes the time during which his regiment was nominally on furlough, while the claimant was held for active duty and actually discharged duty as the commanding officer of the company.

This conclusion is in accordance with the law whether the rate properly allowable be that of the pay to which the claimant was entitled at the time of his muster out and discharge from the service, as this court decided in the case of the similar

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statute passed for the Mexican War, in *United States v. North*, 112 U. S. 510, affirming 19 C. Cl. 254, or whether the proper rate of pay be that to which he was entitled during the nominal furlough of his regiment, as decided by the Court of Claims under these statutes in *Terrell v. United States*, 40 C. Cl. 78.

There has been a contemporaneous and continuous construction of the statute. To reverse this construction as the Government now contends at this late day, would be to overturn thousands of settlements already made. This would result most unequally.

As to the force to be given to contemporaneous and continuous construction see *United States v. Moore*, 95 U. S. 763; *United States v. Alabama R. R. Co.*, 142 U. S. 621; *United States v. Finnell*, 185 U. S. 244.

Clearly, the command was "above that pertaining to his grade." He was only a second lieutenant, the lowest grade of commissioned officer, and for a short time before his discharge from the service, a first lieutenant; but he was, at the time of his muster out and for about two months previous, in actual command of his company, a command appropriate to the grade of captain, as shown by § 14, Army Regulations.

There was a complete literal compliance with the statute. His assignment to the command of the company was made "in orders" of the most formal and peremptory character first issued by the commanding officer of his regiment and subsequently confirmed by the major-general commanding the corps.

The claimant exercised a higher command, and he exercised it under orders issued by competent authority, and this is sufficient. *Thomas v. United States*, 39 C. Cl. 1, 9.

There is no need here for interpretation or construction of the statute. The language is plain and unambiguous. The orders are here under unquestionable authority. The will of Congress expressed in the statute is therefore met and

the right to higher pay follows. *Lake County v. Rollins*, 130 U. S. 671.

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

It is conceded by the Government that claimant is entitled to extra pay, so that the question is to what amount. Was he entitled to receive one month's extra pay of a captain of cavalry mounted (\$166.66) or one month's extra pay of a second lieutenant of cavalry mounted (\$125)?

We lay out of view the suggestion that if claimant were entitled to the extra pay of a second lieutenant of cavalry only, then that a certain sum or sums ought to be deducted as having been previously improvidently paid by the Auditor for the War Department. The United States filed no set-off or counterclaim, and we think we cannot overhaul the allowance by the Auditor for the War Department in the circumstances. Such payment, if made in error, did not determine the question before us within *United States v. Hite*, 204 U. S. 343.

The claim is made under section 7 of the act of April 26, 1898, 30 Stat. 364, 365, c. 191, reading as follows: "That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The main question is whether claimant exercised, "under assignment in orders issued by competent authority, a command above that pertaining to his grade?" When he assumed command of his company, August 26, 1898, he was the senior officer present, the captain and the first lieutenant being absent. Section 253 of the Army Regulations of 1895, then in force, provided: "In the absence of its captain, the command of a company devolves upon the subaltern next in rank who is serving with it, unless otherwise specially directed."

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This embodied the rule of succession by seniority prevailing in the ordinary course of military affairs, while, at the same time, it recognized that there might be exceptions, in respect of which special direction was required, and section 7 of the act of April 26, 1898, applied to such cases.

The exceptions spring from necessity, and where it is apparent that that does not exist, orders relied on as the basis for increased pay under section 7 are ineffectual for that purpose.

In *Humphreys v. United States*, 38 C. Cl. 689, the Court of Claims held that what the law contemplated was "necessary and not gratuitous assignments, and only such as would be for the good of the service and the vigorous prosecution of the war." Chief Justice Nott, speaking for the court, said: "It seems to the court incontrovertible that the words 'under assignment in orders issued by competent authority' constitute the controlling limitation of the statute; and the limitation implies that the benefits of the statute extend only to cases where such an order is necessary to impose the burden of the higher command upon an officer." We concur in that view, and tested by it, Special Orders No. 44, dated August 24, 1898, whereby the lieutenant colonel of the First Ohio Volunteer Cavalry announced that First Lieutenant Forsyth was relieved of the command of troop E, and, as incident thereto, that Second Lieutenant Mitchell was appointed to the command, cannot be considered as an "assignment in orders issued by competent authority," within section 7. That section was not enacted to give increased pay for the discharge of the ordinary duties of the service, but to give compensation for the greater risk and responsibility of active military command, and no assignment in orders when unnecessary to that end can make a case within the statute. *Truitt v. United States*, 38 C. Cl. 398, 406; *Parker v. United States*, 1 Pet. 293, 297. Here the additional duties discharged by Lieutenant Mitchell were "the ordinary incidental duties of military official life which go with such officer's commission." 38 C. Cl. 692.

The attempted confirmation by Special Orders No. 97 must fail of effect under section 7 for like reasons.

Other questions argued at the bar need not be discussed.

Judgment reversed and cause remanded, with a direction to enter judgment in favor of claimant for \$125.

TRACY v. GINZBERG.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF
MASSACHUSETTS.

No. 204. Argued February 26, 1907.—Decided March 18, 1907.

The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property, without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amendment did not impair the authority of the States to determine finally, according to their settled usages and established modes of procedure, such questions, when they do not involve any right secured by the Federal Constitution or by any valid act of Congress, or by any treaty.

189 Mass. 260, affirmed.

THIS suit was instituted in the Supreme Judicial Court of Massachusetts by the plaintiff in error, a citizen of New York, against the defendant in error, a citizen of Massachusetts, individually and as trustee to H. C. Long & Company, composed of H. C. Long and Frank A. Sanderson.

The case made by the bill of complaint is as follows: On the twenty-third of December, 1902, the plaintiff sold to Long and Sanderson the personal property used in carrying on hotel business at a certain place in Boston, and assigned to them the lease of the realty occupied by the hotel. As partial payment therefor he took back a mortgage on the personal property for the sum of \$7,500, running to the James Everard's Breweries, a corporation of New York. The mortgage covered not only

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a part of the purchase price, but also \$3,000 in cash, which the plaintiff paid for the liquor license, which, on or about the above date, he procured to be assigned to Long and Sanderson and to himself, as joint owners, and also the sum of \$1,400 in cash, which the plaintiff paid to the city of Boston as a fee for the liquor license issued by the board of police of that city to Long and Sanderson and to the plaintiff. That license expired by limitation on May 1, 1903.

In consideration of the advance, by plaintiff's procurement, of the above sums of \$3,000 and \$1,400, Long and Sanderson, on the above date, by writing, assigned their right, title and interest in said license to the plaintiff, covenanting and agreeing that all future applications for renewals of the license should be in the names of Long and Sanderson and the plaintiff, and that upon such renewal being granted they would assign, transfer and set over any such license.

Long and Sanderson being without money for the purpose, the plaintiff paid \$1,400 to the city as the renewal fee, and thereupon a new first and fourth class license was issued by the board of police to Long and Sanderson and the plaintiff to sell intoxicating liquors in the said hotel building. This license was taken by the plaintiff into his possession, and he had it in his possession at the bringing of this suit.

On the payment of the license fee for 1903-1904 Long and Sanderson, by an instrument of writing dated April 24, 1903, assigned, transferred and set over to the plaintiff their interest in that license, and further agreed to assign and set over to him their interest in any renewal of the license so long as they should be indebted to James Everard's Breweries. The plaintiff alleged that that assignment was for present and valuable consideration, and that by reason thereof he became the sole owner of the license.

Long and Sanderson were adjudged bankrupts on the twenty-third of July, 1903, being at the time indebted, and are still indebted, to James Everard's Breweries in a sum exceeding \$7,000.

The number of first and fourth class licenses in Boston is limited by law and are substantially all issued each year, so that a new license cannot be issued until an old license is cancelled. Old licenses are of great value to persons who desire to engage in the liquor business in Boston. They sell from \$3,000 to \$5,000 to persons who present them for cancellation together with an application for a new license to themselves.

Because of the large surrender value of old licenses and of the long-continued custom of reissuing licenses to old holders until refused for cause, such licenses have been recognized by courts of Massachusetts as property rights, and the powers of the board of police in dealing with them have been limited to the exercise of the sound discretion within the limits established by the laws of the Commonwealth.

The defendant Ginzberg, having full knowledge of the above facts, procured the board of police, on or about the first of April, 1904, to cancel the plaintiff's license. This was done without notice to plaintiff or hearing on any charge of the violation of the terms of the license. With the assistance of the police board, prior to the cancellation of the license, Ginzberg sold the license for \$3,000, which he refused to pay over to the plaintiff. He also collected from the city the sum of \$200 as a rebate upon the plaintiff's license, and refused to account for any sum to the plaintiff whatever. In the matter complained of Ginzberg acted beyond his powers as trustee of the bankrupt estate and without warrant of law disposed of [to one O'Hearn] a valuable privilege belonging to the plaintiff, and has procured the destruction and cancellation of the plaintiff's valuable rights.

The relief prayed was that the title of the plaintiff to the first and fourth class liquor license issued to Long and Sanderson and himself be established; that Ginzberg be ordered to account for the sums received by him as the proceeds of the plaintiff's license and be required to pay the same over to plaintiff; that the plaintiff's losses and damages by reason of the acts of defendant be established, and that he be ordered

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to pay the same; that execution issue against Ginzberg, individually, for such sums as may be found due to the plaintiff by reason of his wrongful interference with plaintiff's property; that if upon hearing it should appear that defendant acted within his duties as trustee of the bankrupt estate, that the decree run against him as such trustee but without execution thereon; and that the plaintiff have such other and further relief as may be just.

Such is the case made by the bill. After answer and replication the evidence was taken by a special commissioner, to be reported to the full court. In its finding of facts the court said: "In the case at bar, the police commissioners were satisfied that the name of Tracy was inserted in the two licenses to secure to his principal the debt, or part of the debt, due from the defendants Long & Sanderson; that he was not a partner in the liquor business, and for that reason the police commissioners gave a preference to O'Hearn, who was nominated by the trustee in bankruptcy, with [out] the consent, or against the objections, of Tracy, in deciding to whom a license should be issued on the vacancy caused by Long & Sanderson going out of business. The trustee received three thousand dollars for the nomination by him, and I find that it is, in fact, the value of such a nomination. It follows that the three thousand dollars received by the defendant was received for something which he had, and not for anything which the plaintiff had, and the defendant is entitled to have the bill dismissed with costs." By the final decree the bill was dismissed and the case carried before the full court, which affirmed the decree of the trial court.

The Supreme Judicial Court of Massachusetts affirmed the judgment, holding that to sell intoxicating liquor was a personal privilege, valuable as property, in a certain sense, for the personal use of the holder but not assignable or transferable by him in any way; and that "the value of the release is recognized as depending wholly upon the practice of the police commissioners, and because there is no legal right to assign

the privileges of such a license, and the police commissioners refuse to be bound by assignments, or to recognize at all assignments for security, the court holds that a holder of an assignment for security has no rights under the assignment." Further: "In the present case the release or assignment of the licenses by the bankrupts to one who wishes to obtain licenses for the next year, induced him to pay the trustee in bankruptcy three thousand dollars. The money so received was not for any property owned by the plaintiff. It was for a position before the police commissioners, from which the payor had reasonable ground to expect their favorable action. The plaintiff could not control this position, or do anything that would induce the payment by O'Hearn of the money which the defendant received. Upon the facts shown, the board of police commissioners did not consider the insertion of the plaintiff's name in the original license as affecting their right to issue new licenses. It is plain that they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial, for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses." *Tracy v. Ginzberg*, 189 Massachusetts, 260.

Mr. H. J. Jaquith, with whom *Mr. Thomas J. Barry* was on the brief, for plaintiff in error:

The present use of the term "license," as an act of government, in many respects is synonymous with "franchise."

Kent defines a franchise as a privilege conferred by grant from government and vested in individuals. 3 Kent Com. 458; *Gibbons v. Ogden*, 9 Wheat. 1, 213.

A license for a stated period and for a valuable consideration cannot be revoked except for breach of conditions. *Davis v. Townsend*, 10 Barb. 333, 343; *Cook v. Stearns*, 11 Massachusetts, 533, 537; *Commonwealth v. Moylan*, 119 Massachusetts, 109. It is a franchise. *State v. C., M. & St. P. Railway*, 56 Wis-

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consin, 256, 259; *Wiggins Ferry Co. v. East St. Louis*, 102 Illinois, 560, 576; *Hancock v. Singer Mfg. Co.*, 62 N. J. Law, 289, 335; *Logan v. Pyne*, 43 Iowa, 524; *Commonwealth v. Standard Oil*, 101 Pa. St. 119, 145; *State v. Schlier*, 59 Tennessee, 280, 286.

The power to mortgage is coextensive with the power to alienate, and is an incident that cannot be divorced from ownership. *Commonwealth v. Smith*, 10 Allen, 448.

The only limitation upon this power is that the holder of a franchise or license for the benefit of the public cannot do anything to disqualify him from performing his public duties. *Evans v. Boston Heating Co.*, 157 Massachusetts, 37.

A license is property. The word property is legally understood to include every class of acquisitions which a man can own or have an interest in. *In re Fixen*, 102 Fed. Rep. 295, 296; *In re Emrich*, 101 Fed. Rep. 231 (market license); *In re Gallagher*, 16 Blatchf. 410; *Fisher v. Cushman*, 103 Fed. Rep. 860, 864, 865; *In re Becker*, 98 Fed. Rep. 407; *In re Brodbine*, 93 Fed. Rep. 643.

Other privileges are also regarded as property. *In re Hurlbutt Hatch Co.*, 135 Fed. Rep. 504; *Hyde v. Woods*, 94 U. S. 523, 525 (stock exchange); *Sparhawk v. Yerkes*, 142 U. S. 1, 12; *In re Ketchum*, 1 Fed. Rep. 840; *In re Warder*, 10 Fed. Rep. 275.

A privilege is intangible property, and is recognized and protected as property. *Adams Ex. Co. v. Ohio*, 166 U. S. 185, 218, 219.

The Massachusetts Supreme Judicial Court does not seem to have fully determined for itself in just what position before the law the capital invested in licenses stands. Surely the several millions of capital invested in licenses in Boston is within the protection of the law. *Tehan v. Court*, 191 Massachusetts, 92.

A trustee in bankruptcy is bound by all the agreements of the bankrupt as fully as the bankrupt, except as to frauds and preferences and executory contracts; and in taking over property or property rights, he takes them subject to such liens,

encumbrances, or assignments as existed prior to the bankruptcy, provided they are not obnoxious as frauds or preferences. *Mitchell v. Winslow*, 2 Story, 630; S. C., Fed. Cas. 9,673; *Ex parte Newhall*, 2 Story, 360; S. C., Fed. Cas. 10,159; *Fletcher v. Morey*, 2 Story, 555; S. C., Fed. Cas. 4,864; *Windsor v. Kendall*, 3 Story, 507; S. C., Fed. Cas. 17,886; *Windsor v. McClellan*, 2 Story, 492; S. C., Fed. Cas. 17,887; *Ex parte Dalby*, 1 Lowell, 431; S. C., Fed. Cas. 3,540; *Potter v. Coggeshall*, Fed. Cas. 11,322; *Coggeshall v. Potter*, Fed. Cas. 2,955; *Williamson v. Colcord*, Fed. Cas. 17,752.

These cases have been approved and followed by the United States Supreme Court and by the courts of most of the States. *Thompson v. Fairbanks*, 196 U. S. 516, 526.

Upon these authorities the plaintiff was entitled to the aid of a court of equity to enforce his rights against Long & Company as fully as though they had not gone into bankruptcy.

Mr. Alfred W. Putnam, with whom *Mr. William B. Sullivan* was on the brief, for defendant in error:

A liquor license, of course, only purports to grant to the holder the privilege of conducting for a limited period of time what would otherwise be an unlawful business. The very most that Tracy could have claimed as of right was that he was permitted to engage in the liquor trade in the city of Boston.

That privilege is the only "right" which he can fairly and reasonably assert that he acquired as a direct licensee.

The permission to sell intoxicating liquor is not a right or a privilege within the meaning of the Fourteenth Amendment of the Federal Constitution. *Crowley v. Christensen*, 137 U. S. 86; *Giozza v. Tiernan*, 148 U. S. 657; *Bartemeyer v. Iowa*, 18 Wall. 129.

A license is not a contract and confers no contractual rights upon the holder. *Calder v. Kurby*, 5 Gray (Mass.), 597; *Le Croix v. County Commissioners*, 50 Connecticut, 321; *Board of*

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Excise v. Barrie, 34 N. Y. 657; *Sprayberry v. Atlanta*, 87 Georgia, 120; *Stone v. Mississippi*, 101 U. S. 814-820.

The revocation of a license does not constitute taking of property without due process of law. *Board of Excise v. Barrie*, 34 N. Y. 657; *Sprayberry v. Atlanta*, 87 Georgia, 120; *Schwuchow v. Chicago*, 68 Illinois, 444.

The fund of \$3,000 is rightfully held by the trustee in bankruptcy as assets of the bankrupt's estate. It does not lie in the mouth of plaintiff in error to assert that this money is not properly assets of the estate, nor to accuse the defendant in error of being an intermeddler if he fails to prove a better title to the money.

Money realized from the nomination for a license is assets of a bankrupt estate. *In re Fisher*, 98 Fed. Rep. 89 (D. C. Mass.); *Fisher v. Cushman*, 103 Fed. Rep. 860 (C. C. A.); *In re McArdle*, 126 Fed. Rep. 442 (D. C. Mass.).

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

The plaintiff insists that the action of the police commissioners deprived him of property without due process of law. The answer to this contention is that the expectation called a right or property was of the board's creation and therefore subject to the limitations which the board imposed.

The plaintiff also insists that by the judgment of the Supreme Judicial Court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be

heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty. Within the meaning of that amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with “those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.” *Bank of Columbia v. Okely*, 4 Wheat. 235, 244; *Murray's Lessee v. Hoboken &c.*, 18 How. 272. It cannot be said that the state court in this case, by its final judgment, departed from those usages or modes of proceeding.

The judgment is

Affirmed.

URQUHART, SHERIFF, v. BROWN.

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

No 226. Argued March 7, 1907.—Decided March 18, 1907.

Although the power exists and will be exercised in cases of great importance and urgency, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under state authority, but will leave the petitioner to exhaust the remedies afforded by the State for determining whether he is legally restrained of his liberty, and then to bring his case to this court by writ of error under § 709, Rev. Stat.; this rule applies to a case where petitioner contends that his commitment under a state statute, providing for the commitment of one acquitted by reason of insanity, is a deprivation of liberty without due process of law, in violation of the Fourteenth Amendment.
139 Fed. Rep. 846, reversed.

THIS appellee Brown was charged in the Superior Court of Lewis County, Washington, with the crime of murder and was acquitted. The verdict of the jury was: "We, the jury, find the defendant not guilty, by reason of insanity."

The verdict having been entered of record, an order was made which recited that the court by reason of the verdict, the evidence, the proceedings in the trial and the demeanor of the defendant, "finds that the discharge or going at large of said Thomas Brown would be and is considered by the court as manifestly dangerous to the peace and safety of the community"; also, that he be committed to the county jail until the further order of the court.

In making this order the court acted on the authority of a statute of Washington, as follows: "When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the

peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged." Bal. Code, § 6959.

Subsequently, the accused being in the custody of the sheriff under the above order, made an original application to the Supreme Court of Washington on the thirteenth day of June, 1905, for a writ of *habeas corpus*, alleging that he was unlawfully detained and imprisoned, in that the statute under which he was held was in violation of both the Fourteenth Amendment of the Constitution of the United States and of the constitution of the State.

The Supreme Court of Washington, by its final judgment entered July 14, 1905, held that the statute was constitutional, and that the order of the trial court was in strict conformity with its provisions. *In re Brown*, 39 Washington, 160; S. C., 81 Pac. Rep. 552. That court accordingly denied his application to be discharged. The appellee then, on July 18, 1905, made application to the Circuit Court of the United States for the Western District of Washington for a writ of *habeas corpus*. In his answer to this application the sheriff, having the appellee in custody, referred to the proceedings in the Supreme Court of the State, and alleged that the mental condition or capacity of the applicant was in no wise different or improved than it was on the twenty-third of December, 1904, at the time he killed his father. That court granted the writ and the case being heard, the court by its final order entered January 10, 1906, discharged the appellee from custody. The Circuit Judge held that the statute, although constitutional, was not properly administered by the Superior Court in rendering its judgment, and that the imprisonment of the petitioner with sanction of the judiciary of the State, without arraignment, and a fair opportunity to defend himself against charges lawfully preferred, and to produce evidence in his defense was a dep-

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privation of his liberty by the State, without due process of law, and violated the National Constitution; and for that reason the application for the writ of *habeas corpus* was granted. *Brown v. Urquhart*, 139 Fed. Rep. 846.

The order of commitment under which the appellee was held was adjudged by the Circuit Court to be illegal and void, but the judgment was without prejudice to any lawful proceeding to have the prisoner restrained, if he should be adjudged to be a dangerous person by reason of insanity. From that judgment the present appeal was prosecuted.

Mr. E. C. Macdonald, with whom *Mr. John D. Atkinson*, Attorney General of the State of Washington, *Mr. A. J. Falknor* and *Mr. J. R. Buxton* were on the brief, for appellant.

No counsel appeared for appellee.

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

It is the settled doctrine of this court that although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon *habeas corpus*, one held in custody by state authority in violation of the Constitution or of any treaty or law of the United States, the court, justice or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several States, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under state authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. After the highest court of the State, competent under the state law

to dispose of the matter, has finally acted, the case can be brought to this court for reëxamination. The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State are those of great urgency that require to be promptly disposed of, such, for instance, as cases "involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations." The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision, upon *habeas corpus*, in the Supreme Court of the State was in violation of his rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court.¹ In *Reid v. Jones*, 187 U. S. 153, it was said that one convicted for an alleged violation of the criminal statutes of a State, and who contended that he was held in violation of the Constitution of the United States, "must ordinarily first take his case to the highest court of the State, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State." So, in the recent case of *Drury v. Lewis*, 200 U. S. 1, it was said that in cases of the custody by state authorities of one charged with crime the settled and proper procedure was for a Circuit Court of the United States not to interfere by *habeas corpus*, "unless in cases of peculiar urgency, and that instead of discharging

¹ *Ex parte Royall*, 117 U. S. 241, 251; *Ex parte Fonda*, 117 U. S. 516; *New York v. Eno*, 155 U. S. 89; *In re Wood*, 140 U. S. 278; *In re Frederick*, 149 U. S. 70; *Pepke v. Cronan*, 155 U. S. 100; *In re Chapman*, 156 U. S. 211; *Whitten v. Tomlinson*, 160 U. S. 231; *Baker v. Grice*, 169 U. S. 284; *Tinsley v. Anderson*, 171 U. S. 101, 104; *Markuson v. Boucher*, 175 U. S. 184; *Minnesota v. Brundage*, 180 U. S. 499; *Riggins v. United States*, 199 U. S. 547; *In re Lincoln*, 202 U. S. 178.

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they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom."

Without now expressing any opinion as to the constitutionality of the statute in question, or as to the mode in which it was administered in the state court, for the reasons stated the judgment of the Circuit Court must be reversed, with directions to set aside the order discharging the appellee, and to enter an order denying the application for a writ of *habeas corpus*, leaving the appellee in the custody of the State, with liberty to apply for a writ of error to review the above judgment of the Supreme Court of Washington.

It is so ordered.

TINDLE v. BIRKETT.

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

No. 217. Argued February 28, 1907.—Decided March 25, 1907.

Where a claim is founded upon an open account or upon a contract, express or implied, and can be proved under § 63a of the bankruptcy act, if the claimant chooses to waive the tort and take his place with the other creditors, the claim is one provable under the act and barred by the discharge. The words in the fourth subdivision of § 17, "while acting as an officer, or in any fiduciary capacity," extend to "fraud, embezzlement, misappropriation," as well as "defalcation." *Crawford v. Burke*, 195 U. S. 176.
183 N. Y. 267, affirmed.

THE facts are stated in the opinion

Mr. Frank Gibbons for plaintiffs in error:

Section 17 of the act provides that none but provable debts are released by a discharge. These debts are not provable debts and, therefore, are not released within the principles laid down in the second proposition of *Crawford v. Burke*, 195 U. S. 176, 193.

The qualifying clause "while acting as an officer or in any fiduciary capacity" found in § 17, subd. 4, of the act, relates to the word "defalcation" only and not to any of the preceding words, "fraud, embezzlement, misappropriation."

Under the bankruptcy act of 1867 debts created by fraud or arising out of fiduciary relations and in tort generally, were not dischargeable. In the highest courts of many of the States, as well as in many of the United States Circuit Courts, it was held that, if, prior to the bankruptcy, a judgment was obtained for the fraud, then the fraud and tort became merged into the judgment, a contract of record, and was released as a contract indebtedness. *Wolcott v. Hodges*, 81 Massachusetts, 547; *Ellis v. Hays*, 28 Maine, 385; *Crouch v. Gridley*, 6 Hill, 250; *Kellogg v. Schuyler*, 2 Denio, 73; *Blake v. Biglow*, 5 Georgia, 437; *Comstock v. Grout*, 17 Vermont, 512; *In re Adson Comstock*, 22 Vermont, 642; *Manning v. Keyes*, 9 R. I. 224; *In re Wiggers*, 2 Bliss, 71; *In re Samuel Book*, 3 McLean, 317; *Hays v. Ford*, 55 Indiana, 52.

No counsel appeared for defendant in error.

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

This was an action brought in 1899 to recover damages claimed to have been sustained in consequence of specified false and fraudulent representations made by the firm of which the defendant was survivor, by reason whereof plaintiffs alleged

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they were deceived into selling goods to defendant's firm, which they otherwise would not have done. The complaint contained three counts, setting up separate items of damages, namely, \$349.30, \$230.83 and \$321.73 for goods sold, and judgment was demanded for the aggregate with interest on each item.

One of the defenses was that plaintiffs' claims were barred by a discharge in bankruptcy of defendant's firm, to which plaintiffs replied that they were not such as could be discharged in bankruptcy proceedings.

The New York Court of Appeals held that, according to the rulings of this court in *Crawford v. Burke*, 195 U. S. 176, the alleged indebtedness to plaintiffs was covered by the discharge, and directed plaintiffs' complaint to be dismissed. *Tindle v. Birkett*, 183 N. Y. 267.

This writ of error was then prosecuted, and plaintiffs' counsel contends that their debts were not provable debts and therefore not discharged, and that *Crawford v. Burke* might well be modified in view of certain suggestions deemed to be novel.

Sections 17 and 63a of the bankruptcy act of 1898 read as follows:

"SEC. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . .
(2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; . . .
or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

"SEC. 63. Debts which may be proved:

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not . . . ; (4) founded upon an open account, or upon a contract express or implied; and (5) founded

upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, . . ."

Counsel admit that the claims in question were all liquidated. By their nature and amount as well as by the form of the complaint they stand upon the contracts originally made. *Whiteside v. Brawley*, 152 Massachusetts, 133, 134.

Crawford v. Burke was an action in trover instituted in the Circuit Court of Cook County, Illinois, by Burke against Crawford and Valentine, plaintiffs in error, to recover damages for the willful and fraudulent conversion of the interests of the plaintiff in certain shares of stock. There were ten counts in the declaration, five charging fraudulent conversion of that stock, and five, the obtaining of money from plaintiff in the way of margins by means of false and fraudulent representations. Defendants pleaded their discharge in bankruptcy, but were found guilty on all the counts, and judgment was entered against them, which was affirmed by the Appellate Court and by the Supreme Court of Illinois. This court held that plaintiff's claim was "provable under the bankruptcy act," that is, was "susceptible of being proved," and that it might have been proved under section 63a as "founded upon an open account or upon a contract express or implied," if plaintiff had chosen to waive the tort and take his place with the other creditors of the estate. And that the words, in the fourth subdivision of section 17, "while acting as an officer, or in any fiduciary capacity," extended to "fraud, embezzlement, misappropriation" as well as "defalcation."

That case completely determines this as the New York Court of Appeals correctly held.

Judgment affirmed.

DAVIDSON STEAMSHIP COMPANY v. UNITED STATES.

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

No. 220. Argued March 1, 1907.—Decided March 25, 1907.

Where negligence is a mere question of fact and nothing appears which is negligence *per se*, the determination of the question is peculiarly the province of the jury and its conclusions will not be disturbed unless it is entirely clear that they were erroneous.

There is an obligation on all persons to take the care which, under the special circumstances of the case, a reasonable and prudent man would take, and the omission of that care constitutes negligence.

It is within the province of the jury to determine whether a captain of a steamship, also acting as pilot thereof, who fails to keep himself informed of changes made from time to time in the different harbors which he is likely to visit, is guilty of negligence in colliding with a Government breakwater, in course of erection, and on which the lights have been changed, and even though there may have been evidence warranting the finding of contributory negligence on the part of the Government in the way it left the lights, this court will not set aside the verdict after it has been approved by the trial court and the Circuit Court of Appeals. 142 Fed. Rep. 315, affirmed.

THE facts are stated in the opinion.

Mr. Charles E. Kremer and Mr. Hermon A. Kelley for plaintiff in error:

The existence of the breakwater was not known, and it could not, in the darkness, be seen in sufficient time to be avoided.

It is not claimed that any notice of the actual construction of the breakwater or what its condition was on the night of the disaster, or what light it bore, was ever sent out prior to the disaster. The court refused to permit the defendant to show that it was sent out afterwards on October 19, 1901.

No negligence is shown on the part of the master of the *Shenandoah*.

The notices which the Government sent out to mariners, Exhibits "B" and "C," were either never sent to Captain McAvoy, master of the *Shenandoah*, or were not received by him.

Had he received and read them, they would not have informed him of the obstruction which he encountered and collided with.

The evidence shows such contributory negligence on the part of the Government that there is no right of recovery.

The specific negligence of the Government consists:

In not having published or given notice of the actual construction or location of the breakwater.

In not giving notice of the white light which was being displayed to mark it.

In giving misleading notices indicating that the breakwater was completed and that the end of it was marked by a red light.

In using a white instead of a red light to mark the outer end of the breakwater.

Mr. Milton D. Purdy, Assistant to the Attorney General, for defendant in error:

Where contributory negligence is alleged by the defendant, such question is to be determined by the jury, unless no recovery could be had upon any view of the case. *Railroad Co. v. Fraloff*, 100 U. S. 24, 31; *Kane v. Northern Central Ry. Co.*, 128 U. S. 91, 94; *Dunlap v. Northeastern R. R. Co.*, 130 U. S. 652; *R. & D. R. R. Co. v. Powers*, 149 U. S. 43, 44, 47; *Alaska Steamship Co. v. Collins*, 127 Fed. Rep. 937, 940; *Chicago Great Western Ry. v. Price*, 97 Fed. Rep. 423, 428, and cases cited.

The cases cited by counsel for plaintiff in error to sustain their contention that the Government was guilty of contributory negligence, when properly examined do not support the position. *Casement v. Brown*, 148 U. S. 615; *Harrison v. Hughes*, 110 Fed. Rep. 545; *United States v. Dunn & Co.*, 124 Fed. Rep. 705, 707, discussed and distinguished.

MR. JUSTICE BREWER delivered the opinion of the court.

On April 1, 1902, the United States commenced this action in the Circuit Court of the United States for the District of Minnesota to recover for injuries charged to have been done through the negligence of the Davidson Steamship Company to a Government breakwater at Two Harbors, Lake Superior. The defendant answered, denying the negligence and alleging that the result was due to the negligence of the Government, the plaintiff. No question was made as to the amount of the injury. Trial was had before a jury, which returned a verdict for the Government. Judgment thereon was entered by the Circuit Court. This judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 73 C. C. A. 425, and from that court brought here on writ of error.

In a general way, the facts are that on the night of July 24, 1901, the steamer *Shenandoah*, the property of the steamship company, ran into the Government breakwater at Two Harbors, Minnesota. Agate Bay, Lake Superior, is the harbor of the village of Two Harbors, and is an open bay, across the mouth of which there are breakwaters extending from either shore, running in an easterly and westerly direction, and leaving an open space as an entrance to the iron ore and other docks in the bay. The breakwater extending from the easterly side had been constructed for a number of years, extending into the bay for a distance of about seven hundred and fifty feet, and its outer end indicated in the night time by a fixed, large red light, fifteen or twenty feet high. In 1899 the Government projected an extension of this breakwater of about three hundred feet in length, and at an angle of forty-five degrees from the original breakwater. At the time of the injury this extension, composed of wooden cribs filled with stone, had been carried to its full length, but not built up to its intended height, and, in fact, rising only a few inches above the surface of the water. On the extreme outward end of the new extension was a mast or pole about twelve feet

high, and on it was hung an ordinary white light or lantern. The original fixed red light on the old breakwater had been moved back some thirty feet, in order that the new work could be properly joined to the old.

On the evening named the *Shenandoah* loaded a cargo of iron ore at Superior, Wisconsin, and proceeded to Two Harbors, to take in tow a barge that was being loaded there. When the vessel left Superior the night was dark and stormy and the sky covered with clouds, with a heavy wind blowing from the northeast, making a high sea. Arriving off Two Harbors at about 11 o'clock, the steamer headed for the entrance, intending to enter port, as she had formerly done, close to the easterly breakwater. When she had approached within about two hundred feet the surf was seen breaking over the extension of the breakwater. Her engines were promptly stopped and reversed, but, notwithstanding this, she struck this extension about one hundred and twenty-five feet from the fixed red light, and did considerable damage to it, but without injury to herself. The port of Two Harbors is on the north side of Lake Superior, about twenty-seven miles from Duluth, and one of the most important iron ore loading points on the Great Lakes.

Now, whether the injury was the result of negligence, and which party was guilty of negligence, are questions of fact properly determinable by a jury. These questions are the only ones discussed by counsel for the steamship company, and therefore to them alone we direct our attention. It is true in the assignment of errors some other matters are named, but they are not called to our attention in brief or argument, and an examination of them shows that very properly counsel for the steamship company considered them not sufficiently important to justify any discussion.

It is well, before noticing the testimony, to consider the extent to which our inquiry may properly go. The settled rule is that where negligence is a mere question of fact, and nothing appears which is negligence *per se*, the determination

of the question is peculiarly the province of a jury, and its conclusions will not be disturbed unless it is entirely clear that they were erroneous. Courts do not approach the question as an original one and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact. Authorities in this court, as well as in others, are abundant and clear on this point. It is sufficient to refer to one or two.

Railroad Company v. Stout, 17 Wall. 657, was an action to recover damages in behalf of a boy six years of age for injuries sustained upon a turntable belonging to the railroad company. This turntable was in an open space, about eighty rods from the company's depot, in a village of from one hundred to one hundred and fifty persons. The railroad ground was not enclosed or visibly separated from the adjoining property, and was about three-quarters of a mile distant from the house of the child's parents. The boy, with two older boys, went to the turntable and commenced playing on it. It was not watched or guarded by any servant of the company. It was not fastened or locked, and revolved easily on its axis. While so playing he was injured. The jury found the company guilty of negligence. In affirming the judgment this proposition was stated (664):

"It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they

can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In *Railroad Company v. Fraloff*, 100 U. S. 24, 31, one question was as to the value of property for which the company was responsible. Sustaining a judgment against it, we said:

"If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a reëxamination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. *Parsons v. Bedford*, 3 Pet. 446; 21 How. 167; *Insurance Company v. Folsom*, 18 Wall. 249."

In *Dunlap v. Northeastern Railroad Company*, 130 U. S. 649, 652, this was the ruling:

"The Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. *Kane v. Northern Central Railway*, 128 U. S. 91; *Jones v. East Tennessee, Virginia & Georgia Railroad Co.*, 128 U. S. 443."

In *Richmond & Danville Railroad Company v. Powers*, 149 U. S. 43, 45, the jury having found the railroad company guilty of negligence, we sustained the verdict and judgment, saying:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a

jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co. v. Stout*, 17 Wall. 657; *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554; *Delaware & Lackawanna Railroad v. Converse*, 139 U. S. 469."

From these authorities, and many more of a kindred nature could be cited, it is obvious that the question for us to consider is whether there was testimony from which the jury might rightfully find the defendant guilty of negligence. It appears that the captain of the steamship had been for many years on the lakes, and that he was acting as pilot of the ship at the time of the collision. The harbor was one of great importance, although he had not been in it for over a year. He knew that harbor improvements on the Great Lakes were being made by the Government, that information of the condition of those improvements was given from time to time by circulars from the Departments, and still made no efforts to ascertain the then condition of the harbor, the only chart he had being an old one. In addition to the fact that he knew where information could be obtained, might have assumed that he would be likely to be sent to any one of the many important harbors, and ought to have prepared himself therefor, there was testimony that official circulars and notices were mailed to him at his post office address, although he states that he failed to receive them, and relied upon the knowledge which he had from his visit of more than a year theretofore and upon what he should find as he entered the harbor. Now there is an obligation on all persons to take the care which under the special circumstances of the case a reasonable and prudent man would take, and the omission of that care constitutes negligence. It was said by Mr. Justice McLean, delivering the opinion in *Culbertson v. Shaw et al.*, 18 How. 584, 587:

"When a steamer is about to enter a harbor great caution is required. There being no usage as to an open way, the

vigilance is thrown upon the entering vessel. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done."

In *Atlee v. Packet Company*, 21 Wall. 389, 396, Mr. Justice Miller, commenting on the duty of a pilot of a river steamer, makes these observations:

"But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage."

It would not be strange if the jury found that a captain engaged in the navigation of the waters of Lake Superior was guilty of negligence in not keeping himself informed of changes going on from time to time in the different harbors which he was likely to be called upon to visit. His very want of knowledge, when he had the means of ascertaining the facts, could properly be regarded as negligence. Clearly it could not be held as matter of law not to be so.

It is true he was apparently misled by the lights on the

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breakwater, and we do not mean to intimate that there was no evidence from which the jury would have been warranted in finding that the Government was guilty of negligence in the way in which it left those lights. But no omission or negligence on the part of the Government avoids the fact that there was testimony from which the jury was justified in finding the captain guilty of negligence, and for that negligence the steamship company was responsible. The jury might have thought that if he had kept himself properly informed in reference to the condition of that as of other important harbors he would not have been misled by the condition of the lights. At any rate the verdict of the jury was against the contention of contributory negligence on the part of the Government, and the jury was the tribunal to determine this, as well as the question of negligence. We could not set aside the verdict of the jury, approved as it was by the trial court and the Court of Appeals, without ourselves exercising the function of triers of fact, when under the law such questions are committed to the determination of a jury.

The judgment is

Affirmed.

LOVE v. FLAHIVE.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 236. Submitted March 8, 1907.—Decided March 25, 1907.

In a contest over a homestead entry, whether there was a sale and whether the thing sold was or was not the tract in question, are matters of fact to be determined by the testimony, and the findings of the Land Department in those respects are conclusive in the courts.

While a homesteader cannot make a valid and enforceable contract to sell the land he is seeking to enter, he is not bound to perfect his application but may abandon or relinquish his rights in the land, and if he in fact makes a sale he is no longer interested in the land and the Government can treat the sale as a relinquishment and patent the land to other applicants. .
83 Pac. Rep. 882, affirmed.

ON December 3, 1900, Edward H. Love commenced this suit in the District Court of Missoula County, Montana, to have Annie Flahive, the holder of the legal title to a specified tract in that county, adjudged to hold it in trust for him. A demurrer to the complaint was sustained by the District Court and, no amendment being asked, judgment was entered for the defendants. This judgment was affirmed by the Supreme Court of the State (83 Pac. Rep. 882), from which court the case was brought here on writ of error.

The facts, as stated in the complaint and attached exhibits, are that plaintiff, with the purpose of entering the land as a homestead and being qualified therefor, in May, 1882, settled upon, occupied and fenced the entire tract, with the exception of the north twenty acres thereof. In addition to a controversy in the Land Department with the Northern Pacific Railroad Company, which claimed the land under its grant, but whose claim was finally rejected, he had a contest in the Land Department with Michael Flahive, who was also seeking to enter the land, which, after several hearings before the local land officers, with appeals to and decisions by the Commissioner of the General Land Office and the Secretary of the Interior, resulted in a final decision against him and an award of the land to the defendant Annie Flahive, the widow of Michael Flahive, who had died pending the proceedings. In pursuance of that award a patent was issued to her in December, 1899.

Mr. Thomas C. Bach, with whom *Mr. Charles Edmund Pew* was on the brief, for plaintiff in error, submitted:

The Land Department has authority to make such findings of fact as are necessary in the determination of the one question which was committed to it by the acts of Congress, namely, who had made the first settlement upon the land and otherwise complied with the law so as to be entitled to patent. But its authority ends there. Being created for the purpose of performing certain enumerated duties, and its

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judicial powers being defined by statute, its jurisdiction is limited to the power expressly granted. Sec. 2273, Rev. Stat.

The Land Department found repeatedly that Love made the first settlement and conformed to the other provisions of the law, which finding has never been reversed. Right there its jurisdiction ended, and the patent should have been issued to Love upon that finding.

The authority to pass upon equities claimed to exist between parties is vested in the courts, and no attempted usurpation of that authority by a special tribunal can in any degree affect the jurisdiction of the courts in such controversies. *Garland v. Wynne*, 20 How. 6.

Any unexecuted sale of preëmption rights, whether they were those of Love or Finley, was, under the provisions of § 2263, Rev. Stat., absolutely as though it had never been conceived. Where particular contracts are inhibited by statute, and if attempted are in positive terms declared "utterly null and void," such contracts will not be enforced. *Gibbs v. Cons. Gas Co.*, 130 U. S. 396; and see *Miller v. Ammon*, 145 U. S. 421; *Quinby v. Conlan*, 104 U. S. 420; *Hartman v. Butterfield Co.*, 199 U. S. 337.

Mr. S. M. Stockslager and *Mr. George C. Heard*, with whom *Mr. Elmer E. Hershey* was on the brief, for defendant in error, submitted:

To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent. It must appear that, by the law properly administered, the title should have been awarded to the claimant. *Sparks v. Pierce*, 115 U. S. 408; *Bohall v. Dilla*, 114 U. S. 47; *Lee v. Johnson*, 116 U. S. 48.

The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else.

Lee v. Johnson, 116 U. S. 48; *Johnson v. Towsley*, 13 Wall. 72; *Warren v. Van Brunt*, 19 Wall. 646; *Shepely v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 U. S. 473; *Vance v. Burbank*, 101 U. S. 514; *Quinby v. Conlan*, 104 U. S. 420; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. St. Louis Smelting Co.*, 106 U. S. 447; *Baldwin v. Starks*, 107 U. S. 463; *United States v. Minor*, 114 U. S. 233.

The Secretary has jurisdiction at any time prior to the issuing of patent to cancel any entry. He also has jurisdiction to order a hearing for the purpose of obtaining the facts to enable him to determine, in a contest case, whether either claimant, and if either, which one, has the better right, and in doing so he may overrule any and all other decisions theretofore made. *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589; *Beley v. Naphaly*, 169 U. S. 353; *Knight v. U. S. Land Association*, 142 U. S. 161; *Brown v. Hitchcock*, 173 U. S. 473; *Hawley v. Diller*, 178 U. S. 476; *Harkrader v. Goldstein*, 31 L. D. 87.

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

Plaintiff rests his case on the contention that in the conclusions of the Secretary of the Interior there was error in matter of law, inasmuch as it is well settled that in the absence of fraud or imposition the findings of the Land Department on matters of fact are conclusive upon the courts. *Johnson v. Towsley*, 13 Wall. 72; *Lee v. Johnson*, 116 U. S. 48; *Lake Superior &c. Co. v. Cunningham*, 155 U. S. 354, 375; *Burfenning v. Chicago, St. Paul &c. Railway*, 163 U. S. 321, 323; *Gonzales v. French*, 164 U. S. 338; *Johnson v. Drew*, 171 U. S. 93, 99.

He also invokes the authority of *Noble v. Union River Logging Railroad*, 147 U. S. 165, 176, to the effect that when by the action of the Department a right of property has become vested in an applicant it can be taken away only by a

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proceeding directly for that purpose, and contends that his right to the land was determined by certain findings of the Commissioner of the General Land Office on July 26, 1892, affirmed by the Secretary of the Interior on January 12, 1894. It is doubtless true that when once a patent has issued the jurisdiction of the Land Department over the land ceases, and any right of the Government or third parties must be asserted by proceedings in the courts. *United States v. Stone*, 2 Wall. 525, 535; *Michigan Land & Lumber Company v. Rust*, 168 U. S. 589, 593, and cases cited. It may also be conceded that a right of property may become vested by a decision of the Land Department, of which the applicant cannot be deprived except upon proceedings directly therefor and of which he has notice. *Cornelius v. Kessel*, 128 U. S. 456; *Orchard v. Alexander*, 157 U. S. 372, 383; *Parsons v. Venzke*, 164 U. S. 89; *Michigan Land & Lumber Company v. Rust*, *supra*. Without undertaking to indicate the limits to which this can be carried, it is enough to say that the proceedings in this case, both in the local land offices and by appeals and reviews in the General Land Office, were within the settled rules of procedure established by the Department in respect to such matters. Generally speaking, the Land Department has jurisdiction until the legal title has passed, and the several steps in this controversy were before the issue of the patent, while the jurisdiction of the Land Department continued, and with both parties present and participating. The question of title was in process of administration and until the patent issued nothing was settled so as to estop further inquiry. *Knight v. U. S. Land Association*, 142 U. S. 161; *Michigan Land & Lumber Company v. Rust*, *supra*. So, although it be conceded that the findings of the Secretary of the Interior, in 1894, were to the effect that the plaintiff had a right to enter the land, that decision was not final, and it was within the jurisdiction of the Land Department to institute further inquiry, and upon it to finally award the land to the party held to have the better right.

This brings us to the pivotal fact. It appears from the complaint and exhibits that during the time that these proceedings were pending in the Land Department, Love made a sale to James Rundall of the tract in controversy, or some other tract, or some logs, and that Rundall thereafter made a sale of the same property to Flahive. What was the thing sold is not positively shown by the testimony. In the final decision of the case the Secretary of the Interior, after giving a synopsis of the testimony, which he says is largely incomplete and irrelevant and not entirely satisfactory upon the question, says:

"The witnesses Vanderpool and Lynch testify that Love had a place for sale which included the tract in controversy; Rundall that he purchased the tract in controversy from Love. The latter denies any sale of the land, but states that he sold some logs for W. H. Finley. It is evident from Love's statement of the transaction that, conceding the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. H. Finley, upon which the logs were situated, was about to be taken by Rundall.

* * * * *

"It appears that a clear preponderance of the testimony shows that the logs were situated upon the land in controversy; and from Love's evidence it is shown that he at the time of this sale laid no claim to the land upon which this unfinished cabin was erected.

* * * * *

"It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case Love asserted no title. It matters not, under the peculiar circumstances of this case, whether Love sold his own land or the land of W. H. Finley, or simply

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logs; as in the first instance it would work an estoppel of the assertion of claim now, in the second it would be conclusive evidence that the land was not claimed by him, and in the third it would be equally evidence of the same fact, as from his own testimony it appears that he laid no claim to the land upon which the logs were situated.

"This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive, did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted, at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him.

"The decision appealed from is therefore affirmed and the application of Love to enter the tract in controversy is held subject to the rights of Annie Flahive, the widow of Michael Flahive."

Of course, whether there was a sale, and what was the thing sold, were matters of fact to be determined by the testimony, and the findings of the Land Department in that respect are conclusive in the courts. It is objected by the plaintiff that a sale of a homestead prior to the issue of patent is void under the statutes of the United States. *Anderson v. Carkins*, 135 U. S. 483. This is undoubtedly the law, and the ruling of the Secretary was not in conflict with it, but the fact that one seeking to enter a tract of land as a homestead cannot make a valid sale thereof is not at all inconsistent with his right to relinquish his application for the land, and so the Secretary of the Interior ruled. While public policy may prevent enforcing a contract of sale, it does not destroy its significance as a declaration that the vendor no longer claims any rights. He cannot sell and at the same time deny that he has made a sale. The Government may fairly treat it as a relinquishment, an abandonment of his application

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and entry. No man entering land as a homestead is bound to perfect his title by occupation. He may abandon it at any time, or he may in any other satisfactory way relinquish the rights acquired by his entry. Having done that, he is no longer interested in the title to the land. That is a matter to be settled between the Government and other applicants. In this case, Love having relinquished his claim, it does not lie in his mouth to challenge the action of the Government in patenting the land to Mrs. Flahive.

We see no error in the record, and the judgment of the Supreme Court of Montana is

Affirmed.

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

HISCOCK, TRUSTEE IN BANKRUPTCY, *v.* MERTENS.

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

No. 209. Argued February 27, 1907.—Decided March 25, 1907.

The provisions in § 70a of the bankruptcy act of 1898, that a bankrupt having policies of life insurance payable to himself and which have a cash-surrender value, may pay the trustee such value and thereafter hold the policies free from the claims of creditors, are not confined to policies in which the cash surrender value is expressly stated, but permit the redemption by the bankrupt of policies having a cash surrender value by the concession or practice of the company issuing the same.

THE facts are stated in the opinion.

Mr. Will B. Crowley for petitioner:

These policies are not strictly life insurance policies, but investments. They have no cash surrender value within the

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meaning of the proviso in § 70-a-5 of the bankruptcy act, and the bankrupt is not entitled to take them from the trustee upon the payment of what the bankrupt claims is the cash surrender value thereof.

The bankrupt is not entitled to any interest in these policies and cannot take them from the trustee. This question has never been before this court, but the question has been expressly decided adversely to the claim of the bankrupt in the lower courts. *In re Welling*, 113 Fed. Rep. 189; *In re Slingluff*, 106 Fed. Rep. 154.

These cases hold that the term "cash surrender value" in the bankruptcy act refers to a value in cash provided by the terms of the policy itself, and which can be demanded as a contract right by the insured; that it does not mean a sum which the company will voluntarily pay, although not obligated to do so.

The "cash surrender value" contemplated by § 70-a-5 is not a value which may be obtained by means of negotiation or agreement, but that it is only such a value as can be demanded and legally enforced against an unwilling insurance company. *Pulsiver v. Hussey*, 9 Am. Bank. Rep. 657; 97 Maine, 434.

Holden v. Stratton, 198 U. S. 214, does not apply except as to statements which are *obiter*. The peculiar nature and qualities of a tontine policy were not developed in that case.

These policies did pass to the trustee. The claim of the bankrupt that policies which have no cash surrender value do not pass to the trustee, is not well taken.

These policies did, in fact, constitute assets and did pass to the trustee. It is quite clear from the terms of the policies themselves that they had an actual value. They come expressly within the first part of subdivision 5, namely, property which could have been transferred, because it appears from the evidence that these policies not only could have been transferred but were, as a matter of fact, prior to the bankruptcy, transferred as security for loans.

Mr. Dorr Raymond Cobb for respondent:

The policies in question had a cash surrender value within the meaning of § 70a of the bankruptcy act and upon the payment of that cash surrender value to the trustee, the bankrupt may continue to "hold, own and carry" said policies as permitted by that section of the act.

It appeared that the company had fixed the cash-surrender-value of each of the policies in question, and offered to pay the same, and such cash surrender values were stated on the record by one of the company's managers.

These cash surrender values which the company stood ready and offered to pay were based on the definite method of computation referred to as applicable to all similar policies. Premiums on each of the policies having been paid for more than three years, respondent had at all times the right to surrender either of his policies and receive in lieu thereof a paid-up policy "for the entire amount which the full reserve on this policy according to the present legal standard of the State of New York will then purchase as a single premium calculated by the regular table for single premium policies now published and in use by the society." This is substantially the legal requirement in the State of New York.

The contractual and statutory obligation to give the insured a paid-up policy assures a cash surrender value and fixity and uniformity in its payment. It is apparent as a practical question that policies having a cash surrender value will have a paid-up policy value and *vice versa*.

Under the former bankruptcy act, insurance policies passed to the assignee in bankruptcy only to the extent of their "cash surrender value;" that being treated as the sum which the company would voluntarily pay upon the surrender of the policy. Congress did not manifest any intention to change the law as it had been understood and practiced under the former bankruptcy act. *In re MacKinney*, 15 Fed. Rep. 535.

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MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in this case is whether the cash surrender value of a policy of insurance under sections 70-a-5 of the bankruptcy act must be provided for in the policy, or whether it be sufficient, if the policy have such value by the concession or practice of the company. Section 70 provides that "the trustee of the estate of a bankrupt upon his appointment and qualification . . . shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

The respondent and his sons, individually and as composing the copartnership of J. M. Mertens & Co., were declared bankrupts, and petitioner was elected the trustee of their estate October 14, 1903.

At the time the petition in bankruptcy was filed Mertens held four life insurance policies issued by the Equitable Life Assurance Society of the United States. One of the policies, payable to his wife if she should survive him, has been dropped from this controversy. The other three policies were payable

to Mertens at his death, his executors, administrators or assignees. They were subject to certain claims arising from their having been assigned as security for certain loans. With these we are not concerned.

A dispute arose as to the ownership of the policies, and the trustee filed a petition in the District Court for the determination of the ownership of them and that Mertens be required to make an assignment of them to the trustee. Mertens answered, alleging that the policies had, by law and the regular practice of the Equitable Life Assurance Society, a cash surrender value which he had sought to pay to the trustee, and was ready and willing to pay; that it was the uniform practice of the society to pay, upon the surrender of such policies and on policies issued on any of the blank forms shown by the policies, the cash value thereof "determined in accordance with a fixed and definite method of computation, and stated on demand, by any policy holder or person in interest;" that the society, pursuant to law and in accordance with its practice, had stated to him and declared the cash surrender value of each of the policies and its readiness and willingness to pay such value upon the surrender of the policies. The values were stated.

The matter was referred to a special master to take the proofs and report the same, with findings of fact and conclusions of law. Proofs were taken and a report made in accordance with the order of the court. The master, in his report, describing the policies, said:

"None of these express any agreement or provision whereby upon default the company shall pay a 'cash surrender value' to any person. By their terms the assured is excluded from any participation in dividends until the completion of the tontine period, at which time all surplus and profits derived from such policies are to be divided among the persistent policies of that class then in force. At the expiration of the tontine period the persistent policy holder is given certain options, among them to withdraw in cash the policy's entire

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share of the assets, that is, the accumulated reserve, the amount of which is stated in each policy, and, in addition, the accumulated surplus apportioned to the policy. Each of these policies also provides that upon default in payment of a premium and the surrender of the policy within six months thereafter the assured shall be entitled to a new paid-up policy, based upon the reserve accumulated under the old policy, but 'without participation in profits.' Both funds secured by the agreement, namely, the insurance proper and the endowment fund representing the accumulated profits, are payable to the assured or to his executors, administrators or assigns. No other person is mentioned in either of the policies as having any beneficial interest therein."

It appeared from the testimony that as a matter of fact policies of the character of those in controversy had, under the practice of the company, cash surrender values, if offered for surrender within six months from the date of the non-payment of any premium. Explaining this, a witness said:

"To make clear the replies of previous questions I will state that the Equitable Life Assurance Society would decline to purchase for cash a policy during the period for which premiums had been paid, entitling the policy holder to protection for the face value, for the reason that in the event of the death of the holder of that policy before the expiration of the period for which premiums had been paid, the question would be raised as to the liability of the company, so that the payment of an amount of cash for the surrender of a policy is only made by the company after that policy has lapsed by reason of the non-payment upon its due date." And it was testified that the cash surrender values of policies was determined by a fixed and definite method of computation, uniform in all cases, and had, without exception, been paid to persons insured by the company. It further appeared that the surrender values of the policies in controversy were as follows: Policy No. 274445, \$5,905.65; policy No. 417678, \$2,272.56; policy No. 417171, \$6,574.00.

It was further testified that the surrender value of each policy was equivalent to the amount of a paid-up policy, which the company was willing to give. Or, as expressed by a witness, "it is equivalent to the percentage reserved under that policy (referring to policy No. 274445), which the company is willing to pay in consideration of the surrender."

The District Court held that the policies had no cash surrender value within the meaning of section 70 of the bankrupt act. The court said:

"In the policies in question not only is there a failure to provide for a cash surrender value, but the provisions are inconsistent with the existence of such a value. This, however, is not at war with the fact that the Assurance Association may be willing to pay money for the surrender of such policies. There is no pretence that this custom of the insurer formed a part of the contract between the parties, or that the insured could enforce the payment of a surrender value, or the payment of anything, on surrendering the policy. In short, the insurer might be willing to pay a surrender value and might not. Such payment would be optional with it."

And again:

"The association might be willing to pay one day, entirely unwilling the next. Is this the 'cash surrender value' spoken of in the bankruptcy law? This court thinks not. It would seem that had Congress intended that every bankrupt holding a policy of insurance of the nature of these should retain the same as his own on paying to the trustee in bankruptcy the value thereof that the insurer might fix by its custom or otherwise, it would have used language appropriate to that end, and not an expression implying a value the insured has a legal right to demand, and the insurer may be compelled to pay, a value generally understood to be provided for in the policy itself."

The court cited, to sustain its views, *In re Welling*, 113 Fed. Rep. 189, and *In re Stingluff*, 106 Fed. Rep. 154.

An order was entered requiring Mertens to assign the policies

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to the trustees. It was reversed by the Circuit Court of Appeals. The latter court, however, said, that "it should be inclined to concur with the views expressed in *In re Welling*, and to sustain the conclusion of the District Judge in the cause at bar, that 'no policy is understood to have a cash surrender value unless provided for in the policy so as to be enforceable by the insured,' were it not for a subsequent expression of opinion by the Supreme Court. This is found in *Holden v. Stratton*, 198 U. S. 214, as follows:

"There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words "cash surrender value" as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867, *In re Newlands*, 6 Ben. 342; *In re McKinney*, 15 Fed. Rep. 535, and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved we do not expressly decide it.' "

The court observed that the extract from *Holden v. Stratton*, was *obiter* to the questions decided in the case, but considered it such an explicit declaration of views that the court expressed hesitation to disregard it.

We are hence confronted with the problem whether the *obiter* of *Holden v. Stratton* shall be pronounced to be the proper construction of section 70 of the bankrupt act. We may remark at the commencement that that *obiter* was not inconsiderately uttered, nor can it be said that it was inconsequent to the considerations there involved. It was there necessary to determine between conflicting decisions of two

Circuit Courts of Appeals upon the effect of state statutes of exemption from liability for debts, and a careful consideration of section 6 of the bankrupt act, which provided for exemptions, and section 70, which defined the property which passed to the trustee, was necessary to be made and their proper effect and relation determined. As elements in that consideration the meaning and scope of section 70 were involved and the purpose of Congress in its enactment. Section 6 provides for exemptions "prescribed by the state laws." Section 70 vests the title of all the property of the bankrupt in the trustee, "except in so far as it is to property which is exempt." Then, after a designation of the property the title to which is transferred, follows the proviso in regard to insurance policies. It was argued that the proviso would be meaningless unless considered as wholly disconnected from the clause as to exempt property, and this court replied:

"As section 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve."

198 U. S. 213.

And, contemplating the proviso as having such purpose,

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the court used the language quoted by the Circuit Court of Appeals, and expressed the view that, as between the two constructions that had been made of the terms, "cash surrender value," whether they meant a stipulation in the contract or the recognition by the company, the latter harmonized with the practice under the bankrupt act of 1867 and tended to elucidate and carry out the purpose contemplated by the proviso as the decision construed it. And the precedent practice is necessarily a strong factor and would be so even if it had a less solid foundation in reason. It is nowhere better expressed than in *In re McKinney*, 15 Fed. Rep. 535. It is there pointed out that the foundation of the surrender value of a policy is the excess of the fixed annual premiums in the earlier years of the policy over the annual risk during the later years of the policy. "This excess," it was said, "in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value."

And further:

"Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance instead of being retained by the assured, and paid by him to the company in the shape of greatly increased premiums when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the assured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured the company, to be relieved from all responsibility for the increased risk, which is represented by this accumu-

lating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made. . . ."

In *In re Newland*, 6 Ben. 342, it was said that the present value of a policy is its cash surrender value, and but for that "it could not be said to have any appreciable value. *Parker v. Marquis of Anglesey*, 20 Weekly Reporter, 162 and 25 Law Times Rep., new series, 482."

There is no expression in either of the cases that the cash surrender value depended upon contract as distinct from the usage of companies. And section 70 expresses no distinction. At the time of its enactment there were policies which stated a surrender value and a practice which conceded such value if not stated. If a distinction had been intended to be made it would have been expressed. Able courts, it is true, have decided otherwise, but we are unable to adopt their view. It was an actual benefit for which the statute provided, and not the manner in which it should be evidenced. And we do not think it rested upon chance concession. It rested upon the interest of the companies and a practice to which no exception has been shown. And that a provision enacted for the benefit of debtors should recognize an interest so substantial and which had such assurance was perfectly natural. What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies. In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to "continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings."

Counsel for petitioner argues that the policies are mere investments, and intimates the injustice of keeping them from the trustee, and illustrates the comment by contrasting what the company would have paid as the surrender value of policy No. 274445, if default had been made in payment

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of premiums, and what the company would pay six months thereafter. The contrast is between \$5,905.65 and \$11,318.40. But this is the result of the age of the policy, and cannot be a test of other policies or of the construction of the law. And a precisely like effect would result if the policy expressed a surrender value, in which case, it is conceded, it would come under the law. The same comment is applicable to other arguments of petitioner which tend to confound the distinction between surrender value and other value. Section 70 deals with the former, and makes it the conditions of the relative rights of the bankrupt and the trustee of his estate. Pursuing the argument farther, it is said that "the right to participate in the profits was a part and parcel of the policy and of the privileges enjoyed thereunder;" and it is further observed that the difference between the value of the policy which was used for illustration, "if lapsed on September 8, 1903, given as \$5,905.65, and its value on March 8, 1904, \$11,318.40, is chiefly made up of the value of this right to participate in profits." And counsel for petitioner is disposed to think the contention absurd that the bankruptcy law contemplated that such a valuable right "could be absolutely wiped out and taken from the trustee in such a case as this by allowing the bankrupt to take up the policy by paying what the bankrupt here claims to be the surrender value." Such result would not appear to be absurd if the policy were only two years old instead of nineteen years. Manifestly a policy cannot be declared in or out of the law according to its age, nor can anything be deduced from the investment features of tontine policies. Such policies were decided to be covered by the law in *Holden v. Stratton*. Whether the law should have included them is not our concern. Whatever may be said against it, it has seemed best to the legislature to encourage the extra endeavor and sacrifice which such policies may represent.

It is further contended that respondent has not made out that the policies have a cash surrender value, because it appears

from the evidence that the company would not accept their surrender until they had lapsed, and that they had not lapsed either when the petition was filed or the bankruptcy adjudged. But this is tantamount to saying that no policy can ever have a surrender value. According to the testimony, policies which have a stipulation for such value are subject to the same condition. And there is nothing in the record to show that the practice and policies of other companies are not the same as those of the Equitable Life Assurance Society. Section 70 is broad enough to accommodate such condition. It permits the redemption of a policy by the bankrupt from the claims of creditors by paying or securing to the trustee the cash surrender value of the policy "within thirty days" after such value "has been ascertained and stated to the trustee by the company issuing the same."

Judgment affirmed.

MOORE v. McGUIRE.

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

No. 222. Argued March 1, 4, 1907.—Decided March 25, 1907.

Where the bill is brought in the Circuit Court to quiet, and remove a cloud upon, the title of land alleged to be within the State and District where the suit is brought, and the cloud is based upon tax sales made under the authority of an adjoining State in which defendants claim the land is situated, although the chief difference may be upon the question of fact as to the location of the boundary line between the two States, if the construction of the act of Congress admitting one of the States to the Union and defining its boundaries is also in dispute the Circuit Court has jurisdiction of the case as one arising under the Constitution or laws of the United States. *Joy v. St. Louis*, 201 U. S. 332, distinguished. Under the acts of Congress of March 1, 1817, 3 Stat. 348, admitting Mis-

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Mississippi, and of June 15, 1836, 5 Stat. 50, admitting Arkansas to the Union, the boundary line between the two States is the middle of the main channel of the Mississippi River as it was in 1817, and at the point where Island No. 76 is situated it was at that time on the Mississippi side of that island which has never been within the State of Mississippi, notwithstanding attempts on the part of that State to exercise jurisdiction thereover.

In this case the court determined a controversy between private parties involving the location of the boundary line between two States favorably to the party in possession of the land involved under the authority of the State actually exercising jurisdiction thereover, but expressed doubt as to whether courts should in such a case go further than the actual conditions rather than leave it to the other State, if dissatisfied, to bring a suit in its own name.

142 Fed. Rep. 787, reversed.

THE facts are stated in the opinion.

Mr. D. E. Myers and *Mr. U. M. Rose*, with whom *Mr. W. E. Hemingway* and *Mr. G. B. Rose* were on the brief, for appellants:

The boundary line between the States is the thread of the Mississippi River. If the western boundary of the Mississippi was at the time of her admission into the Union the eastern shore of the river, as the act of admission would seem to have intended, the act of admission of Arkansas, making her eastern line the thread of the river, had the effect to amend the former act so as to make the line identical for both States. "Where territories are coterminous they must have a common boundary." *Coffee v. Groover*, 123 U. S. 22.

This line is not changed by any later displacements of the main navigable channel of the river. *Missouri v. Nebraska*, 196 U. S. 23; *Nebraska v. Iowa*, 143 U. S. 360; *Indiana v. Kentucky*, 136 U. S. 508.

There is no one living now who knows personally where the main channel of the river at Island 76 was in 1817. It is equally impossible to establish the fact by general reputation, which has passed away with the generation that formed it. Nothing then, is left but tradition; and that is the best evidence because it is the only evidence. *Ellicott v. Pearl*, 10 Pet. 435.

Evidence of tradition is admissible in cases of this kind. "Repute," "reputation" and "tradition" are used convertibly in this kind of case. 28 Am. & Eng. Enc. Law, 2d ed. 443, note 7. See also 1 Elliott Ev., §§ 402-403.

Courts have always been liberal in receiving evidence with regard to boundaries which would not be strictly competent in the establishment of other facts. Old surveys, perambulations of boundaries, even reputation, are constantly received on the question of boundaries of large tracts of land. *Ayers v. Watson*, 137 U. S. 596; *Orton v. Smith*, 18 How. 266; *Hart v. Sansom*, 110 U. S. 155; *Boardman v. Reed*, 6 Pet. 341; *Beard v. Talbott*, Cook (Tenn.) (Cooper's ed.), 142.

On the whole testimony the court below found "that the evidence conclusively establishes the fact that ever since 1839, and probably two or three years before that time, up to the year 1881, the main channel was east of the island."

The effect and construction of a United States land patent must, in the very nature of the subject, be a question for the United States courts to determine for themselves, without reference to the rules of construction adopted by the States for their grants. *Scranton v. Wheeler*, 57 Fed. Rep. 811.

The question as to boundaries between the States is not governed by the local law. *Martin v. Waddell*, 16 Pet. 367.

The decision of the Land Department that lands are swamp and overflowed lands is final and conclusive. *Rogers Locomotive Works v. Emigrant Co.*, 164 U. S. 560; *Heath v. Wallace*, 138 U. S. 573; *Wright v. Rosebery*, 121 U. S. 509.

A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles until it is set aside or annulled by some judicial tribunal in a direct proceeding for that purpose. *Moore v. Robins*, 96 U. S. 533.

With the patent passes away all authority or control of the executive department over the land, and over the title which it has conveyed. *Noble v. Union River Logging Ry.*, 147 U. S. 175; *Hardin v. Jordan*, 140 U. S. 400.

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The letters of the United States Land Officers embraced in the transcript are wholly irrelevant, except as showing that the State of Mississippi years ago was fully advised of the situation from a legal point of view as affecting the questions of acquiescence and prescription.

As no patent has ever issued from the United States to the State of Mississippi, the defendants are not in a position to contest the title of the plaintiffs. *Stringer v. Young*, 3 Pet. 337; *Chotard v. Pope*, 12 Wheat. 590; *Carroll v. Safford*, 3 How. 461.

There is no charge of fraud or unfairness. *Lytle v. Arkansas*, 9 How. 335.

The Swamp Land Act of September 28, 1850, only granted lands "which shall remain unsold at the passage of this act." The defendants have no standing in court unless they can show a prior right. *Schaer v. Gliston*, 24 Arkansas, 137; *Holland v. Moon*, 39 Arkansas, 120; *Miller v. Gibbons*, 34 Arkansas, 213; *Dewees v. Reinhardt*, 165 U. S. 392.

A mere intruder without title cannot attack the judgment of the Land Department. *Ehrhardt v. Hogaboom*, 115 U. S. 69; *Bates v. Railway Co.*, 1 Black, 208.

Defendants show no interest in the lands whatever. The State of Mississippi could only acquire title by patent; and as a patent has already issued no patent can ever be issued to that State. *Rogers Works v. Emigrant Co.*, 164 U. S. 570.

Mr. J. M. Moore, with whom Mr. Alexander Y. Scott, Mr. Charles Scott and Mr. E. H. Woods were on the brief, for appellee:

Usucaption and prescription as generally asserted is not a positive rule of international law, whereby one nation can acquire territory of right belonging to another; said rule is merely a rule of evidence aiding in the construction of treaties or the ascertainment of the true and ancient boundary.

The Act of Congress admitting Mississippi into the Union, made the middle channel of the Mississippi River the western boundary of the State of Mississippi.

In 1817, the date Mississippi was admitted into the Union, the main channel of the Mississippi River ran west of Island 76.

Even in case the court should hold the western boundary of Mississippi to be the eastern bank of the Mississippi River, the boundary of Mississippi would extend to the eastern bank of the main channel of said river for navigation purposes and hence to the western bank of Island 76, including said Island within the territorial jurisdiction of Mississippi.

Arkansas never had such possession of Island 76 and never exercised such jurisdiction over the territory of said island as to warrant the invoking of the pretended doctrine of usucaption.

Mississippi never abandoned or relinquished its possession so that the so-called doctrine of prescription could be invoked against her; but on the contrary, she has held possession of said island from 1817 to the present date; and Arkansas has not claimed possession for a sufficient length of time to obtain title under the pretended doctrine of usucaption and prescription.

The act of an executive officer, or officers within the State, cannot transfer title to property within the territorial jurisdiction of the Nation or State or change or affect the boundary of said State.

The Land Department of the United States cannot change the boundaries between two States by the mere ministerial act of offering the land for sale, erroneously as within one or the other of the States.

The sovereign right of taxation belonging to a State is not defeated by the Federal Government patenting land within its territorial jurisdiction to a citizen of the State or of a foreign State.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to quiet and remove a cloud upon the title to land alleged to be in Arkansas. The Circuit Court found that

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the land was in Mississippi and dismissed the case for want of jurisdiction. 142 Fed. Rep. 787. The judge made the usual certificate, and an appeal was taken to this court.

The land in controversy is Island No. 76, formerly called Chapeau Island, in the Mississippi River, and whether it is part of Arkansas or of Mississippi depends, as both parties agree, on what was the western boundary of Mississippi, as established by the Act of Congress admitting that State to the Union. Act of March 1, 1817, c. 23, 3 Stat. 348. In that Act the State is bounded by a line "beginning on the river Mississippi" and running around the State "to the Mississippi river, thence up the same to the beginning." The plaintiffs contend that these words should be construed to bound the State on the eastern bank of the river, while the defendants maintain that they refer to the middle of the main channel, as it then was. The chief difference is upon the question of fact whether the main channel was to the east or west of the island in 1817, but as the construction of the statute also is in dispute, there is jurisdiction, and *Joy v. St. Louis*, 201 U. S. 332, cited by the appellees, does not apply.

We shall assume for the purposes of decision that the boundary is the middle of the main channel as it was in 1817, and address ourselves at once to the chief issue. Some facts are clear. Arkansas was admitted to the Union by Act of Congress of June 15, 1836, c. 100, 5 Stat. 50. This Act purported, in terms, to bound the new State by the middle of the main channel; that is, of course, as it then was, so that if at that time the channel was on the Mississippi side, the act of the Government imported an understanding that the boundary of Mississippi went no farther. In 1847, 1848 and 1849 there were purchases of a great part of the island at the United States Land Office in Helena, Arkansas, and certificates and patents were issued by the United States Government. The titles thus created are not attacked, but are said to have been lost by the Mississippi tax sale hereafter mentioned. The small remnant was conveyed by the United States to Arkansas

ten years later by a patent under the Swamp Land Act. Arkansas regularly taxed the island as far back as its books are preserved, and presumably before. The above mentioned greater part was forfeited for taxes to the State. Then the State instituted a statutory proceeding to decide whether the forfeiture was valid, and, if not, to collect the taxes by a new sale. A new sale was ordered in due time, made, and the deed approved by the court. The plaintiffs are purchasers from the grantor under this sale and also from grantees of the residue patented under the Swamp Land Act to the State.

Thus it is apparent that Arkansas has exercised dominion over the island from 1847 down to recent times. The State of Mississippi, on the other hand, only recently and since the channel has changed, as we shall state, has attempted to tax it. In 1891, it purported to sell the land for taxes, but the next year the money paid was refunded to the purchaser, on the certificate of the Governor and Attorney General of the State that the land was "within the limits and the property of the State of Arkansas." Later, in 1899, the State changed its mind and sold the land for taxes again, the defendants getting their title from this sale, but the possession of Arkansas and the plaintiffs under it has remained. In view of these conditions there may be a doubt whether courts should go beyond them in a private controversy, rather than leave it to the State of Mississippi, if dissatisfied, to bring a suit in its own name. See *Jones v. United States*, 137 U. S. 202; *Foster v. Neilson*, 2 Pet. 253; *Filhiol v. Torney*, 194 U. S. 356; *Bedel v. Loomis*, 11 N. H. 9; *State v. Dunwell*, 3 R. I. 127; *State v. Wagner*, 61 Maine, 178, 184. But, however this may be, the facts stated give us a starting point and raise a presumption which is fortified by some further matters also beyond dispute.

The court below finds that "ever since 1839, and probably two or three years before that time, up to the year 1881, the main channel was east of the island in controversy, and since 1881, up to the present time west of the island;" the change

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being due, it seems to the washing away of the old Napoleon Island, ten miles or so above. There is no serious attempt to cast doubt upon this finding and we deem it correct. In connection with the finding it should be noticed that a Mississippi statute of 1839, repeated in the Code of 1857, p. 64, gives as one boundary of Bolivar County, "thence down the main channel of the said Mississippi," thus seemingly adopting the channel as it then was, on the Mississippi side, as the true boundary, and furnishing evidence from which we should not lightly depart. In 1849, the island was surveyed and platted as part of Arkansas, and the survey was certified by William Pelham, the Surveyor of Public Lands in Arkansas. The field notes state that the main channel is on the Mississippi side and that the inhabitants of the island vote and pay taxes in Arkansas. They add that the channel or chute on the other side is wide, but in low water very shallow, and that on December 27, 1845, the surveyor got his skiff through with difficulty. This is the most exact and authentic of the surveys produced on either side.

The presumption raised by the facts thus far recited is confirmed by the evidence of an old steamboat captain, whose personal experience went back to 1839. He testified that he learned under his father and brother, and that they instructed him that the channel was on the east side in 1812. He further stated that one of the first wood yards established on the Mississippi River for selling wood to steamers was just above No. 76 on the Mississippi side. Another witness, who lived in the neighborhood in 1839 and after, testified that the channel was considered to be on the east side, that the boats passed directly in front of her house and that they could not pass up the chute on the other side, except in very high water. Having in mind the finding that we have quoted we mention the last testimony only for the indication that it gives of a more or less permanent condition existing at the time when the witness's memory began.

As against this consensus of action on the part of the two

States concerned and the United States, this presumption from the establishment of the channel for a time running back nearly or quite to the admission of Arkansas, and this testimony from memory and tradition, the chief reliance of the defendants is upon certain maps and the statement in a letter to which we shall refer. The first and most important of the maps is one of a "Reconnaissance of the Mississippi and Ohio Rivers," made during the months of October, November and December, 1821, by two captains and a lieutenant of engineers under the direction of the board of engineers. This exhibits Chapeau Island with a dry sand bar on the Mississippi side, and indicates by dots that the channel is to the west. If the distances are accurate the sand bar at the top approaches pretty near to Mississippi; but in view of the small scale of the map and the absence of measurements there is no sufficient warrant for assuming that the distances are accurate. As to the indication of the channel, it would not be surprising, considering the short time during which the reconnoitre extended, if it had been determined by nothing more than the visible width. But in any event it hardly would do more than confirm a conjecture suggested by other sources which we shall mention, that in some years the western passage was as good as or better than the more permanent one to the east.

The next map is one certified January 22, 1829, of a survey in February, 1827, showing the Arkansas shore sectionized and the island sketched in, with distances indicated at some points, but not sectionized. This map cannot be said to help either side except by speculation of an uncertain sort. The next map, however, is more definite. It is a map of Township 21, Range 8 west, Mississippi, said to be projected from field notes of Benjamin Griffin, also produced, made in January and February, 1830. Here the island is divided up as part of the township, although not sectionized under the United States statutes, and there are other slight indications that the draughtsman regarded the island as belonging to Mis-

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Mississippi. This map is more or less counteracted by another map of the same township signed by Benjamin Griffin, which does not sectionize the island and indicates, if it indicates anything about it, that the channel is on the east side. The field notes in two places speak of "where the west boundary comes to the river," and they give the width of the east channel at the top as 2,920 feet. The defendants contend that the first mentioned of these two maps is the completed work, but that hardly can be said to be proved.

In addition to these maps there is some correspondence, etc., from which it appears that the island was selected by Mississippi under the Swamp Land Act, and that after the selection had been approved by the Secretary of the Interior, but before any patent had issued, the island was sold by the State in 1854 to one Ford. In 1859, Ford wrote to the Governor of Mississippi complaining that Arkansas claimed jurisdiction and that the island had been disposed of as public domain within the limits of that State, asking the Governor to claim a patent from Washington and enclosing a letter to the writer, Ford, from one Downing, who is said to have been Surveyor General of Mississippi at an earlier date. This letter is much relied upon. It purports to answer an inquiry as to the island, refers to the survey of 1830 or 1831 and says that at that time, and for some years after, the Island Chute, as it was called, was quite narrow, not over one hundred yards wide about opposite the middle of the island, and that at that time the writer never heard of a steamboat going up or down on the east side. The main river then passed on the west side. The writer adds that he thinks it was in 1835 that he spent some time in examining the land in T. 21, R. 8 W., and that the Island Chute was quite narrow then.

Presumably this letter was written with knowledge of Ford's object, and it hardly can be said to stand on the footing of disinterested tradition. Whether it was admissible or not we need not consider. It was forwarded to the Department of the Interior by the Governor with Ford's claim. The

Commissioner answered the letter, expressing an opinion favorable to Mississippi from inspection of the plats and Downing's statement, and enclosing a similar opinion of a former Commissioner in 1855, also from inspection of the plats. Both letters, however, called for evidence of the condition in 1817, and the later one specifically asked for an affidavit from Downing and another disinterested witness. It was assumed that the land, or most of it, was disposed of, and that the question would be of reimbursement. The affidavits asked for seem not to have been furnished, and nothing more appears to have been done until June 27, 1896. At that date another letter from the Acting Commissioner speaks of the land as having been mostly disposed of before the Swamp Land Act and therefore not granted by it, and suggests the submission of a list containing the 51 acres not so disposed of for approval to Mississippi, giving the Governor sixty days for action. Nothing further was done.

This evidence appears to us insufficient to meet the established facts to which we have referred. It must be admitted to raise a doubt whether the channel has not varied from time to time before the great changes about 1881. This doubt is enhanced by other sources of information not put in evidence but partially referred to by the plaintiffs at the argument. A map in Samuel Cumming's *Western Navigator*, Philadelphia, 1822, vol. 1, indicates the channel on the Arkansas side, and this is confirmed by the text. Vol. 2, p. 44. In the *Navigator*, Zadok Cramer, published for a number of years at Pittsburgh for the information of pilots, in 1806 the channel is said to be good on both sides. In 1808 and 1811 it is said that the left (east) side is the best in low water. In 1814, 1817 and 1818, on the other hand, the best channel is said to be on the right side at all stages. We refer to all the years that we have seen. In view of this statement for the very year when Mississippi was admitted, it is impossible not to hesitate, but in Cumming's *Western Pilot* for 1833 we read "channel either side: the right is nearest, and the left

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is probably rather deepest," and this seems to us to have been true for the whole time. Upon the whole evidence we are compelled to decide that the plaintiffs have made out their case.

Decree reversed.

MR. JUSTICE HARLAN agrees with the Circuit Court as to both the facts and the law, and therefore dissents.

MR. JUSTICE PECKHAM took no part in the decision.

EMPIRE STATE-IDAHO MINING AND DEVELOPING
COMPANY v. HANLEY.

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

No. 206. Argued February 1, 1907.—Decided March 25, 1907.

In a suit in the Circuit Court of the United States where diverse citizenship exists, if the real question is the controlling effect of *res judicata* of a decree rendered between the parties in another suit, and whether the court rendering it had jurisdiction so to do and those questions are decided upon principles of general law, the case is not one involving the construction and application of the Constitution and laws of the United States, and a direct appeal does not lie to this court under § 5 of the Court of Appeals Act of 1891, 29 Stat. 492; nor can the decision appealed from be converted into one involving the construction and application of the Constitution by averring argumentatively that to give such effect to the former adjudication amounts to depriving a party of due process of law.

THE defendant in error, complainant below, brought suit in the Circuit Court of the United States for the District of Idaho against the Empire State-Idaho Mining and Developing Company and the Federal Mining and Smelting Company, appellants herein. The bill filed July 27, 1904, alleged di-

versity of citizenship as the ground of jurisdiction, and averred that the Empire State-Idaho Mining and Developing Company, the Federal Mining and Smelting Company and complainants are the owners and possessors, as tenants in common, of the Skookum mine and mining claim and the ores therein contained, situated in Yreka Mining District, Shoshone County, Idaho. The complainant was alleged to be the owner of an undivided one-eighth interest in the fee thereof, and the Empire State-Idaho Mining and Developing Company the owner of the undivided seven-eighths of said mine and claim.

There are other allegations, not necessary to be here set out, and then, in the eighth paragraph of the bill, it is alleged:

"8. That prior to May 17, 1902, the defendant Empire State-Idaho Mining and Developing Company extracted from said mine, through said tunnels, large quantities of ore and sold the same and received all of the proceeds thereof and paid no part of the same to complainant; that complainant brought suit on March 19, 1899, in the United States Circuit Court, District of Idaho (a court having jurisdiction of the parties and subject matter) against said defendant and Charles Sweeny and F. Lewis Clark, to recover his share of the proceeds and to quiet his title to said mine and ore bodies; and in said suit recovered a decree against said defendant Empire State-Idaho Mining and Developing Company, duly given and made in said United States Circuit Court at Moscow, Idaho, on or about November 17, 1902, for the sum of one hundred seventy-five thousand dollars (\$175,000), and which decree quieted the title of this complainant to said one-eighth interest in said claim and ore bodies, a certified and attested copy of which decree was, on the — day of November, 1902, recorded in Shoshone County, Idaho, and the amount decreed to complainant therein remains unpaid and unsatisfied, excepting the sum of \$5,523.42; that as the result of an appeal from said decree by complainant the same was, on the tenth day of May, 1904, so modified as to make the amount thereof \$255,061.40, with interest thereon from February 15 until

paid, at seven per cent per annum, and the said amount and every part thereof is now unpaid."

The bill avers the extraction of a large amount of ore in which the complainant alleges he is entitled to an interest, and that the defendant the Empire State-Idaho Mining and Developing Company and the Federal Mining and Smelting Company deny the title of the defendant to the mining and ore bodies. It further avers that the defendants are appropriating the ores mined to their own use, and, after other allegations not necessary to be set out, prays for an injunction restraining the defendants from extracting ore from the Skookum mine pending the suit, and for an accounting for the ores extracted from the mines and claim since May 17, 1902.

By the amended answer the defendants, among other defenses, set up that the ores which they are extracting belong to a vein or lode not having its apex within the Skookum mining claim, but belonging to a vein having its apex within the lode mining claim lying to the north of the Skookum claim and a part of the San Carlos claim owned by the defendants, and deny that the defendants are mining any ores in which the complainant has any right, and avers that the claim thereto is without merit; and coming to answer the eighth paragraph of the bill, setting up the decree upon which the plaintiffs relied for their title, the defendants set up paragraphs 6 and 7:

"6. Answering paragraph eighth of the bill, these defendants admit that an action was brought against the parties named in said paragraph as alleged therein, but deny that said action was brought to quiet title to said ore bodies, or that the decree therein did in fact quiet title to said ore bodies or to an undivided one-eighth interest therein in the complainant, and allege further concerning said decree in said action that the court, in the said action, had no jurisdiction to determine title to the said Skookum mine or to the ore bodies lying within or beneath the said mining claim, for the reason that the bill of complaint in the said action does

not purport to be an action to quiet title to the said mine or ore bodies, nor does the same make a case for the quieting of title thereto, nor is it such as to authorize the decree rendered in said action purporting to quiet the title to said mine and ore bodies, and for the further reason alleged by defendants to be a fact, that no opportunity was given to the defendants therein to litigate the title to said ore bodies before the decree in said action purporting to quiet title was rendered, and for the further reason that at the time of the commencement of said action the defendant herein, Empire State-Idaho Mining and Developing Company, was, as shown by the complaint herein, in exclusive possession of such ore bodies and the complainant was out of possession thereof, and an action of law alone would lie in the Federal court to determine title to such ore bodies, and that the defendant therein, being the defendant, Empire State-Idaho Mining and Developing Company, had a right under the laws and Constitution of the United States to a trial by jury of the question of title to said ore bodies, and defendants allege that so much of the decree in said action as undertook or purported to quiet title to such ore bodies was and is absolutely void as to the Empire State-Idaho Mining and Developing Company, because the same constituted and was in fact an attempt to deprive it of its property without due process of law within the meaning of article 5 of the amendments to the Constitution of the United States, and because the same constituted an adjudication of its property rights without its consent by the court without a jury, contrary to the provisions of article 7 of the amendments to the Constitution of the United States.

"7. The defendants attach hereto, marked Exhibit A, and pray that the same may be taken as a part of this answer, copies of the complaint, answer and replication in the action referred to in the eighth paragraph in the bill, and allege that the same constituted the sole pleadings in the said action, and together with the evidence constituted the sole basis for the final decree rendered therein, a copy of which is attached

hereto and marked Exhibit B, and made a part hereof; that after the replication in said cause was filed testimony was taken before an examiner, on the part of the complainant, in support of the allegations contained in the bill, to wit, the allegations that the defendants Clark and Sweeney had acquired the one-eighth interest in the Skookum mine from the complainant by fraud, covin and deceit, and testimony was introduced by the defendants contradicting the testimony of the complainant, and tending to support the affirmative allegations of the answer, and no testimony was offered or taken, either for complainant or defendants, concerning the said one-eighth interest, except the evidence for and against fraud, covin and deceit, as before alleged. Thereupon the said cause was submitted to the court for decision, and the said Circuit Court entered a decree in favor of the defendants therein. Thereupon complainant in that suit appealed to the United States Court of Appeals for the Ninth Circuit from the said decree, and the said court, after a hearing upon the pleadings and the evidence before it, found that the allegations of the bill relating to the fraud in procuring title to the one-eighth interest claimed by the said Hanley were sustained by the evidence, and the decree was reversed and the cause sent back to the Circuit Court for the further proceedings in accordance with the opinion. Thereupon an order was made by the Circuit Court directing an accounting, and evidence was introduced by complainant to show the amount and value of ores extracted from the Skookum mine prior to May, 1902, by the defendants in said suit. That defendants in the said action thereupon offered to prove that the said ore so extracted from underneath the Skookum mine prior to that time was part of the vein having its apex in the said San Carlos claim, above referred to, owned by defendants, and that the said San Carlos claim was so located that its extralateral rights included the ore bodies from which the said ores were extracted. The said offer to prove the said fact was thereupon denied by the said court, acting under

the order of the United States Circuit Court of Appeals for the Ninth Circuit, in a certain mandamus proceeding brought in said court to test the question; that defendants in the said action thereafter, and at all times, contended and insisted that they had a right to show in the accounting that the ores taken from under the Skookum claim were a part of the vein apexing in the San Carlos claim, of which the defendants were the owners, and that the court was without jurisdiction to render a decree in the said action quieting title to the Skookum mine, or to the ore bodies referred to in the bill of complaint, but its contentions and objections were overruled and the decree averred by the complainant was rendered notwithstanding such protests and objections; and defendants aver that the said decree purporting to quiet title in said ore bodies was rendered without evidence being taken upon the said contention of the defendants, and without any evidence whatever being heard which threw any light upon the contention; and said decree was thereafter, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, affirmed, the court in said cause holding as ground for its action that the bill of complaint made a cause for quieting title to the one-eighth interest in the said Skookum mine and to the ore bodies in the limits thereof, and that the defendants in said cause, having failed to plead title to the ore bodies in themselves by virtue of the facts hereinbefore set up, were estopped to litigate the said facts."

The complainant below filed exceptions to this amended answer, in which he averred that in the former decree the title to the ore bodies in question was quieted and that the issues made in that case were within the jurisdiction and power of the court to determine, and that the question of the right and title to one-eighth of the Skookum mine and mining claim and ores therein contained had been determined in the former suit in favor of the complainant and the said question had become *res judicata* in a court having jurisdiction of the parties and the subject matter.

Upon hearing the exceptions to the amended answer, they were sustained and the answer held insufficient. Thereupon the defendants, averring that the court was in error and that the said amended answer constituted a defense, declined to plead further, and elected to stand upon the amended answer. The complainant thereupon moved the court for a final decree for one-eighth of the amounts stated in paragraph 9 of the answer to have been mined as therein stated. A final decree was rendered accordingly, and thereupon a direct appeal was taken to this court.

Mr. George Turner, with whom *Mr. F. T. Post* was on the brief, for appellant.

Mr. Myron A. Folsom for appellee.

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

In the brief and argument of the learned counsel for the plaintiff in error it is said: "The sole question in the case is whether, on the facts set up and pleaded in the answer, there was jurisdiction in the United States Circuit Court in the former suit to render the judgment quieting in the complainant Hanley title to one-eighth of *all* the ore bodies found within the boundaries of the Skookum mining claim. The lower court thought the answer failed to show want of jurisdiction and sustained complainant's exceptions."

A preliminary question for examination in this court, although not made in argument by counsel, is whether this court has jurisdiction of this case by direct appeal from the judgment rendered in the Circuit Court of Idaho. It is apparent from the statement preceding this opinion that the extent and effect of the adjudication in the first case, wherein the complainant alleges title was decreed to him, was the real controversy between the parties. The complainant con-

tended that the court in the former case had adjudicated title to all of the ore bodies found within the boundaries of the "Skookum claim." The defendants contended that the ore bodies in controversy belonged to another mine, the San Carlos, the property of the defendants, by reason of the fact that they are of a vein which has its apex in the San Carlos mining claim and not in the Skookum; and that the decree in the former suit was without jurisdiction in so far as it undertook to quiet title for such ore bodies, because the pleadings in that suit made no case for such decree.

If this case can come here by direct appeal, it must be because it is within section 5 of the Court of Appeals Act, 1891, providing for direct appeals in certain cases from the Circuit Court to this court. Sec. 5, 29 U. S. Stat. 492. It cannot be brought directly here as a case in which the jurisdiction of the court is in issue; for the jurisdiction challenged is not that of the court rendering the decree from which this appeal is taken, but is that of the court rendering the former decree, which is set up in the complaint as the basis of the title sued upon. *In re Lennon*, 150 U. S. 393.

If the case is properly here, it must be because it is one which involves the construction or application of the Constitution of the United States. It has been repeatedly held that it is only when the Constitution of the United States is directly and necessarily drawn in question that such an appeal can be taken, and the case must be one in which the construction or application of the Constitution of the United States is involved as controlling. We think this case is not of that character. It is evident that the real issue as to the former judgment was whether it was *res judicata* between the parties, or, as contended by the plaintiff in error, rendered without jurisdiction. The court in deciding against the plaintiff in error decided that the court had jurisdiction and that the former decree was conclusive. This decision does not necessarily and directly involve the construction or application of the Constitution of the United States.

In *World's Columbian Exposition v. United States*, 56 Fed. Rep. 654, 657, Mr. Chief Justice Fuller, speaking for the court, said: "Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws."

In *re Lennon*, 150 U. S. *supra*, was a proceeding in *habeas corpus* to discharge a party held upon an order for imprisonment for failing to pay a fine imposed for contempt. The petitioner alleged that the Circuit Court had no jurisdiction of the case in which the order of injunction had been issued, for violation of which the petitioner was alleged to be guilty of contempt; and that it had no jurisdiction either of the subject-matter or of the person of the petitioner. The application being denied and direct appeal being taken to this court, it was held that it would not lie under section 5, Act of March 3, 1891, because the jurisdiction of the Circuit Court of the petition for *habeas corpus* was not in issue, nor was the construction or application of the Constitution involved. Of the latter phase of the case Mr. Chief Justice Fuller, speaking for the court, said:

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject-matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound

by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

In *Carey v. Houston & Texas Central R. R. Co.*, 150 U. S. 170, in which a bill in equity had been filed in order to impeach and set aside a decree of foreclosure on the ground of fraud and want of jurisdiction in the foreclosure suit, it was held that no case for appeal directly to this court was made as one that involved the construction or application of the Constitution of the United States. In that case Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors and *jurisdictional* defects in the foreclosure proceedings and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the Circuit Court decided no question of the construction or application of the Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained."

The cases cited were followed and the principles deducible

therefrom applied in *Cosmopolitan Mining Company v. Walsh*, 193 U. S. 460. In that case it was contended, in a replication to an answer setting up certain former judgments rendered against the complainant as a bar to the suit brought by it to recover possession of the real property sold under the judgments, that they were awarded without due process of law, in violation of the Fourteenth Amendment. And this was upon the theory that the service of process in the state courts upon the corporation's agent in the suits where the judgments were rendered was unauthorized by the laws of the State or the general principles of law. It was held that the case was not one directly involving the construction or application of the Federal Constitution within the meaning of section 5 of the Act of March 3, 1891, and the writ of error was dismissed.

We think the principles involved in these cases decisive against jurisdiction in this court of this appeal. It is true that it is averred in the sixth paragraph of the amended answer above set forth that in the action to determine title to the ore bodies the mining company had the right under the laws and Constitution of the United States to a trial by jury, of which it was deprived; and that so much of the decree as undertook to quiet title to the ore bodies was rendered without jurisdiction, because the same constituted and was in fact an attempt to deprive the defendant of its property without due process of law in violation of the Federal Constitution. But these averments of conclusions as to constitutional rights do not change the real character of the controversy and make it a case in which the controlling rule of decision involves the construction or application of the Constitution of the United States.

The thing relied upon in this case was the controlling effect as *res judicata* of a decree rendered between the parties in another suit. And the real issue was as to the jurisdiction of the court to render the decree. The determination of that question did not involve the construction or application of

the Constitution of the United States. The Circuit Court held that the court rendering the first decree had jurisdiction to determine the ownership of the ore bodies underneath the surface of the Skookum claim. The court thus really decided a question of *res judicata* between the parties upon general principles of law. And it does not convert the decision into one involving the construction and application of the Constitution of the United States to aver, argumentatively, that to give such effect to a former adjudication under the circumstances amounts to depriving a party of due process of law.

We are of opinion therefore that the case does not come within the fifth section of the Circuit Court of Appeals Act as one directly appealable to this court.

The writ of error is dismissed for want of jurisdiction in this court.

ROCHESTER RAILWAY COMPANY v. CITY OF ROCHESTER.

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

No. 156. Argued January 14, 15, 1907.—Decided March 25, 1907.

Although the obligations of a legislative contract granting immunity from the exercise of governmental authority are protected by the Federal Constitution from impairment by the State, the contract itself is not property which as such can be transferred by the owner to another, but is personal to him with whom it is made and incapable of assignment, unless by the same or a subsequent law the State authorizes or directs such transfer; and so held as to a contract of exemption with a street railway company from assessments for paving between its tracks.

The rule that every doubt is resolved in favor of the continuance of governmental power, and that clear and unmistakable evidence of the intent to part therewith is required, which applies to determining whether a legislative contract of exemption from such power was granted also applies to determining whether its transfer to another was authorized or directed. A legislative authority to transfer the estate, property, rights, privileges

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Statement of the Case.

and franchises of a corporation to another corporation does not authorize the transfer of a legislative contract of immunity from assessment.

Where a corporation incorporates under a general act which creates certain obligations and regulations, it cannot receive by transfer from another corporation an exemption which is inconsistent with its own charter or with the Constitution or laws of the State then applicable, even though under legislative authority the exemption is transferred by words which clearly include it.

Although two corporations may be so united by one of them holding the stock and franchises of the other, that the latter may continue to exist and also to hold an exemption under legislative contract, that is not the case where its stock is exchanged for that of the former and by operation of law it is left without stock, officers, property or franchises, but under such circumstances it is dissolved by operation of the law which brings this condition into existence.

182 N. Y. 116, affirmed.

THE defendant in error brought an action against the plaintiff in error, a street surface railroad corporation, hereinafter called the Rochester Railroad, to recover \$18,274.02, the expense of making new pavements of two streets within the space between the tracks, the rails of the tracks and two feet in width outside the tracks of the railroad. The action was brought under section 98 of chapter 39 of the General Laws of New York, which was enacted in 1890, and is as follows:

"Every street surface railroad corporation, so long as it shall continue to use any of its tracks in any street, avenue or public place, in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities and whenever required by them to do so and in such manner as they may prescribe. In case of the neglect of any such corporation to make pavements or repairs after the expiration of thirty days' notice to do so the local authorities may make the same at the expense of such corporation. . . ."

The Rochester Railroad was incorporated on February 25, 1890, under a law of New York enacted May 6, 1884. Chap. 252, Laws of New York, 1884. That law authorized the

formation of street surface railroad corporations and provided that they should "have all the powers and privileges granted and be subject to all the liabilities imposed by this act." Among the liabilities was that imposed by section 9 of the act, which is as follows:

"Every such corporation incorporated under, or constructing, extending, or operating a railroad constructed or extended, under the provisions of this act, within the incorporated cities and villages of this State, shall also, whenever and as required and under the supervision of the proper local authorities, have and keep in permanent repair the portion of every street and avenue between its tracks, the rails of its tracks and a space of two feet in width outside and adjoining the outside rails of its track or tracks, so long as it shall continue to use such tracks, so constructed, under the provisions of this act. In case of the neglect of such corporations to make such pavement or repairs the local authorities may make the same at the expense of such corporation after the expiration of thirty days' notice to do so."

Section 18 of the act provides that "all acts and parts of acts, whether general or special, inconsistent with this act are hereby repealed, but nothing in this act shall . . . interfere with or repeal or invalidate any right heretofore acquired under the laws of this State by any horse railroad company or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road in accordance with the terms and provisions of its charter and the acts amendatory thereof."

The Rochester Railroad Company was incorporated for the purpose of acquiring the property of the Rochester City and Brighton Railroad Company, hereinafter called the Brighton Railroad. The Brighton Railroad was incorporated March 5, 1868, under a general law of the State of New York. Chap. 140, Laws of 1850. That law contained no provision respecting the repairs of streets, and, differences having arisen between the Brighton Railroad and the city, as to the extent of the

burden of such repairs properly to be borne by the railroad, they joined in an application to the legislature for the enactment of a law which should regulate that and other subjects. Such a law was enacted February 27, 1869, and its fifth section was as follows:

"Said company shall put, keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the common council of said city of Rochester; but whenever any of said streets are, by ordinance or otherwise, permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof."

On the twenty-fifth day of February, 1890, the Brighton Railroad duly executed and delivered a lease of its property, franchises, rights and privileges, for the unexpired term of its charter, to the Rochester Railroad, which accepted the lease and took possession of the property. Subsequently, in the same year the Rochester Railroad acquired the entire capital stock of the Brighton Railroad. The acquisition of stock was in pursuance of the authority contained in chapter 254 of the Laws of New York of 1867, which, as amended by chapter 503 of the Laws of 1879, is as follows:

"Any railroad corporation created by the laws of this State, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered

on their minutes, become *ex officio* the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of the said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the said corporation, to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected hereby, nor shall existing liabilities or the rights of creditors of the corporation, where stock shall have been so surrendered or transferred, be in any way affected or impaired by this act."

Subsequently, the Rochester Railroad duly obtained permission to convert the road into an electric trolley road, expended large sums of money in doing so, and, in the acquisition of the stock of the Brighton Railroad and the conversion of its road into an electric road, relied upon the provisions of the act of 1869 as a contract exempting it, with respect to the streets covered by the tracks of the Brighton Railroad, from other street repairs than those therein described. The city acquiesced in this view until October, 1898, when, upon the suit of an owner of adjoining property, the Court of Appeals held that under section 9 of the Act of 1884 and section 98 of chapter 39 of the General Laws, which were regarded as substantially the same, the Rochester Railroad was bound to bear the expense of a new pavement on

the location acquired from the Brighton Railroad. *Conway v. Rochester*, 157 N. Y. 33. Subsequently, the city repaved two streets which were within the location acquired and operated by the Brighton Railroad, prior to the passage of the Act of 1884, and, in obedience to the decision in the *Conway case*, assessed against the Rochester Railroad its share of the expense of pavement and brought this action to recover the amount of the assessment. It was set up in defense of the action that by the Act of 1869, the State of New York had entered into an inviolable contract with the Brighton Railroad, exempting it from the expense of pavement, that the contract had passed with the property of the Brighton Railroad to the Rochester Railroad and that the assessment was in violation of the Constitution of the United States. The contentions of the Rochester Railroad were denied by the Court of Appeals of New York, 182 N. Y. 116, which held, first, that the statute mentioned did not constitute a contract between the State and the railroad company, and, second, that if it did, the exemption granted by the statute was personal to the Brighton Railroad and did not pass to the Rochester Railroad. The case was remanded to the Supreme Court and a judgment entered pursuant to the remittitur from the Court of Appeals, and by writ of error that judgment is brought here for review.

Mr. Charles J. Bissell, with whom *Mr. William C. Trull* and *Mr. Joseph S. Clark* were on the brief, for plaintiff in error:

The general railroad acts, in imposing liability upon the plaintiff in error and the railroad and property of the plaintiff in error for the permanent improvement of the streets mentioned in the complaint, impair the obligation of the contract existing between the plaintiff in error, and the State of New York, and the city of Rochester, relieving plaintiff in error from liability to pay or bear any portion of such expense.

The company accepted the franchise and acted under it for many years, extending its road and complying with all the conditions of the act of 1869. This property right was trans-

ferred to the plaintiff in error, under the merger acts, which accepted the provisions and expended upon the faith thereof nearly four millions of dollars. Under the practical construction placed upon the contract by the state and city authorities, extending from 1869 to 1897, no question was raised that the railroads were exempted from paving between the tracks and two feet outside, in all the streets in which the franchise was obtained and the road constructed, prior to the date of the passage of the General Street Railroad Act of 1890, under which, as construed by its highest court, the State now seeks to strike down benefits annexed to this franchise, and enforce to the letter the burdens imposed by it.

This cannot be done. *Chicago v. Sheldon*, 9 Wall. 50; *Detroit v. Railway Co.*, 184 U. S. 368; *Cleveland v. Railway Co.*, 194 U. S. 517; *Pearsall v. Gr. Northern Ry. Co.*, 161 U. S. 646; *L. S. & M. S. R. R. Co. v. Smith*, 173 U. S. 694; *New Jersey v. Wilson*, 7 Cranch, 164; *Dodge v. Woolsey*, 18 How. 331; *McGee v. Mathis*, 4 Wall. 143; *Farrington v. Tennessee*, 95 U. S. 679; *Asylum v. New Orleans*, 105 U. S. 362; *Powers v. D. G. H. & M. Ry. Co.*, 201 U. S. 543.

The court erred in holding that even if the act of 1869, together with the ordinances of 1862 and 1869, constituted a contract, it was personal to the Rochester City & Brighton Railroad Company, and did not pass to the plaintiff in error, under the lease, followed by the merger, made pursuant to the provisions of the act of the legislature of the State of New York, chapter 254 of the Laws of 1867 and chapter 503 of the Laws of 1879, the latter act amending the act of 1867.

The merging company, the plaintiff in error, took everything which the lessor had by the same title and to the same extent as any stockholder purchasing the entire stock would take it, only the merging company took title to all the property, privileges, etc., as well as to the stock. That everything was to pass to the merging company was clearly the legislative intent. Each corporation continued in life, the lessor corporation, although it had parted with all its property, as well as the

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Argument for Defendant in Error.

lessee corporation which acquired it. *In re New York Elec. Co.*, 133 N. Y. 690; *Morgan v. Louisiana*, 93 U. S. 217; *L. & N. R. R. Co. v. Palmes*, 109 U. S. 244; *C. & O. R. R. Co. v. Virginia*, 94 U. S. 718; *C. & O. Ry. Co. v. Miller*, 114 U. S. 176; *Wilson v. Gaines*, 103 U. S. 417; *Shields v. Ohio*, 95 U. S. 319, and other cases discussed and applied.

In the light of all these cases, giving to them all their full force and effect and construing the grant to the Rochester City & Brighton Railroad Company of an exemption from paying for new pavements, as a privilege personal to that company, the same legislature, the same power that conferred the privilege, expressly provided in the Merger Acts of 1867 and 1879, that that particular privilege should pass to any merging company which might thereafter comply with the provisions of the Merger Acts.

The Rochester Railway Company was a merging corporation contemplated by the statutes, and when it acquired the entire capital stock of the Rochester City & Brighton Railroad Company, then held under lease, and filed the certificate required by the Merger Acts, it acquired all the estate, property, rights, privileges and franchises of the Rochester City & Brighton Railroad Company, and now holds them as "fully and entirely and without change or diminution, as the same were before held and enjoyed," and that directly within the meaning and the authority of the several cases examined and digested under this head.

Mr. William B. Webb and *Mr. Benjamin B. Cunningham* for defendant in error:

The alleged immunity from taxation being personal to the Rochester City & Brighton Railroad Company could not be acquired by the plaintiff in error by lease or purchase of said company's property and franchises, unless with the permission of the legislature of the State of New York. The decision of the state court, that the state statutes did not permit this immunity to pass to plaintiff in error, was based upon the con-

struction of state statutes, and no Federal question is presented. However, the decision of the state court accords with the construction placed by this court upon similar statutes.

The decision of the state court that the alleged immunity was personal and did not pass to the plaintiff in error, is correct, and this court will agree with a state court in its construction of a state statute, whenever the question decided is balanced with doubt. *Mead v. Portland*, 200 U. S. 148; *Water Works Co. v. Tampa*, 199 U. S. 241.

The settled doctrine of this court is that a grant to a corporation of the franchises, rights and privileges of a former corporation does not operate to transfer an immunity from taxation. *Gulf &c. Ry. Co. v. Hewes*, 183 U. S. 66; *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U. S. 174; *Wilmington &c. R. R. Co. v. Alsbrook*, 146 U. S. 279; *Pickard v. East Tenn. &c. R. R. Co.*, 130 U. S. 637; *Chesapeake & Ohio R. R. Co. v. Miller*, 114 U. S. 176.

Plaintiff in error was incorporated under an act which provides that it shall be subject to all liabilities imposed thereby, one of which liabilities is that it shall pave between its tracks and two feet outside thereof. It acquired its corporate life under this act, and accepted its corporate capacity and leased the property and franchises of the Rochester City & Brighton Company subject to the provisions and liabilities of the act under which it was incorporated.

The act of 1884, under which plaintiff in error was incorporated, modified ch. 503 of the Laws of 1879, so as to forbid a corporation formed under the Laws of 1884 to acquire by lease or purchase any immunity from paying the costs of paving between the tracks and two feet outside of the tracks of the railroad operated by it.

A corporation is bound by the provisions of the act under which it is incorporated, and that when it has taken advantage of the provisions of a statute granting it corporate capacity, it assumes all liabilities arising therefrom. *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17.

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

By the judgment of the highest court of the State of New York, the city of Rochester was allowed to recover from the Rochester Railroad, a street surface railroad corporation, the cost of laying new pavements on the parts of two streets which lay between the tracks, the rails of the tracks and two feet outside of the tracks of the railroad. This recovery was had under a statute of New York, which required such railroads to keep that part of the street over which their tracks ran in permanent repair. The requirement of permanent repair includes the duty of laying new pavements. *Conway v. Rochester*, 157 N. Y. 33.

The Rochester Railroad, not denying its liability in ordinary cases to bear the expense of paving, asserts that, with respect to the two streets in question, it was exempted from that burden by contract with the State of New York, made with its predecessor in title, the Brighton Railroad, and transferred to it with the title to the property of that railroad. The contract relied upon is found in a law enacted in 1869, for the benefit of the Brighton Railroad, which relieved that road from the burden of pavement of any part of the streets in which its tracks were situated. The Rochester Railroad claims that the law of New York, so far as that law imposes upon it the cost of the pavement of the streets in question, was in violation of that provision of the Constitution of the United States which forbids a State to pass any law impairing the obligation of contracts.

The Brighton Railroad was incorporated in 1862, under the general law of 1850, which contained no provision with respect to the railroad's share of street repairs. Until the enactment of the law of 1884, under which the Rochester Railroad was subsequently incorporated, there was no general law regulating the apportionment between street railroads and municipalities of the expense of such repairs, and the

question was determined in individual cases either by agreement or a special law. Differences having arisen between the Brighton Railroad and the city of Rochester as to the share of the expense of street repair which ought to be borne by the railroad, they joined in a request for legislation which would settle this and other disagreements. In response to that request the law of 1869 was enacted. The fifth section of the law, after providing that the railroad should put and keep the surface and street inside of the rails of its tracks in repair, enacts that: "Whenever any of said streets are by ordinance or otherwise permanently improved said company shall not be required to make any part or portion of such improvement or bear any part of the expense thereof."

This law obviously, as held by the Court of Appeals, exempted the railroad from the expense of new pavements, which is the expense sought to be recovered in this action. This was the effect conceded to the statute by the city for the whole time during which the railroad property was owned and operated by the Brighton Railroad, and even after it parted with the property, and until the decision in *Conway v. Rochester*, 157 N. Y. 33, in 1898. Whether this statute was a contract between the State of New York and the Brighton Railroad inviolable by the Federal Constitution, and if so, whether its benefits have been waived or it has been lawfully modified or repealed by virtue of the powers reserved by the constitution or laws of New York, are questions which have been much argued at the bar. We do not deem it necessary in this case to decide those questions, and therefore put out of view many facts found in the record which were deemed by both parties to be relevant to them. We assume, for the purpose of our decision, that there was a contract exempting the Brighton Railroad from the expense of street pavements, and that the contract could not constitutionally be impaired by the State of New York, and that its benefits have not been waived.

It becomes therefore necessary to inquire whether the

contract has been transferred with the property of the Brighton Railroad to the Rochester Railroad, the plaintiff in error.

The Rochester Railroad was incorporated for the purpose of acquiring the property of the Brighton Railroad, which was accomplished by a lease of the property, franchises, rights and privileges of the Brighton Railroad, followed by the purchase of its capital stock. This was done under the authority of a statute, which provided that a railroad corporation, being the lessee of the property of another railroad corporation, might acquire the whole of the capital stock of the latter, and in such a case its "estate, property, rights, privileges, and franchises should vest in and be held and enjoyed by" the purchasing corporation. It is contended that the effect of the transfer under this law is to vest in the Rochester Railroad the exemption from the expense of street pavement which the Brighton Railroad enjoyed through the contract with the State of New York. This contention presents the question to be decided.

This court has frequently had occasion to decide whether an immunity from the exercise of governmental power which has been granted by contract to one, has by legislative authority been vested in or transferred to another, and in the decisions certain general principles, which control in the determination of the case at bar, have been established. Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor. *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417; *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244; *Picard v. Tennessee &c.*, 130 U. S. 637; *St.*

Louis &c. Co. v. Gill, 156 U. S. 649; *Norfolk & Western Railroad v. Pendleton*, 156 U. S. 667. But the State, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the State in authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed every doubt is resolved in favor of the continuance of the governmental power and clear and unmistakable evidence of the intent to part with it is required.

Keeping these fundamental principles steadily in mind, we proceed to inquire whether the State of New York has authorized or directed the transfer from the Brighton Railroad to the Rochester Railroad of the contract of exemption. A legislative authorization of the transfer of "the property and franchises," *Morgan v. Louisiana*, *ub. sup.*; *Picard v. Tennessee &c. Co.*, *ub. sup.*; of "the property," *Wilson v. Gaines*, *ub. sup.*; *Louisville & Nashville R. R.* *ub. sup.*; of "the charter and works," *Memphis &c. Railroad Co. v. Commissioners*, 112 U. S. 609; or of "the rights of franchise and property," *Norfolk & Western Railroad Co. v. Pendleton*, *ub. sup.*, is not sufficient to include an exemption from the taxing or other power of the State, and it cannot be contended that the word "estate" has any larger meaning. It is, however, argued that the word "privileges" is sufficiently broad to embrace within its meaning such an exemption, and that when it is added to the other words the legislative intent to transfer the exemption is clearly manifested, and that the words of the law under consideration, "the estate, property, rights, privileges and franchises," indicate the purpose to vest in the purchasing corporation every asset of the selling corporation which is of conceivable value. There is authority

sustaining this position, which cannot be set aside without examination.

In the case of *Humphrey v. Pegues*, 16 Wall. 244, it appeared that the charter of the Northeastern Railroad Company granted by the State of South Carolina originally contained no exemption from taxation, but that by amendment to the charter some years later the real estate and stock of the company were exempted from all taxation during the continuance of its charter. Subsequently, the legislature granted the charter of the Cheraw and Darlington Railroad Company, and provided that "all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company." The State of South Carolina attempted to tax the stock and property of the Cheraw and Darlington Railroad Company, and the validity of that taxation was the question in the case. The court held that the powers, rights and privileges granted to the Cheraw and Darlington Railroad Company were those contained in the amendment of the charter, as well as those contained in the original charter, and said, by Mr. Justice Hunt: "All the 'privileges,' as well as the powers and rights, of the prior company were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others." Upon this reasoning it was held that the stock and real estate of the Cheraw and Darlington Railroad Company were exempt from taxation. See *Gunter v. Atlantic Coast Line*, 200 U. S. 273.

In *Chesapeake & Ohio Railroad v. Virginia*, 94 U. S. 718, it was said that an act conferring upon a railroad corporation "the benefits of the charter" of another corporation which had an immunity from taxation, and "the rights, privileges, franchises and property" of another corporation, which when formed would have the "rights, privileges and franchises

and property" of the corporation holding the immunity, was sufficient to transfer the immunity from taxation. But this expression of opinion was unnecessary to the decision of the case, which merely decided that where a railroad corporation acquired the property of another railroad corporation, to which was attached an immunity from taxation, that immunity did not extend beyond the property thus acquired. In *Southwestern Railroad Company v. Georgia*, 92 U. S. 665, where a statute allowed the Muscogee Railroad to unite with the Southwestern Railroad into one company, under the charter of the latter, and it was provided that "all the rights, privileges and property [of the Muscogee Railroad Company] shall be part and parcel of the Southwestern Railroad," it was held that the immunity from taxation enjoyed by the Muscogee Railroad passed with its property to the Southwestern Railroad.

In *Tennessee v. Whitworth*, 117 U. S. 139, it was held that a statute conferring upon a railroad corporation "all the rights, powers and privileges" of another railroad corporation, and "all the powers and privileges" of a third railroad corporation included the immunities from taxation enjoyed respectively by the latter corporations, the ground of the decision being that an exemption from taxation is, in the common acceptance of the term, a privilege.

If the authority of these four cases, supported by some *dicta* which need not be cited, remained unimpaired, it would justify the opinion that a legislative transfer of the "privileges" of a corporation includes an exemption from the taxing or other governmental power granted by a contract with the State. But other and later cases have essentially modified the rule which may be deduced from them.

In the case of the *Chesapeake & Ohio Railroad Company v. Miller*, 114 U. S. 176, it was held that the foreclosure of a mortgage on railroad property under the provisions of a statute which authorized the purchaser under a foreclosure sale to become a corporation, and provided that it should

"succeed to all such franchises, rights and privileges" as were possessed by the mortgagor company, did not vest in the purchasing corporation an immunity from taxation.

In *Picard v. East Tennessee, Virginia & Georgia Railroad Company*, 130 U. S. 637, Mr. Justice Field, in delivering the opinion of the court, said:

"The later, and, we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington & Weldon Railroad Company v. Alsbrook*, 146 U. S. 279, Mr. Chief Justice Fuller, in delivering the opinion of the court, said on page 297: "We do not deny that exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect."

In *Keokuk & Western R. R. Co. v. Missouri*, 152 U. S. 301, Mr. Justice Brown, in delivering the opinion of the court, said: "Whether under the name 'franchises and privileges' an immunity from taxation would pass to the new company may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled."

These conflicting views were before the court in *Phenix Fire & Marine Insurance Company v. Tennessee*, 161 U. S. 174. The plaintiff in error in that case claimed to have an immunity from taxation by virtue of a provision in its charter granting it "all the rights and privileges" of the De Soto Insurance Company, which had an immunity from taxation by virtue of a provision in its charter granting it "all the rights, privileges and immunities" of the Bluff City Insurance Company, whose charter contained an expressed immunity from taxation. Mr. Justice Peckham, in delivering the opinion of the court, stated the question for decision in these words: "Is immunity from taxation granted to plaintiff in error under language which grants 'all the rights and privileges'

of a company which has such immunity?" Much significance was given to the fact that the word "immunity," which clearly includes an exemption, was used in the charter of the De Soto company and not used in the charter of the plaintiff in error, granted seven years later. But the decision was not rested on this circumstance, although the omission was thought to cast a grave doubt upon the plaintiff's claim. The opinion reviews all the cases, cites the foregoing quotations from the opinions of Mr. Justice Brown, Mr. Justice Field and of the Chief Justice, and, after saying "There must be other language than the mere word 'privilege' or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted," concludes that "If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In *Gulf & Ship Island Railroad Company v. Hewes*, 183 U. S. 66, Mr. Justice Brown, in delivering the opinion of the court, said, citing this case as authority: "The better opinion is that a subrogation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity. We, therefore, conclude that the words "the estate, property, rights, privileges and franchises," did not embrace within their meaning the immunity from the burden of paving enjoyed by the Brighton Railroad Company. Nor is there anything in this, or any other statute, which tends to show that the legislature used the words with any larger meaning than they would have standing alone. The meaning is not

enlarged, as faintly suggested, by the expression in the statute that they are to be held by the successor "fully and entirely and without change and diminution," words of unnecessary emphasis, without which all included in "estate, property, rights, privileges and franchises" would pass, and with which nothing more could pass. On the contrary, it appears, as clearly as it did in the *Phoenix Fire Insurance Co. case, supra*, that the legislature intended to use the words "rights, franchises and privileges" in the restricted sense. The law under which this transfer was made was enacted in 1867 and amended in 1879. In 1869 an act was passed authorizing the merger and consolidation of railroad corporations, chap. 917, Laws of 1869, which provided that upon the consolidation "all and singular the rights, privileges, *exemptions* and franchises should be transferred to the new corporation." In 1876 an act was passed, chap. 446, Laws of 1876, which authorized the purchasers of the rights, privileges and franchises of railroad corporations (except street railroad corporations) under a foreclosure sale to become a corporation, and thereupon have "all the franchises, rights, powers, privileges and *immunities*" of the corporation whose property was sold. The omission in the statute under consideration of the words "*exemptions*" or "*immunities*," either of which would be apt to transfer the immunity claimed, is significant, in view of the fact that each of these words was employed by the legislature about the same time in other statutes dealing with the transfer of corporate property, and raises a doubt of the intention of the legislature, which in cases of the interpretation of a statute claimed to divest the State of a governmental power is equivalent to a denial.

The conclusion that the exemption of the Brighton Railroad did not accompany the transfer of its property to the Rochester Railroad is reached by another and entirely independent course of reasoning, based upon a consideration of the law under which the Rochester Railroad was incorporated. That was the general incorporation law of 1884. Every corporation

incorporated under it was made "subject to all the liabilities imposed by the act," (§ 1) and directed to keep the street surface about and between its tracks "in permanent repair," (§ 9) which, as held by the state court, includes the duty of laying such pavement as is in controversy here. We follow the construction by that court of § 9, so far as it holds that that section applies to all tracks, whether constructed under this law or any other law, owned and operated by a corporation incorporated under it. Whether the section applies, or constitutionally can apply, to a corporation not deriving its powers from the act of 1884, in respect of tracks not constructed under its provisions, it is not necessary for us to consider. There may have been a saving of the rights of such corporations under § 18. That question would be presented if the Brighton Railroad, instead of a successor in title, were claiming an exemption. Here a corporation, deriving its right to exist under the act of 1884, is asserting an exemption from a duty imposed upon it by the law which created it. The authorities are numerous and conclusive that no corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the constitution or laws of the State then applicable, and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it. *Trask v. Maguire*, 18 Wall. 391; *Shields v. Ohio*, 95 U. S. 319; *Maine Central R. R. v. Maine*, 96 U. S. 499; *Railroad Co. v. Georgia*, 98 U. S. 359; *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244; *Memphis &c. R. R. v. Commissioners*, 112 U. S. 609; *St. Louis &c. R. R. v. Berry*, 113 U. S. 465; *Keokuk &c. R. R. v. Missouri*, 152 U. S. 301; *Norfolk & Western R. R. v. Pendleton*, 156 U. S. 667; *Yazoo &c. R. R. v. Adams*, 180 U. S. 1; *Grand Rapids &c. R. R. v. Osborn*, 193 U. S. 17; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304.

The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and

obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the constitution, in general laws or in the charter itself. The Rochester Railroad, therefore, having accepted its charter under a law which imposed upon it the duty of laying pavements is bound to perform that duty, even in respect of tracks, which, while owned by a predecessor in title, would have been exempt.

The foregoing considerations would be conclusive of the case were it not that the plaintiff in error takes another position, which, if tenable, would avoid the result reached by either course of reasoning. It is insisted that this is not a case of transfer of an exemption; that the rules governing transfer are not applicable here; that the Brighton Railroad has not ceased to exist as a corporation; that it has been merely joined by merger with the Rochester Railroad, which controls it by stock holdings, and operates it by virtue of its franchises; and that, therefore, the Rochester Railroad may claim and enjoy the exemption of the Brighton Railroad in its behalf in respect of its property. In support of this view counsel cite *Tomlinson v. Branch*, 15 Wall. 460; *Central Railroad v. Georgia*, 92 U. S. 665; *Tennessee v. Whitworth*, *ub. sup.* These cases hold that where corporations are united in such manner that one continues to exist as a corporation, owning and operating its property, by virtue of its own charter, the corporation thus continuing to exist still holds its immunities and exemptions in respect of the property to which they apply. But the cases have no application here. It may well be that a proceeding for condemnation of property, begun by the Brighton Railroad, would not abate by reason of its consolidation with the Rochester Railroad, as held in 43 State Reporter, 651, affirmed 133 N. Y. 690. An examination, however, of the statute under which the union of the two corporations was made, and the transactions by which the union was accomplished, shows that the Brighton

Railroad has ceased to exist as a corporation. The Rochester Railroad first took a lease of the Brighton Railroad, apparently for the purpose of bringing itself within the provisions of the act of 1879. Then all the stock of the latter corporation was acquired by exchange of shares of stock of the former corporation. Then a certificate of the transfer of stock was filed with the Secretary of State. Thereupon, by operation of the law, the "estate, property, rights, privileges and franchises" of the Brighton Railroad vested in the Rochester Railroad, to be thereafter controlled by the Rochester Railroad in its own corporate name. The law does not expressly dissolve the selling corporation, but it leaves it without stock, officers, property or franchises. A corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence. *Maine Central Railroad v. Maine*, *ub. sup.*; *Keokuk &c. Railroad v. Missouri*, *ub. sup.*; *Yazoo &c. Railroad*, *ub. sup.*

The judgment of the Supreme Court of New York is, therefore,
Affirmed.

MR. JUSTICE WHITE concurs in the result.

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Argument for Plaintiff in Error.

PEARCY v. STRANAHAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

No. 1. Submitted March 4, 1907.—Decided April 8, 1907.

The averment that territory named in the complaint is a part of the United States is a conclusion of law and not admitted by a demurrer.

The court takes judicial cognizance whether or not a given territory is within the boundaries of the United States, and is bound to take the fact as it really exists however it may be averred to be.

Who is the sovereign *de jure* or *de facto* of territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. *Jones v. United States*, 137 U. S. 202.

The Isle of Pines under the provisions of the Platt Amendment and the Constitution of the Republic of Cuba is *de facto* under the jurisdiction of the Republic of Cuba, and, as the United States has never yet taken possession thereof, it has remained and is foreign country within the meaning of the Dingley Tariff Act of 1897. *DeLima v. Bidwell*, 182 U. S. 1; *United States v. Rice*, 4 Wheat. 246.

THE facts, which involve the political status of the Isle of Pines and whether it is under the jurisdiction of Cuba or that of the United States, and whether merchandise therefrom is subject to duty, as coming from a foreign country within the meaning of the Dingley Tariff Act, are stated in the opinion.

Mr. James C. Lenney for plaintiff in error:

Up to the ratification of the second Treaty of Paris (April 11, 1899), the Isle of Pines was under the sovereignty of the Crown of Spain. It did not belong to, nor was it a part of, the Island of Cuba.

Spain acquired title to and sovereignty over the Isle of Pines by right of discovery.

Spain, until A. D. 1899, retained the title and sovereignty thus acquired.

Since a territory can have but one sovereignty at one time, it follows that the Island of Cuba at no time prior to 1899 acquired any title to the Isle of Pines, either expressly or by implication.

No authority has been found to hold that the maritime jurisdiction of one island can extend to another island located in the open sea forty miles distant from the nearest shore. Geographically, then, there appears to be no ground for holding that the Isle of Pines belonged to or was a part of the Island of Cuba.

In the absence, therefore, of any express cession of sovereignty to Cuba, or of any impliable intention to include this isle as a part of Cuba, or of any good geographical reason for so doing, it must follow that on April 11, 1899, Spain did own, and Cuba, a mere colony, did not own or include, the Isle of Pines.

Under article II of the said treaty—"Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies. . . .—the Isle of Pines passed direct from the sovereignty of the Crown of Spain to that of the people of the United States.

The only reasonable construction is that by article II of the treaty, as above quoted, the United States acquired all the islands under Spanish sovereignty in the West Indies except the Island of Cuba.

The very language of the treaty itself, as explained in the protocols and construed according to its fair and ordinary meaning, is overwhelmingly in favor of this proposition.

On or about August 14, 1899, the United States War Department, in an official letter stated:

"The Isle of Pines, . . . was ceded by Spain to the United States, and is, therefore, a part of our territory."

The maps and other data prepared and issued by the General Land Office of the Department of the Interior indicate the Isle of Pines as being United States territory.

The "Platt Amendment" provided:

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Argument for Plaintiff in Error.

"That the Isle of Pines shall be *omitted* from the proposed constitutional boundaries of Cuba; the title thereto being left to future adjustment by treaty."

When Cuba was transferred to the government of its people, on May 20, 1902, the American military governor of Cuba was ordered by the United States Secretary of War *to continue "the present government of the Isle of Pines"* (which was American) "as the *de facto* government."

By the terms of the proposed treaty, negotiated in 1903 and still pending in the United States Senate, our country's present ownership of the Isle of Pines is clearly recognized by the sections which provide for a transfer of our title to Cuba, the consideration being certain naval stations which we theretofore possessed.

Under article II of the treaty, the Isle of Pines was ceded directly to the United States.

It is a historical fact that at this time Spanish sovereignty in the West Indies was limited to Cuba, Porto Rico, the Isle of Pines, and some very small, insignificant islands, mostly uninhabited and located round about these three large ones. Such being the fact, the only reasonable conclusion from this language can be, that by the "other islands" phrase it was the intention of the parties to cede, and they did cede, the Isle of Pines direct from the Crown of Spain to the people of the United States just as plainly as Porto Rico, in the same article, was ceded. It cannot be too greatly emphasized that such is the only reasonable construction applicable to this phrase. Unless it refers to the Isle of Pines, it means nothing, and certainly it would be a most serious imputation to hold that the learned commissioners deliberately inserted words meaning nothing or worse than nothing into so important a document of state.

Official acts and declarations subsequent to the treaty support the same view.

Not only did all the parties thus intend at the time of the making of the treaty, but subsequent acts and declarations

for more than three years thereafter were almost uniformly in support of this view. We already have official declarations, both executive and legislative.

The "Platt Amendment" expressly excludes the Isle of Pines from the boundaries of Cuba.

Plaintiff calls attention to article VI of the amendment to the Army Appropriation Bill, passed March 2, 1901, and widely known by the popular title "Platt Amendment." This amendment, which is still in force, expressly provided "that the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty."

This clause is doubly significant, showing, as it does, the attitude of both the republics. Up to this point we have been noting the acts of our own Government and the attitude of our own people. That the Cubans themselves claimed no conflicting title is clearly proven by their vote on June 12, 1901. Without discussion and without debate, the Cuban Congress incorporated this identical language into their own constitution. By so doing they expressly admitted, first, that the Isle of Pines was not then a part of the Cuban Republic, and, secondly, that the isle should not become Cuban soil unless granted to the Republic from the United States by good and valid treaty. The effect of this action must have been to leave the isle as theretofore, under American administration and control; for when the congresses of both countries have expressly declared that at present the Isle of Pines is not Cuban territory it must be territory of the United States.

The Isle of Pines, not being a foreign country under the tariff law, but, like Porto Rico, a part of the United States, it follows that the seizure, etc., complained of by plaintiff and the detention after demand made was unwarranted, illegal, and an act of conversion. *De Lima v. Bidwell*, 182 U. S. 1, 198 *et seq.*; *Dooley v. United States*, 182 U. S. 222; *Armstrong v. United States*, 182 U. S. 243.

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Argument for Defendant in Error.

The Attorney General, The Solicitor General and Mr. Otis J. Carlton, Special Assistant to the Attorney General, for defendant in error, submitted:

Whether the Isle of Pines be included within the boundaries of the United States is a political question, which cannot be decided by this court, being nonjudicial in its nature.

The question in this case resolves itself into a question of boundaries within the principle of the following cases: *Foster v. Neilson*, 2 Pet. 253; *Garcia v. Lee*, 12 Pet. 511; *United States v. Arredondo*, 6 Pet. 691.

It is well settled that the courts of the United States are scrupulous to exercise no power not clearly judicial in its nature. *Hayburn's case*, 2 Dallas, 409; *United States v. Ferreira*, 13 How. 40; *United States v. Yale Todd*, 13 How. 52 (note); *Gordon v. United States*, 117 U. S. 697.

If it be considered that the title to the Isle of Pines has been determined by the political departments to be in the United States, the fact that the question of ownership by mutual agreement between the United States and the Republic of Cuba is to be settled by arbitration, the adjudication to take the form of a treaty, excludes this court from its jurisdiction to decide the question of title in this case.

While this court, as a general rule, will decide questions of individual rights, founded upon a treaty, by ascertaining and following the determination of the political departments upon political questions, still, if those departments, charged with the settlement of our relations with foreign powers, have directed that political questions be settled in a certain manner, that determination is conclusive on the courts.

It is well settled that, even to determine questions judicial in their nature, special tribunals may be erected, their decisions to be final and conclusive on the courts. *United States v. Ferreira*, 13 How. 40; *Murray v. Hoboken &c. Co.*, 18 How. 280; *Bates & Guild Co. v. Payne*, 194 U. S. 109; *United States v. Ju Toy*, 198 U. S. 253.

The Isle of Pines was not ceded to the United States by the

treaty of peace, article II, but was included within the term "Cuba" in article I.

The Isle of Pines is, by a well-settled principle of international law, a part of Cuba. Hall's International Law, edition of 1895, pp. 129, 130.

We intervened in aid of the Cuban revolutionists from the highest motives of humanity, and not to wage a war of conquest.

The term "Cuba," historically and politically, includes the Isle of Pines.

This is shown by the official acts of the Spanish Government, which, from 1774 to 1898, treated the Isle of Pines, as included in the political division known as Cuba, just as the Island of Nantucket is included in the Commonwealth of Massachusetts.

Conceding, for the purposes of argument only, that the Isle of Pines was ceded to the United States by the treaty of peace, as we have never taken possession of the island, and as it has been and is being governed by the Republic of Cuba, it has not ceased to be "foreign country" within the Dingley Act.

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

Plaintiff brought his action in the Circuit Court of the United States for the Southern District of New York against the then collector of the port of New York to recover the value of certain cigars seized by him, which had been brought to that port from the Isle of Pines, where they had been produced and manufactured. This seizure was made under the Dingley Act, so called (act July 24, 1897, 30 Stat. 151, c. 11), and the regulations of the Secretary of the Treasury thereunder. The Dingley Act provided for the imposition of duties "on articles imported from foreign countries," and in plaintiff's complaint it was asserted that the Isle of Pines was "in possession of and part of the United States," and hence domestic territory. The Government demurred, the demurrer was sustained, the

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complaint dismissed and the case brought here on a writ of error.

Whether the Isle of Pines was a part of the United States is a conclusion of law not admitted by the demurrer. It was certainly not such before the treaty of peace with Spain, and, if it became so, it was by virtue of that treaty. The court takes judicial cognizance whether or not a given territory is within the boundaries of the United States, and is bound to take the fact as it really exists, however it may be averred to be. *Jones v. United States*, 137 U. S. 202; *Lincoln v. United States*, 197 U. S. 419; *Taylor v. Barclay*, 2 Sim. 213.

August 12, 1898, a protocol of agreement for a basis for the establishment of peace was entered into between the United States and Spain, which provided:

"ARTICLE I. Spain will relinquish all claim of sovereignty over and title to Cuba.

"ARTICLE II. Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrões to be selected by the United States." 30 Stat. 1742.

This was followed by the treaty of peace, ratified April 11, 1899, containing the following articles:

"ARTICLE I. Spain relinquishes all claim of sovereignty over and title to Cuba.

"And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

"ARTICLE II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões." 30 Stat. 1754-1755.

In *Neely v. Henkel*, 180 U. S. 109 (Jan. 14, 1901), the question was whether Cuba was a foreign country or foreign territory within the act of Congress of June 6, 1900 (31 Stat. 656, c. 793),

providing for the extradition from the United States of persons committing crimes within any foreign country or foreign territory or any part thereof, occupied or under the control of the United States. And it was held that Cuba was within this description. Mr. Justice Harlan, delivering the opinion of the court, said:

"The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States.

"While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

"Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without inter-

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ference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

"It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

If then the Isle of Pines was not embraced in article II of the treaty, but was included within the term "Cuba" in article I, and therefore sovereignty and title were merely relinquished, it was "foreign country" within the Dingley Act.

This inquiry involves the interpretation which the political departments have put upon the treaty. For, in the language of Mr. Justice Gray, in *Jones v. United States*, 137 U. S. 202, "who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any Government conclusively binds the judges as well as all other officers, citizens, and subjects of that Government."

By the joint resolution of April 20, 1898, 30 Stat. 738, entitled "Joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and Government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the United States disclaimed any disposition or intention to exercise sovereignty or control over Cuba, except in the pacification thereof, and

asserted its determination, when that was accomplished, to leave the control of the island to its people. What was the signification of the word "Cuba" at that time?

The record of the official acts of the Spanish Government from 1774 to 1898 demonstrates that the Isle of Pines was included in the political division known as "Cuba." The first official census of Cuba, in 1774; the "Statistical Plan of the Ever Faithful Isle of Cuba for the Year 1827;" the establishment by the Governor General, in 1828, of a colony on the island; the census of 1841; the budgets of receipts and expenses; the census for 1861, 1877, 1887, and so on, all show that the Isle of Pines was, governmentally speaking, included in the specific designation "Cuba" at the time the treaty was made and ratified, and the documents establish that it formed a municipal district of the province of Habana.

In short, all the world knew that it was an integral part of Cuba, and in view of the language of the joint resolution of April 20, 1898, it seems clear that the Isle of Pines was not supposed to be one of the "other islands" ceded by article II. Those were islands not constituting an integral part of Cuba, such as Vieques, Culebra and Mona Islands adjacent to Porto Rico.

Has the treaty been otherwise interpreted by the political departments of this Government? The documents to which we have had access, with the assistance of the presentation of the facts condensed therefrom in the brief for the United States, enable us to sufficiently indicate the situation in that regard, and we think it proper to do this, notwithstanding the determination of the case turns at last on a short point requiring no elaboration.

The Spanish evacuated Havana January 1, 1899, and the government of Cuba was transferred to a military governor as the representative of the President of the United States. The President ordered, August 17, 1899, a census to be taken as a first step toward assisting "the people of Cuba" to establish "an effective system of self-government." In accomplish-

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ing this the island was divided into 1,607 enumeration districts. Three enumerators took the census of the Isle of Pines, which was described as a municipal district of the judicial district of Bejucal, in the Province of Habana. The report on the census, as published by the War Department in 1900, stated: "The government of Cuba has jurisdiction not only over the island of that name, but also over the Isle of Pines, lying directly to the south of it, and more than a thousand islets and reefs scattered along its northern and southern coasts. . . . The Isle of Pines, with an area of 840 square miles, is a municipal district of the Province of Habana. . . . The total population of Cuba, including the Isle of Pines and the neighboring keys, was, on October 16, 1899, 1,572,797."

The population tables give the population of the Isle of Pines as a municipal district of Habana Province, and so of the statistics as to rural population; sex, nativity and color; age and sex; birthplace; conjugal condition; school attendance; foreign whites; number and size of families; dwellings of families—these and like items are given as to the Isle of Pines as under the Province of Habana.

In August, 1899, the Military Governor of Cuba appointed a mayor and first assistant mayor of the Isle of Pines.

On June 16, 1900, an election was held throughout the island, at which the people of Cuba in all their municipalities elected their municipal officers, participated in by the inhabitants of the Isle of Pines, as is stated in the report of the Committee on Foreign Relations, Senate Document No. 205, Fifty-ninth Congress, though this was denied in a minority report.

A constitutional convention was called and the inhabitants of the Isle of Pines participated in the election of delegates thereto, September 15, 1900.

The convention concluded its work by October 1, 1901, and December 31, 1901, an election was held to choose governors of provinces, provincial councillors, members of the house of representatives, and presidential and senatorial electors, under

an order of General Wood of October 14, 1901, No. 218, approved by the War Department, which divided the Province of Habana into four circuits, the third being composed of several ayuntamientos, of which the Isle of Pines was one.

February 24, 1902, the electors met, chose senators, and elected Señor Palma, President, and Señor Romero, Vice President.

The government was transferred to Cuba, May 20, 1902, and in making the transfer, and declaring the occupation of Cuba by the United States and the military government of the island to be ended, the Military Governor wrote to "The President and Congress of Cuba," among other things: "It is understood by the United States that the present government of the Isle of Pines will continue as a *de facto* government, pending the settlement of the title to said island by treaty, pursuant to the Cuban constitution and the act of Congress of the United States approved March 2, 1902[1]." On the same day President Palma replied:

"It is understood that the Isle of Pines is to continue *de facto* under the jurisdiction of the government of the Republic of Cuba, subject to such treaty as may be entered into between the Government of the United States and that of the Cuban Republic, as provided for in the Cuban constitution and in the act passed by the Congress of the United States, and approved on the 2d of March, 1901." 31 Stat. 897.

At that date the Isle of Pines was actually being governed by the Cubans through municipal officers elected by its inhabitants, and a governor of the Province of Habana, councillors, etc., in whose choice they had participated. And see *Neely v. Henkel*, 180 U. S. 109, 117, 118.

February 16, 1903, the Senate of the United States, by resolution, requested the President "to inform the Senate as to the present status of the Isle of Pines, and what government is exercising authority and control in said island."

In reply the President submitted a report from the Secretary of War, which stated:

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"The nature of the *de facto* government under which the Isle of Pines was thus left pending the determination of the title thereof by treaty is shown in the following endorsement upon a copy of the said resolution by the late military governor of Cuba:

[Here follows the endorsement, dated February 20, 1903, of which the following is a part:]

"At the date of transfer of the Island of Cuba to its duly elected officials the Isle of Pines constituted a municipality included within the municipalities of the Province of Habana and located in the judicial district of Bejucal. The government of the island is vested in its municipal officers, subject to the general control of the civil governor of the Province of Habana, who is vested under the constitution of Cuba with certain authority in the control of municipal affairs. Under the military government of Cuba the Isle of Pines was governed by municipal officials, subject to the general authority of the civil governor, who received his authority from the Governor General. The Isle of Pines, as it had existed under the military government, was transferred as a *de facto* government to the Cuban Republic, pending the final settlement of the status of the island by treaty between the United States and Cuba. The action taken by the military government was in accordance with telegraphic orders from the honorable the Secretary of War. The government of the island to-day is in the hands of its municipal officers, duly elected by the people under the general control of the civil governor of the Province of Habana and the Republic of Cuba. As I understand it, the government of the Isle of Pines is vested in the Republic of Cuba, pending such final action as may be taken by the United States and Cuba looking to the ultimate disposition of the island. No special action was taken to protect the interests of the citizens of the United States who have purchased property and have settled in the Isle of Pines, for the reason that no such action was necessary. All Americans in the island are living under exactly the same conditions as other foreigners,

and if they comply with the laws in force it is safe to say that they will not have any difficulty or need special protection. At the time these people purchased property they understood distinctly that the question of ownership of the Isle of Pines was one pending settlement, and in locating there they took the risks incident to the situation.' "

We are justified in assuming that the Isle of Pines was always treated by the President's representatives in Cuba as an integral part of Cuba. This was indeed to be expected in view of the fact that it was such at the time of the execution of the treaty and its ratification, and that the treaty did not provide otherwise in terms, to say nothing of general principles of international law applicable to such coasts and shores as those of Florida, the Bahamas, and Cuba. Hall, 4th ed., 129, 130; *Louisiana v. Mississippi*, 202 U. S. 1, 53; *The Anna*, 5 C. Rob. 273.

In August, 1902, the Treasury Department decided that duties should be assessed on goods coming from the Isle of Pines at the same rates as on similar merchandise imported from other places.

On July 2, 1903, a treaty with Cuba was signed, relinquishing any claim by the United States to the Isle of Pines under the treaty of peace, but this failed of ratification, and on March 2, 1904, another treaty was signed, which relinquished all claim of title under that treaty.

November 27, 1905, the Secretary of State wrote an American resident of the Isle of Pines:

"The treaty now pending before the Senate, if approved by that body, will relinquish all claim of the United States to the Isle of Pines. In my judgment the United States has no substantial claim to the Isle of Pines. The treaty merely accords to Cuba what is hers in accordance with international law and justice.

"At the time of the treaty of peace which ended the war between the United States and Spain, the Isle of Pines was and had been for several centuries a part of Cuba. I have no

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doubt whatever that it continues to be a part of Cuba and that it is not and never has been territory of the United States. This is the view with which President Roosevelt authorized the pending treaty, and Mr. Hay signed it, and I expect to urge its confirmation."

There are some letters of an Assistant Secretary of War or written by his direction, and other matters, referred to, which we do not regard as seriously affecting the conclusion that the Executive has consistently acted on the determination that the United States had no substantial claim to the Isle of Pines under the treaty.

The only significant legislative action is found in the proviso of the act of March 2, 1901, the Army Appropriation Act (31 Stat. 895, c. 803), commonly called the Platt Amendment (897), which reads:

"Provided further, That in fulfillment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled 'For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect,' the President is hereby authorized to 'leave the government and control of the island of Cuba to its people' so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:"

Then follows eight clauses, of which the sixth is:

"VI. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty."

It appears that certain American citizens, asserting interests in the Isle of Pines, had contended that it belonged to the

United States under the treaty, and the sixth clause of the Platt Amendment, while not asserting an absolute claim of title on our part, gave opportunity for an examination of the question of ownership and its settlement through a treaty with Cuba. The Republic of Cuba has been governing the isle since May 20, 1902—the present situation need not be discussed—and has made various improvements in administration at the suggestion of our Government, but Congress has taken no action to the contrary of Cuba's title as superior to ours.

It may be conceded that the action of both the political departments has not been sufficiently definite to furnish a conclusive interpretation of the treaty of peace as an original question, and as yet no agreement has been reached under the Platt Amendment. The Isle of Pines continues at least *de facto* under the jurisdiction of the government of the Republic of Cuba, and that settles the question before us, because as the United States have never taken possession of the Isle of Pines as having been ceded by the treaty of peace, and as it has been and is being governed by the Republic of Cuba, it has remained "foreign country" within the meaning of the Dingley Act according to the ruling in *De Lima v. Bidwell*, 182 U. S. 1, and cases cited; *United States v. Rice*, 4 Wheat. 246. There has been no change of nationality for revenue purposes, but, on the contrary, the Cuban Government has been recognized as rightfully exercising sovereignty over the Isle of Pines as a *de facto* government until otherwise provided. It must be treated as foreign, for this Government has never taken, nor aimed to take, that possession in fact and in law which is essential to render it domestic.

Judgment affirmed.

MR. JUSTICE McKENNA concurred in the judgment.

MR. JUSTICE WHITE and MR. JUSTICE HOLMES concurred specially.

MR. JUSTICE MOODY took no part.

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WHITE and HOLMES, JJ., concurring.

MR. JUSTICE WHITE, with whom was MR. JUSTICE HOLMES, concurring.

My reasons for agreeing to the conclusion announced by the court are separately stated to prevent all implication of an expression of opinion on my part as to a subject which in my judgment the case does not require and which, as it is given me to see it, may not be made without a plain violation of my duty.

The question which the case raises, by way of a suit to recover duties paid on goods brought from the Isle of Pines, is whether that island, by the treaty with Spain, became a part of the United States, or was simply left or made a part of the Island of Cuba, over which the sovereignty of Spain was relinquished.

I accept the doctrine which the opinion of the court announces, following *Jones v. United States*, 137 U. S. 202, that "who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as other officers, citizens and subjects of that government." That the legislative and executive departments have conclusively settled the present status of the Isle of Pines as *de facto* a part of Cuba and have left open for future determination the *de jure* claim, if any, of the United States to the island, as the court now declares, is to me beyond possible contention. Thus, by the amendment to the act of 1891, which was enacted to determine the *de facto* position of the island and to furnish a rule for the guidance of the executive authority in dealing in the future with the island, it was expressly provided "that the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty." So, also, when the Island of Cuba was turned over to the Cuban government by the military authority of the United States, that government was expressly notified by such authority, under the direction of the President, that

whilst the *de facto* position of the Isle of Pines as a part of Cuba was not disturbed it must be understood that its *de jure* relation was reserved for future determination by treaty between Cuba and the United States. And this notification and relation was in terms accepted by the President of the Republic of Cuba. If the opinion now announced stopped with these conclusive expressions I should of course have nothing to say. But it does not do so. Although declaring that the *de facto* position of the Isle of Pines as resulting from legislative and executive action is binding upon courts, and although referring to the conclusive settlement of that *de facto* status and the reservation by the legislative and executive departments of the determination of the *de jure* status for future action, the opinion asserts that it is open and proper for the court to express an opinion upon the *de jure* status, that is, to decide upon the effect of the treaty. In doing so it is declared that all the world knew that the Isle of Pines was an integral part of Cuba, this being but a prelude to an expression of opinion as to the rightful construction of the treaty. To my mind any and all expression of opinion concerning the effect of the treaty and the *de jure* relation of the Isle of Pines is wholly unnecessary and cannot be indulged in without disregarding the very principle upon which the decision is placed, that is, the conclusive effect of executive and legislative action. In other words, to me it seems that the opinion, whilst recognizing the force of executive and legislative action, necessarily disregards it. This follows, because the views which are expressed on the subject of the meaning of the treaty amount substantially to declaring that the past action of the executive and legislative departments of the government on the subject have been wrong, and that any future attempt by those departments to proceed upon the hypothesis that the *de jure* status of the island is unsettled will be a violation of the treaty as now unnecessarily interpreted.

MR. JUSTICE HOLMES concurs.

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SWING v. WESTON LUMBER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No 145. Argued January 10, 1907.—Decided April 8, 1907.

The State has undoubted power to prohibit foreign insurance companies from doing business within its limits, or, in allowing them to do so, to impose such conditions as it pleases.

Where the state court decides that a foreign insurance company cannot recover assessments on a policy issued within the State because it has not complied with the statutory conditions imposed by the State, no Federal question is involved, and a request to find that the state statute could not prevent the insured from going outside the State and obtaining insurance on property within the State does not raise a Federal question, where the fact was otherwise, and the writ of error will be dismissed.

140 Michigan, 344, affirmed.

THE facts are stated in the opinion.

Mr. Patterson A. Reece, with whom *Mr. Virgil I. Hixson* was on the brief, for plaintiff in error.

Mr. Edward C. Chapin for defendant in error.

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

This action was brought in the Circuit Court of Schoolcraft County, Michigan, by Swing, trustee of the Union Mutual Fire Insurance Company, a corporation of Ohio, against the Weston Lumber Company, a corporation of Michigan, to collect its share as a policy holder of an assessment made by the order of the Supreme Court of Ohio in liquidating the liabilities of the insurance company.

The assessment against defendant was in respect of a policy for \$5,000 and a renewal thereof on defendant's lumber and other property at Manistique, Michigan. The insurance company was never licensed to do business in Michigan, and the

defense was pleaded that it was a foreign corporation, not authorized to transact business in that State, and that the policies were issued in direct violation of the laws of Michigan, the company not having complied with those relating to foreign insurance companies doing business in the State; and that the contracts of insurance were at variance with and contrary to the settled policy of the State.

The case was tried by the court without a jury. At the conclusion of the trial plaintiff made requests for certain findings as matters of law, including this:

"11. That the statutes of this State do not and could not under the Constitution of the United States prohibit this defendant from going or sending outside of this State and there procuring insurance on property belonging to the defendant and located in this State from an insurance company not authorized to do business in this State;" which the court refused.

Findings of fact and conclusions of law were made and filed. It was found, among other things, that—

"In the latter part of the summer of 1889 defendant desired to increase the amount of insurance carried upon lumber accumulated in its yards, and made application to a local agency conducted by a banking institution of the town for a considerable addition to the line of its insurance already held in that agency. Not being able to write, in one risk, in its own companies, the amount of additional insurance desired, the local agency, through W. C. Marsh, an employé of the bank, who attended to its insurance business, placed twelve different policies with outside agencies. Part of this line of insurance was sent to George R. Lewis & Company, an agency of Minneapolis, Minnesota, through which concern the \$5,000 insurance involved in this case was placed with the said Union Mutual Fire Insurance Company of Cincinnati, Ohio."

It was admitted that the insurance company had never complied with any of the requirements imposed by the statutes of Michigan on insurance companies of other States seeking to transact business in Michigan.

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Sections 5157 and 10467 of the Compiled Laws of Michigan of 1897 are as follows:

(5157.) "That it shall be unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this State any insurance business for any person, persons, firm or copartnership who are non-residents of this State, or for any fire or inland navigation insurance company or association, not incorporated by the laws [or] of this State, or to act for or in behalf of any person or persons, firm or corporation, as agent or broker, or in any other capacity, to procure, or assist to procure, a fire or inland marine policy or policies of insurance on property situated in this State, for any non-resident person, persons, firm or copartnership, or in any company or association without this State whether incorporated or not, without procuring or receiving from the commissioner of insurance the certificate of authority provided for in section twenty-three of an act entitled 'An act relative to the organization of fire and marine insurance companies transacting business within this State,' approved April third, eighteen hundred and sixty-nine, as amended. Such certificate of authority shall state the name or names of the person, persons, firm or copartnership, or the location of the company or association as the case may be and that the party named in the certificate has complied with the laws of this State, regulating fire, marine, and inland navigation insurance, and the name of the duly appointed attorney in this State on whom process may be served." Act of 1881, § 1.

(10467.) "But when, by the laws of this State, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

Judgment was entered in favor of defendant, and affirmed, on error, by the Supreme Court of Michigan. *Swing v. Weston Lumber Company*, 140 Michigan, 344.

The Supreme Court held that a foreign mutual insurance company, which had not been authorized to do business in Michigan as provided by its statutes, could not maintain a suit to collect assessments due on a policy issued by one of its agents in another State on request of an insurance broker of Michigan who was unable to place the whole line in his own authorized companies. *Seamans v. Temple Company*, 105 Michigan, 400, citing many cases, was referred to and quoted from. It appeared therefrom that it had been for years the policy of the State to limit the business of insurance to such corporations, domestic and foreign, as should be authorized to do business, after compliance with certain regulations and conditions prescribed by law, and that the statutes were intended to be prohibitory in their character.

The power of the State to prohibit foreign insurance companies from doing business within its limits, or in allowing them to do so to impose such conditions as it pleases, is undoubted. *Hooper v. California*, 155 U. S. 648; *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S. 246; *Chattanooga National Building & Loan Association v. Denson*, 189 U. S. 408.

What was held here on the facts was that the contract was brought about and completed in Michigan by a representative of the foreign corporation. So far as defendant was concerned its application for insurance was made and the business was done with the local office at Manistique, with which it was in the habit of doing business. It was not a case of defendant "going or sending outside of this State and there procuring insurance on property belonging to the defendant and located in this State from an insurance company not authorized to do business in this State," as supposed in plaintiff's eleventh request for finding. That request is the only pretense in the record of a Federal question being raised prior to the judgments below, and was entirely inadequate for that purpose.

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Naturally enough, neither the Circuit Court nor the Supreme Court referred to any Federal question whatever.

The writ of error cannot be maintained. *Chicago, Indianapolis & Louisville Railway Company v. McGuire*, 196 U. S. 128, 132; *Allen v. Allegheny County*, 196 U. S. 458.

Writ of error dismissed.

GILA BEND RESERVOIR AND IRRIGATION COMPANY v. GILA WATER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 226 of October term, 1905. Petition submitted October 9, 1906.—Decided April 8, 1907.

Petition for rehearing in *Gila Reservoir Co. v. Gila Water Co.*, 202 U. S. 270, denied.

The failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled; and where the question of the jurisdiction of a court in a particular case over property in its actual possession was not presented in that court, the appellant cannot, in this court, question the power of that court to order a sale of the property or the title conveyed to the purchaser.

THE facts are stated in the opinion.

Mr. Hugh T. Taggart and *Mr. William C. Prentiss* for appellant.

Mr. Charles F. Ainsworth for appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

During the October term, 1905, and on May 14, 1906, 202 U. S. 270, the decree of the Supreme Court of the Territory of Arizona in this case was affirmed. On May 26 (the last day

of the term) an order was entered which in effect continued the jurisdiction of this court to the present term, giving opportunity to plaintiff in error to present a petition for rehearing during the vacation. That petition was presented, and in the early part of this term, after full consideration, was denied. Subsequently, lest in the confused state of the record it might be supposed by either of the parties that the facts had been misapprehended, we, on January 7, 1907, entered an order withdrawing the memorandum denying the petition for rehearing and granting leave to counsel on both sides to file such additional briefs as they desired. In pursuance of this leave, briefs on both sides have been filed, and we have again examined the record.

This consists of the pleadings, the decree in favor of the defendant, a bill of exceptions divided into two parts—one being a statement of exceptions, and the other a narrative of the “circumstances and evidence”—the decree and opinion of the Supreme Court and a statement of facts prepared for the review by this court. The opinion was filed March 26, 1904, and the statement of facts allowed February 21, 1905, nearly a year after the decision. In addition, there appears a motion made in the Supreme Court by the appellee to strike from the files the abstract of record for several reasons, one of which was that it did not contain the findings of fact and the conclusions of law of the District Court. This is followed by the suggestion of a diminution of the record in what purports to be these findings and conclusions. It does not appear that any action was taken by the Supreme Court upon this motion or any leave given to amend the record by the addition of the findings and conclusions.

We copy in full the statement of facts prepared and allowed by the Supreme Court:

“Statement of facts in this case in the nature of a special verdict made by the Supreme Court of the Territory of Arizona, and also rulings of the court below on the admission and rejection of evidence as excepted to on the foregoing transcript

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of the record in the above-entitled cause, to be used by appellant herein in its appeal to the Supreme Court of the United States.

"That the above-entitled cause was tried in the court below upon the complaint which was the statement of a cause of action to quiet title to the property described in said complaint against the defendants therein mentioned; the amended answer of the Gila Water Company, one of the said defendants, denying the plaintiff in said complaint being the owner of the property therein described, said defendant further alleging peaceable and adverse possession of the property described in plaintiff's complaint under the title and color of title for more than three years preceding the date of the commencement of the above action, and also alleging peaceable and adverse possession of said property for more than five years before the commencement of the suit, using and enjoying the same, paying taxes thereon, claiming under deeds duly recorded; the cross complaint of said defendant, Gila Water Company, claiming to be the owner in fee simple of all the property described in plaintiff's complaint in said cause, and the answer of appellant herein to said Gila Water Company's cross complaint;

"That all of the other defendants mentioned in said complaint answered and disclaimed any right, title and interest in and to the property described in said complaint;

"That this Supreme Court adopts and makes a part of this statement of facts the bill of exceptions in this case, part I, exceptions, part II, circumstances and evidence, as certified and signed on the 24th day of November, 1902, by Hon. Edward Kent, the presiding judge who tried this cause below, the same as if it were set forth at length herein;

"That no order was made in the court below consolidating the case known as No. 1728 in the trial court and the case known as No. 1996 in the same court, said cases being those the record of which is referred to in the above-mentioned bill of exceptions;

"That the receiver appointed in said case No. 1728 made the sale and executed the deed under which the Gila Water Company, appellee, claims title to the property in dispute; that no order was in terms made extending the receivership in said case No. 1728 to said case No. 1996, the latter case being the one in which said receiver made said sale and by the judgment rendered therein assumed to convey the title to said property; that the only orders made in said case No. 1996 relating to said receivership are those dated May 29, 1894, November 23, 1898, July 21, 1894, November 20, 1894, and January 10, 1895, referred to in said bill of exceptions.

"That from the foregoing record and facts, the court finds that plaintiff and appellant herein, Gila Bend Reservoir and Irrigation Company, a corporation, has not and did not have at the commencement of this action any cause of action in respect to, nor did it have and has not now any right, title or interest in and to the property or any part thereof mentioned and described in the complaint herein; that the defendant appellee, Gila Water Company, a corporation, was at the time of the commencement of this action and is now the owner in fee simple and in possession of all the property mentioned and described in plaintiff's complaint herein."

Appellant invokes the doctrine laid down in *Herrick v. Boquillas Cattle Company*, 200 U. S. 96, 98; *Harrison v. Perea*, 168 U. S. 311, 323, and cases cited in the opinion, to the effect that our jurisdiction on an appeal from the Supreme Court of a Territory, "apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of facts support the judgment." Of course, if there are no findings or statement of facts and no exceptions in respect to the introduction or rejection of testimony, the decree will be affirmed, if responsive to the allegations of the pleadings.

The statement of facts prepared by the Supreme Court, standing by itself, is incomplete, but it is helped by a reference to the bill of exceptions in the trial court, which is adopted

and made part of the statement. True, much of the matter in this bill is a mere recital of testimony, but we find in it copies of certain orders and decrees. Putting all together, we are enabled to see clearly the scope of the inquiry. It appears that prior to this litigation two suits were brought in the trial court, one numbered 1728 and the other 1996. The appellant was defendant in the latter. In the first an order was made December 6, 1893, appointing James McMillan receiver of the property now in question. The complaint in suit No. 1996, alleging that the court had already appointed a receiver in the prior case, prayed the appointment of a receiver or an enlargement of the powers of the one then acting, and that he take possession of the property and sell the same to pay the debts. No order appears of record in terms either consolidating the two cases or extending the receivership in case No. 1728 to case No. 1996. A decree was entered in suit No. 1996, of date November 20, 1894, which, after finding the amounts due certain creditors, adjudged and decreed "that James McMillan, the receiver heretofore appointed by this court, and now in possession of said premises, under the orders of this court, proceed to advertise and sell said property and distribute the proceeds as directed in the decree." On January 3, 1895, a report, bearing a double heading, to wit, the titles and headings of both suits Nos. 1728 and 1996, and purporting to be of a sale of the property by James McMillan, receiver, under the order and decree in suit No. 1996, was filed in the court, and on January 10, 1895, an order bearing the same double heading of the two suits was entered, confirming that sale. Subsequently a deed of the property to the purchaser was executed, purporting to be from the receiver duly appointed in the two equity suits, with titles and numbers as above.

The decree in suit No. 1996 was appealed to the territorial and the United States Supreme courts, and affirmed by each of them. The briefs of appellant in the territorial Supreme Court show that the question of the jurisdiction of a court in

a particular case over property in its actual possession was not presented. In the brief of appellant filed in this case this statement appears:

"So confident were counsel of the lack of equity in the bill and of reversal by the appellate courts that the fundamental question of jurisdiction, now urged, was overlooked.

"Indeed, the attention of counsel was so centered upon that point and the question of change of venue that in the brief in this court it was even stated that the receiver had been appointed upon motion of the plaintiffs in suit No. 1996, and that the decree therein of November 20, 1894, provided for the appointment of a receiver."

It is now contended that, inasmuch as the question is one of jurisdiction, neither the omission to call attention to the matter in the prior litigation nor the misrecital of fact operates to render the decree in that case *res judicata* upon the question, but leaves the matter open for present inquiry. Counsel are mistaken. In that litigation the present appellant was the defendant. The property was in the possession of the court, even if held under a prior receivership. The decree directed its sale. It was sold. The sale was confirmed, the deed made and the property delivered to the purchaser. The appellant at least cannot now question the jurisdiction of the court in that suit or the title which it conveyed to the purchaser at the sale. A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled.

Further, in the opinion heretofore filed, after referring to the declaration of the Supreme Court of the Territory that the trial "court, by its action, ratified the acts of the receiver in the second suit, and thereby, in effect, extended his power and authority as such receiver to such second suit," we said (p. 274):

"The objection made by the appellant to it is, as we have indicated, that suit No. 1996 was a proceeding *in rem*, and that the court did not acquire jurisdiction of the property

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for the reason that it was in the custody of the court in suit No. 1728, and that the court in the latter case did not extend the receivership to the No. 1996, nor consolidate the suits, and, therefore, had no power to order the sale of the property by the receiver in No. 1728.

"This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action. It is clear from the record that the District Court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases as in fact consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996."

Nothing further need be added to show that the case was rightly decided. The petition for a rehearing is

Denied.

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

BALLENTYNE v. SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 216. Argued March 21, 1907.—Decided April 8, 1907.

The old English rule that in chancery sales, until confirmation of the master's report the bidding would be opened upon a mere offer to advance the price ten per cent has been rejected, and a sale will not be set aside for inadequacy of price unless so great as to shock the conscience or where there are additional circumstances against its fairness; and each case stands upon its own facts.

While the confidence in the stability of judicial sales should not be disturbed, a sale under foreclosure of valuable property, worth at least seven times the amount of the bid, should not be confirmed in the face of an adverse report by the master and the trial court.

THIS is an appeal from a judgment of the Supreme Court of

the Territory of Hawaii, 17 Hawaii, 96, affirming an order of the third judge of the First Circuit Court in the Territory of Hawaii, which refused to confirm a sale of property made by a commissioner under order of court in a foreclosure suit brought by William O. Smith, as trustee, against the Pacific Heights Electric Railway Company, Limited, a Hawaiian corporation, and directed that the property be again offered for sale. The suit was brought to foreclose a trust deed of fifty thousand dollars executed by the railway company to Smith, as trustee, on April 1, 1902, and purporting to convey an electric railway two and one-half miles in length and running up to Pacific Heights, with its equipment of every kind, and also all land and other property conveyed to it by deed from one Charles S. Desky, dated January 25, 1902.

The sale was made on February 4, 1905, for the sum of eleven hundred dollars. It was in bulk of the entire property covered by the mortgage, except a cable and condenser, which were of comparatively little value, and which, for reasons not at all affecting the merits of this controversy, were not sold with the balance of the property. The commissioner who made the sale reported that the amount realized was disproportionate to the value of the property sold, and recommended that it should not be confirmed, but that such further order should be made as to the court should seem meet in the premises. On the hearing of a motion to confirm the sale and objections thereto, the trial court found that the evidence was overwhelming that the actual value of the property was at least seven times the amount at which the property was struck off, that being the highest and best bid therefor.

Mr. David L. Withington, with whom *Mr. William R. Castle* was on the brief, for appellants:

The sale should have been confirmed. It was regularly conducted and no fraud, unfairness or irregularity of any kind is alleged.

The single question presented under this head is, whether

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inadequacy of price uncoupled with any irregularity and by any circumstances indicating either fraud or unfairness, where it is not claimed that the inadequacy of price is evidence of fraud or unfairness, will authorize the court to set aside the sale.

Before the decision in this case by the court below the point had been settled in Hawaii in a very similar case, cited and approved by the court in its opinion, in which although the court found that the cost of repairing would be greater than the value of the vessel repaired, which is the case of this railroad, it declined to consider it as a wrecking proposition, which is a pure matter of conjunction, which is this case, and after holding that the purpose of confirmation was to determine whether the sale was "fairly and properly conducted." *Smith v. City of Columbia*, 11 Hawaii, 709.

Byers v. Surget, 19 How. 303 and *Graffam v. Burgess*, 117 U. S. 180, 186 are reviewed in a more recent case recognizing the rule that other circumstances than mere inadequacy of price are generally necessary. *Schroeder v. Young*, 161 U. S. 334.

Many cases sustain the proposition that gross inadequacy of itself is not sufficient.

Nor is mere inadequacy apart from the circumstances of the case of itself, however gross it may be, evidence of irregularity or unfairness. It is only in connection with the circumstances of the case which of themselves might not be sufficient to evidence fraud, irregularity or unfairness that the court may, because of the grossness of the inequality, infer fraud, irregularity or unfairness.

In the case at bar there is no allegation or contention that there was fraud, irregularity or unfairness, or that the inadequacy evidenced any of these.

The discretion to set aside a judicial sale is a legal discretion and not an arbitrary one, and is to be exercised under the rules of law and the exercise of this discretion under an erroneous rule of law is clear error.

The authority of the circuit judge must be exercised and governed by the principles of judicial discretion under the rules of law. *Ex parte Farmers' Loan & Trust Co.*, 129 U. S. 206; *Blossom v. The Milwaukee and Chicago R. R. Co.*, 1 Wall. 655.

Mr. F. M. Hatch, with whom *Mr. William O. Smith*, *Mr. A. Lewis, Junior*, and *Mr. L. J. Warren* were on the brief, for appellee Smith:

Authorities from other jurisdictions are clearly in support of the principle here decided and applied, many of them going beyond the extent required to uphold the ruling before us.

As to the use of the alternative "or" instead of "and," whereby it meant that gross inadequacy of price, shocking to the conscience, is sufficient of itself, see: *Graffam v. Burgess*, 117 U. S. 180, 191; *Rorer, Judicial Sales*, § 28; 17 Am. & Eng. Ency. of Law, 2d ed., 1000-1002; *Magann v. Segal*, 92 Fed. Rep. 252, 259; *Pewabic Mining Co. v. Mason*, 145 U. S. 367; *Fidelity Ins. Co. & S. D. Co. v. Roanoke St. Ry. Co.*, 98 Fed. Rep. 476; *Marlett v. Warwick*, 18 N. J. Eq. 111.

For cases as to a sacrifice being sufficient see: *Ganst v. Moss*, 20 Illinois, 549; *Page v. Kress*, 80 Michigan, 85.

A marked distinction should be preserved between cases where the application for a resale is made before and where after confirmation by the court. In the one case the sale is incomplete; in the other, the act of confirmation has made it complete and given the purchaser a vested right which he had not before held. Cases where the application for resale is made after there has been an acceptance of the bid by the court and a confirmation of the sale are not, then, we submit, fair precedents for cases like that at bar, where there has been a rejection of the bid and no confirmation and the application is promptly made.

For other cases as to the rights of a bidder before and after confirmation see: *Rorer, Judicial Sales*, § 545; *Wiltzie, Mortgage Foreclosure*, § 469; 2 *Jones on Mortgages*, §§ 1637, 1641;

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State v. Campbell, 5 S. Dak. 636; and see 10 Wisconsin, 123; 63 N. Car. 379.

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

The question presented is whether a court of equity may, prior to any order of confirmation, set aside a foreclosure sale of mortgaged property upon the single ground of inadequacy in price; and further, whether, if it has that power, the inadequacy here shown is so gross as to justify such action. It does not appear that there was any fraudulent conduct on the part of the purchaser or any combination to restrict bidding. The sale was duly advertised. It was, so far as disclosed, open and public, and the bid reported was the highest. Nothing in time or place or lack of attendance of buyers is shown. Many of the considerations, therefore, which have influenced courts of equity to set aside judicial sales are not to be found in the present case. Indeed, the only substantial objection is that the amount of the bid is largely below the value of the property. Something may be said on each side of the question; on the one, that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that to the extent of that value the debts secured upon the property may be paid; that it owes to them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bidding in good faith, at an open and public sale, to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that if the

creditors make no effort and are willing to take the chances of a general attendance, they have no right to complain on the ground that the property did not bring what it should have brought.

In England the old rule was that in chancery sales, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten per cent; but this rule has been rejected, and now both in England and this country a sale will not be set aside for mere inadequacy of price, unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness. But if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. *Graffam v. Burgess*, 117 U. S. 180, 191, 192. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts.

It was said by Mr. Chief Justice Waite, in *Mayhew v. West Virginia Oil & Oil Land Company*, 24 Fed. Rep. 205, 215, "that in chancery a bidder at a sale by a master, under a decree of court, is not considered a purchaser until the report of sale is confirmed." See also *Magann v. Segal*, 92 Fed. Rep. 252, 255; *Jennings v. Dunphy*, 174 Illinois, 86; *Vanbussum v. Maloney*, 2 Met. (Ky.) 550, 552; *Sumner v. Sessoms*, 94 N. Car. 371; *Branch v. Griffin*, 99 N. Car. 173. The power of a court of equity in reference to a resale was affirmed by this court in *Pewabic Mining Company v. Mason*, 145 U. S. 349, in which case we said (p. 356):

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and the conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made he will,

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certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted."

See also *Schroeder v. Young*, 161 U. S. 334.

Now, in the case before us, the commissioner who made the sale reported against its confirmation. It was not confirmed but set aside by the trial court, which found that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the bid. While the testimony is not preserved, it is stated by the Supreme Court of the Territory that it was claimed that only four years before the sale the property cost \$78,000, exclusive of the right of way. It was, in fact, bonded less than three years before for \$50,000. Speaking in general terms, it consisted of an electric railway two and a half miles in length, two freight cars, two passenger cars, and other appliances for running the railway. All this was sold for \$1,100. The action of the trial court in setting aside the sale was approved by the Supreme Court of the Territory.

Under the circumstances we think the order of the Supreme Court should be sustained. While we are disinclined to any action which will impair confidence in the stability of judicial sales, yet with the concurrence of judicial opinion adverse to this sale, considering the amount of property sold, the meager sum bid by the purchaser, the express finding that the overwhelming testimony was to the effect that the property was worth at least seven times more than the sum bid, and also recognizing that the courts which have passed upon this question are much more familiar with the condition of things in Hawaii, and therefore more competent to appreciate the significance of the transactions attending the sale, we have come to the conclusion that it would not be right to reverse the ruling below and confirm the sale.

The judgment of the Supreme Court of the Territory of Hawaii is

Affirmed.

FIELDS v. UNITED STATES.

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

No. 395. Argued March 12, 13, 1907.—Decided April 8, 1907.

While under § 6 of the Court of Appeals Act of 1891, 26 Stat. 828, a certiorari can only be issued when a writ of error cannot be, it will not be issued merely because the writ of error will not lie; but only where the case is one of gravity, where there is conflict between decisions of state and Federal courts, or between those of Federal courts of different circuits, or something affecting the relations of this nation to foreign nations, or of general interest to the public.

One who embezzles money from an estate forfeits his right to commissions, irrespective of whether he is or is not convicted of any crime in respect thereto, and his conviction does not involve the pecuniary amount of the commissions which he forfeits by reason of the embezzlement; nor does the fact that such commissions amount to over \$5,000 give this court jurisdiction under § 233 of the Code to review the judgment of the Court of Appeals of the District of Columbia affirming the conviction. The rule that a writ of error does not lie from this court to the Court of Appeals of the District of Columbia in a criminal case applies in such a case.

Writ of error to review 27 App. D. C. 433, dismissed.

THOMAS M. FIELDS was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. Of eight counts in the indictment seven were disposed of by demurrer or by verdict in favor of the defendant. The trial, begun on May 8, and ending May 15, 1905, resulted in a verdict of guilty under the third count. Motions in arrest of judgment and for a new trial having been overruled, he was sentenced to imprisonment and labor in the penitentiary for five years. The Court of Appeals of the District modified the judgment of the Supreme Court by striking out the order for "labor," and, as so modified, affirmed it. 27 App. D. C. 433. The case was brought to this court on writ of error. A motion to dismiss and a petition for certiorari were presented by the respective parties, the consideration of both of which was postponed to the hearing on the merits. The indictment was found under section 841 of the District Code, which is as follows:

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"Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

The statute under which the writ of error was sued out is section 233 of the District Code, which reads:

"SEC. 233. Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

Mr. Frank J. Hogan and Mr. John C. Gittings, with whom Mr. Henry E. Davis was on the brief, for plaintiff in error:

The forfeiture under § 841 is not merely of some right or claim to some commissions, but of all right or claim to any of them; nor is the forfeiture confined merely to commissions, but it extends to costs and charges, and hence operates to leave a fiduciary deeply in debt for proper costs and charges which

he has duly paid, even under express orders of the appointing court, as in this case.

Under § 841 such commissions are involved in this case, and measure the value in money of the matter in dispute. It can even be said that the commissions are themselves the matter in dispute for the purpose of jurisdiction on this writ of error, even though in one sense an incident to the prosecution for embezzlement. Under *Chapman v. United States*, 164 U. S. 436, and *Sinclair v. District of Columbia*, 192 U. S. 16, if this statute and proceeding involve only the bare question of guilt or innocence of the elemental act as a crime, this court has no jurisdiction on the writ of error, because in such event the matter in dispute is incapable of pecuniary estimation; but by the imperative terms of the statute itself, and the necessary effect of the judgment (if valid) the case at bar presents as the matter in dispute, one that is not only capable of pecuniary estimation, but has actually been so estimated to the very penny; whereas the *Chapman case* and the *Sinclair case* were utterly devoid of this essential element.

While the mere guilt or innocence of the accused is ordinarily a matter that is incapable of pecuniary estimation, yet the statute can make it otherwise. Under § 841 the guilt and forfeiture are inseparable—the one cannot arise or exist without the other. The forfeiture is purely pecuniary, and can be said to make the guilt or innocence a matter in dispute that is capable of a money valuation, and, moreover, fixes this value as the amount of the commissions, costs and charges to which the accused is entitled.

In this case the matter in dispute is whether the plaintiff in error, as a chancery receiver, is subject to a prosecution ending in a sentence depriving him of all right of claim to any commissions, costs and charges as receiver, amounting to \$10,070.82; or such commissions themselves can be considered as the matter in dispute for the purpose of jurisdiction. It is not the form, but the substance, of the proceeding that determines the matter in dispute. The statute controls abso-

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lutely the entire controversy. Property rights are often concluded in criminal cases, and criminal issues are often determined in civil cases as the basis of pecuniary claims. There is no hard and fast rule to prevent such proceedings and results, especially when based upon statutes. *Smith v. Adams*, 130 U. S. 167; *Stinson v. Dousman*, 20 How. 461.

If these commissions be in one sense an incident to the prosecution for embezzlement, still this court has jurisdiction. *Simms v. Simms*, 175 U. S. 162; *De La Rama v. De La Rama*, 201 U. S. 303.

In the case at bar, though this court may have no jurisdiction of the embezzlement feature of the case as such, yet it has of the forfeiture feature, but it cannot determine the latter without passing on the sufficiency of the evidence of the former, because both points of the case rest upon exactly the same evidence; and this, therefore, opens the whole record and sets the matter at large.

Mr. James S. Easby-Smith, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for defendant in error.

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

The petition for a certiorari must be first considered. A certiorari can be issued only when a writ of error cannot. 26 Stat. 828, sec. 6, last two paragraphs. There have been two or three instances in which, after a writ of error has been allowed, an application for a certiorari has been filed, the latter because of doubt whether the former would lie. It must not be supposed that because we have before us both a writ of error and an application for certiorari that the rules laid down by this court governing the latter applications are to be ignored, and the case held in this court by either the writ of error or the certiorari.

In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public.

Will a writ of error lie? Is the case one of which this court has jurisdiction? It is settled that a criminal case, as such, cannot be brought here on writ of error from the Court of Appeals of the District. *Chapman v. United States*, 164 U. S. 436, and cases cited in the opinion; *Sinclair v. District of Columbia*, 192 U. S. 16.

The authority of these cases is not questioned, but it is contended that the forfeiture of all right or claim to any commissions, etc., was determined by the judgment in the case at bar, and that, therefore, it comes within the pecuniary provisions of section 233. *Smith v. Whitney*, 116 U. S. 167, is cited as authority. In that case we sustained our jurisdiction over a judgment of the Supreme Court of the District, dismissing a petition for a writ of prohibition to a court martial convened to try an officer for an offense punishable by dismissal from the service and consequent deprivation of salary, which, during the term of his office, would exceed the sum of \$5,000. But that case is very different from this. There the direct result of an adverse judgment of the court martial was the deprivation of an office with a salary of over \$5,000. That sum, therefore, was involved in the trial sought to be restrained. But no such result follows in this case. The act of the defendant in fraudulently converting or appropriating the moneys in his possession operates to forfeit all right or claim to any commissions, etc., and this, irrespective of the question whether he is or is not convicted of any crime in respect thereto. It is true such fraudulent conversion or appropriation is declared

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to be embezzlement, and the defendant was prosecuted and convicted of that offense, but the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys. The only direct pecuniary result of a conviction is a fine not exceeding \$1,000, and that as a punishment for the offense. *United States v. More*, 3 Cranch, 159, 174. It adjudges no forfeiture of commissions. It may be that it furnishes evidence in respect to the forfeiture of commissions, but if so it is simply evidence. Nor does the criminal offense depend at all upon the amount of the appropriation. If the official fraudulently converts or appropriates \$1,000, the crime is the same as though he fraudulently converts or appropriates \$50,000. All that can be accomplished by the criminal prosecution is the statutory punishment for the offense, which cannot exceed a fine of \$1,000, or imprisonment for ten years, or both. The conviction is conclusive as to the fact of a fraudulent conversion and appropriation, but not as to the amount thereof, any more than a conviction of larceny is a conclusive adjudication that the larceny was committed at a day named or of the precise amount or value of the property charged to have been stolen. Those are incidental and minor facts, which may or may not be proved exactly as stated. All that is necessary to sustain the judgment before us is that there was a fraudulent conversion or appropriation of some amount of money in the possession of the official. For these reasons, the writ of error cannot be sustained.

The application for a certiorari is denied and the writ of error is

Dismissed.

MR. JUSTICE WHITE concurred in the judgment.

MERCANTILE TRUST COMPANY *v.* HENSEY.

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

No. 245. Submitted March 15, 1907.—Decided April 8, 1907.

It is for the plaintiff in error to show affirmatively that error was committed, it is not to be presumed and will not be inferred from a doubtful statement in the record.

Where there is no evidence of the amount of damage caused by each particular breach but only of the total amount sustained, the attention of the trial court should have been called to the plaintiff's objection to a recovery of particular damage permitted, and a request made for direction of verdict, and in the absence thereof the objection cannot be argued here.

Although under a building contract the builder, to be entitled to payment, must first obtain the certificate of the architect, in the absence of a provision in plain language to that effect, the certificate is not conclusive as to the amount due nor a bar to the owner showing a violation of the contract, in material parts, by which he has sustained damage.

27 App. D. C. 210, affirmed.

THE Mercantile Trust Company, by this writ of error, seeks to review a judgment of the Court of Appeals of the District of Columbia, affirming a judgment against it of the Supreme Court of the District for the sum of \$8,468. The action was brought upon a bond for fifty thousand dollars, executed January 24, 1900, by the company as surety for one Jones, for the performance by him of a written contract entered into on the same date between him and the defendant in error, who was the plaintiff below, relative to the completion by Jones for the defendant in error of certain houses already in process of construction in the city of Washington. The condition of the bond was, in substance, that if the principal, Jones, should duly and faithfully perform and fulfill all the conditions of the contract entered into between him and the defendant in error the bond was to be void, otherwise to remain in force.

The contract provided that Jones, for the consideration mentioned therein, would within seven months from the date thereof well and sufficiently erect and replace all defective

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work and finish the twenty-one brick dwelling houses mentioned "agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed within the time aforesaid in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, and also shall and will find and provide such good, proper and sufficient material of all kinds whatsoever as shall be proper and sufficient for the completing and finishing all of said twenty-one houses and other works of the said buildings mentioned in the said specifications for the sum of eighty-nine thousand two hundred and fifty dollars, to be paid as set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part hereof." Hensey, "in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified," agreed to pay the contractor the above-named sum "as the work progresses in the manner and at the time set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part of this agreement; provided that in each of the said cases a certificate shall be obtained from and signed by the architect in charge that the contractor is entitled to payment, said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work if it be afterwards discovered to have been ill done or not according to the drawings and specifications either in execution or materials; and, further, that the party of the second part shall furnish, if required, satisfactory evidence that no lien does or can exist upon the work." The last payment provided for in the contract was to be made, "when the houses are fully completed in accordance with the said agreement and the plans and specifications prepared therefor."

All the materials were to be new and of the best quality, and the contractor was to "execute and complete all the work as set forth in the specifications and drawings in the best and most workmanlike manner." It was agreed that "in all cases of doubt as to the meaning of the drawings reference is to be made to the architect in charge, whose decision will be final."

Although this contract was entered into in January, 1900, and under it the houses were to be completed in seven months, yet, for some reason, Bates Warren, the person named in the contract, did not appoint an architect until April, 1901, when he appointed Mr. W. J. Palmer. The evidence given on the part of the plaintiff tended to prove that the contractor, Jones, abandoned the work on the houses early in the fall of 1900, leaving them uncompleted, and the work was otherwise carried on during the following winter, but that there was no architect in charge until Mr. Palmer's appointment. From that time Mr. Palmer seems to have in some degree superintended the work, and on the twenty-ninth of July, 1901, reported in writing to Mr. Warren the completion of the houses in question. In his letter Mr. Palmer said: "The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications it has been where the same were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses."

This action was subsequently commenced for the purpose of recovering the damages which the plaintiff Hensey alleged he had sustained by reason of the failure of Jones to fulfill and carry out the contract. Issue being duly joined between the parties, the plaintiff gave evidence tending to prove that the houses were not completed within the contract time, nor according to the plans and specifications in the particulars stated, and that the value of the houses was between two and three thousand dollars less on each house than it would have been had they been completed according to the contract,

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plans and specifications. The defendant duly objected to such evidence and took exceptions to its admission.

A verdict was rendered in favor of the plaintiff in the sum of \$8,468, after allowing the defendant's claim of set-off of \$29,032.

Mr. Hayden Johnson and *Mr. John Ridout*, for plaintiff in error, submitted:

The testimony of all the plaintiff's witnesses who testified in respect of deficiencies in construction being as to the total damage sustained by the plaintiff, as the result of structural defects, defective materials and omissions, and the trial court having ruled that the jury should consider omissions alone, there was no basis upon which the jury could segregate damages caused by defective materials and damages caused by omissions so as to reach a verdict in accordance with the court's rulings.

All the witnesses who were produced by the plaintiff testified, in proof of the damage sustained by the plaintiff, that the difference in the value of the houses by reason of the omissions, structural defects and defective materials was from \$2,000 to \$3,000 less on each house than it would have been had they been completed according to the witness's interpretation of the contract, plans and specifications. No witness was interrogated in respect of the difference in the value of the houses by reason of omissions alone. No witness undertook to segregate the items assigned as breaches, and give the damage arising from each alleged defect.

Under the rulings of the court, therefore, the case was submitted to the jury for them to assess damages only for omissions, if any they should find, and they were expressly instructed not to assess damages for substitutions of material or modification of construction made with the approval of the architect under his interpretation of the plans and specifications. This necessarily requires, in view of the testimony of the architect, that what "substitutions of material and modifica-

tions of construction were made with his approval and according to his interpretation of the plans and specifications, that the jury segregate the damage arising from omissions from the damages resulting from substitutions of material and modifications of construction. Unless from the testimony they can do this, the charge given them in the twelfth prayer, and its explanation by the court, becomes idle and useless. And yet all the testimony in the case, as far as the money estimate for damage is concerned, lumps omission, structural defects and defective materials, and furnishes no basis whatever upon which they can be segregated. Even though all of the substitution of materials and modifications of construction were not made with the consent of the architect, it is conceded that some of them were, so this segregation is none the less essential in giving the jury a basis upon which to assess damages.

Under the building agreement, the architect's certificate of completion should have been held to be final and conclusive of such completion, there being no evidence of fraud or bad faith on his part.

Taking into consideration that there is not one word in the record from which fraud or bad faith on the part of either Warren or Palmer could be inferred, it is believed that they, having been made the arbitrators by Hensey as to the proper construction of the work, and the Trust Company having acted under their directions, their decision is final and binding upon Hensey.

The law upon the subject is entirely settled. *Boettler v. Tendick*, 73 Texas, 494; *Crane Elevator Co. v. Clark*, 80 Fed. Rep. 705; *Railway Co. v. Gordon*, 151 U. S. 285; *Railroad Co. v. Price*, 138 U. S. 188; *Sweeney v. United States*, 109 U. S. 618.

Mr. Arthur A. Birney and *Mr. Henry F. Woodard*, for defendant in error, submitted:

While it is competent for parties to agree that the certificate of an engineer, architect or other person shall be final and

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conclusive, and that in such case, and "in the absence of fraud, or such gross mistake as to necessarily imply bad faith, or failure to exercise an honest judgment, the action of the architect would be final," this attribute of finality attaches only where the parties have so agreed, either in terms or by necessary implication, is clear from the decisions.

Cases of such express agreement for conclusiveness which are cited by the other side, are *Boettler v. Tendick*, 5 L. R. A. 270; *Sweeney v. United States*, 109 U. S. 618; *Railroad Co. v. March*, 114 U. S. 549; *Railroad Co. v. Price*, 138 U. S. 185; *Sheffield R. R. Co. v. Gordon*, 151 U. S. 287; while *Kihlberg v. United States*, 97 U. S. 400, is a case of necessary implication, treated by the court as an express agreement.

These cases and others are reviewed in *Central Trust Co. v. Louisville &c. Ry. Co.*, 70 Fed. Rep. 282, where, after pointing out that the provision for finality is found in the contracts in those cases where the certificate was held conclusive, the court says that the court should not imply such an agreement but should require clear and express language, because it is contracting away the right of the party to appeal to the courts of justice in case of a controversy.

But however it may be in other cases where the architect, agent of the owner, accepts and certifies work as done according to the contract, in this case the certificate cannot bind, because the right of the owner, notwithstanding a certificate, to claim for bad work and inferior materials is expressly reserved to him; and the certificate is so clearly wrong as to prove either fraud or such mistake by the architect as necessarily to imply bad faith, and for this reason is not binding. *Kihlberg v. United States*, 97 U. S. 402.

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

After even more than the usual number of pleas, additional pleas, replications, rejoinders and demurrers, which are to be

found in the pleadings in this District, the parties came to trial on the issues of fact, and the plaintiff recovered a verdict as stated. The judgment entered on the verdict was affirmed by the Court of Appeals. 27 App. D. C. 210.

The grounds submitted in this court for the reversal of the judgment are reduced to two, set forth in the brief for the plaintiff in error, as follows:

"First, that the testimony of all the plaintiff's witnesses who testified in respect of deficiencies in construction being as to the total damage sustained by the plaintiff as the result of structural defects, defective materials and omissions, and the trial court having ruled that the jury should consider omissions alone, there was no basis upon which the jury could segregate damages caused by defective materials and damages caused by omissions so as to reach a verdict in accordance with the court's ruling.

"Second, that under the building agreement, the architect's certificate of completion should have been held to be final and conclusive of such completion, there being no evidence of fraud or bad faith on his part."

In regard to this first ground of reversal, the record is at first sight somewhat confused. The plaintiff in error asserts that there was no evidence given segregating the items upon which the sum total of the damage was arrived at; that the evidence given on the part of the plaintiff was that the houses were each worth between two and three thousand dollars less on account of the failure of plaintiff in error to fulfill the conditions of the contract, but that it is impossible to discover from that evidence what amount of the damage was due to omissions, what amount to structural defects and what amount to defective material; and, as the court instructed the jury that in considering the question of structural defects they were not at liberty to consider anything but omissions, and were not entitled to consider substitutions of material or modifications of construction made with the approval of the architect under his interpretation of the plans and specifications, there

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was in reality no evidence before the jury upon which they could have estimated the damages under the instruction given them by the court; that all the witnesses testified simply as to the total diminution in value, as a result of the three items mentioned—omissions, structural defects and defective material—while the court charged, agreeably to the twelfth request of the plaintiff in error, that they were at liberty only to consider damages resulting from omissions.

The twelfth prayer of the plaintiff in error, which its counsel asserts was granted by the court, is as follows:

“The jury are instructed that, in considering the question of structural defects, they are not at liberty to consider anything but omissions, if any they find, and are not entitled to consider substitutions of materials or modifications of construction made with the approval of the architect, under his interpretation of the plans and specifications.”

There are several answers to the first ground urged by the plaintiff in error for a reversal of this judgment.

(1) It does not appear that there is any basis in the record for the assertion of the plaintiff in error, that there was no evidence given showing the amount of damage sustained from each of the breaches of the contract, but only a statement of the sum total sustained by reason of all the breaches. The bill of exceptions does not purport to set forth all the evidence given upon the trial of the case. There is a general statement that the plaintiff in error gave evidence by several witnesses that the houses were not completed according to the plans and specifications in the contract, in the particulars set forth in the assignment of breaches, and that the value, by reason of the omissions, structural defects and defective materials, was from two to three thousand dollars less on each house than it would have been had they been completed according to the contract, plans and specifications. This is not at all equivalent to saying that there is no evidence except as to the total damage. It is much more probable that on the trial such evidence was given, and that the state-

ment in the bill is simply a summary of the total amount of damage, which the evidence showed in detail had been sustained from each particular breach. It does not mean that there was no evidence of the amount of the damage caused from each breach that was proved. It is very improbable that the case was tried in any such manner. The amount of damage on account of each breach that was proved would most naturally have also been proved as part of the case.

It is part of the duty of a plaintiff in error, affirmatively to show that error was committed. It is not to be presumed, and will not be inferred from a doubtful statement in the record. We think in this case the record fails to show the absence of the evidence as argued by the plaintiff in error.

(2) If, however, we assume that there was no such evidence in detail and only a conclusion given as to the total amount of damage, and if we further assume that the twelfth request of the plaintiff in error was charged by the court, and the right of recovery was thereby limited as stated, it does not appear that the plaintiff in error made any point on the trial of the absence of the evidence of damage in detail, or that the court was asked to direct a verdict for the defendant on account of its absence. If there were no evidence of the amount of damage caused by each particular breach, but only of the total amount sustained, and the plaintiff in error desired to avail itself of that objection to a recovery for the particular damage permitted, counsel should have called the attention of the court to the point, and requested a direction of a verdict for the defendant on that ground. No such request was made, and nothing was said which would show that counsel for the plaintiff in error had any such objection in mind, and he cannot argue an objection here which was never taken in the trial court.

(3) In truth the court did not limit the recovery of damages, as is set forth in the above-mentioned twelfth request to charge, but permitted a recovery for the total sum of the various items proved.

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The defendant in error insists that the twelfth request, instead of being charged, was in fact refused by the court. We think that in this assertion the defendant in error is perfectly right. Some little confusion at first appears on looking in the record, caused by a mistaken reference to the request which was charged, but a more careful perusal of all that appears regarding the charge of the court, and the requests and refusals to charge, brings us to the conclusion that there is not the slightest doubt that the court refused the twelfth request, instead of charging it. In such case there was no occasion for segregating the items of damage proved.

This leaves the argument of the plaintiff in error upon the first ground wholly without merit.

The other ground taken for a reversal in this case is that the architect's certificate of July 29, 1901, was conclusive between the parties and was a bar to the maintenance of this action.

Mr. Palmer, in his letter or certificate, reported the completion of the buildings according to his interpretation of the plans and specifications, and that where deviations had been made from them it was where the same were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work had been done according to the interpretation most beneficial to the houses.

We do not think this certificate was conclusive, and it did not, therefore, bar the maintenance of this action. The language of the contract, upon which the claim is based, is set out in the foregoing statement, and while it provides that the work shall be completed agreeably to the drawings and specifications made by M. D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, it omits any provision that the certificate shall be final and conclusive between the parties. In other words,

the contract provides that before the builder can claim payment at all he must obtain the certificate of the architect; but after such certificate has been given, there is no provision which bars the plaintiff from showing a violation of the contract in material parts, by which he has sustained damage. A contract which provides for the work on a building to be performed in the best manner and the materials of the best quality, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications. *Glacius v. Black*, 50 N. Y. 145; *Fontano v. Robbins*, 22 App. D. C. 253.

There is also in the contract the provision already mentioned in the statement of facts in regard to payments as the work progressed, which showed that a certificate was to be obtained from and signed by the architect in charge, before the contractor was entitled to payment, but it was provided that the certificate should "in no way lessen the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications either in execution or materials." There is the further positive agreement of the contractor to execute and complete all the work as set forth in the specifications in the best and most workmanlike manner, and also that final payment is to be made only when the houses are completed in accordance with the agreement and the plans and specifications prepared therefor.

The whole contract shows, in our opinion, that the certificate that the houses had been completed according to the contract and its plans and specifications was not to be conclusive of the question, and the plaintiff was not thereby precluded from showing that in fact the contractor had not complied with his contract, and the plaintiff had thereby sustained

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damage. The cases cited in the opinion of the court below, *Fontano v. Robbins*, 22 App. D. C. 253; *Bond v. Newark*, 19 N. J. Eq. 576; *Memphis &c. R. R. Co. v. Wilcox*, 48 Pa. St. 161; *Adlard v. Muldoon*, 45 Illinois, 193, are in substance to this effect. To make such a certificate conclusive requires plain language in the contract. It is not to be implied. *Central Trust Co. v. Louisville &c. R. R. Co.*, 70 Fed. Rep. 282, 284. The cases of *Sweeney v. United States*, 109 U. S. 618; *Martinsburg &c. Railroad Co. v. March*, 114 U. S. 549; *Chicago &c. Railroad Co. v. Price*, 138 U. S. 185; *Sheffield &c. R. R. Co. v. Gordon*, 151 U. S. 285, were all cases in which the contract itself provided that the certificate should be final and conclusive between the parties.

The only case in which the certificate of the architect or his decision was by the contract made final was in case of doubt as to the meaning of drawings, in which case reference was to be made to the architect in charge, whose decision was to be final.

Both grounds urged by the plaintiff in error in this court for reversal of the judgment are untenable, and it must therefore be

Affirmed.

Mr. JUSTICE BREWER took no part in the decision of this case.

JOHNSON v. BROWNE.

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

No. 481. Argued March 4, 5, 1907.—Decided April 8, 1907.

Although the surrender of a person demanded under an extradition treaty has been made, it is the duty of the courts here to determine the legality of the subsequent imprisonment which depends upon the treaties in force between this and the surrendering governments.

While the treaty of 1842, with Great Britain, had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, such a limitation is found in the manifest scope and object of the treaty itself and it has been so construed by this court. *United States v. Rauscher*, 119 U. S. 407.

A person extradited under the treaty of 1899 with Great Britain cannot be punished for an offense other than that for which his extradition has been demanded even though prior to his extradition he had been convicted and sentenced therefor.

Sections 5272, 5275, Revised Statutes, clearly manifest the intention and the will of the political department of the Government, that a person extradited shall be tried only for the crime charged in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested and detained for any other offense.

Repeals by implication are never favored, and a later treaty will not be regarded as repealing, by implication, an earlier statute unless the two are so absolutely incompatible that the statute cannot be enforced without antagonizing the treaty, and so held that the treaty with Great Britain of 1899 did not repeal §§ 5272, 5275, Rev. Stat.

While the escape of criminals is to be deprecated, treaties of extradition should be construed in accordance with the highest good faith, and a treaty should not be so construed as to obtain the extradition of a person for one offense and punish him for another, especially when the latter offense is one for which the surrendering government has refused to surrender him on the ground that it was not covered by the treaty.

THE respondent sued out a writ of *habeas corpus* from the Circuit Court of the United States for the Southern District of New York, directed to the agent and warden of the state prison at Sing Sing, in the State of New York, where he was confined, and pursuant to the terms of the writ the respondent was brought before that court in New York city, and after a hearing the court ordered his discharge. The agent and warden has appealed to this court from that order.

The facts appearing on the hearing before the Circuit Court on the return to the writ were these:

The respondent was an examiner of silks in the appraisers' department in the port of New York, and in the spring of 1903, in the Circuit Court of the United States for the Southern District of New York, a grand jury found two indictments against him, one being found against him jointly with two others for conspiring to defraud the United States in violation

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Statement of the Case.

of section 5440 of the Revised Statutes; and the other was against him alone for knowingly attempting to enter certain Japanese silks upon payment of less than the amount of legal duty thereon, in violation of section 5444, Revised Statutes.

In January, 1904, he, in company with one of the others named in the indictment (the other having fled the jurisdiction), was tried in the Circuit Court of the United States for the Southern District of New York upon the indictment charging them with conspiracy. He was convicted and sentenced to imprisonment in the state prison at Sing Sing, N. Y., for two years.

He appealed to the Circuit Court of Appeals for the Second Circuit, where the conviction was affirmed, and thereafter an application was made in his behalf to this court for a certiorari to review the judgment of conviction, which application was denied in January, 1906.

After his trial and conviction, and pending a review of the judgment, the respondent had been enlarged on bail, and after the judgment was affirmed in the Circuit Court of Appeals and a certiorari from this court had been denied, he was, on the nineteenth of January, 1906, duly called in the Circuit Court to submit himself to sentence, but did not appear, and his default was entered.

A few days subsequently he was found in the Dominion of Canada. This Government then instituted extradition proceedings in Montreal to procure his rendition upon the judgment of conviction of conspiracy to defraud the United States, and claimed it was an extraditable crime under the fourth subdivision of article I of the treaty or "extradition convention" of 1889, between the United States and Great Britain. That subdivision reads as follows:

"4. Fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by the laws of both countries."

The respondent was held for extradition by the Canadian

commissioner, but, on writ of *habeas corpus*, the Court of King's Bench held that the conspiracy to defraud the United States, as set forth in the indictment upon which respondent was convicted, was not such a fraud as was provided for in the subdivision of the article of the treaty above referred to. Extradition was therefore refused.

Thereupon the United States secured the rearrest of the respondent on another complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes, and for which he had not been tried in New York. The Canadian commissioner held the respondent upon that complaint, and ordered his extradition, and, upon a writ of *habeas corpus*, the Court of King's Bench affirmed that order; and the respondent was then surrendered to the proper agent of the United States, who at once took him to the State of New York, and, having arrived within the Southern District of that State, the marshal of that district, proceeding under the warrant for imprisonment issued by the Circuit Court upon the conviction of the respondent on the conspiracy indictment, took possession of him and delivered him into the custody of the warden of Sing Sing Prison, there to be imprisoned for two years according to the sentence imposed upon him under the conviction as stated.

The respondent then obtained this writ upon a petition setting forth the above facts, and claimed that his imprisonment was in violation of the third and seventh articles of the extradition treaty between the United States and Great Britain. 26 Stat. 1508. The warden of the prison made return August 7, 1906, that he held the respondent by virtue of the final judgment of the Circuit Court of the United States for the Southern District of New York, rendered on the ninth of March, 1904, as above set forth.

Mr. W. Wickham Smith, with whom *The Solicitor General* was on the brief, for appellant:

There is nothing in either article III or article VII of the

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Argument for Appellant.

Blaine-Pauncefote Treaty of July 12, 1889, which protects the respondent from imprisonment under a sentence imposed before his flight.

It is entirely clear that the sole purpose of paragraph 1 of article VII was to prevent any claim being interposed on behalf of a fugitive convict that the provisions of the treaties of 1842 and 1889 applied only to untried criminals, and not to those who had been tried and convicted.

The language of article III is plain, unambiguous and unequivocal. It leaves no room for construction. Neither in a contract nor in a statute could these words be stretched so as to include punishment. The word "tried" has a plain meaning, everywhere understood, and as to which there can be no mistake or confusion. It certainly does not imply or include punishment. Until a party has been tried it cannot be determined whether he is to suffer any punishment. He may be acquitted, or after conviction sentence may be suspended, or he may be immediately pardoned, in none of which cases would he suffer any punishment. The object of inserting the word "triable" is obviously to protect the person extradited from being arrested and kept in custody or held in bail awaiting trial. It was obviously intended to give the party extradited a right to raise the question of the illegality of his arrest without having to wait until the prosecuting officer got ready to try him, and compel him to put in his plea for the first time at the beginning of the trial.

The necessity and propriety of adhering to the plain language of treaties has been fully recognized by this court. *The Amiable Isabella*, 6 Wheat. 1, 71; *Society &c. v. New Haven*, 8 Wheat. 464, 490; *Tucker v. Alexandroff*, 183 U. S. 424, 436.

The language of article III of the treaty of 1889, considered in connection with that of article II of the same treaty, repels any inference that it was the true intent and meaning of article III to forbid the punishment of any person extradited under the terms of the treaty for an offense of which he had

been convicted and upon which he had been sentenced before his flight.

In this article there is added to the words "triable or tried" found in the third article the words "or be punished." If these words were found in article III this case would never have arisen.

That the intention of the parties to a treaty must be ascertained by an examination of the entire instrument was held by this court in *United States v. Texas*, 162 U. S. 1.

The same principle has been repeatedly applied by this court to statutes. *Silver v. Ladd*, 7 Wall. 219, 227; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 22; *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, 635.

The language of article III of the treaty when compared with that of provisions in other treaties of the United States, adopted both prior and subsequent to that of the treaty in question, plainly shows that the construction contended for by the respondent is untenable. *In re Joseph Stupp*, 11 Blatchf. 124.

The fact that an application had been made by the United States to the Canadian Government for the extradition of respondent on a charge upon which he had been convicted and sentenced, and that said application had been refused, does not in any way destroy the right of the Circuit Court of the United States to enforce the execution of its sentence after the extradition of respondent on another charge.

Nothing in *United States v. Rauscher*, 119 U. S. 407, prevents the imprisonment of respondent under the sentence imposed upon him before his flight.

Mr. Terence J. McManus, with whom *Mr. W. M. K. Olcott* was on the brief, for appellee:

The order appealed from was in complete accord with well-settled principles of law, with treaty provisions and with the statutes of the United States relating to the subject of extradition.

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Argument for Appellee.

Almost all of the important authorities on the law of nations have held that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial. Foelix, *Droit. Int. Prive*, II, § 608; Twiss, *Law of Nations, Time of Peace*, ed. 1884, § 238; Phillimore, 3d ed., I, 517; Creasy, *Int. Law*, 202; Lewis, *For. Juris.* 37; Pomeroy, *Int. Law*, Woolsey's ed. (1886), 236; Lawrence's *Wheat.* (1863) 233.

The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place. Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, April 9, 1817, MSS. notes to *For. Leg.* II, 218; Mr. Webster, Sec. of State to Mr. d'Argaiz, June 21, 1842; Webster's Works, VI, 399-405.

Hence, the right to surrender rests, as between two sovereign governments, exclusively upon treaty provisions.

When treaty stipulations have been entered into, the same writers and many others of equal authority hold that when a fugitive has been surrendered to the demanding Government, he shall be tried only for the specific offense for which his surrender was granted, and that in the event of his not being tried for that offense, or having been tried and acquitted thereon, he is entitled to a reasonable time to leave the country before being arrested upon any other charge of crime alleged to have been committed prior to his extradition. 1 Moore on *Extradition*, p. 255; Billot. *Traite de l'Extradition*, 308; Field's *Int. Code*, § 237; Wharton, *Conf. of Laws*, § 846. And see also *Cosgrave v. Whinney*, 174 U. S. 63; *Ex parte Coy*, 32 Fed. Rep. 911; *People v. Stout*, 81 Hun, 336.

Neither the British "Extradition Act of 1870" nor § 5275, Rev. Stat., has been revoked, abrogated or even modified, by the treaty of July 12, 1889, § VI of which is manifestly an unequivocal ratification of the controlling authority of the existing statutory procedure regulating extradition in both countries.

The treaty of 1889 was not an original compact. It was expressly declared to be "Supplementary to the Tenth Article of the Treaty" of 1842.

Therefore, under all the rules of construction, it is to be considered in conjunction with that treaty, and with the cases in which the meaning of its terms was judicially determined.

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

It does not appear that any movement has been made or notice given by this Government to try the respondent on the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing Prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from the one for which he was extradited. In other words, he has been extradited for one offense and is now imprisoned for another, which the Canadian court held was not, within the treaty, an extraditable offense.

Whether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself. Article 2, Convention of July 12, 1889, 26 Stat. 1508; United States Treaties in Force, April 28, 1904, 350, 351.

We can readily conceive that if the Dominion authorities, after the Court of King's Bench had decided that the crime of which respondent had been convicted and for which extradition had been asked was not extraditable, and the request for extradition had, therefore, been refused, had been informed on the subsequent proceeding for extradition on the other indictment that it was not the intention of this Government to try respondent on that indictment, but that having secured his extradition on that charge, it was the intention

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of this Government to imprison him on the judgment of conviction, they would have said that such imprisonment would not be according to the terms of the treaty, and they would have refused to direct his extradition for the purpose stated.

Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this Government and Great Britain, known as the Ashburton treaty of 1842, 8 Stat. 572-576, Art. 10, and the subsequent one, called a convention, concluded in 1889, and above referred to.

The treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet this court held that there was such a limitation, and that it was to be found in the "manifest scope and object of the treaty itself;" that there is "no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other." *United States v. Rauscher*, 119 U. S. 407, 422, 423.

Again, at the time of the decision of the *Rauscher* case there were in existence sections 5272 and 5275, Rev. Stat. (3 Comp. Stat. p. 3595), both of which are cited and commented upon in that case, and in the course of the opinion of Mr. Justice Miller, at p. 423, he said:

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this Government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a Congressional construction of the purpose and meaning of extradition treaties,

such as the one we have under consideration, and, whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

"That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition."

Mr. Justice Gray, page 433, in his concurring opinion, places that concurrence upon the single ground that these sections clearly manifest the will of the political department of the Government in the form of an express law that the person should be tried only for the crime charged in the warrant of extradition, and he should be allowed a reasonable time to depart out of the United States before he could be arrested or detained for any other offense. Both grounds were concurred in by a majority of the whole court.

If the question now before us had arisen under the treaty of 1842 and the sections of the Revised Statutes above mentioned, we think the proper construction of the treaty and the sections would have applied to the facts of this case and rendered the imprisonment of the respondent illegal. The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.

It is true that the tenth article of the treaty contained no specific provision for delivering up a convicted criminal, but if otherwise delivered, he could not have been punished upon a former conviction for another and different offense.

The claim is now made on the part of the Government that "the manifest scope and object of the treaty" of 1842 are altered and enlarged by the treaty or convention of July 12,

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1889. The second, third, sixth and seventh articles of that convention are set forth in the margin.¹

It will be perceived that the second article provides that no person surrendered shall be triable or tried, *or be punished*, for any political crime or offense, while article three provides that no person surrendered shall be triable or be tried (leaving out the words "or be punished") for any crime or offense committed prior to the extradition, other than the offense for

¹ Article II.

A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

Article III.

No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

Article VI.

The extradition of fugitives under the provisions of this convention and of the said tenth article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

Article VII.

The provisions of the said tenth article and of this convention shall apply to persons convicted of crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In a case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

which he was surrendered, until he shall have had an opportunity for returning to the country from which he was surrendered. Hence, it is urged that, as punishment for another offense of which the person had been convicted is not in so many words expressly prohibited in and by article three, a requisition may be obtained for one crime under that article, and when possession of the person is thus obtained, he may be punished for another and totally different crime of which he had been convicted before extradition.

We do not concur in this view. Although if the words "or be punished" were contained in the third article, the question in this case could not, of course, arise, yet we are satisfied that the whole treaty, taken in connection with that of 1842, fairly construed does not permit of the imprisonment of an extradited person under the facts in this case.

The mere failure to use these words in the third article does not so far change and alter "the manifest scope and object" of the two treaties as to render this imprisonment legal. The general scope of the two treaties makes manifest an intention to prevent a State from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose. Why the words were left out in the third article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.

In addition to the provisions of the treaty of 1889, we find still in existence the already mentioned sections of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested from the country to which he was brought.

It is argued, however, that the sections in question have

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been repealed by implication by the treaty or convention of 1889, and that the respondent, therefore, cannot obtain any benefit from them. We see no fair or reasonable ground upon which to base the claim of repeal. Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. *United States v. Lee Yen Tai*, 185 U. S. 213. If both can exist the repeal by implication will not be adjudged. These sections are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished for another, such as is the case here. The most that can be asserted is that an inference to that effect perhaps might be drawn from the absence in article III, of positive language preventing such punishment. But that slight and doubtful inference, resting on such an insufficient foundation, is inadequate to overcome the positive provisions of the statute and the otherwise general scope of both treaties, which are inconsistent with the existence of such right.

It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the Government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.

Our attention has been directed to various other treaties

between this Government and other nations, where provision is expressly made in regard to punishment. They frequently provide that no person shall be triable or tried "or be punished" for any other offense than that for which he was delivered up, until he has had an opportunity of returning to the country from which he was surrendered. But because in some of the treaties the words "or be punished" are contained we are not required to hold that in the case before us the absence of those words permits such punishment, when that construction is, as we have said, contrary to the manifest meaning of the whole treaty, and also violates the statutes above cited. The order of the Circuit Court is

Affirmed.

MR. JUSTICE MOODY did not sit in the case and took no part in its decision.

HUNT *v.* NEW YORK COTTON EXCHANGE.

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

No. 314. Submitted March 4, 1907.—Decided April 8, 1907.

Quotations of prices on an exchange, collected by the exchange, are property and entitled to the protection of the law, and the exchange has the right to keep them to itself or have them distributed under conditions established by it. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236.

In a suit brought by an exchange to enjoin defendant from receiving quotations from the telegraph company to which it has given the right to distribute them, and from using the same, the value involved is not merely the amount which defendant pays the telegraph company, but the right of the exchange to keep the control of the quotations and protect itself from competition which is the object of the suit; and if the testimony shows, as it does in this case, that such right is worth more than \$2,000, the Circuit Court has jurisdiction, so far as amount is concerned; and when the plea presents such an issue the burden is on appellant to show that the amount involved is less than the jurisdictional amount.

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The fact that defendant has, in another action in the state court, and to which the exchange was not a party, obtained an injunction against the telegraph company, enjoining it from ceasing to deliver the quotations, does not deprive the Circuit Court of jurisdiction of the suit by the exchange under § 720, Rev. Stat., the parties and the purpose not being the same.

144 Fed. Rep. 511, affirmed.

THIS is a bill in equity brought by the New York Cotton Exchange, a New York corporation, against appellant, a citizen of Tennessee, in the Circuit Court of the United States for the Western District of Tennessee, to enjoin him from receiving and using the quotations of sales made upon the Exchange. The case is here on questions of jurisdiction, and only a synopsis of the principal facts alleged is necessary.

The Exchange is a private corporation under the laws of New York, with 450 members, and owns in the city of New York a building for the use of its members, and conducts therein on every business day cotton sales for present and future delivery, the transfers aggregating many million bales of cotton annually. The purchases and sales for future delivery are permitted to be made and are made only during market hours and by open *viva voce* bidding, and the knowledge of the prices thus made has become a species of property of such value that Telegraph Companies pay large sums of money to the Exchange for the privilege of receiving instantaneously the quotations and distributing the same to customers and many persons in the United States who are engaged in the cotton commission business. Such persons are willing to pay and do pay the Telegraph Companies therefor, and the Exchange realizes from the distribution of the quotations through the Telegraph Companies large sums of money annually. The quotations are such peculiar kind of property that their value depends upon the power of the Exchange to confine the transmission and distribution thereof to such Telegraph Companies and their distributing agencies as will contract therefor with the Exchange, and, that, if any person or corporation is permitted to promptly acquire the quotations surreptitiously or

by theft, or without paying the Exchange therefor, such person or corporation can promptly give the same to numerous other persons, and the Telegraph Companies contracting with the Exchange would thus be put at a disadvantage in competition with such persons so obtaining the quotations without paying for them, and would thereby be deterred from continuing to pay the Exchange the prices provided in the contracts with the Telegraph Companies. The manner of collecting and distributing the quotations is detailed, and yearly the cost to the Exchange, it is alleged, is \$4,500. Prior to 1893 the Exchange permitted the Telegraph Companies to gather the quotations through their own employes upon the floor of the Exchange building, and to distribute them without any effective restrictions upon the persons entitled thereto, with the result that many persons used the same in conducting so-called "bucket shops," by reason thereof the bucket shop evil assumed such large proportions and became so serious as to materially affect the legitimate transactions upon the floor of the Exchange, and its members were deprived of many customers. The Exchange therefore found it necessary to terminate such right or license of the Telegraph Companies, and to that end made contracts with them. The contracts are attached to the bill. It is enough to say of them that under them the companies receive the quotations under the condition not to furnish them to any persons, firms or corporations who, or which, may be directly or indirectly engaged in the promotion or maintenance of "bucket shops" or other places where such continuous quotations are used as a basis for bets or other illegal contracts based upon fluctuations of the prices of cotton dealt in on the Exchange. Nor shall the companies directly or indirectly furnish the quotations to any person, firm or corporation, whether members of the Exchange or not, until such person, firm or corporation shall have submitted an application in writing to the Exchange in such form as it shall provide, and until it has approved of the application. The Exchange has power to revoke its approval. In such event the companies shall cease

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to furnish the quotations, and if they have installed tickers or wires in the office or place of business of such person, firm or corporation they shall immediately remove the same. This, however, they are not required to do, "or to discontinue service furnished by any other means, which are under restraint by injunctions of the courts during the pendency of the injunction." In case of an application once approved and afterwards disapproved by the Exchange and a suit be commenced against the companies on account of the continuance of the quotations, the Exchange shall defend such suit at its expense and pay all fines, penalties, etc., to which the companies may be subject. In cases where an application has not been approved by the Exchange suits against the companies for the refusal to furnish the quotations shall be defended at the expense of the companies, which shall use diligent efforts to secure the removal of injunctions. If the suit shall be brought against the Exchange it shall defend at its own cost. For the purpose of protecting the companies against the use of quotations originating on the Exchange by parties not entitled to them the companies may prosecute suits in their own name or that of the Exchange to prevent or stop such competitive use.

The Western Union Telegraph Company has to pay the Exchange for the quotations \$13,584 per annum in equal installments of \$1,132 at the close of each month. The form of the application is attached to the contract.

It is alleged that all persons receiving the quotations have made applications in the form set out, except in a few instances where persons who were receiving quotations from the companies prior to the execution of the contracts have since the execution thereof secured temporary injunctions (the Exchange not being a party to the suits) to enjoin the companies from withholding or withdrawing the quotations on the ground that such persons were not required to sign such applications or secure the approval of the Exchange.

The defendant, Clarence P. Hunt (appellant), has not made application to either of the companies or the Exchange, nor

has the Exchange consented to his receipt of the quotations. On July 14, 1903, he was receiving from the Western Union Telegraph Company the quotations, and the company on said day notified him of the contract between it and the Exchange, and that under said contract the company would be required to and would cease furnishing the quotations. Hunt declined to make an application, but in lieu thereof, on July 31, 1903, filed in the Chancery Court of Shelby County, Tennessee, a petition against the company to enjoin it from ceasing to furnish him said quotations. An *ex parte* injunction was issued. The company then filed its answer, and, the cause coming on for final hearing on appeal and answer, decree was entered for it. The Supreme Court of the State reversed the decree without deciding the merits, for the reason that the Chancery Court should not have decided the cause on bill and answer, but should have awaited the taking of evidence. The cause is now pending and the injunction is still in force, and that by reason thereof only the company is furnishing Hunt the quotations. And it is alleged "that such authorized receipt and use of said quotations by said defendant is calculated to and in time will, if not entirely stopped, seriously impair the value to your orator of its quotations, and that if even one person within the jurisdiction of this court be allowed to secure such quotations without restrictions as to the use thereof which your orator imposes as aforesaid, such person can furnish them to all the bucket shops and other persons within the United States desiring them, and thus entirely defeat the efforts of your orator to prevent their use in bucket shops as a basis of their illegal bets, and materially impair the right of your orator to derive a revenue from the distribution of said quotations."

It is further alleged that there is no adequate remedy at law and that "the amount involved and matters in dispute, exclusive of interest and costs, is much more than the sum of \$2,000." An injunction was prayed. A preliminary injunction was issued. 144 Fed. Rep. 511.

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The appellant filed a plea to the jurisdiction, traversing the allegations of the bill which averred the jurisdictional amount. A replication to the plea was filed. The court sustained the jurisdiction. The appellant then filed an answer, in which he alleged that the contracts with the Telegraph Companies were illegal and void, that the Exchange had no right to require the making of applications to it and no right to require the companies to refuse the quotations to persons applying therefor, because such persons refused to make application to the Exchange. He admitted that he had not made an application to the Exchange, but had been desirous and even anxious to pay for the use of the quotations and conform to any reasonable rules or regulations by whomsoever prescribed. He alleged that those stated in the appeal were not reasonable, but unjust, oppressive and illegal. And further, that he commenced business in Memphis as a broker, dealing in cotton, stocks, grain and provisions, about the month of March, 1898, and made application to the Western Union Telegraph Company, under its designation of the Gold and Stock Telegraph Company, for its quotations by "ticker." The application was accepted, he agreeing to pay therefor the sum of \$25 per month. He has continued to receive the quotations until the present time, and has built up and has now a considerable business, at great expense and labor, and the value and profits of the business depend largely upon the receipt and use of the quotations "by and through the 'ticker,' under and in accordance with the contract." The quotations are received through the "ticker" automatically—a specimen of which is attached to the answer—and the letters and figures are at once put upon a blackboard in his office for reference and use, and are used immediately for the transaction of business. They indicate New York as the place from which the quotations are sent, the time of sending, the month the cotton has been sold for. He has transacted no business except as a broker, as stated, and is duly licensed under the laws of Tennessee. Every transaction made by him is evidenced by a report made to his cus-

tomers upon a form, a copy of which is attached to the answer. The report evidences the consummation of the contract and has upon it the following:

"All orders for the purchase or sale of any article are received and executed with the distinct understanding that *actual delivery* is contemplated where order is executed, and that the party giving the order so understands and agrees."

Shortly after July 14, 1903, he was informed that the Exchange had required the Telegraph Company to cancel its contract with him and to take the ticker out of his office and to cease to furnish to him the quotations, thereupon he and other persons similarly engaged in business of broker commenced in the Chancery Court of Shelby County the suit mentioned in the bill. The record and proceedings in the suit are referred to as part of the answer. The bill in that suit prayed an injunction against the Telegraph Company from removing the ticker or refusing to furnish the quotations as long as the company furnished them to any other person. A preliminary injunction was granted. The Western Union Telegraph Company, the defendant in the suit, answered, and based its defense substantially upon its contract with the Exchange. Hunt, upon the authority of such contract, and upon information and belief, averred that the answer was so filed by the company at the request and by the direction and for the benefit of the Exchange, "and with the view and for the purpose of asserting and setting up for him, and in his belief, the very same matters and grounds and causes of action as are set up and relied upon in this suit." Upon the hearing the injunction was discharged and the suit dismissed. The decree was reversed by the Supreme Court of the State and the injunction continued in force. The opinion of the Supreme Court is made part of the answer. It appears therefrom that the court considered that a serious question was presented by the defense of the contracts between the Telegraph Companies and the Exchange. It was said upon the defense two questions arose—one of fact, whether the contract were made;

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the other of law, whether, conceding the existence of the contracts, did "they furnish a sufficient answer to the demands of the complainants." The court declined to pass upon either question, regarding the record imperfect. The court continued the injunction.

The suit is still pending in the Chancery Court, and by reason of his contract with the company of May 1, 1899, and the injunction, Hunt has remained in the use and enjoyment of the ticker, "and is receiving, and the Western Union Telegraph Company has been and is furnishing him, the continuous quotations described in the bill and in this answer." And it is averred that that suit embraces the same questions of fact and law as this present suit and is between the same parties plaintiffs and defendants, and the decree to be pronounced will adjudicate and dispose of the same matters of controversy. That suit is relied on as a bar to the present one, and it is insisted that the Circuit Court had no jurisdiction to grant or issue the injunction prayed for, as "it would require and compel the violation and breach of the injunction granted and in force in the Chancery Court of Shelby County, and the undoing of what has been done and is to be done in the course of the said suit." The other allegations of the answer are not material to the question now involved. A replication to the answer was filed. The case was submitted on the pleadings and exhibits, agreement of counsel as to certain paragraphs of the bill, evidence taken before the court, which consisted of the record of the suit in Shelby County, and testimony of witnesses. It was decreed that a permanent injunction issue restraining Hunt in accordance with the prayer of the bill. Extracts from the testimony will appear in the opinion of the court.

Mr. Thomas B. Turley and Mr. William H. Carroll, for appellant, submitted:

There is no evidence tending to establish that the matter in dispute between the parties to this suit amounts to \$2,000,

exclusive of interest and costs, and the learned trial judge committed an error in so holding.

Board of Trade v. The Christie Grain Co., 198 U. S. 236, can be distinguished. The matter in controversy in the *Christie* case was not the subject of argument or pleading.

The bill is a *quia timet* one, pure and simple. It is neither alleged nor proven that the contract between the appellee and the Telegraph Company was impaired, stopped, impeded or interfered with. The allegation is that such unauthorized receipt and use of said quotations by the appellant is calculated to, and in time will, if not entirely stopped, seriously impair the value to your orator, of its quotations. The proof established that the value of the contract between the appellee and the Telegraph Company is the amount in dollars and cents received and paid. So the question is whether the subject matter of this litigation, is that through the fear and apprehension that unless the appellant is restrained, the value of the contract between the appellee and the Telegraph Company will be depreciated. Thus far that value has not been affected. The Exchange receives the price it stipulated for, and the appellant has paid the Telegraph Company for quotations which he receives from it.

The compensation provided for the privilege of receiving and selling said quotations, necessarily embraces the right to sell such quotations to persons who occupy the relation of the appellant to the Telegraph Company, protected by the injunctive process of a court of competent jurisdiction.

This question is not analogous to the cases holding for jurisdictional purposes, that the amount involved is the value of the complainant's right to conduct its business without being subject to the burden of a nuisance, an illegal tax, or a threatened appropriation of property under an unconstitutional act, of the value of \$2,000, exclusive of interest and costs. *Scott v. Donnell*, 165 U. S. 107; *Railroad v. Ward*, 2 Black, 485; *Ins. Co. v. Morrison*, 178 U. S. 262, discussed and distinguished.

Manifestly, the object sought to be accomplished by the

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bill in this case is stopping the receipt by the appellant of continuous cotton quotations which he is receiving by virtue of the injunctive process in his suit against the Telegraph Company, now pending in the state court, and necessarily the amount in controversy is determinable by the value to the appellee of the accomplishment of that object. *McNeill v. Railway Co.*, 202 U. S. 543, 558; *McDaniel v. Traylor*, 196 U. S. 415, 422.

Upon the facts and circumstances of this case, the Circuit Court of the United States, in equity, had no jurisdiction to grant the injunction herein.

In this case appellant is not a stranger to the trust, and therefore is not to be restrained, because he does not get at the knowledge which he requires by inducing a breach of trust, nor is he using the knowledge obtained by such a breach. He gets at that knowledge by paying for it.

The transactions on the Chicago Board of Trade and the New York Cotton Exchange and the New York Stock Exchange are legal transactions, and enforceable, and so far as the appellant is concerned every transaction which he makes is a legal transaction, within the cases adjudged by this court. *Clews v. Jamison*, 182 U. S. 461, 489.

Whether this case be viewed as a case analogous to a trade secret, or the use of valuable information gathered by others, upon the facts disclosed by the record, the court was without jurisdiction to grant the final decree enjoining the appellant. *High on Injunction*, 4th ed., § 19, p. 27.

The appellant, under the peril of a contempt proceeding, is deprived of the benefit of the judgment of the state court, and the effect of the decree is to enjoin him from enforcing the decree of the state court.

Mr. Henry S. Robbins, Mr. Henry W. Taft and Mr. Henry Craft, for appellee:

The amount in dispute exceeds \$2,000.

Upon this issue the burden of proof was upon appellant.

Sheppard v. Graves, 14 How. 504, 510; *Adams v. Shirk*, 55 C. C. A. 25; *S. C.*, 117 Fed. Rep. 801; *Penna. Co. v. Bay*, 138 Fed. Rep. 203; *Wetmore v. Rymer*, 169 U. S. 115; *Gage v. Pumpselly*, 108 U. S. 164; *R. R. Co. v. Ward*, 2 Black, 485; *Ry. Co. v. Kuteman*, 54 Fed. Rep. 547; *Whitman v. Hubbell*, 30 Fed. Rep. 81; *McNeill v. Southern Ry. Co.*, 202 U. S. 558; *Hutchinson v. Beckham*, 118 Fed. Rep. 399; *Butchers' &c. Co. v. Louisville & N. R. Co.*, 14 C. C. A. 290; *S. C.*, 67 Fed. Rep. 35; *Scott v. Donald*, 165 U. S. 107; *Amelia Milling Co. v. Tennessee Coal Co.*, 123 Fed. Rep. 811; *Humes v. City*, 93 Fed. Rep. 857; *Nashville Ry. Co. v. McConnell*, 82 Fed. Rep. 65; *Smith v. Bivens*, 56 Fed. Rep. 352; *Lanning v. Osborne*, 79 Fed. Rep. 657.

The question presented by the second assignment of error is only whether the pendency of the prior state court suit is a bar to relief in the suit at bar, and this, as respects jurisdiction, is not different in its nature from the question whether in a suit in chancery the remedy is not at law. In both cases this court has several times decided that the question thus raised was not one of jurisdiction within the act of 1891. *Smith v. McKay*, 161 U. S. 355; *Blythe v. Hinckley*, 173 U. S. 501, 507.

The objection that the court cannot grant the relief sought because of prior state court litigation pending, or constituting *res adjudicata*, does not present a question of jurisdiction. *Blythe v. Hinckley*, 173 U. S. 501, 507; *Huntington v. Laidley*, 176 U. S. 668, 679; *Louisville Trust Co. v. Knott*, 191 U. S. 225; *Bache v. Hunt*, 193 U. S. 523.

The prior pendency of a suit (not involving the court's possession of the *res*) in one jurisdiction is no bar to a like suit, even between the same parties, in another jurisdiction, and that within this rule a state court and a Federal court (even within that State) are courts of different jurisdictions. *Gordon v. Gilfoil*, 99 U. S. 168; *Stanton v. Embrey*, 93 U. S. 548; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Merritt v. American Barge Co.*, 24 C. C. A. 530; *S. C.*, 79 Fed. Rep. 228; *Shaw v. Lyman*,

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79 Fed. Rep. 2; *Defiance Water Co. v. City*, 100 Fed. Rep. 178; *Marshall v. Otto*, 59 Fed. Rep. 249; *Hurst v. Everett*, 21 Fed. Rep. 218.

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

It will be observed that this case is like the *Board of Trade of the City of Chicago v. Christie Grain & Stock Company*, 198 U. S. 236, and we therefore start with some propositions established. It is established that the quotations are property and are entitled to the protection of the law, and that the Exchange "has the right to keep the work which it has done, or paid for doing, to itself." It is, however, contended by appellant that the controversy about them that this suit presents does not involve the value of \$2,000, exclusive of interest and costs. This is the issue presented by the plea to the jurisdiction. Appellant contends that the value involved is measured by his contract with the Telegraph Company. The Exchange contends that the matter in dispute is the value of the object sought to be accomplished by the bill. The Circuit Court expressed it to be "the value of the contract between the New York Cotton Exchange and the Western Union Telegraph Company."

On the issue presented by the plea the burden of proof was upon the appellant, and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount. *Sheppard v. Graves*, 14 How. 504; *Wetmore v. Rymer*, 169 U. S. 115; *Gage v. Pumpelly*, 108 U. S. 164; *Adams v. Shirk*, 117 Fed. Rep. 801. The only evidence offered by him was his contract with the Telegraph Company in connection with evidence of the manner of his receipt and use of the quotations. This testimony was to the effect that the quotations are communicated through a ticker, which is a machine with a tape attached to it, that registers the price of cotton, giving the hour. They come sometimes

not more than a quarter of a minute or a half of a minute apart, and are copied from the tape and placed upon a blackboard, where all can see them. When new quotations are received the old ones are generally wiped out. The "ticker service is very slow, and the value of it depends on the time it is received. After it is put upon the blackboard it becomes public property, so far as concerns the value of it." And it was testified that a firm by the name of Ganong & Fitzgerald received their quotations about five minutes before appellant, they having better wire service. And also that there was a wire running into the Memphis Cotton Exchange, and that not quite a minute elapsed from the time the ticker registers the market quotations to the time they are registered on the blackboard in the city of Memphis and open to the public. Appellant testified that the amount of his business in cotton for future delivery amounted to one-half million dollars per year, and when he took a trade himself he was prepared to deliver the cotton or commodity in conformity with the agreement between himself and his customer, and goes so far as to write across all orders that actual delivery is contemplated and understood.

A witness on the part of the Exchange testified that he was employed by the Board of Trade as expert to investigate persons who pretended to be brokers, "but who were in fact bucket shops," and was in that position for several years, gathered statistics, made estimates of the volume of business during 1901 and 1902, and has kept pretty well informed ever since as to the number of bucket shops in the United States. And he further testified that trades are carried on in such shops in all commodities that are traded in on the New York Cotton Exchange, New York Stock Exchange and the Chicago Board of Trade. Of the value of the right of the New York Cotton Exchange to control the distribution of its quotations he said: "One can only estimate or approximate the value of the right, for the reason that the volume of speculative business in the country changes, and that changes the value of the right. If there is a large volume of speculative business

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in cotton the value to the New York Cotton Exchange would probably amount to a million dollars, while with a depressed market it would not amount to more than \$200,000 or \$300,000." And this is the amount per year.

A superintendent of the Exchange testified to his familiarity in a general way with what is called the independent trader, or independent trade, as distinguished from the trade or traders who carry their transactions to the cotton exchanges of the country, and in a measure with the volume of business done by such persons in an approximate way.

He further testified that the amount of business thus diverted from the Exchange made a difference to the Exchange of fully one million dollars a year, and that the value of the right to control the distribution of the quotations in the manner set out in the bill would very much exceed \$2,000.

The witness was unable to state the relative amount of business done on the Exchange in the years 1903, 1904 and 1905, because there was no record of the transactions kept, but he reached the conclusion in regard to the value of the business diverted from the Exchange partly from the evidence given by appellee and partly as to the business done by the bucket shops. And he put the value, "in dollars and cents," of the contract between the Exchange and the Telegraph Company, independent of the amount of business diverted, at the amount the Exchange received from the Telegraph Company. The following colloquy took place between the witness and counsel for appellant:

"Q. Now, Mr. King, what time, up to this good moment and hour, has that exchange failed to receive the amount of that contract, that is, for giving the Western Union Telegraph Company the right to furnish this information gathered on the floor of the New York Cotton Exchange?

"A. It has not.

"Q. Then in short this here is nothing except fear and apprehension that unless these defendants are restrained that is likely to happen, and affect the value of the contract?

“A. And the business upon the Exchange.”

It is manifest that the injury to the Exchange is not the rate paid by the appellant to the Telegraph Company. The purpose of the suit is to enjoin the appellant from receiving, using or selling, directly or indirectly, the Exchange's quotations or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them either by contract of purchase from the Exchange, or with its consent and approval, from one of the Telegraph Companies authorized to distribute them. In other words, the object of the suit is to keep the control of the quotations by the Exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops. And the right to the quotations was declared, as we said in *Board of Trade v. Christie Grain & Stock Company*, to be property, and the Exchange may keep them to itself or communicate them to others. The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the Exchange determines the jurisdiction, not the rate paid by appellant to the Telegraph Company. The value of the right was testified to be much greater than \$2,000. In *Mississippi & Missouri Railroad Company v. Ward*, 2 Black, 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is *Board of Trade v. Cella Commission Company*, 145 Fed. Rep. 28. In the latter suit the Chicago Board of Trade obtained a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. The latter declaration is supported by *Scott v. Donnell*, 165 U. S. 107.

Counsel for appellant do not deny that jurisdiction is determinable by the object sought to be accomplished by the bill,

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but they assert that the value of that was speculative and changed with the volume of business. Counsel lay great stress on the testimony of the superintendent of the Exchange, to the effect that the value of the contract between the Exchange and the Telegraph Company, independent of the business diverted from the Exchange, is, in dollars and cents, the amount it receives from the Telegraph Company. Upon this testimony counsel assert the right claimed by the Exchange to be the narrow one of preventing the appellant from receiving the continuous quotations from the Telegraph Company, which he pays for, pending a litigation in the state courts, and this distinguishes the case from the *Board of Trade v. Christie Grain & Stock Company*, and contend that the jurisdictional amount has not been established, as the Telegraph Company is fulfilling its contract with the Exchange. Of the latter contention we have sufficiently indicated our view, and it is only necessary to add that because the value of the quotations to the Exchange varies with the volume of business does not impair the effect of the testimony that the value of its right to control them is "much greater than \$2,000." We cannot concur in the conclusion urged by appellant that this case is distinguishable in principle from *Board of Trade v. Christie Grain & Stock Company*, either in the right asserted or in the defense against it. Even if the cases were distinguishable, it might still be contended, that would be of no consequence in determining the jurisdictional amount of the matter in dispute. But we will consider the difference claimed to exist between the cases. In the *Christie case*, it is contended, the right asserted was "to prevent getting at the knowledge of a trade secret or the quotations of the market surreptitiously, and using the knowledge so obtained," and that, it is insisted, was the matter in controversy. "Here," it is said, "there is no violation of a duty or trust. The market quotations are not received surreptitiously. The appellant is not depriving the appellee of the protection of the law." In the *Christie case* the quotations were gotten and published, "in some way not

disclosed," but, it was said, as the defendants did not get them from the Telegraph Companies authorized to distribute them, had declined to sign contracts satisfactory to the plaintiff (Board of Trade) and denied the plaintiff's rights altogether, it was a reasonable conclusion that they got, and intended to get, their knowledge in a way which was wrongful. This, however, was not said to limit the plaintiff's right but to express a violation of it. The right was clearly defined to be, the right of the Board of Trade to keep the quotations to itself or communicate them to others. And this is also the right of the Exchange in the case at bar. It can be violated not only by getting the quotations surreptitiously or "in some way not disclosed," or by getting them from a person forbidden to communicate them.

The next contention of appellant is that the court had no jurisdiction to grant the injunction and pronounce the decree appealed from. The only question involved in this branch of the case, appellant says, is "whether it comes within the provision of the Revised Statutes, § 720, which is to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings of any court except in matters of bankruptcy."

And, appellant insists, that this suit necessarily offends that section, because under its decree he "cannot have the benefit of the judgment of the state court without being in contempt of the Federal court," and that he is restrained by the Circuit Court from receiving from the Telegraph Company what the company is forbidden to refuse him by the state court. To sustain his contention appellant cites *United States v. Parkhurst Davis Mercantile Company*, 176 U. S. 317, and cases there referred to. Also *Diggs v. Woolford*, 4 Cranch, 179; *Watson v. Jones*, 13 Wall. 579; *Dyall v. Reynolds*, 96 U. S. 340; *Central &c. Bank v. Stevens*, 169 U. S. 433. These cases do not sustain his contention. In *Central Bank v. Stevens* it was decided that a state court had no power to enjoin a party whose rights had been adjudged by a Circuit Court of

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the United States from proceeding with a sale of property under a decree of that court. In the other cases cited, except *Watson v. Jones*, the purpose was to directly enjoin parties from proceeding in the state courts. In *Watson v. Jones* was considered what identity of parties, rights and relief prayed for were necessary to enable the pendency of an action in one court to be pleaded in bar in another court, and it was said: "The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties." The principle was also expressed in that case, and sustained by authorities, that the possession of property by one court cannot be interfered with by another, and, that "The act of Congress of March 2, 1793 (now § 720 of the Revised Statutes of the United States) as construed in *Diggs v. Walcott*, 4 Cranch, 179, and *Peck v. Jenness*, 7 How. 625, are equally conclusive against any injunctions from the Circuit Court, forbidding the defendants in the case to take possession of property which an unexecuted decree of a state court required the marshal to deliver to them." The case at bar has not that feature, nor has it identity with the case in the Chancery Court of Shelby County. Its parties and purposes are different. The pendency of a suit in a state court does not deprive a Federal court of jurisdiction. *Gordon v. Gilfoil*, 99 U. S. 168; *Insurance Co. v. Brunes' Assignee*, 96 U. S. 588; *Stanton et al. v. Embrey, Administrator*, 93 U. S. 548; *Merritt v. American Barge Co.*, 79 Fed. Rep. 228; *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383.

The Circuit Court had jurisdiction, and its decree is

Affirmed.

WILLIAM W. BIERCE, LIMITED, A CORPORATION, v.
HUTCHINS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

No. 212. Argued March 20, 21, 1907.—Decided April 8, 1907.

In an appeal from the Supreme Court of the Territory of Hawaii, tried by the court of first instance without a jury, where the Supreme Court of the Territory reversed the conclusions of law, but took the finding of fact as true, and those findings are not open to dispute, but the question for decision is definite and plain, there is no need to send the case back for a statement of facts by the Supreme Court of the Territory, although one should have been made.

Election is simply what its name imports; a choice shown by an overt act between two inconsistent rights either of which may be asserted at the will of the chooser alone. Transfer is different from election and requires acts of a different import on the part of the owner and corresponding acts on the part of the transferee.

The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt.

The absolute liability for the price and putting that liability in the form of a note are consistent with the retention of title until the note is paid; and, in the absence of statute, a stipulation that the sale is conditional and the goods remain the property of the seller, until payment of a note given for the price is lawful and enforceable in replevin even where, as in this case, possession was given and additional security of mortgage bonds was required.

16 Hawaii, 717, reversed.

THE facts are stated in the opinion.

Mr. Charles H. Aldrich, with whom *Mr. Henry W. Prouty* and *Mr. Henry S. McAuley* were on the brief, for appellant:

The findings of fact by the trial court were adopted by the Supreme Court of the Territory, though different legal conclusions were held to follow from such facts. This is equivalent to a special finding by the Supreme Court. *Stringfellow v. Cain*, 99 U. S. 610; *Harrison v. Perea*, 168 U. S. 311, 323, and cases there cited,

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Appeal and not writ of error was proper because of the provisions of the act of April 7, 1874, 18 Stat. 27. *Story v. Black*, 119 U. S. 235; *Idaho Improvement Co. v. Bradbury*, 132 U. S. 509; *Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222.

The doctrine of election, whether on the common law or equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. *Watson v. Watson*, 128 Massachusetts, 152, 155; *Standard Oil Co. v. Hawkins*, 74 Fed. Rep. 395.

No rights of third parties are involved. The property was in the custody of a court of equity. The attorney said to have made the election was acting for other creditors who, with a creditors' committee and the approval of the court, were carrying on the business of the insolvent debtor. Replevin would have made these plans impossible. The attorney swears he had no intention of making an election, and the facts show he could not have had, if exercising sound judgment. In such a case the party is not held to an election. *Johnson-Brinkman Commission Co. v. Mo. Pac. Ry. Co.*, 126 Missouri, 344; *Wells v. Robinson*, 13 California, 134; *In re Van Norman*, 41 Minnesota, 494, 496; *Garrett v. Farwell Co.*, 199 Illinois, 436, 440.

Even where there are inconsistent rights the question of the conclusive effect of an election depends upon whether the rights of third parties have intervened. If so, the election is conclusive. If not, it is not conclusive. *Dickson v. Patterson*, 160 U. S. 584, 592; *Campbell Printing Press Mfg. Co. v. Rockaway Publishing Co.*, 56 N. J. L. 676; *Standard Oil Co. v. Hawkins*, 74 Fed. Rep. 395.

The cases cited in the opinion of the court below and relied upon involved the rights of third parties taking without notice. *Lehman v. Van Winkle*, 92 Alabama, 443; *Van Winkle v. Crowell*, 146 U. S. 42.

If the party does not in fact have two inconsistent rights, and merely attempts to assert a right he does not have, but supposes he has, and without obtaining any legal satisfaction

therefrom, he is not precluded from asserting his actual right. *Snow v. Alley*, 156 Massachusetts, 193, 194, 195, and cases cited; *Watson v. Watson*, 128 Massachusetts, 152, 155; *Fuller-Warren Co. v. Harter*, 53 L. R. A. 603, 606; *In re Norman*, 41 Minnesota, 494, 496.

Mr. David L. Withington and *Mr. Aldis B. Browne*, with whom *Mr. Alexander Britton*, *Mr. John W. Cathcart* and *Mr. William R. Castle* were on the brief, for appellee:

The transaction did not constitute a conditional sale.

The device of attempting a contradiction in terms by apparently retaining the title in the vendor and then giving to the vendee not only the indicia of ownership but also powers which are inconsistent with the retention of title has been long the subject of judicial reprobation, and the rule is well settled that although there may be an express agreement that title is to remain in the vendor until the performance of some condition, the contract will be construed as an absolute sale where the other circumstances of the case indicate that the parties so intended. *Herryford v. Davis*, 102 U. S. 205; *Andrews v. Colorado Savings Bank*, 20 Colorado, 313; *Mining Co. v. Lowrey*, 6 Montana, 288; *Aultman v. Silpa*, 85 Wisconsin, 359; *Palmer v. Howard*, 72 California, 293.

From its decisions it would appear that the rule laid down by this court is that a conditional sale should not be inferred, but that where the intent to preserve the title in the vendor is clear and there is nothing inconsistent therewith in the transaction, particularly if the right to possession is reserved, then the condition will be maintained. *Ark. Valley Co. v. Mann*, 130 U. S. 69; *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268.

The entire agreement, with the construction put upon it by the parties, and the circumstances which surround it, show that it was not the intention or agreement of the parties to reserve the title; and that the terms of the agreement, the construction put upon it by the parties and the circumstances

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which surround the agreement are all inconsistent with such theory.

Taking the mortgage bonds as security was inconsistent with the retention of title in the plaintiff. Acting with full knowledge of all the circumstances plaintiff has no right to complain if its agreement is less remunerative than if the bondholders had joined with the company in making a contract. *Toledo R. R. Co. v. Hamilton*, 134 U. S. 296.

As a bondholder it is estopped from asserting that the mortgage does not cover all the property and rights which it professes to cover, that the rolling stock as well as the superstructure and fixtures of the road as it came into existence become instantly attached to and was covered by the mortgage. *Galveston R. R. Co. v. Cowdrey*, *ubi supra*.

Taking the mortgage which presumably warrants that the title is in the Kona Company, is clearly inconsistent. Cases *supra* and *Austin v. Hamilton*, 96 Georgia, 759; *McCormick Harvester Co. v. Lewis*, 52 Kansas, 358.

The delivery of the property and its use without claim of title for two years is inconsistent with the claim of the vendor's retaining title.

The mere delivery of the property itself has been held presumptive evidence of the waiver of the condition. *Peabody v. McGuire*, 79 Maine, 572; *Farlow v. Ellis*, 15 Gray, 229.

And the granting of additional time was such a waiver. *Cole v. Hines*, 81 Maryland, 476; *Hutchins v. Munger*, 41 N. Y. 155.

How much more is the definite intention that the property should be incorporated into the plantation, should come under the security of a mortgage being negotiated at the same time, and the security of which mortgage was taken to secure the purchase price.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decision upon a bill of exceptions

in a case tried by the court of first instance without a jury. *Hecht v. Boughton*, 105 U. S. 235. The facts were found by the trial court and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. It sustained the exceptions upon one point which went to the root of the plaintiff's cause of action, and, upon the plaintiff's motion, coupled with a statement that it would have no further evidence to present at a second trial, ordered a judgment for the defendant, in order that the case might be brought to this court. The findings of fact were taken to be true by the Supreme Court and are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decision here are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made. *Stringfellow v. Cain*, 98 U. S. 610; *Harrison v. Perea*, 168 U. S. 311, 323.

The suit was replevin for certain rails, cars, engines and goods, delivered by the appellant to the Kona Sugar Company, Limited, and sold by a receiver of that company to the appellee with full notice of the appellant's claim. Originally there was a contract for the sale of this property for cash, but the Kona Company having failed to pay, the appellant offered certain "terms in settlement of the contract" previously made, as follows: "We will take in settlement of this contract the sum of \$10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53 in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being a portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you, payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.—Upon such payment being made to us before

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the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This offer was accepted, this contract took the place of that previously made, and the property was delivered.

For purposes of decision the Supreme Court assumed that, under the foregoing instrument, the passing of title was subject to a condition precedent, but intimated that the majority of the court thought otherwise, if it had been necessary to decide the point. It was not necessary because the court was of opinion that, if there was such a condition, it was lost by what was considered an election on the plaintiff's part. The court below had found that there was no election, and therefore the question was and is whether the acts done by the appellant constituted one as matter of law. If not, then it must be considered whether the sale was on a condition precedent, and those are the two questions of law in the case.

The facts are simple. After the last contract was made the Kona Company got into trouble and a receiver was appointed. The appellant thereupon filed a claim of lien upon the railroad supposed to belong to the Kona Company, for materials used in the construction and equipment of the road, the materials referred to being the property in question. On or about August 1, 1902, it brought a suit to enforce this lien and in November of the same year filed a petition in the Kona Company proceedings asking that a decree already made for the sale of all the Kona Company's property should be modified so as to except all liens from the operation of the sale. Only a part of the property was used in the construction of the road and under any circumstances the claim of a lien would have been bad. The lien suit was dismissed, before anything had been done in it, in January, 1903. On February 13, the ap-

pellant, by leave of court, filed a petition in the Kona Company proceedings for an order that the receiver either should pay the amount due upon its note or deliver the property, setting up the contract and alleging that its title to the property still remained. The abortive lien proceedings constitute the election that is supposed to have brought the appellant's title to an end. We have not gone into further particulars because there can be no doubt that to claim a lien upon anything is inconsistent with asserting a title to it, and may be assumed to be sufficient to manifest an election if one is possible. The appellant's allegations in its first petition could give no additional strength to its choice.

Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, "if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election." Co. Lit. 145a. So a man may ratify or repudiate an unauthorized act done in his name. *Metcalfe v. Williams*, 144 Massachusetts, 452, 454. He may take the goods or the price when he has been induced by fraud to sell. *Dickson v. Patterson*, 160 U. S. 584. He may keep in force or may avoid a contract after the breach of a condition in his favor. *Oakes v. Manufacturers' Ins. Co.*, 135 Massachusetts, 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee.

In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated condi-

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tions. The case stands on election alone, and the appellant had no right to elect in the sense of the argument. It could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. It must be kept in mind that the effect attributed to the assertion of the lien is attributed to it as a strictly unilateral act, not as an offer to which an assent might be presumed. As such an act the appellant could not give it the supposed effect. It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title, *Van Winkle v. Crowell*, 146 U. S. 42, and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis. *Northern Assurance Co. v. Grand View Building Assoc'n*, 203 U. S. 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. *Snow v. Alley*, 156 Massachusetts, 193, 195.

There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the

meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

The contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful. *Harkness v. Russell*, 118 U. S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one or qualifies and explains it as intended to do less than it purports to do when taken alone. *Chicago Railway Equipment Co. v. Merchants' National Bank*, 136 U. S. 268. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first-mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace after-acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once by way of estoppel in favor of third persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course the absolute liability for the price, and putting that liability in the form of a note, are consistent with the retention of title until the note is paid. Parties can agree to pay the value of goods upon what consideration they please, *White v. Solomon*, 164 Massachusetts, 516, and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does.

It was suggested that the ratification of the contract by the Kona Company did not mention the condition. But it got

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its rights from the contract and, of course, got only such rights as the contract gave. Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.

Judgment reversed.

KAWANANAKOA v. POLYBLANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

No. 273. Argued March 21, 1907.—Decided April 8, 1907.

Under Equity Rule 92, where a part of the mortgage premises has been sold to the sovereign power which refuses to waive its exemption from suit, the court can, all other parties being joined, except the land so conveyed and decree sale of the balance and enter deficiency judgment for sum remaining due if proceeds of sale are insufficient to pay the debt.

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends, and as this doctrine is not confined to full sovereign powers it extends to those, such as the Territories of the United States, which in actual administration originate and change the law of contract and property.

A Territory of the United States differs from the District of Columbia in that the former is itself the fountain from which rights ordinarily flow, although Congress may intervene, while in the latter the body of private rights is created and controlled by Congress and not by a legislature of the District.

17 Hawaii, 82, affirmed.

THE facts are stated in the opinion.

Mr. Sidney M. Ballou, for appellants, submitted:

The owners of the equity of redemption of all parts of the premises covered by a mortgage must be made defendants in a suit in equity to foreclose that mortgage.

The result of a violation of this rule is that the whole burden of the mortgage debt will be placed on a part of the land instead of being distributed *pro rata* over the whole thereof, which would be manifestly unjust. See *Detweiler v. Holderbaum*, 42 Fed. Rep. 337.

The Territory of Hawaii is a municipal corporation with capacity to sue and be sued. 1 Dillon on Municipal Corporations, § 20; 1 Thompson on Corporations, § 1.

This court has called the Territories "organized municipalities" and likened them to the District of Columbia. *Talbott v. Silver Bow Co.*, 139 U. S. 438, 445.

The closest analogy that can be drawn is between the Territory of Hawaii and the District of Columbia. The latter has been held to be a municipal corporation. *Barnes v. District of Columbia*, 91 U. S. 540.

Every municipal corporation may be sued.

It is entirely immaterial that the Organic Act is silent upon the right of the Territory to sue and be sued. These powers are inherent in all municipal as well as other corporations. In addition to the statement from Thompson on Corporations quoted above, in connection with the definition of a corporation, we may cite the following authorities: 2 Dillon Mun. Corps., § 935. See also Ingersoll on Pub. Corps., p. 492; *Prout v. Pittsfield Fire District*, 154 Massachusetts, 450; *City of Janesville v. Milwaukee &c. R. R. Co.*, 7 Wisconsin, 484.

The Territory of Hawaii cannot by its own legislative enactments exempt itself from liability to suit or prescribe any certain class of cases in which alone it may be sued. The exemption of the United States and each of the several States from suit, except so far as is authorized by their own legislatures, has nothing to do with the corporate capacity of either the United States or the several States, but is a mere privilege which when waived leaves the sovereign State liable to suit like any other public corporation. It is based solely upon sovereignty, and the reading of any of the cases which discuss this principle will show how inapplicable the reasoning of those

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cases will be when applied to a Territory which has no sovereignty.

But even if no relief could be had against the Territory in this action, the mortgagee would not be entitled to a deficiency judgment against the mortgagors. She is entitled to such a judgment under Equity Rule No. 92 only upon a sale of the mortgaged land and if she is not able to compel a sale of all of that land even through no fault of her own, she cannot have deficiency judgment though she may have a remedy in some other proceeding.

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton* and *Mr. E. A. Douthitt* were on the brief, for appellees:

The Territory of Hawaii cannot be joined as party respondent in suit to foreclose a mortgage.

There is no provision of the Hawaiian laws providing for suit against the Territory in such case as this. The only provisions of law relating to suits against the Territory are contained in § 2000, Rev. Laws of Hawaii, originally § 1, chap. 26, Laws 1894. This section confers a right of action against the Territory in four different classes of cases, within none of which does the cause at bar fall.

It is elemental, of course, that the state or sovereign cannot be sued in its own courts without its consent; and this is as applicable to a dependent state or sovereignty as to one which has no suzerain or overlord. The political entity which makes laws and creates tribunals for their enforcement, which creates judicial remedies and legislates as to how, when, and under what conditions rights may be litigated and remedies enforced, manifestly cannot be sued in the courts of its creation except by its own consent and legislative provision. In the other case, such political entity would be subordinate to its own creatures. *Beers v. State of Arkansas*, 20 How. 527, 529.

The immunity of the Territory from suit save by its consent rests upon the more easily defined basis, the practical and common-sense ground that a body politic which enacts its

own laws and creates its own courts, defining and limiting their jurisdiction, is of necessity exempt from the jurisdiction of those courts save by its own consent.

In the very nature of things, the creator is not, save with its own consent, under the dominion of its creature; the power which creates tribunals must of necessity be superior to their jurisdiction. If there were to be any general judicial jurisdiction over the Territory, Congress would naturally have placed it in the Federal courts; yet § 86 of the Organic Act creating the Federal court of local jurisdiction contains no such provision.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree affirming a decree of foreclosure and sale under a mortgage executed by the appellants to the appellee, Sister Albertina. 17 Hawaii, 82. The defendants (appellants) pleaded to the jurisdiction that after the execution of the mortgage a part of the mortgaged land had been conveyed by them to one Damon, and by Damon to the Territory of Hawaii, and was now part of a public street. The bill originally made the Territory a party, but the Territory demurred and the plaintiffs dismissed their bill as to it before the above plea was argued. Then the plea was overruled, and after answer and hearing the decree of foreclosure was made, the appellants having saved their rights. The decree excepted from the sale the land conveyed to the Territory and directed a judgment for the sum remaining due in case the proceeds of the sale were insufficient to pay the debt. Eq. Rule 92.

The appellants contend that the owners of the equity of redemption in all parts of the mortgage land must be joined, and that no deficiency judgment should be entered until all the mortgaged premises have been sold. In aid of their contention they argue that the Territory of Hawaii is liable to suit like a municipal corporation, irrespective of the permission given by its statutes, which does not extend to this case. They liken the Territory to the District of Columbia, *Metro-*

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politan R. R. Co. v. District of Columbia, 132 U. S. 1, and point out that it has been a party to suits that have been before this court. *Damon v. Hawaii*, 194 U. S. 154; *Carter v. Hawaii*, 200 U. S. 255.

The Territory, of course, could waive its exemption, *Smith v. Reeves*, 178 U. S. 436, and it took no objection to the proceedings in the cases cited if it could have done so. See Act of April 30, 1900, c. 339, § 96; 31 Stat. 141, 160. But in the case at bar it did object, and the question raised is whether the plaintiffs were bound to yield. Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (*Leviathan*, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "*Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy.*" Bodin, *Republique*, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, *De Jure Maiestatis*, c. 3. *Nemo suo statuto ligatur necessitative*. *Baldus., De Leg. et Const., Digna Vox* (2d ed., 1496, fol. 51b. Ed. 1539, fol. 61).

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the Territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by

Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress and not by a legislature of the District. But for the Territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, c. 339, §§ 6, 55; 31 Stat. 141, 142, 150; *Coffield v. Hawaii*, 13 Hawaii, 478. See further *Territory of Wisconsin v. Doty*, 1 Pinney, 396, 405; *Langford v. King*, 1 Montana, 33; *Fisk v. Cuthbert*, 2 Montana, 593, 598.

However it might be in a different case, when the inability to join all parties and to sell all the land is due to a conveyance by the mortgagor directly or indirectly to the Territory the court is not thereby deprived of ability to proceed.

Decree affirmed.

MR. JUSTICE HARLAN concurs in the result.

THE WINNEBAGO.¹

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Nos. 218, 219. Argued February 28, 1907.—Decided April 8, 1907.

A state law will not be held unconstitutional in a suit coming from a state court at the instance of one whose constitutional rights are not invaded, because as against a class making no complaint it might be held unconstitutional.

Whether a state lien statute, otherwise constitutional, applies to vessels not to be used in the waters of the State; on whose credit the supplies were furnished; whether the lien was properly filed as to time and place; and what the effect thereof is as to *bona fide* purchasers without notice, are not Federal questions, but the judgment of the state court is final and conclusive on this court.

Whether a state lien statute is unconstitutional as permitting the seizure and sale of a vessel and the distribution of the proceeds in conflict with

¹ Docket titles: 218, *Iroquois Transportation Company, Claimant of the Steamer "Winnebago," v. De Laney Forge and Iron Company*; 219, *Same v. Edwards*.

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the exclusive jurisdiction in admiralty of the Federal courts will not be determined in a suit from the state courts where no holder of a maritime lien is present contesting the unconstitutionality of the statute.

A contract to build a vessel is not a maritime contract enforceable only in admiralty, but the remedy is within the jurisdiction of the state court, and this rule applies to items furnished the vessel after she has been launched, but which are really part of her original construction.

142 Michigan, 84, affirmed.

THESE cases may be considered together. They are writs of error to the judgments of the Supreme Court of Michigan affirming the decrees of the Circuit Court of Wayne County, Michigan, enforcing liens for the De Laney Forge and Iron Company, defendant in error, in 218, and George W. Edwards and others, defendants in error in 219, and intervenors in the original case.

The *Winnebago*, a steel steamer of 1,091 tons burthen, was built by the Columbia Iron works, at St. Clair, Michigan. The contract price was \$95,000; date of contract, March 8, 1902; between the Columbia Iron Works and John J. Boland and Thomas J. Prindeville. It was understood that these persons should organize a corporation to be known as the Iroquois Transportation Company. The contract price was to be paid, \$31,000 in cash, from time to time; for the balance the transportation company was to execute its notes to the amount of \$16,000, to issue bonds for \$48,000, to be secured by mortgage upon its property. On April 5, 1902, Boland and Prindeville assigned the contract to the Iroquois Transportation Company. Payments were made on the contract as follows: \$7,500, at date of signing contract; \$7,500, April 3, 1902; \$4,000, April 14, 1902; \$4,000, June 15, 1902; \$4,000, July 15, 1902.

An additional \$4,000 was paid on October 3, 1902, and two negotiable notes of \$4,000 given, maturing respectively November 1, 1903, and November 1, 1904.

The steamer was launched March 21, 1903. After she was in the water the work on the contract continued. On July 18, 1903, she was inspected, measured, enrolled and licensed to

be employed in domestic and foreign trade. This license was issued in the name of the Columbia Iron Works as owner.

On July 19, 1903, the Iroquois Transportation Company received a bill of sale of the steamer and delivered to the Columbia Iron Works ninety-six negotiable bonds of \$500 each, secured by mortgage on the steamer, and paid the balance of the purchase money, which was to be paid in cash, then amounting to between \$400 and \$500.

The agreement recited that possession was given to the Iroquois Transportation Company for the purpose of completing and finishing up those things still remaining undone on the steamer and required to be done by the iron works by the terms of the contract for the construction of the steamer, "it being the sole intent and purpose of this agreement to enable the Iroquois Transportation Company to obtain immediate possession of the steamer, and without intending either to limit the extent of the obligation of said Columbia Iron Works under the original specifications."

The steamer left St. Clair for Lorain, Ohio, July 19, 1903. At that time she was not completed, and workmen remained on her and went with her to St. Clair, where additional work was done upon her. She was afterwards engaged in carrying cargoes between points on Lake Erie and Lake Superior.

On July 30, 1903, the Columbia Iron Works made an assignment for the benefit of creditors. On August 25, 1903, the De Laney Forge and Iron Company served notice on the Iroquois Transportation Company that it made a claim of lien against the steamer for forging and material furnished; and on October 6, 1903, complaint was filed in the Circuit Court of Wayne County, Michigan, and shortly thereafter Edwards and others intervened in the case, claiming a lien. The Iroquois Company gave a bond under the statute for the release of the vessel. Decrees were rendered in favor of the claimants and intervenors in the Circuit Court of Wayne County, and upon appeal they were affirmed in the Supreme Court of Michigan. 142 Michigan, 84.

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Argument for Plaintiff in Error.

Mr. Charles E. Kremer, with whom Mr. William T. Gray was on the brief, for plaintiff in error:

The *Winnebago* was, at the time of her seizure, not used or intended to be used in navigating the waters and canals of this State. *Sauter v. The Sea Witch*, 1 California, 162; *Tucker v. Sacramento*, 1 California, 403; *Ray v. Henry Harbeck*, 1 California, 451; *Haytien Republic*, 65 Fed. Rep. 120.

A proceeding under the statutes of Michigan against a vessel which has already been enrolled and licensed under the laws of the United States, and at the time of the seizure was actually engaged in interstate commerce, is unconstitutional and void because in conflict with the Constitution and laws of the United States. *The Glide*, 167 U. S. 606; *Johnson v. Elevator Company*, 119 U. S. 397; *White's Bank v. Smith*, 7 Wall. 646; *The Menominee*, 36 Fed. Rep. 197; *Perry v. Haynes*, 191 U. S. 17; *The Edith*, Fed. Case 4283; *S. C.*, 11 Blatchf. 451; *The Edith*, 94 U. S. 519; *Moir v. The Dubuque*, Fed. Case 9696; *The Roanoke*, 189 U. S. 185.

The *Winnebago*, engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the courts of the State of Michigan. *Mich. C. R. Co. v. Chicago M. L. S. Co.*, 1 Ill. App. 339; *Wall v. Norfolk & W. R. Co.*, 52 W. Va. 485; *Connery v. Quincy O. & K. C. R. Co.*, 99 N. W. Rep. 365.

The contract to build a ship is a maritime contract and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the state law. *People's Ferry Co. v. Beers*, 20 How. 383; *Roach v. Chapman*, 22 How. 129; *J. E. Rumbell*, 148 U. S. 1; *Davis v. New Brig*, Fed. Cas. 3643; *Read v. Hull of a New Brig*, Fed. Cas. 11,609; *The Calisto*, Fed. Cas. 2316; *The Hull of a New Ship*, Fed. Cas. 6859; *Van Pelt v. The Ohio*, Fed. Cas. 16,870; *The Abbie Whitman*, Fed. Cas. 15; *Sewall v. The Hull of a New Ship*, Fed. Cas. 12,682; *Purington v. The Hull of a New Ship*, Fed. Cas. 11,478; *The Richard Busteed*, Fed. Cas. 11,764; *Drew v. The Hull of a New Ship*, Fed. Cas. 4078; *The*

Chas. Mears, Fed. Cas. 10,766; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 378; *Benedict's Admiralty*, 2d ed., § 264; *De Lovio v. Boit*, 2 Gall. 475; *Insurance Co. v. Dunham*, 11 Wall. 10; 2 *Parsons on Ship. and Adm.* 327; *Dupont De Nemours v. Vance*, 19 How. 162; *The Grape Shot*, 9 Wall. 129; *The Guy*, 9 Wall. 758; *The Lulu*, 10 Wall. 192; *The General Custer*, 10 Wall. 204; *The Patapsco*, 13 Wall. 329; *The Robert Parsons*, 191 U. S. 17; *The Blackheath*, 195 U. S. 361; *The Magnolia*, 20 How. 296, 307.

Mr. Herbert K. Oakes, with whom *Mr. John C. Shaw*, *Mr. Charles B. Warren*, *Mr. William B. Cady*, *Mr. Joseph G. Hamblen, Jr.*, and *Mr. Hugh Shepherd* were on the brief, for defendant in error:

The proceeding here does not trench upon the exclusive jurisdiction of the Federal courts in admiralty cases. *The Glide*, 167 U. S. 606 and *Perry v. Haynes* (*The Robert W. Parsons*), 191 U. S. 17, distinguished.

Even if the Michigan statute is unconstitutional in some respects, it is constitutional and valid, insofar as it relates to the claims in controversy here, and the part being dealt with in this controversy is not so related in substance, and the provisions are not so interdependent that one cannot operate without the other. Under such circumstances, the part that is constitutional will, under all the authorities, stand. 6 *Am. & Eng. Ency. of Law*, 2d ed., p. 1088, and cases cited; *Keokuk Co. v. Keokuk*, 95 U. S. 80; *Unity v. Burrage*, 103 U. S. 447-459.

So long as the materials furnished were to be used as part of the original construction of the ship, the admiralty will not take cognizance of them. *The Iosco*, Bro. Adm. 495; *S. C.*, Fed. Cas. 7060; *The Victorian*, 24 Oregon, 121, 132-135.

Even if there had been seizure in this case, and if it were shown that the *Winnebago* was engaged in interstate commerce at the time appearance was asked or service accepted, the whole trend of judicial authority, as evidenced by the references

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above made, is to the effect that the State here had complete power to make and enforce the law here made and enforced, insofar as it relates to the non-maritime matter here under discussion, and that its enforcement is not a regulation of commerce. *Smith v. Maryland*, 18 How. 71, 74; *Johnson v. Elevator Co.*, 119 U. S. 388, 398; *Cannon v. New Orleans*, 20 Wall. 577, 582; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Trans. Co. v. Parkersburg*, 107 U. S. 691.

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

The Michigan statute, under which the liens are claimed in this case, is as follows:

"Third Compiled Laws of Michigan, p. 3254:

"(10789) Sec. 2. Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this State, shall be subject to a lien thereon:

"First, for all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water craft, on account of work done or services rendered, on board of such craft, by seamen, or any employé, other than the master thereof; on account of work done or service rendered by any person in or about the loading or unloading of said water craft; on account of work done or materials furnished by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing or equipping such craft: *Provided*, That when labor shall be performed or materials furnished, as aforesaid, by a subcontractor or workman other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely notice of his or their said claim, and from thenceforth said person or persons shall have a lien upon said craft *pro rata* for his or their said claims, to the amount that may be due by said owner of said original contractor for work or labor then done on said water craft."

Several objections are urged by the plaintiff in error which, if sustained, will result in the reversal of the judgments of the Supreme Court of Michigan. Some of them are of a non-Federal character. It is insisted that the statute does not apply in this case, because the steamer *Winnebago* was not to be used in navigating the waters of Michigan, within the terms of the statute. But this only presents a question of state law, upon which the judgment of the state court is final and conclusive. The same may be said as to the objection because the transportation company was a *bona fide* purchaser without notice of complainant's lien, and because complainant did not within a year file its claim for a lien with the proper court in the county in which it resided. These are state questions, likewise concluded by the decision of the state court.

It is further contended that to seize the vessel and subject her to sale and the proceeds thereof to distribution in the state court would be in direct conflict with the exclusive jurisdiction in admiralty in the courts of the United States in favor of liens of a maritime character, and therefore the Michigan act is unconstitutional. No maritime lien is asserted in this case, and it is merely a matter of speculation as to whether any such claim existed, or might be thereafter asserted. No holder of any such maritime lien is here contesting the constitutionality of the state law.

In a case from a state court, this court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so held. This was distinctly ruled in a case decided at this term. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152. See also *Supervisor v. Stanley*, 105 U. S. 305-311; *Lampasas v. Bell*, 180 U. S. 276, 283, 284; *Clark v. Kansas City*, 176 U. S. 114-118; *Cronin v. Adams*, 192 U. S. 108-114.

There is no one in position in this case to make this objection, and, for aught that this record discloses, no such maritime

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lien existed. If this statute is broad enough to include strictly maritime liens, it can only be held unconstitutional, in a case coming from a state court, where the complaint on that ground is made by the holder of such a demand. We agree with Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, in a case directly involving this question, where other claimants upon the *Winnebago* had removed a case to the United States Circuit Court for the Eastern District of Michigan, whence it was taken to the Circuit Court of Appeals:

“And the fact that she [the *Winnebago*] might become subject to maritime liens would not destroy liens already lawfully acquired. It is true she might become subject to maritime liens which would be superior to the existing lien, and that such liens would have to be enforced in the admiralty. But that possibility does not defeat the enforcement by the state court of the non-maritime lien to which she is subject. How else is the owner of the latter to obtain his remedy? It may be the vessel will never become subject to maritime liens at all; and, if so, the holder of the existing lien may never have even the privilege of proving his claim in some cause instituted for another purpose, but no such supposed embarrassment has yet occurred. And they are as yet imaginary. But suppose such other liens should attach. That should not prevent the enforcement of the earlier lien in the proper court. If the holder of the earlier lien delays his action, he subjects himself to the danger of superior liens becoming fastened, and the enforcement of his own lien in the state court must leave the vessel subject to the superior liens of which the state court cannot take cognizance. If occasion requires, and the admiralty court enforces the superior liens, it is in no wise obstructed by the action of the state court, and a title under a decree of the former court would defeat the title gained under the decree of the state court. The case of *Moran v. Sturgis*, 154 U. S. 256 is a good illustration of this subject. There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other

should require it; but that is an incident common along all the lines of concurrent proceedings in the state and Federal courts, and gives no ground for the denial of jurisdiction to either." *The Winnebago*, 73 C. C. A. 295.

It is next insisted that the materials and supplies were not furnished on the credit of the vessel, but were contracted for, furnished and delivered on the credit of the Columbia Iron Works.

The findings upon this proposition are again questions within the exclusive jurisdiction of the state court. The findings will not be disturbed here.

It is next objected that the court erred because certain items were allowed for material furnished the vessel after she was launched, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But we agree with the state court that these items were really furnished for the completion of the vessel and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the state court. *The Iosco*, Fed. Cas. 7060; *The Victorian*, 24 Oregon, 121; *The Winnebago*, 73 C. C. A. 295.

It is urged that the attempt to enforce the lien on the vessel was while she was engaged in interstate commerce, and therefore proceedings against her were unlawful and void, in view of the exclusive control of this subject by Congress under the Constitution and laws of the United States. But it must be remembered that concerning contracts not maritime in their nature, the State has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of the States enforcing attachment and execution in cases cognizable in state courts have been sustained and upheld. *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388-398. The State may pass laws enforcing the rights of its citizens which affect interstate commerce but fall short of regulating such commerce in the sense

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in which the Constitution gives exclusive jurisdiction to Congress. *Sherlock et al. v. Alling*, 93 U. S. 99, 103; *Kidd v. Pearson*, 128 U. S. 1, 23; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477.

Upon the subject, Mr. Justice Brown, speaking for the court in *Knapp v. McCaffery*, 177 U. S. 638-642, said:

"That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the State. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in the construction (*The Jefferson, People's Ferry Co. v. Beers*, 20 How. 393; *The Capitol, Roach v. Chapman*, 22 How. 129), we held in *Edwards v. Elliott*, 21 Wall. 532, that in respect to such contracts it was competent for the States to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem*."

The contract in this case being for the construction of a vessel, and its enforcement within the power and jurisdiction of the state courts, we do not think that execution of such a decree can be avoided because the vessel engaged in interstate commerce.

Finally, an elaborate and able argument is made in support of the contention that a contract to build a ship is a maritime contract, and therefore can be enforced only in admiralty, but as late as this term, in *Graham v. Morton Transportation Company*, this contention was overruled upon the authority of the previous decisions of this court. 203 U. S. 577.

The judgments of the Supreme Court of Michigan are

Affirmed.

PETERSON *v.* CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF TEXAS.

No. 225. Argued March 6, 7, 1907.—Decided April 8, 1907.

Foreign corporations can be served with process in a State only when doing business therein, and such service must be upon an agent who represents the corporation in such business.

Under the circumstances of this case a railroad company is not doing business in a State simply because another railroad company, of which it owns practically the entire capital stock, does do business therein, nor is the latter company or its officers and employes agents of the former company for the purpose of service of process even though such agents may at times also represent that company as to business done in other States. There is no partnership liability under such circumstances by which the company owning or controlling the capital stock of the other can be brought into court to respond for a tort by serving the latter company with process.

THIS case comes here upon a certificate from the Circuit Court of the United States for the Northern District of Texas, raising the question of the jurisdiction of that court over an action brought by plaintiffs in error, Augusta A. Peterson and Ida Peterson, the latter a minor, suing by her mother and next friend, and both being citizens of Texas, against the Chicago, Rock Island and Pacific Railway Company, an Illinois corporation, hereinafter at times referred to as the Pacific Company.

The plaintiffs in error, wife and daughter of one John Peterson, an employe of the Pacific Company, sought recovery for the alleged negligent killing of said John Peterson while engaged as an engineer in its employ at Chickasha in the Indian Territory, on October 19, 1903. It is charged in the petition that the Pacific Company was then engaged in carrying on its business in the State of Texas in the name and through the Chicago, Rock Island and Gulf Railroad, a corporation of the State of Texas, hereafter at times referred to as the Gulf Company, which latter corporation, it was alleged, was

an auxiliary corporation and agent of the defendant, and was then and there dominated and controlled by it, its lines of railroad being operated by the Pacific Company as a part of the Rock Island system.

It was charged that S. B. Hovey, Vice President and General Manager of the Gulf Company, residing in Tarrant County, Texas, was also the general manager and local agent of the Pacific Company in that State. It was also alleged that F. E. Merrell was the local agent in Tarrant County, Texas, of the Pacific Company, and that M. E. Sebree was the local agent for it in said county and State.

Service of citation was made on the defendants by serving the parties above named as its agents in Tarrant County, Texas, in pursuance of the statute of the State. The defendant moved to quash the service on the ground that neither of the parties were such agents, and filed in support of its motion the affidavits of each, Hovey, Merrell and Sebree, denying such agency. Thereafter plaintiffs made application for additional process in pursuance of a later statute of the State of Texas, to be hereinafter noticed, and charged that A. L. Thomas, who resides in Tarrant County, Texas, was a train conductor engaged in handling trains over the tracks of the Gulf Railroad in the State of Texas and over those of the Pacific Railroad beyond the limits of the State, and that he was engaged in running and handling passenger trains on the tracks of both said companies on both sides of the state line, and was an agent and representative of the defendant company, residing in Tarrant County, Texas. It was further charged that V. N. Turpin, who resides in Fort Worth, Tarrant County, Texas, was a ticket agent engaged in the selling of tickets and the making of contracts for transportation and for and in the behalf of the Pacific Company from the city of Fort Worth, Texas, over the lines of the Gulf Company in the State of Texas and over the line of the defendant company beyond the line of said State, and was an agent and representative of the defendant company in said State and county.

These persons, Thomas and Turpin, were accordingly served under the application for new process as the agents and representatives of the defendant company in the said county and State.

The defendant company filed a supplemental motion to quash this service upon the grounds that these persons were not the agents or representatives of the defendant company, filing their affidavits in support of said motion. In the return of the writ served on Hovey it was also set forth that he was general manager of the Pacific Company, residing in Tarrant County, Texas. The motion and supplemental motion to quash the service was heard by the court, the motion sustained and the cause dismissed for want of jurisdiction, the court holding that the defendant had not been properly served with process.

From the stipulated facts, documentary evidence and testimony embodied in the bill of exceptions the following facts, pertinent to the determination of the issues, may be gathered:

The Pacific Company and the Gulf Company are both of the "Rock Island System" of railroads. The second annual report of the "Rock Island Company" June 30, 1904, shows that it is the owner of the entire capital stock, except directors' shares, of the Chicago, Rock Island and Pacific Railroad Company, a corporation of Iowa; that company owns 695,574.75 shares of the capital stock of the Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa, and 286,349 shares of the common capital stock of the St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri, and the report adds:

"Each of the two latter companies operates independently its lines of railway and each is interested through the ownership, directly or indirectly, of at least the majority of the capital stock, in certain subsidiary companies, each of which operates its property independently. The lines of the Chicago, Rock Island and Pacific Railway Company, including lines

formerly of the Choctaw, Oklahoma and Gulf Railroad Company, the Burlington, Cedar Rapids and Northern Railway Company, and the Rock Island and Peoria Railway Company, together with the lines of its subsidiary companies, namely, the Chicago, Rock Island and Gulf Railway Company, and the Chicago, Rock Island and El Paso Railway Company, comprise what is known as the 'Rock Island System.'

"As the Rock Island Company is the owner of the entire capital stock, except directors' shares, of the Chicago, Rock Island and Pacific Railroad Company, the income of both the companies is included in the following statement."

This report purports to be made by order of the board of directors, was dated October 17, 1904, and was signed by Robert Mather, President. Appended to this report as a part of it, under the head of "Statements and Exhibits, Rock Island System Lines," was the following statement, to wit:

"On page 23 of said report, under the heading of 'Rock Island System—State of Mileage Operated:'

"The Chicago, Rock Island and Gulf Railway Company:	
Terral, I. T. (Red River), to Dallas, Texas.....	126.67
Bridgeport, Texas, to Graham, Texas.....	53.29
Texhoma, O. T., to Bravo, Texas-New Mexico state line.....	91.75
Texola, O. T. (Texas state line), to Amarillo, Texas...	112.97
Total Chicago, Rock Island and Gulf Railway Company.....	386.68"

Plaintiff also introduced in evidence a railroad folder, dated July 10, 1904, on which was printed in large letters "Rock Island System Time Table," in which appears the names of the Chicago, Rock Island and Pacific Railway Company; Chicago, Rock Island and El Paso Railway Company, and the Chicago, Rock Island and Gulf Railway Company; with a list of the names and residences of the passenger and freight agents, and a schedule of the passenger trains on said lines.

On the inside of the cover of the folder is a map showing the lines of the said railroad company, so connected as to belong to one system. Below the map is printed:

“The Rock Island System of America.

“The Rock Island System covers a territory which is 1,000 miles long by 1,000 miles wide, supports a population of more than 21,000,000 people and is capable of supporting at least four times that many. The area of this territory is as great as the combined area of France, Germany, Italy, Spain, Austria-Hungary, Denmark, the Netherlands, Turkey, Switzerland and Greece, and its productive capacity is greater.

“Here are produced more than half the wheat, more than half the corn, and nearly half the cotton, silver, and gold produced in the United States.”

The origin of the Gulf Company is thus stated in the annual report of the Rock Island road, June 30, 1904:

“Consolidation of Texas Lines.

“The legislature of the State of Texas, by an act passed March 27th, 1903, authorized the sale of the railroads and properties of the Chicago, Rock Island and Texas Railway Company, extending from the Red River to Fort Worth, Texas, with a branch from Bridgeport, Texas, to Graham, Texas. The Chicago, Rock Island and Mexico Railway Company extending from the Texas-Oklahoma line near Texhoma to the Texas-New Mexico line at Bravo; and the Choctaw-Oklahoma and Texas Railroad Company, extending the Texas-Oklahoma line near Texola, Texas, to Amarillo, Texas, to the Chicago, Rock Island and Gulf Railway Company, which had constructed a line of railroad from Dallas, Texas, to Fort Worth, Texas, where it connected with the line first named above.

“In accordance with the authority granted, the properties referred to were, by appropriate corporate action, deeded to the Chicago, Rock Island and Gulf Railway Company on December 1, 1903.

"This consolidation permits the properties in question to be operated by one management instead of four separate sets of officials, as heretofore, resulting in economy of operation and greater efficiency in service.

"In stating the assets and liabilities of the companies forming the system, the holdings of the Chicago, Rock Island and Pacific Railway Company in the bonds and capital stock of auxiliary lines, together with loans between system companies, have been eliminated from the liabilities and a like reduction made in the value of the assets; the figures as stated, therefore, represent the value of the assets and the real liability without duplication."

Plaintiffs also introduced in evidence the twenty-fourth annual report of the Pacific Company for the year ending June 30, 1904, in which it is set forth:

"They have included therein operations and affairs of the operated lines and auxiliary companies forming the 'Rock Island System.'

"In order to make exhibits comparative the figures for the last preceding year have been restated to meet changed conditions due to the including in this report the operation of the auxiliary companies.

"These lines, thus forming the Rock Island System, are the following:

" Mileage Operated.

The Chicago, Rock Island and Pacific Railway	6,760.74
The Chicago, Rock Island and El Paso Railway	111.50
The Chicago, Rock Island and Gulf Railway	386.92

"On page 9 of said report, under the head of 'Property' and 'Franchises,' occur the following:

"During the year expenditures were made for construction of extensions and completion of system lines as follows:

Fort Worth, Texas, to Dallas, Texas	\$111,371 55
Yarnall, Texas, to Amarillo, Texas	108,615 64
Jacksboro, Texas, to Graham, Texas	32,138 96

Red River to Fort Worth, Texas.....	28,013 04
Texhoma (Texas state line) to Bravo, Texas.....	9,646 03
Texola (Texas state line) to Yarnall, Texas.....	2,328 30

"In addition to the expenditures during the year as above, there has been transferred to property account sundry amounts expended prior to July 1st, 1903, for construction of new lines and shops, and purchase of equipment, which have been heretofore stated in the system assets as 'Advances for Construction and Equipment,' the property represented by such amounts having been deeded to the Chicago, Rock Island and Pacific Railway Company or the Chicago, Rock Island and Gulf Railway Company, \$23,169.83.

"There has also been transferred to this account the expenditures made prior to July 1st, 1903, for the purchase of shares of capital stock of the Burlington, Cedar Rapids and Northern Railway Company and the Rock Island and Peoria Railway Company, also cost of stock of the Choctaw, Oklahoma and Gulf Railroad Company in excess of its par value and the value of bonds of the Chicago, Rock Island and Texas Railway Company, owned by the Chicago, Rock Island and Pacific Railway Company, the value of said property appearing upon balance sheets shown in prior year's report as 'Stocks and Bonds of Constituent Companies,' \$16,446,009.73.

"On page 11 of said report, under the heading 'New Lines Open for Operation,' the following statements are made, viz:

"Additions have been made to the operated system—mileage since the last report as follows:

"By the Chicago, Rock Island and Gulf Railway Company, Fort Worth, Texas, to Dallas, Texas, 33.26 miles, opened for operation in December, 1903.

"Yarnall, Texas, to end of track west of Amarillo, Texas, 18.40 miles, opened for operation in November, 1903.

"Corrections in measurements, Red River to Fort Worth, Texas, .83 miles.

"Operated system mileage was decreased 18.22 miles between Yarnall, Texas, and Amarillo, Texas.

"Fort Worth, Texas, to Dallas, Texas.—This line was completed and the line opened for operation by the Chicago, Rock Island and Gulf Railway Company, December 1st, 1903. It is 33.26 miles in length, connecting with the line of the former the Chicago, Rock Island and Texas Railway Company at Fort Worth, and extending to Dallas, where, by an agreement with the Gulf, Colorado and Santa Fe Railway Company, it has the joint use of the latter company's terminal facilities.

"The opening of this line gives the Gulf Company direct entrance into Dallas, enabling it to compete for the traffic of that important commercial center.

"On page 12 of said report is the following statement, viz:

"System Mileage Under Construction.

"By the Chicago, Rock Island and Gulf Railway Company: Amarillo, Texas, to Texas-New Mexico boundary 69.87

"Amarillo, Texas, to Tucumcari, N. M. The grading for a considerable portion of this line has been done from Amarillo westward.

"It was deemed advisable, however, to suspend active construction until such time as the business outlook would warrant the expenditure necessary to complete."

Upon the hearing, counsel made an agreed statement of facts, as follows:

"The Chicago, Rock Island and Pacific Railway Company is a consolidated corporation, chartered under the laws of Illinois and Iowa. It has been an existing railroad corporation for over twenty years. In June of the year 1892 and for some years prior to that time the said railway company owned and operated a line of railway from the city of Chicago in a southwesterly direction through the States of Illinois, Iowa, Missouri and Kansas to Minco, Indian Territory. During the year 1892 this company extended its line from Minco, Indian Territory, in a southerly direction to the north boundary line of Texas in Montague County.

"The Chicago, Rock Island and Texas Railway Company was a corporation organized under the laws of Texas on the 15th day of July, 1892. It had an authorized capital stock of three million dollars, in shares of one hundred dollars each, of which seven hundred and fifty-four shares were subscribed for at the time of its organization. Below is a list of the names of the stockholders and the number of shares of capital stock of this company subscribed for by each, at its original organization.

[The list shows that of the 754 shares subscribed, 745 were held by one of the attorneys of the Pacific Company, and of the other 9 shares, 3 were held by other employés of that road.]

"Under the charter of the Chicago, Rock Island and Texas Railway Company, it was authorized to construct a line of road from the north boundary line of Texas at a point in Montague County in a southerly direction through Montague, Wise and Parker Counties; the charter being afterward amended, authorized the construction into Tarrant County. This charter authorized the issuance of first mortgage bonds amounting to fifteen thousand dollars per mile for construction and not exceeding five thousand per mile for equipment.

"When the Chicago, Rock Island and Pacific Railway Company constructed its line to a point near the north bank of the Red River, north of Montague County, construction work stopped for a period of time. The Chicago, Rock Island and Texas Railway Company began the construction of its line at the north line of the State in Montague County some time after the Chicago, Rock Island and Pacific Railway Company stopped work at a point north of Red River. After construction work began on the Chicago, Rock Island and Texas Railway Company south of Red River, the Chicago, Rock Island and Pacific Railway Company constructed its line from the point where work had stopped north of Red River, to a connection with the Chicago, Rock Island and Texas Railway Company at the state line. The Texas com-

pany finished the construction of its line into Fort Worth in the latter part of 1893. Some of the same contractors who constructed the Chicago, Rock Island and Pacific Railway from Minco south to Red River also took contracts for work on the Texas line.

"On the 2d day of January, 1893, after the Chicago, Rock Island and Texas Railway Company had constructed and was operating its line as far south as Bowie, Texas, it entered into an agreement with the Chicago, Rock Island and Pacific Railway Company, a true copy of which is hereto attached and marked 'Exhibit A' for identification. This agreement went into effect immediately after it was executed, and was acted upon and observed by said companies until the 14th day of April, 1903, when the same was canceled under authority of the board of directors of each company by a written agreement, a true copy of which is hereto attached, marked 'Exhibit B' for identification.

[Exhibits A and B are not printed, as they are the contract and cancellation thereof, both made before the present case arose.]

"After the Chicago, Rock Island and Texas Railway Company had constructed its line, it issued first mortgage bonds to the extent of fifteen thousand dollars per mile thereon, and these bonds were purchased by the Chicago, Rock Island and Pacific Railway Company, for which it paid the Texas line one hundred cents on the dollar. The Chicago, Rock Island and Texas line cost a large sum of money in excess of the amounts for which it issued bonds, which additional cost was paid by application of money subscribed by the stockholders and by borrowing from the Chicago, Rock Island and Pacific Railway Company, which money so borrowed has long since been returned with interest.

"At the time the Chicago, Rock Island and Pacific Railway Company constructed its line to Red River there was no town or city at that particular point, but there were towns and cities south, east and west of there in the State of Texas,

and a railroad line, being a part of the Missouri, Kansas and Texas Railway of Texas, nine miles south of that point.

"When the Chicago, Rock Island and Texas Railway Company was first organized its general offices were located at Bowie, Montague County, Texas, and remained there for some time, until the charter was amended removing them to Fort Worth. The first general officers elected by the Chicago, Rock Island and Texas Railway Company, and their residences, were as follows: M. A. Low, Topeka, Kansas, President; J. C. McCabe, Bowie, Texas, General Freight Agent, and H. F. Weber, Bowie, Texas, Vice President, Superintendent, Secretary and Treasurer. All these men, prior to the time they were elected officials of the Chicago, Rock Island and Texas Railway Company had been employed in some capacity by the Chicago, Rock Island and Pacific Railway Company. In 1893 S. B. Hovey was elected Vice President of the Texas company and remained the Vice President and Superintendent of the Chicago, Rock Island and Texas Railway Company from that date until it was sold out under an act of the legislature in 1903. Mr. M. E. Sebree, who was served with citation in this case, was, for a number of years and until the date of its sale, trainmaster of the Chicago, Rock Island and Texas Railway Company and assistant trainmaster of the Chicago, Rock Island and Pacific Railway Company, with jurisdiction on that line up to Chickasha, Indian Territory. Prior to the time he was employed by the Chicago, Rock Island and Texas Railway Company he had been employed by the Chicago, Rock Island and Pacific Railway Company as brakeman, conductor, etc. M. A. Low, of Topeka, Kansas, remained the President of the Chicago, Rock Island and Texas Railway Company from its organization until the 8th day of November, 1900, during all of which time he was one of the general attorneys of the Chicago, Rock Island and Pacific Railway Company.

"The Chicago, Rock Island and Texas Railway Company never issued or sold any equipment bonds, but before it was

sold out under special act of the legislature to the Chicago, Rock Island and Gulf Railway Company, it had purchased and was the owner of between one thousand and twelve hundred freight cars of various kinds. During the time it had no equipment of its own, it rented rolling stock from various railway companies, but principally from the Chicago, Rock Island and Pacific Railway Company, and paid therefor prices prevailing between other lines of railway in the State of Texas.

"After the Chicago, Rock Island and Texas Railway Company constructed its line into Fort Worth from Bowie and after the execution of the contract between it and the Chicago, Rock Island and Pacific Railway Company, of date of January 2d, 1893, the most of the passenger and freight trains running over its line from Red River to Fort Worth and from Fort Worth to Red River were operated beyond its lines as the trains of the Chicago, Rock Island and Pacific Railway Company. The employ  s operating these trains were under the control of and paid by the Chicago, Rock Island and Texas Railway Company while working on its line, and they were also under the control of and paid by the Chicago, Rock Island and Pacific Railway Company while on its line. The equipment in the various trains went as far north as the business justified, some of the passenger equipment going as far as Chicago, and some to Kansas City, while the freight equipment stopped at points beginning at Chickasha, and from there north wherever the freight was destined. The passenger equipment coming south stopped at Fort Worth and the freight equipment, where the freight was handled in carload lots, went to destination, wherever that might be.

"Whenever necessary the Texas company would operate a local train to handle freight between Fort Worth and Red River, but as a general rule the through service maintained took care of this business. It operated a local freight and passenger train between Bridgeport and Jacksboro and afterward to Graham from the time that branch was built until it was sold out, which was several years. On the through

freight trains the run made by the crews was from Fort Worth to Chickasha and on the through passenger train the run made by the crews was from Fort Worth to Caldwell, Kansas, these crews being handled and paid as above set forth. Outside the Pullman cars, which were in each passenger train, nearly all the passenger equipment used by the Chicago, Rock Island and Texas Railway Company belonged to the Chicago, Rock Island and Pacific Railway Company, for which it paid rental, as provided for under the terms of the contract herein first referred to.

"Defendant's witness will testify that the Texas company paid no part of the cost of operating the Chicago, Rock Island and Pacific Railway, nor did the Pacific Company pay any part of the cost of the operation of the Chicago, Rock Island and Texas Railway, nor did either of them participate in the earnings of the other. The relationship between the companies is fully disclosed by the terms of the contract dated January 2d, 1893, which was observed up to the time of its cancellation.

"The passenger conductors, brakemen and train guards wear regular train uniforms and on the lapel of the coat are the words 'Rock Island,' and on the cap is the word 'Conductor,' 'Brakeman' or 'Porter.' Any member of these train crews, while working on the line of the Texas company, may be discharged by the proper officer of that company; and while working on the line of the Pacific Company may be discharged by the proper officer of that company. Either company, of course, employs additional men when needed.

"At the time the contract of January 2d, 1893, was canceled the Chicago, Rock Island and Texas Railway Company was operating about an hundred and forty miles of road, and the Chicago, Rock Island and Pacific was operating about three thousand three hundred miles. For a considerable time after the Chicago, Rock Island and Texas Railway Company was built into Fort Worth it employed and maintained at its Fort Worth office a train dispatcher, who gave orders for the

movement of trains over its line, but as a matter of economy this was abolished, and the Texas company paid a part of the salary of the train dispatcher located at Chickasha to give orders for the movement of trains over its rails.

"On the 22d day of September, 1903, the Chicago, Rock Island and Texas Railway Company, under authority of a special act of the legislature known as Senate Bill No. 161, was purchased and absorbed by the Chicago, Rock Island and Gulf Railway Company, and since that time has ceased to exist as a railroad or do any business as such.

"At the time the Gulf Company purchased the Texas company it had constructed and was operating a line of road from Fort Worth in Tarrant County to Dallas in Dallas County. The Chicago, Rock Island and Gulf Railway Company now owns and operates three hundred and eighty-six miles of road, all of which is located inside of the State of Texas. It does not own any railroad outside the State of Texas. It owns at the present time about sixteen hundred cars, including ballast, refrigerator and cattle cars, twenty locomotives, and eight cabooses, but does not own any passenger equipment other than the Pullman cars which are used in each of its passenger trains; it rents its passenger equipment from the Chicago, Rock Island and Pacific Railway Company, and pays therefor current rental charged by connecting lines in Texas. The train crews on both the through passenger and freight trains are handled in the same way that they were when the line into Fort Worth was operated by the Chicago, Rock Island and Texas Railway Company, but the Chicago, Rock Island and Gulf Railway Company is now operating in many places local trains between local points in Texas.

"The following is a list of stockholders and the amount of stock of the Chicago, Rock Island and Gulf Railway Company owned by each.

[The list is not printed, as the record discloses that, except directors' shares, the stock is held for the Chicago, Rock Island and Pacific Railway Company.]

"The Chicago, Rock Island and Gulf Railway Company is operating under a lease that part of the line of the Chicago, Rock Island and Pacific Railway Company which begins at the north boundary line of the State of Texas, extending northward to the town of Terral, Indian Territory, a distance of about $1\frac{1}{2}$ miles.

"Blank passes, properly signed by different railroads, including the Chicago, Rock Island and Pacific, Texas and Pacific, Houston and Texas Central and other lines are sometimes placed with S. B. Hovey, and when so placed he has the permission of such line to fill in the names of parties and countersign the pass, and when so countersigned such pass is recognized by the line over which it is issued. The local ticket agents of the Chicago, Rock Island and Gulf Railway Company sell coupon tickets over the Chicago, Rock Island and Pacific Railway Company's line and nearly all other lines in the United States, which tickets are duly honored by the respective roads over which they read. The Chicago, Rock Island and Gulf Railway Company operates only one passenger train each way daily between Fort Worth and Dallas, while it operates two trains each way from Fort Worth north. It operates also only a local freight service between Fort Worth and Dallas, but no through freight service. Proper officials of the Chicago, Rock Island and Gulf Railway Company and of the Chicago, Rock Island and Pacific Railway Company exchange reports with each other as to the amount of exchange business done.

"No dividends were ever paid on the stock of the Chicago, Rock Island and Texas Railway Company, and none have been paid on that of the Chicago, Rock Island and Gulf Railway Company. The net earnings of the Chicago, Rock Island and Texas Railway Company were put into betterments and improvements, and the same is the case with the Chicago, Rock Island and Gulf.

"In 1897, L. G. Hastings, then secretary of the Chicago, Rock Island and Texas Railway Company, reported to the

Interstate Commerce Commission that the Chicago, Rock Island and Texas Railway Company was controlled by the Chicago, Rock Island and Pacific Railway Company, through the ownership of a majority of its bonds. In 1899 he reported it as controlled by the Pacific Company, through its ownership of a majority of its capital stock.

"On the 2d day of August, 1904, M. E. Sebree, who resides in Fort Worth, Texas, was trainmaster of the Chicago, Rock Island and Gulf Railway Company, and was also assistant trainmaster of the Chicago, Rock Island and Pacific Railway Company between the north line of Texas and Chickasha, Indian Territory. He is paid by the Gulf Company for the work he does for it and by the Pacific Company for the work he does for it. S. B. Hovey is Vice President and Superintendent of the Chicago, Rock Island and Gulf Railway Company, and will testify that he is not connected with, nor does he perform any service for, any other railroad.

"After making certain changes and additions, the Chicago, Rock Island and Gulf Railway Company adopted the book of rules issued by the Chicago, Rock Island and Pacific Railway Company for the control of the operation of its line, and such rules are now in force. The cars and engines belonging to the Chicago, Rock Island and Gulf Railway Company, when in need of repairs, have the work done at its shops at Fort Worth and Dallas, if the cars and engines are convenient to these two points; otherwise, the work is done at some other convenient place, either on or off the line of the Chicago, Rock Island and Pacific Railway Company, wherever the cars or engines may be at the time the repairs are needed.

"On the 2d day of August, 1904, the Chicago, Rock Island and Gulf Railway Company had a different president and altogether different executive officers from any of the lines above listed as included in the Rock Island system. The Chicago, Rock Island and Gulf Railway Company does not now and never has paid any part of the salary of any officer of the Chicago, Rock Island and Pacific Railway Company,

or of any of the lines named as constituting the Rock Island System.

"Before the Chicago, Rock Island and Gulf Railway Company purchased the Chicago, Rock Island and Texas Railway Company, the Chicago, Rock Island and Mexico Railway Company and the Choctaw, Oklahoma and Texas Railroad Company, M. E. Sebree was trainmaster of the Chicago, Rock Island and Texas Railway Company and division trainmaster of the Chicago, Rock Island and Pacific Railway Company, with jurisdiction to Chickasha, Indian Territory. Since the purchase by the Gulf Company of the above-named Texas lines Mr. Sebree's jurisdiction extends over what were the Chicago, Rock Island and Mexico Railway Company and the Choctaw, Oklahoma and Texas Railroad Company, otherwise there has been no change in his employment or jurisdiction for the past five to ten years.

"The Chicago, Rock Island and Gulf Railway Company pays a portion of the salary of a joint train dispatcher located at Chickasha, Indian Territory, under the same character of arrangement which existed between the Chicago, Rock Island and Texas Railway Company and the Chicago, Rock Island and Pacific Railway Company. This train dispatcher in giving orders for the handling of trains on the Chicago, Rock Island and Gulf Railway Company is subject to the control, direction and supervision of the executive officers of the Chicago, Rock Island and Gulf Railway Company as if exclusively employed by it.

"The rails of the Chicago, Rock Island and Gulf Railway Company on the line running from Fort Worth north connect at the state line with the rails of the Chicago, Rock Island and Pacific Railway Company. The point of connection is somewhere near the middle of Red River on a bridge. At this particular point there is no town, station or turnout, and the trains going in either direction do not stop at said point. It was not possible to build a town or station at the exact point of connection."

It was further stipulated as to Thomas, the conductor, and Turpin, the ticket agent, after they were served with process, as follows:

A. L. Thomas "was at the date of said service and is now and has for many years been a conductor running on and handling passenger trains for the defendant, the Chicago, Rock Island and Pacific Railway Company, the Chicago, Rock Island and Texas Railway Company, and later on the Chicago, Rock Island and Gulf Railway Company, after its purchase of the Texas company, running and handling such trains between Fort Worth, Texas, and Caldwell, Kansas. That the run of said Thomas is now and has been from Fort Worth, Texas, to Caldwell, Kansas, as aforesaid, on both sides of the state line, and that Caldwell, Kansas, is the end of the first passenger division on said lines north of Fort Worth. And it is further agreed that V. N. Turpin, upon whom process was served herein as the ticket agent of the defendant company was, at the date of the service of said process and has been for a long time ticket agent of the Chicago, Rock Island and Gulf Railway Company at Fort Worth, engaged in selling tickets for the said Chicago, Rock Island and Gulf Railway Company, over its lines and also over the lines of the Chicago, Rock Island and Pacific Railway Company and all of its connections. It is further agreed that the facts are that 'Thomas is carried on the Pacific Company's pay roll and paid for services rendered while on that company's line north of the Texas state line; and is carried on the Gulf Company's pay roll and paid by the Gulf Company for services rendered on its line south of the Texas state line; and that Turpin is carried on the Gulf Company's pay roll alone, and is not carried on the Pacific Company's pay roll, and is not an agent of the Pacific Company, unless the above stated facts make him one.' "

The annual report of the Pacific Company shows that the board of directors of said company consists of thirteen members, with an executive committee of eight members.

The report of the Rock Island Company shows that the board of directors of said company consists of sixteen members and its financial committee of six members.

Eleven members of the board of directors of the Pacific Company are also members of the board of directors of the Rock Island Company. Five members of the executive committee of the Pacific Company are also members of the finance committee of the Rock Island Company. The officers of the Rock Island Company, with two exceptions, are also officers of the Pacific Company and a majority of the officers of either said companies are common to both of them.

S. B. Hovey, upon whom service was made as aforesaid, was also produced as a witness, and testified that at the time of the service of citation upon him he was the Vice President and Superintendent of the Gulf Railroad Company, and resided at Fort Worth, Texas; that he held the same position in the Chicago, Rock Island and Texas Company before it acquired the Gulf Company, and before that time he had been for many years an employé of the Pacific Company; that the train dispatcher of the Pacific Company, located on its lines at Chickasha, in the Indian Territory, is also train dispatcher of the Gulf Company. He was a "joint man," as the trains were operated by the same crews across the Texas state line without stopping; that the movements of trains on the Gulf route are directed from Chickasha as are those on the line of the Pacific Company after they cross the state line going northward. The daily reports of the cars on the Gulf line are made to the chief dispatcher at Chickasha; that the business could not be handled in any other way.

Settlements between the two companies are made on a mileage basis. Reports are made by the officers of the Gulf Company and Mr. Winchel, who is President of the Gulf Company and of the Pacific Company. The Gulf Company keeps a fund on deposit with the Pacific Company at Chicago and receives interest thereon; that when the defendant company

constructed its line of road across the Red River in 1892, the Texas Company was organized, and the Pacific Company furnished the money with which the road was constructed south from Red River to Fort Worth. Most of the directors of the Texas Company were employ  s of the Pacific Company. No dividends were paid on the stock of the Texas Company, and when the Gulf Company took over its property the directors surrendered their stock in the old company and got back their \$5.00 each; that the transfer to the Gulf Company of the Texas road, the El Paso road and the Mexico road was for the purpose of consolidating these roads and getting under one management, the management of the system. The employ  s who run over both the Pacific and Gulf lines while in Texas are employed and discharged by the latter company; north of the Texas line they are employed and discharged by the Pacific Company; the operation of trains was then as it had been before the Rock Island and Texas road ceased to exist; that the Pacific Company did not pay any part of the salaries of the heads of the departments of the Gulf Company—none for the general office. It, the Pacific Company, pays the train men according to the number of miles run on its rails. The Gulf Company pays the expenses of the men while on the rails of that company according to the number of miles run; that the Rock Island and Gulf Company had separate cars, servants and agents of its own; that the Gulf Company lines booked trains daily between Fort Worth and its northern terminus and back, which trains do not run on the lines of the Pacific road. He also testified that the lines mentioned on the Rock Island folder as constituents of the Rock Island System, namely, the Chicago, Rock Island and Mexico; the Chicago, Rock Island and El Paso; the Choctaw, Oklahoma and Gulf; the Chicago, Rock Island and Texas; and the Chicago, Rock Island and Pacific, were not operated as one road, but were operated separately; that the revenues were divided just as revenues earned by the Chicago, Rock Island and Gulf and T. & P. would be divided; that they were

divided on a mileage basis; that no reports were made by the Gulf Company to the head of the traffic department of the Pacific Company; that reports were made by the Gulf Company to the President of the Gulf Company, who was also President of the Pacific Company; that no representative of the Pacific Company was sent to examine the books of the Gulf Company further than just as a representative of any other connecting line would occasionally check up business with the Gulf Company; that the books of the latter company had never been audited from the Chicago office; that there was no contract between the Gulf Company and the Pacific Company, except a traffic agreement as to the division of rates, made by the general freight agent of each line, of the same character of contracts which exist between the Gulf Company and other lines with which it interchanges business; that the Gulf Company owned about 1,500 or 1,600 freight and cattle cars and about twenty engines, which were marked C. R. I. and G.; the train dispatcher has no power to furnish cars on the Gulf road "if I instruct him not to do so"; that since he had been Vice President of the Gulf Company, he had had no connection whatever with the Pacific Company and no duties to perform with any other railroad than the Gulf Company; that for traffic hauled over the two lines the Gulf Company received the amount agreed upon by the general freight agents in the same manner that the Gulf Company and the T. and P. divided the revenues; that neither road pays any part for moving freight over the other line, nor pays any part of the loss sustained while in the hands of the other company by damage to freight; that the Gulf Company has on deposit with the Pacific Company several hundred thousand dollars, for which it receives six per cent interest per annum. When needed it is checked out.

A copy of the folder of the "Rock Island System's" lines was sent up with the record. A copy of the map shown on the folder is printed on the freight window of the office of the agent of the Gulf Company and calendars with that map

printed on them are distributed for the purpose of advertising the system lines.

Mr. D. T. Bomar, with whom *Mr. Sam. J. Hunter* was on the brief, for plaintiffs in error, submitted:

By organizing the Chicago, Rock Island and Texas Railway Company, and through it operating the railroad in Texas, the Chicago, Rock Island and Pacific Railway Company was doing its business in Texas by and through those persons who purported to represent the sub-corporation, and the principal corporation was legally in Texas through its said agents, and was liable to suits in the courts of this State by service of process upon the agents which represented it in that business. *St. Claire v. Cox*, 106 U. S. 350; *Hatcher v. Leasing Co.*, 75 Fed. Rep. 368; *Manufacturing Co. v. Kelly*, 160 U. S. 327; *S. C.*, 16 Sup. Ct. 307; *Pennsylvania R. Co. v. Anoka Nat'l Bank*, 47 C. C. A. 454; *S. C.*, 108 Fed. Rep. 482; *Norton v. Railroad Co.*, 61 Fed. Rep. 618; *Interstate Tel. Co. v. Baltimore & O. Tel. Co.*, 51 Fed. Rep. 49; *Montgomery v. Frobes*, 148 Massachusetts, 252; *Day v. Telegraph Co.*, 66 Maryland, 365.

Since the defendant company so completely owns, dominates and controls the auxiliary corporation through its ownership of the stocks and bonds of the latter company, the contract mentioned became useless and its cancellation did not lessen or affect the control of the defendant over the subordinate corporation. It follows that the service had on the officers and agents of the latter company was valid service on the defendant. *Buie v. C., R. I. & P. Ry. Co.*, *supra*, also other cases *supra* and the authorities there cited and reviewed. See also the following authorities: *Northern Securities Co. v. United States*, 193 U. S. 197; *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. Rep. 202; *Lehigh Valley Ry. Co. v. Dupont*, 128 Fed. Rep. 841; *Newcomb v. N. Y. Cent. Ry. Co.*, 81 S. W. Rep. 1072; *Oriental Invest. Co. v. Barclay*, 64 S. W. Rep. 87; *C. & O. Ry. Co. v. Howard*, 178 U. S. 153-167; *Tuchband v. C. &*

A. Ry. Co. 115 N. Y. 437; 6 *Thomp. Corp.*, §§ 7505, 8034, 8037; *Barrow Steamship Co. v. Kane*, 170 U. S. 100.

The facts established by the agreement of counsel for the defendant and by evidence that was undisputed, show conclusively that the Chicago, Rock Island and Gulf Railway Company was and is controlled and dominated by defendant in such a way and to such an extent as to make it such a local agent of defendant in Texas as is contemplated by Art. 1223 of the Texas statutes, and such facts show conclusively that S. B. Hovey, F. E. Merrell and M. E. Sebree who were severally served with process in this case were each and all such agents of defendant as is contemplated by said statute.

The parties served with process at the time of such service sustained to the defendant the exact relation prescribed by Texas statute regulating such service. Such statute was enacted to provide for the service of process in just such cases as this one and to meet the conditions here presented. The real question at issue, therefore, is: Had the Texas legislature the power to enact such law? If yea, then the service was valid service on the defendant. *Barrow Steamship Co. v. Kane*, 170 U. S. 107, 108; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 146; *Shaw v. Quincy Mining Co. (Ex parte Shaw)*, 145 U. S. 444, 452.

Mr. M. A. Low for defendant in error:

A foreign corporation can only do business in a State with its consent expressed or implied. The laws of Texas give no such express consent to a foreign railway company and none can be implied, either from its laws or its action with respect to such corporations. It does not authorize a foreign railway company to own, lease or operate a railway within the State. There is nothing in the record to show that the Rock Island Company was doing business in Texas with the consent of the State. *The Lafayette Ins. Co. v. French*, 18 How. 404;

St. Clair v. Cox, 106 U. S. 350; *Barrow Steamship Company v. Kane*, 170 U. S. 100.

The evidence offered on the hearing of the motions to quash the service of citations was not sufficient to show that the Rock Island Company was doing business in Texas. As a matter of law, it could not own, lease or operate the railway of the Gulf Company; nor could these companies consolidate. On the facts stated in the petition the court will take judicial notice that each company was a separate and independent corporation, created under the laws of different States, and that they could not be one company, substantially or otherwise, because they had no power to so unite.

The fact that the Rock Island Company loaned money to the Texas Company to assist it in constructing or extending its railway, that it owned all or any part of the capital stock of the Gulf Company, and that it exercised such authority in the selection of directors of the company as a stockholder lawfully may, does not tend to show that it was doing business in Texas. *United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17; *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S. 587, 596; *Potter v. Pittsburg Steel Co.*, 120 U. S. 649; *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 333, 344; *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. Rep. 235; *Central Grain & Stock Exch. v. Board of Trade*, 125 Fed. Rep. 463; *St. Louis & S. W. R. Co. v. Gate City Co-operative Co.*, 70 Arkansas, 10; *St. Louis & Southwestern R. Co. v. Smith*, 71 Arkansas, 290; *Conley v. Mathieson Alkali Works*, 190 U. S. 406.

None of the citations issued in this case was legally served, and on the facts in evidence, the court did not err in sustaining the motion to quash.

To the validity of service of process upon a foreign corporation, it is necessary that the corporation be at the time actually and substantially doing business in the State, and that the service be made upon an agent representing the corporation with respect to the business carried on in the State, in such a capacity that, in the absence of express authority,

acquiescence in the exercise of such authority ought to be clearly implied. The agent upon whom service is made must sustain such a representative relation to the business transacted by the corporation in the State as to charge him with the duty of accepting service. Story on Agency, § 140; *St. Clair v. Cox*, 106 U. S. 350, 357; *Fitzgerald Const. Co. v. Fitzgerald*, 137 U. S. 98-106; *Mexican Central Ry. v. Pinkney*, 149 U. S. 194; *Goldey v. Morning News*, 156 U. S. 518, 521, 522; *United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 617, 619; *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. Rep. 235, 240; *Conley v. Mathieson Alkali Works*, 190 U. S. 406; *Central Grain & Stock Exchange v. Board of Trade*, 125 Fed. Rep. 463; *N. K. Fairbanks & Co. v. Cincinnati N. O. & T. P. Ry. Co.*, 54 Fed. Rep. 420, 423; *Strain v. Chicago Portrait Co.*, 126 Fed. Rep. 831, 833, 834; *Frawley v. Pennsylvania Casualty Co.*, 124 Fed. Rep. 259; *Union Pacific R. Co. v. Miller*, 87 Illinois, 45.

Service upon one partner or joint obligor will not confer jurisdiction to render a personal judgment against another partner or joint obligor. *D'Arcy v. Ketchum*, 11 How. 165; *Goldey v. Morning News*, 156 U. S. 521; *In re Grossmayer*, 177 U. S. 48; *Kingsley v. Great Northern R. Co.*, 91 Wisconsin, 380.

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

This case presents a question of jurisdiction to be determined as one of fact. It may be divided into two propositions: First. Was the Pacific Company doing business in the State of Texas? Secondly. If so, were the alleged agents served with process in the State of Texas duly authorized as such and competent to be thus served, in such wise as to give jurisdiction of the Pacific Company?

The statutes which concern service on corporations in the State of Texas are as follows (Sayles' Texas Civil Statutes):

"Art. 1194, Sec. 25. Foreign, private or public corporations, etc.—Foreign, private or public corporations, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any court within this State having jurisdiction over the subject matter, in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or when the defendant corporation has no agent or representative in the State, then in the county where the plaintiffs or either of them reside."

"Art. 1223. Foreign corporations, how served.—In any suit against a foreign, private or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association, or acting corporation or association."

By the act of March 13, 1905, General Laws of Texas, 1905, p. 30, an additional method of serving foreign corporations was provided as follows:

"SEC. 2. That service may be had on foreign corporations having agents in this State in addition to the means now provided by law by serving citation upon any train conductor who is engaged in handling trains for two or more railway corporations, whether said railroad corporations are foreign or domestic corporations, if said conductor handles trains over foreign or domestic corporations' tracks across the state line of Texas, and on the track of a domestic railway corporation within the State of Texas, or upon any agent who has an office in Texas, and who sells tickets or makes contracts for the transportation of passengers or property over any line of railway or part thereof, or steamship or steamboat of any such foreign corporation or company.

"SEC. 3. For the purpose of obtaining service of citation on foreign railway corporations, conductors who are engaged in handling trains and agents engaged in the sale of tickets or the making of contracts for the transportation of property as described in sec. 2 of this act, are hereby designated as agents of said foreign corporations or companies upon whom citation may be served."

It is settled by the decisions of this court that foreign corporations can be served with process within the State only when doing business therein, and such service must be upon an agent who represents the corporation in its business. *St. Clair v. Cox*, 106 U. S. 350; *Goldey v. Morning News*, 156 U. S. 518, 521, 522; *Conley v. Mathieson Alkali Works*, 190 U. S. 406.

It is contended upon the part of the plaintiffs in error that the Pacific Company was doing business in the State of Texas, because of a partnership arrangement with the Gulf Company, or because the latter company was the agent of the Pacific Company, or, as it is sometimes said, the representative of the Pacific Company in the State of Texas. As to the question of partnership, we do not think this record presents a question of that sort. The suit is not for a partnership liability. It is an action upon a single cause of action for the tort of the Pacific Company. Service is not had by serving one partner. The real contention is that the service reaches the Pacific Company because of the agency or representative character of the Gulf Company.

Is it true that the Gulf Company was the agent of the Pacific Company or its mere creature in such a sense that to serve it is equivalent to serving the controlling company? It is a fact that both companies had common agents and employes to a certain extent, but the record shows that such employes were paid in proportion to the business done for each company. And that while in the service of the companies respectively they were under the exclusive management and control of the company in whose service they were engaged, with no

power to discharge or employ, the one company for the other; and that, although the service was in a sense common, it was kept distinct and separate in the control and payment of the employes while in the separate service of the respective companies.

It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business.

This record discloses that the officers and agents of the Gulf Company control its management. The fact that the Pacific Company owns the controlling amounts of the stock of the Gulf Company and has thus the power to change the management does not give it present control of the corporate property and business. *Pullman Palace Car Company v. Missouri Pacific Co.*, 115 U. S. 587, 597.

In *Conley v. Mathieson Alkali Works*, 190 U. S. 406, suit was brought upon a contract with the Mathieson Alkali Works. The defendant had designated no agent upon whom summons could be served, and service was made upon two members of the board of directors resident of the city of New York. Upon motion made to set aside the service of summons a reference was directed to ascertain whether the defendant corporation was doing business in the State of New York. The master reported, among other things, that the defendant had operated a plant at Niagara Falls, but had conveyed all its property to another corporation organized under the laws of Virginia. That the consideration expressed for the conveyance was \$1.00 and other valuable consideration, but the substantial consideration was the entire capital stock of the

grantee, the Castner Electrolytic Alkali Company. That the business of the defendant since said transfer was carried on in Providence, where it had its principal place of business. The master found that the company at the time of attempted service was not doing business in New York. Of the effect of the transfer of the entire stock of the new company to the defendant the master found: "The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company, and that the operations of that company were carried on under the same management as before December 31, 1900, is not material. The new corporation was a separate legal entity, and, whatever may have been the motives leading to its creation, it can only be regarded as such for the purpose of legal proceedings. It was that corporation alone which transacted any business in this State, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation. *People v. American Bell Telephone Co.*, 117 N. Y. 241; *United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17."

Upon exceptions the master's report and conclusions were affirmed and the service set aside. That judgment was affirmed in this court. In the course of the opinion, Mr. Justice McKenna, speaking for the court, coming to deal with the effect of the transfer to the Castner Company, said: "The defendant was competent to convey its property to the Castner Electrolytic Alkali Company and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law which provided for a monthly meeting in New York could not of itself keep the corporation in New York. The testimony is positive that no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; that all of the business of the corporation was conducted at Providence, except of a purely manufacturing character, which was conducted at Saltville."

So, in the case at bar, notwithstanding the ownership of the stock in the Gulf Company by the Pacific Company, the former company transacts the business in Texas, and is a separate legal entity, authorized under the laws of Texas and legitimately carrying on business there.

There is no evidence that the Pacific Company may not lawfully hold the stock of the Gulf Company, and under the statute of Illinois it seems to be authorized so to do. Starr & Curtis, Ill. Stat. vol 3, p. 3229. It is true that the Pacific Company loaned the money to build the road of the Texas Company, predecessor of the Gulf Company. But as was well observed by Judge (afterwards Justice) Jackson in *United States v. American Bell Telephone Company*, 29 Fed. Rep. 17: "For one person to supply means for another to do business on is not the doing of that business by the former."

The conduct and control of the business in Texas was entrusted to the Gulf Company. As the largest stockholder the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contracts and to persons with whom it dealt.

Nor do we think that the persons served with process are agents of the Pacific Company doing the business of the company in Texas. Section 2 of the act of March 13, 1905, Laws of Texas, 1905, p. 30, is very broad, and would seem to comprehend conductors who handle trains for two or more corporations over foreign or domestic roads across the state lines of Texas and on the track of a domestic railroad within the State of Texas, or upon any agent who has an office in Texas and who sells tickets or makes contracts for the transportation of passengers or property over any line of railroad or part thereof, of any such foreign corporation or company; and such companies and agents by section 3 of the act are made agents of the foreign corporation or company, upon whom the cita-

tion may be served. But it is essential to the validity of such service that the corporation shall be doing business within the State, and that the service be upon an agent representing the corporation with respect to such business. *Goldie v. Morning News*, 156 U. S. *ubi sup.*; *Conley v. Mathieson Alkali Co.*, 190 U. S. *ubi sup.*

The conductors, one of whom was served, when he crossed the Texas line, this record shows, became the servant and agent of the Gulf Company. The ticket agent sold tickets for the Gulf Company, in whose employment he was. He would also sell tickets good upon its line, and over the lines of the Pacific Company, but he transacted this business as the agent of the Gulf Company. As to Hovey, the record fails to show that he was agent of the Pacific Company; on the contrary, it shows that he had no connection with the company, and that his duties were confined to the affairs of the Gulf Company. The same is true of Merrell; and as to Sebree, the record shows that for the services rendered as trainmaster he was paid by each company for the service performed for it and had no charge as agent of the business of the Pacific Company in the State of Texas.

We reach the conclusion that the Pacific Company was not doing business in the State of Texas and that the attempted service was not upon agents of that company transacting its business in that State in such a sense as to give jurisdiction by service of citation upon them. The judgment of the Circuit Court is

Affirmed.

Dissenting: The CHIEF JUSTICE and MR. JUSTICE MOODY.

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Argument for Plaintiff in Error.

METROPOLITAN LIFE INSURANCE COMPANY OF
NEW YORK v. CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 199. Argued January 31, 1907.—Decided April 8, 1907.

Neither the fiction that personal property follows the domicile of the owner, nor the doctrine that credits evidenced by notes have the situs of the latter, can be allowed to obscure the truth; and personal property may be taxed at its permanent abiding place although the domicile of the owner is elsewhere.

Where a non-resident enters into the business of loaning money within a State and employs a local agent to conduct the business, the State may tax the capital employed precisely as it taxes the capital of its own citizens, in like situation, and may assess the credits arising out of the business, and the foreigner cannot escape taxation upon his capital by temporarily removing from the State the evidences of credits which, under such circumstances, have a taxable situs in the State of their origin. Loans made by a New York life insurance company on its own policies in Louisiana are taxable in that State although the notes may be temporarily sent to the home office.

115 Louisiana, 698, affirmed.

THE facts are stated in the opinion.

Mr. Charles Pollard Cocke, with whom *Mr. William Wirt Howe* and *Mr. Walker B. Spencer* were on the brief, for plaintiff in error:

The property sought to be taxed was beyond the limits and jurisdiction of the State of Louisiana, and the statute of Louisiana of 1898, as construed and applied, deprives the plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment. *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Railroad Co. v. Jackson*, 7 Wall. 262; *Murray v. Charleston*, 96 U. S. 432, 440; *Erie Railroad Co. v. Pennsylvania*, 153 U. S. 628-648; *New Orleans v. Stempel*, 175 U. S. 309, and *Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 389, distinguished.

The Supreme Court of Louisiana cannot be held to have

decided that any statute of Louisiana imposed on plaintiff in error, as a condition to doing business in the State, payment of taxes on property in its hands beyond the jurisdiction of the State. But, if the court did so decide, plaintiff in error may, nevertheless, assert in this court that the statute is unconstitutional.

The State cannot by statute validly exact from a foreign corporation, as a condition, either to entering the State, or as a condition to continuing to do business therein, an agreement or stipulation that it will not avail itself of the rights and privileges conferred on it by the Federal Constitution. *Insurance Co. v. Morse*, 20 Wall. 445; *Doyle v. Continental Ins. Co.*, 94 U. S. 335; *Barrow v. Burnside*, 121 U. S. 186; *Southern Pacific Co. v. Denton*, 146 U. S. 202; *Barrow Steamship Co. v. Kane*, 170 U. S. 100; *Blake v. McClung*, 172 U. S. 239; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 257.

The utmost that the State can do is to provide that any foreign corporation which asserts a right or privilege under the Federal Constitution shall be deprived of its license to do business in the State. Its power, in other words, may be exerted to punish, but not to prevent, an appeal to constitutional immunity. *Security Mutual Life Ins. Co. v. Prewitt*, *supra*.

Mr. F. C. Zacharie, Mr. George H. Terriberry and Mr. H. Garland Dupre, with whom *Mr. Samuel L. Gilmore* was on the brief, for defendants in error:

The Supreme Court of Louisiana having decided that there was nothing in the constitution and laws of Louisiana, opposed to the taxing of these notes, this court will not go behind the decision of the highest court of the State upon this point. *Michigan Central R. R. Co. v. Powers*, 201 U. S. 291.

In *Blackstone v. Miller*, 188 U. S. 189, and *Washington County v. Bristol*, 177 U. S. 133, this court affirmed the power of state taxation of notes which were given in the State and were payable in the State, although the notes were held

in New York until such time as it became necessary to collect or renew them. This was done by forwarding the notes back to the agent in the State which was the domicile of the debtor.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to review the judgment of the Supreme Court of Louisiana, which sustained a tax on the "credits, money loaned, bills receivable," etc., of the plaintiff in error, a life insurance company incorporated under the laws of New York, where it had its home office and principal place of business. It issued policies of life insurance in the State of Louisiana and, for the purpose of doing that and other business, had a resident agent, called a superintendent, whose duty it was to superintend the company's business generally in the State. The agent had a local office in New Orleans. The company was engaged in the business of lending money to the holders of its policies, which, when they had reached a certain point of maturity, were regarded as furnishing adequate security for loans. The money lending was conducted in the following manner: The policy holders desiring to obtain loans on their policies applied to the company's agent in New Orleans. If the agent thought a loan a desirable one he advised the company of the application by communicating with the home office in New York, and requested that the loan be granted. If the home office approved the loan the company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed, attached the policy to it, and forwarded both note and policy to the home office in New York. He then delivered to the borrower the amount of the loan. When interest was due upon the notes it was paid to the agent and by him transmitted to the home office. It does not appear whether or not the notes were returned to New Orleans for the endorsement of the payments of interest. When the notes were paid it was to the agent, to whom they were sent

to be delivered back to the makers. At all other times the notes and policies securing them were kept at the home office in New York. The disputed tax was not *eo nomine* on these notes, but was expressed to be on "credits, money loaned, bills receivable," etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment. The tax was assessed under a law, Act 170 of 1898, which provided for a levy of annual taxes on the assessed value of all property situated within the State of Louisiana, and in Section 7 provided as follows:

"That it is the duty of the tax assessors throughout the State to place upon the assessment list all property subject to taxation, including merchandise or stock in trade on hand at the date of listing within their respective districts or parishes. . . . And provided further, In assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, &c., as will represent in their aggregate a fair average on the capital, both cash and credits, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this State business interests that may claim domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared as assessable within this State and at the business domicile of said non-resident, his agent or representative."

The evident purpose of this law is to lay the burden of taxation equally upon those who do business within the State. It requires that in the valuation for the purposes of taxation of the property of mercantile firms the stock, goods and credits shall be taken into account, to the end that the average

capital employed in the business shall be taxed. This method of assessment is applied impartially to the citizens of the State and to the citizens of other States or countries doing business, personally or through agents, within the State of Louisiana. To accomplish this result, the law expressly provides that "all bills receivable, obligations or credits arising from the business done in this State shall be assessable at the business domicile of the resident." Thus it is clear that the measure of the taxation designed by the law is the fair average of the capital employed in the business. Cash and credits and bills receivable are to be taken into account merely because they represent the capital and are not to be omitted because their owner happens to have a domicile in another State. The law was so construed by the Supreme Court of Louisiana, where, in sustaining the assessment, it was said:

"There can be no doubt that the seventh section of the act of 1898, quoted in the judgment of the District Court, announced the policy of the State touching the taxation of credits and bills of exchange representing an amount of the property of non-residents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the State of Louisiana. The evident object of the statute was to do away with discrimination theretofore existing in favor of non-residents as against residents, and place them on an equal footing. The statute was not arbitrary but a legitimate exercise of legislative power and discretion."

The tax was levied in obedience to the law of the State, and the only question here is whether there is anything in the Constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the State. Property situated without that jurisdiction is beyond the State's taxing power, and the exaction of a tax upon it is in violation of the Fourteenth Amendment to the Constitution. *Louisville Ferry Co. v. Kentucky*, 188 U. S. 385; *Delaware &c.*

Railroad Co. v. Pennsylvania, 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194. But personal property may be taxed in its permanent abiding place, although the domicile of the owner is elsewhere. It is usually easy to determine the taxable situs of tangible personal property. But where personal property is intangible, and consists, as in this case, of credits reduced to the concrete form of promissory notes, the inquiry is complicated, not only by the fiction that the domicile of personal property follows that of its owner, but also by the doctrine, based upon historical reasons, that where debts have assumed the form of bonds or other specialties, they are regarded for some purposes as being the property itself, and not the mere representative of it, and may have a taxable situs of their own. How far promissory notes are assimilated to specialties in respect of this doctrine, need not now be considered.

The question in this case is controlled by the authority of the previous decisions of this court. Taxes under this law of Louisiana have been twice considered here, and assessments upon credits arising out of investments in the State have been sustained. A tax on credits evidenced by notes secured by mortgages was sustained where the owner, a non-resident who had inherited them, left them in Louisiana in the possession of an agent, who collected the principal and interest as they became due. *New Orleans v. Stempel*, 175 U. S. 309. Again, it was held that where a foreign banking company did business in New Orleans, and through an agent lent money which was evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed, the credits thus evidenced were taxable in Louisiana. *Board of Assessors v. Comptoir National*, 191 U. S. 388. In both of these cases the written evidences of the credits were continuously present in the State, and their presence was clearly the dominant factor in the decisions. Here the notes, though present in the State at all times when

they were needed, were not continuously present, and during the greater part of their lifetime were absent and at their owner's domicile. Between these two decisions came the case of *Bristol v. Washington County*, 177 U. S. 133. It appeared in that case that a resident of New York was engaged through an agent in the business of lending money in Minnesota, secured by mortgages on real property. The notes were made to the order of the non-resident, though payable in Minnesota, and the mortgages ran to her. The agent made the loans, took and kept the notes and securities, collected the interest and received payment. The property thus invested continued to be taxed without protest in Minnesota, until finally the course of business was changed by sending the notes to the domicile of the owner in New York, where they were kept by her. The mortgages were, however, retained by the agent in Minnesota, though his power to discharge them was revoked. The interest was paid to the agent and the notes forwarded to him for collection when due. Taxes levied after this change in the business were in dispute in the case. In delivering the opinion of the court, Mr. Chief Justice Fuller said: "Nevertheless, the business of loaning money through the agency in Minnesota was continued during all these years, just as it had been carried on before, and we agree with the Circuit Court that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes as expounded in the decisions to which we have referred. . . ."

Referring to the case of *New Orleans v. Stempel*, the Chief Justice said:

"There the moneys, notes and evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

"Persons are not permitted to avail themselves, for their own benefit, of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public need, through action of this sort, whether taken for convenience or by design."

Accordingly it was held that the tax was not forbidden by the Federal Constitution.

In this case, the controlling consideration was the presence in the State of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the *Bristol case*. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the State. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long continued though not permanent absence, cannot have the effect of releasing them as the representatives of investments in business in the State from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true home, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. *Blackstone v. Miller*, 188 U. S. 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising

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out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidences of credits in the form of notes. Under such circumstances, they have a taxable situs in the State of their origin.

The judgment of the Supreme Court of Louisiana is

Affirmed.

BEHN, MEYER & CO. v. CAMPBELL & GO TAUCO.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 227. Argued March 7, 1907.—Decided April 8, 1907.

In the absence of modification by statute the rule in respect to all courts whose records are brought for review to this court is that errors alleged to have been committed in an action at law can be reviewed here only by writ of error; but this court has always observed the rule recognized by legislation that while an appeal brings up questions of fact as well as of law, on writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact.

In reviewing judgments of the Supreme Court of the Philippine Islands the same rule applies as does in reviewing judgments of the Circuit Court of the United States that alleged errors of law not stated in the assignment of errors filed with the petition for the writ of error will be disregarded unless they are so plain that under the provision in the thirty-fifth rule to that effect the court may at its option notice them, but this court will not subject the opinion of the court below to minute scrutiny to discover error of law when on the whole it is clear, as in this case, that the facts found by that court justify the judgment under review.

THE defendants in error, hereinafter called the plaintiffs, brought an action in the Court of First Instance of the city of Manila in the Philippine Islands, to recover from the plaintiff in error, hereinafter called the defendant, the sum of 9,250.62 pesos, alleged to be due on account of labor and materials furnished under a building contract and its modifications. The defendant among other defenses set up first, that the labor

was performed in a negligent and unworkmanlike manner, which caused the defendant great damages; and, second, that the plaintiffs contracted in writing with the defendant to fill a certain lot of land with earth and sand at a given rate per cubic meter, and had been paid upon their representation of the amount of earth and sand used in the filling \$81,497.65, Mexican currency; that the amount of sand and earth used was much less than that represented, and that the plaintiffs had been overpaid \$41,197.63, Mexican currency. The defendant sought to recover this overpayment by way of counter claim. A trial before the judge of the Court of First Instance resulted in a finding that the defendant had been damaged through the negligent and unworkmanlike manner of furnishing the labor under the building contract and its modifications, to an amount equal to the sum remaining due under the terms of that contract, and that there had been an overpayment on the filling contract, as alleged by the defendant. Accordingly judgment was rendered dismissing the plaintiffs' complaint and that the defendant recover from the plaintiffs \$52,000, Mexican currency. The plaintiffs appealed to the Supreme Court of the Islands. That court found as a fact substantially that the plaintiffs had fully complied with their contract and were entitled to recover the amount they alleged to be due; that the amount paid by the defendant to the plaintiff on account of filling was determined by actual measurements made at the time of the filling by defendant's representatives; that there was no fraud or mistake, and that the defendant, therefore, was not entitled to recover anything on account of overpayment on that account. The judgment of the Court of First Instance was reversed, and judgment ordered for the plaintiffs in the sum of \$9,250.62, Mexican currency. Thereupon the defendant appealed to this court. The appeal was dismissed by this court for want of jurisdiction. The defendant then sued out a writ of error, which was allowed by a justice of the Supreme Court of the Philippine Islands, and filed with its petition the following assignment of errors:

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"1. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the city of Manila to the effect that the plaintiffs in error were entitled to the sum of \$9,250.62, Mexican currency, as damages sustained by reason of the faulty construction of the premises in question.

"2. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the city of Manila granting judgment in favor of the plaintiff in error in the sum of \$52,000, Mexican currency, the amount overpaid by the plaintiffs in error to the defendants in error for the delivery of sand.

"3. The Supreme Court of the Philippine Islands erred in finding as matters of fact the following:

"(1.) That in the construction of the building the contract, plans and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone, instead of upon the ground as called for by the plan.

"(2.) That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.

"(3.) That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessary almost completely to the direction of the inspecting architect or engineer.

"(4.) That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

"(5.) That although there is some evidence to indicate that

a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

"(6.) If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

"(7.) That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

"(8.) That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling house.

"By the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substantially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted.

"4. The Supreme Court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the court reversing the judgment of the Court of First Instance.

"5. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the city of Manila, and in giving judgment against the plaintiff in error in the sum of \$9,250.62, Mexican currency.

"6. The Supreme Court of the Philippine Islands erred in not confirming the judgment of the Court of First Instance of the city of Manila in giving judgment in favor of the plaintiff in error in the sum of \$52,000, Mexican currency."

Mr. Henry E. Davis, with whom *Mr. Charles C. Carlin* was on the brief, for plaintiff in error.

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

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Opinion of the Court.

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

The defendant first appealed from the judgment of the Supreme Court of the Philippine Islands, which had been rendered against it, and the appeal was dismissed. 200 U. S. 611. The reason, so plain that it seemed not to require statement, was that errors alleged to have been committed in an action at law can be reviewed here only by writ of error. This in the absence of modification by statute is the rule in respect to all courts whose records are brought here for review. *Walker v. Dreville*, 12 Wall. 440; *United States v. Hailey*, 118 U. S. 233; *Deland v. Platte County*, 155 U. S. 221; *Comstock v. Eagleton*, 196 U. S. 99.

The defendant, having failed in its appeal, has now brought a writ of error and asks this court to review the facts to the same extent that they would be reviewed on appeal. But this overlooks the vital distinction between appeals and writs of error which has always been observed by this court, and recognized in legislation. An appeal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. *Wiscart v. D'Auchy*, 3 Dall. 321; *Generes v. Campbell*, 11 Wall. 193; *United States v. Dawson*, 101 U. S. 569; *England v. Gebhard*, 112 U. S. 502; *Martinton v. Fairbanks*, 112 U. S. 670; *Dower v. Richards*, 151 U. S. 658 (where the cases are reviewed by Mr. Justice Gray); *Elliott v. Toepfner*, 187 U. S. 327; § 1011, Rev. Stat.

The assignment of errors in the case at bar does not allege any errors of law but deals exclusively with questions of fact. There are six assignments. The first, second, fifth, and sixth assignments severally allege that the Supreme Court erred in rendering the judgment which it did and in reversing the judgment of the Court of First Instance. The third assignment specifically recites that "the Supreme Court of the Philippine

Islands erred in finding as matters of fact the following;" then come eight specifications of errors in such findings. It is, however, argued by counsel that the fourth assignment of error in effect alleges an error in law. That assignment is as follows: "The Supreme Court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the court reversing the judgment of the Court of First Instance."

The Philippine Code of Procedure (Public Laws of Philippine Commission, Act 190, 1901) prescribes in chapter 22 the practice of the Supreme Court in reviewing the judgments of courts of first instance. It confines the review to questions of law, with certain exceptions, one of which is as follows:

"If the excepting party filed a motion in the Court of First Instance for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence, and the judge overrules said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence and make such findings upon the facts and render such final judgment as justice and equity require. But, if the Supreme Court shall be of the opinion that the exception is frivolous and not made in good faith, it may impose double or treble additional costs upon the excepting party, and may order them to be paid by counsel prosecuting the bill of exceptions, if in its opinion justice so requires." Sec. 497, subdiv. 3.

The Supreme Court, in the case at bar, acted upon the authority conferred by this subdivision. It is said that the Supreme Court can review the evidence taken in the Court of First Instance and thereby arrive at a different conclusion of facts from that found by the trial court only in the case that "the findings of fact were plainly and manifestly against the weight of evidence." It is therefore urged that whether the court erred in setting aside the conclusions of the lower court as plainly and manifestly against the weight of evidence is a question of law which may be brought here by writ of error.

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It was held in *De la Rama v. De la Rama*, 201 U. S. 303, that upon an appeal this court will consider whether a reversal by the Supreme Court of the findings of the Court of First Instance was justified on the ground that the findings below were plainly and manifestly against the weight of evidence, and upon being satisfied that the action of the Supreme Court was not warranted on that ground would reverse it. But this case was one of appeal, and the vital distinction between an appeal and a writ of error has already been shown. The principle acted upon in that case is not applicable to writs of error. The fourth assignment of error, therefore, raises no question of law.

The case would stop here were it not for the fact that the defendant in its brief and in the oral argument in its behalf goes beyond the assignment of errors and sets up three alleged errors of law not contained in them.

It is said that the court below erred:

"(1) In holding as a matter of law that the fact of taking possession of said dwelling house was an acknowledgment by the plaintiffs in error that it was constructed substantially as required by the said contract;

"(2) In holding as a matter of law that the plaintiffs in error were not entitled to recover their overpayments for earth and sand because no mutual mistake was shown in the premises;

"(3) In rendering judgment for a sum in Mexican currency instead of in Philippine pesos."

It is provided in the act giving this court jurisdiction to review the judgments of the Supreme Court of the Philippine Islands that they may be reviewed here "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 Court of the United States." In such cases alleged errors not stated in the assignment of errors filed with the petition for the writ, have sometimes been considered. The limits of this practice is accurately stated in the thirty-fifth rule of this court. There it is said that if errors are not assigned

with the petition for the writ they will be disregarded, except that the court in its option may notice a plain error not thus assigned.

But we find no such plain error in the opinion of the Supreme Court as warrants us in reversing its judgment. The findings of fact made by that court support and require the judgment which it rendered. We do not think it necessary or desirable to select from an opinion, which was engaged with a discussion of evidence and the inferences which might properly be drawn from it, statements of law and subject them to minute scrutiny, where on the whole it is clear that the facts found by the court justify the judgment which it rendered. Therefore we do not consider any questions except those set forth in the assignments of errors, and, deeming that they allege no errors in law, we affirm the judgment.

Affirmed.

QUINLAN *v.* GREEN COUNTY, KENTUCKY.

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

No. 213. Argued February 27, 28, 1907.—Decided April 8, 1907.

Where a question certified by the Circuit Court of Appeals contains more than a single question or proposition of law it will not be answered by this court.

Where the qualified voters of the county vote for an issue of bonds for subscription to stock of a railroad on condition that the county be exonerated from a prior subscription authorized for another railroad, and thereafter the judge of the county court authorized by statute to make the subscription enters an order to that effect, receives the stock subscribed for, and issues the bonds, and nothing further is ever done in regard to the prior subscription, although no formal exoneration thereof was ever made or attempted, a *bona fide* purchaser before maturity of the bonds and coupons for value is entitled to assume in his purchase that the county had been fully exonerated from the prior subscription.

PLAINTIFF in error brought an action in the Circuit Court of

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the United States for the Western District of Kentucky upon certain bonds and coupons purporting to have been issued by the defendant in error, one of the counties of the State of Kentucky. The following was the form of the bond:

“United States of America,
“County of Green, State of Kentucky.

“\$500.00

“For the Cumberland and Ohio Railroad.

“Twenty years after date, the county of Green, in the State of Kentucky, will pay to the holder of this bond the sum of five hundred dollars, with interest thereon at the rate of six per cent per annum, payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

“In testimony whereof, the judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

“(Green County Seal.)

T. R. BARNETT, *Judge.*

D. T. TOWLES, *Clerk.*”

The case was tried without a jury, and the court, after finding facts, rendered judgment for the defendant. The case then went to the Court of Appeals for the Sixth Circuit, and that court has certified here two questions of law upon which it desires instructions, with a statement of facts upon which the questions arise. In addition to the statement of facts we take into account the material parts of the charter of the Cumberland and Ohio Railroad Company, section 15 of which contains the following provisions:

“SEC. 15. That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town or county may desire; and the county court of any such

county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of any city, town or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed;

* * * * *

“That, if preferred, the application herein authorized to be made to the county court may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court. At all meetings of the stockholders for the purpose of electing officers, or any other purpose, the said town, cities, and counties may, by proxies duly authorized by the

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authorities thereof, cast a vote for each share so subscribed by said town, city, or county. . . .”

The charter gives to the Cumberland and Ohio Railroad “all the powers and privileges conferred upon the Louisville and Nashville Railroad Company by the laws of Kentucky for constructing and operating their said proposed railroad.” The charter of the Louisville and Nashville Railroad Company provides “that said railrcad company may receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription.” The commissioners of the Cumberland and Ohio Railroad requested the County Court to submit to the qualified voters of the county the question whether the county should subscribe to \$250,000 of the capital stock of the company, payable in bonds of the county, whereupon the judge of the county court on the 17th of June, 1869, ordered an election in the following terms:

“Whereas the commissioners of the Cumberland and Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the County Court of Green County to order an election in said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company, and payable in the bonds of said county, having twenty years to run, and bearing six per cent interest from date, and upon condition that said company shall locate and construct said railroad through said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumber-

land and Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Elizabethtown and Tennessee Railroad, or any part of the interest thereon. It is, therefore, ordered by the court that an election, by the qualified voters of Green County, at the voting places in said county, be held and conducted by the several officers, as prescribed by law, for holding elections on the third day of July, 1869, to vote on the question as to whether or not the said county court shall, for and on behalf of said county, subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland and Ohio Railroad, conditioned and to be paid as above stated."

The election was duly held July 3, 1869, and the vote was in the affirmative. During the year before this vote the voters of the county had voted in favor of a proposition to subscribe to the stock of the Elizabethtown and Tennessee Railroad, and thereupon the county judge had ordered the clerk of his court to make a subscription to the stock of the Elizabethtown and Tennessee Railroad Company, "on the terms specified in the order submitting the question to a vote." This was the subscription from which Green County desired to be exonerated before the Cumberland and Ohio Railroad bonds should be issued, or any part of their principal or interest paid. On June 3, 1870, the county judge entered an order reciting the election at which the qualified voters had approved the subscription to the capital stock of the Cumberland and Ohio Railroad, and concluding: "Now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and

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this subscription is made with the conditions, set out in the order of this court, ordering said election and now of record in the office of this county."

At the April term, 1871, the Supreme Court of the State rendered a decision in the case of *Mercer v. Navigation Company*, 8 Bush, 300. It is argued that this decision shows that the subscription to the stock of the Elizabethtown and Tennessee Railroad was void. However that may be, at a time which does not distinctly appear, but later than that decision, the judge of the County Court issued and delivered to the Cumberland and Ohio Railroad Company bonds of Green County to a small amount. On August 15, 1872, the judge in a formal order, reciting that application had been made for the issue of the balance of the bonds, directed that, "the court being sufficiently advised," they be signed and issued. Thereupon certificates of 2,500 shares of that stock of the par value of \$100 per share were delivered to Green County, which has since held and owned them. It was conceded at the argument that the county had made payment of interest on the bonds thus issued to the Cumberland and Ohio Railroad. No formal or express exoneration of said county from the payment of the subscription to the stock of the Elizabethtown and Tennessee Railroad was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last-named railroad company have ever issued or delivered in execution of said orders or under the terms of said subscription. The proceeds of \$150,000 of the bonds were expended within Green County in the partial construction of five miles of the road to Greensburg. This five miles was completed by a lessee at its own expense. Nothing else has been done within the county.

The plaintiff is the *bona fide* holder for value of the bonds and coupons in suit, but had notice that the railroad had not been laid further than Greensburg, and therefore did not extend "through" the county.

The questions certified by the Circuit Court of Appeals are:

"1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland and Ohio Railroad Company and the issuance of bonds in payment therefor? or, if this question should be deemed too broad, then,

"2d. Assuming the facts to be as found was a *bona fide* purchaser, before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been 'fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and in behalf of said county to the Elizabethtown and Tennessee Railroad Company?'"

Mr. Edmund F. Trabue and *Mr. George DuRelle*, with whom *Mr. John J. McHenry*, *Mr. John C. Doolan* and *Mr. Atilla Cox, Jr.*, were on the brief, for Mary Amis Quinlan:

It is demonstrable not only that the county was completely exonerated upon the issuance of the bonds, but that it was so understood by the County Court which withheld the issuance thereof until such exoneration.

Not only is this true, but the County Court was the judge of the exoneration and held the county to be exonerated. *Provident &c. Co. v. Mercer Co.*, 170 U. S. 593.

Although May 20, 1868, the Green County Court made a void order directing its clerk to make a subscription to the stock of the Elizabethtown and Tennessee Railroad Company, it avoided all the points of invalidity thereof in the orders of June 17, 1869, and June 3, 1870, and thoroughly understood wherein the invalidity of the first order lay, and what exoneration was necessary for the county's safety. Accordingly, the County Court determined that it was exonerated, and delivered

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the bonds which were not directed to be printed until October 12, 1871, as above indicated.

Mr. Ernest MacPherson, with whom *Mr. John W. Lewis* was on the brief, for Green County:

The purchaser of municipal bonds is bound to take notice of the law under which the obligations are issued. This is the settled law in the Federal courts. *Barnett v. Denison*, 145 U. S. 139.

The purchaser of the papers herein involved knew that by the terms of the charter of the Cumberland and Ohio Railroad conditional subscriptions to its corporate stock were valid.

At its summer term, 1871, before the bonds herein sued on were ever issued, or even printed, the Kentucky Court of Appeals construed the charter (statute) of the Cumberland and Ohio Railroad Company and held valid conditional subscriptions to its stock, and that subscribers might provide for any sort of payment they might choose. *Shelby County Court v. C. & O. R. R. Co.*, 8 Bush, 216.

In the absence of a recital in a municipal bond or coupon that the conditions essential to its validity have been performed, it is open to the municipality to show the non-performance of the conditions. *Citizens' Saving Association v. Perry County*, 156 U. S. 701; *Town of Coloma v. Eaves*, 92 U. S. 481; *Prov. Life & Trust Co. v. Mercer Co.*, 170 U. S. 593.

In the alleged bonds of Green County, there being no recitals, and no reference to the law or authority under which they were issued, it was the duty of every person dealing therein to look to the records of the Green County Court. *Crow v. Oxford*, 119 U. S. 222.

If the second question be intended to ask whether the bare fact that the bonds were signed and delivered by the county judge was a decision that there had been a full and complete exoneration from the liability on the subscription to the Elizabethtown and Tennessee Railroad, it should be answered in the negative. It has already been shown that "when the law

confers no authority to issue the bonds in question, the mere fact of their issue can not bind the town to pay them, even to a purchaser before maturity and for value." *Hopper v. Covington*, 118 U. S. 148.

The fact that coupons for interest were for a few years paid, in no legal way estops the county to show the invalidity of the bonds or coupons, or the failure of the road to fulfill the conditions.

The record does not show that Green County paid interest on the bonds illegally issued for two years by the same officials who issued the bonds, and also failed to incorporate in the bonds the conditions required by the contract, although it so appeared in the *Shortell case*. *Wilkes County v. Coler*, 190 U. S. 113.

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

The first question certified is thought by a majority of the court to contain more than a single question or proposition of law, and for that reason it is not answered.

The second question deals with the exoneration from subscription to the stock of the Elizabethtown and Tennessee Railroad Company which was made by the vote of the county a condition to the issue of the bonds, and we confine our consideration to that question and the facts relevant to it.

There is no doubt of the power of the defendant to issue the bonds. The legislature of Kentucky gave it in plain terms, upon the condition that its exercise receive the approval of the qualified voters. That approval was given upon the condition imposed by the vote that the bonds should not be issued before the county had been exonerated from a subscription to the stock of another railroad company. The law gave the county the right to impose conditions. This particular condition is a condition precedent to the lawful issue of the bonds, although it must not be understood that this statement applies to the other so-called conditions expressed in the vote.

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Of them nothing is intended to be said. If there had been a recital in the bonds which imported that the condition had been performed, that would have been conclusive in favor of a *bona fide* holder. *Provident Trust Co. v. Mercer County*, 170 U. S. 593; *Gunnison County Commissioners v. Rollins*, 173 U. S. 255. But there was no such recital in the body of these bonds, and the words of the heading, "For the Cumberland and Ohio Railroad," cannot be interpreted as such without going beyond the decided cases, which themselves have gone far. In the absence of a recital it is open to the defendant to show that the condition which it had a right to impose and did impose by the vote of its electors had not been complied with. *Citizens' Savings Association v. Perry County*, 156 U. S. 692. In other words, in the absence of a recital, the performance of the condition is not conclusively presumed.

But by the terms of the law it was the duty of the judge of the County Court, in whom the powers of the court were vested, to issue the bonds. After a favorable vote has been had in an election called by the court, the law provides that "it shall be the duty of said County Court . . . to make the subscription in the name of their . . . counties . . . and proceed to have issued the bonds to the amount of such subscription, as hereinbefore directed." This clearly placed upon the judge the duty and responsibility of ascertaining and determining whether the condition of the issue of the bonds had been complied with. *Coloma v. Eaves*, 92 U. S. 484.

If he had issued the bonds and they had contained in them recitals which fairly imported a compliance with the condition upon the happening of which their issue was authorized, they would have gone into the hands of innocent holders with a conclusive presumption that the condition had been performed. This principle has been announced by repeated decisions of this court and needs no other citations to support it than those already made. Without such recital the presumption is, as has been shown, not conclusive. The further question arises,

therefore, whether there is any presumption at all of the performance of the condition from the facts of subscription and issue. In the first case, dealing with this question (*Knox County v. Aspinwall*, 21 How. 539), it was said that a purchaser of such bonds had the right to assume that the condition of their issue had been complied with, merely from the facts of the subscription and issue. But in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided. *Citizens' Savings Association v. Perry County*, *ub. sup.* In *Supervisors v. Schenck*, 5 Wall. 772, it was said *obiter* by Mr. Justice Clifford, speaking of bonds of the kind under consideration, "the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority." The same *dictum* was in substance repeated by the same justice in *Lexington v. Butler*, 14 Wall. 282-296.

In *Pendleton County v. Amy*, 13 Wall. 297, it appeared that the county of Pendleton had issued bonds in aid of a railroad company. An act of the legislature gave the county the authority to issue the bonds, provided a majority of the real estate owners of the county should so vote. One of the pleas of the defendant in an action on the bonds was that they had never been authorized by the vote prescribed in the act which gave the power to issue them. This plea was demurred to, and the court passed upon the question thus raised. Mr. Justice Strong, in delivering the opinion of the court, said:

"If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote had been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attaches to the exercise of the power, has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do

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not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled."

In this case there was no recital in the bond. It appeared by the pleadings that the bonds had been exchanged for the stock of the railroad company which was retained, and the decision was based upon the ground that the retention of the stock created an estoppel.

In the case of *Coloma v. Eaves*, 92 U. S. 484, the opinion of the court lends some countenance to the broad principle stated in *Knox v. Aspinwall*, but Mr. Justice Bradley, in a concurring opinion, said:

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of taxpayers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no farther. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court. "

These cases left it uncertain whether the court would give to the facts of subscription to stock and issue of bonds in payment therefor by officers charged with the duty of ascertaining

whether conditions precedent had been complied with, the same conclusive effect as to the validity of the bonds which would exist when to those facts was added a recital in the bonds themselves. But the tendency, observable in the earlier cases, to deny to bonds in the hands of an innocent holder any other defense than a want of power of the maker was arrested by the cases of *Buchanan v. Litchfield*, 102 U. S. 278, and *Citizens' Savings Association v. Perry County*, *ub. sup.*, which held that the mere facts of the subscription to stock and issue of bonds containing no recital left it open to the obligor to show that a condition precedent had not been fulfilled. But these cases in no way conflict with the view expressed by Mr. Justice Strong in *Pendleton County v. Amy*, and by Mr. Justice Bradley in *Coloma v. Eaves*, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one. Independent of authority such a presumption exists and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly. In the case at bar the judge of the County Court was charged with the duty of issuing the bonds upon the performance of the condition precedent. That condition was that the county should be "fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown and Tennessee Railroad." The performance of that condition did not necessarily require any formal release or the execution of any paper whatever. It was completely fulfilled, if from any circumstance it should appear that the county had been effectively relieved from any liability on account of the vote in aid of the Elizabethtown and Tennessee Railroad. It would be impossible for any purchaser of the bonds to ascertain whether this condition had been complied with, except by an inquiry which would naturally be made of the judge himself. The judge determined that it had been complied with, and the fact that for thirty-eight years no one has made any claim against the county on account of its sup-

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posed liability to subscribe to the stock of the Elizabethtown and Tennessee Railroad shows conclusively that he was right.

Construing the second question to inquire not whether there is conclusive presumption, but whether on the facts found there is any presumption at all that the county had been exonerated from its former subscription to another railroad, we answer it

Yes.

TRAVERS v. REINHARDT.

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

No. 76. Argued November 1, 2, 1906.—Decided April 15, 1907.

While the predominant idea of the testator's mind when discovered is to be heeded as against all doubtful and conflicting provisions which might defeat it, effect must be given to all the words of a will if by the rules of law it can be done; and the words "without leaving a wife *or* child or children" will not be construed as "without leaving a wife *and* child or children," notwithstanding a general dominant interest on the part of the testator that his real estate should descend only through his sons.

A man and woman, neither of whom was a resident of Virginia, and who had not obtained any marriage license, went through a ceremony in Virginia which the woman thought was a marriage by a clergyman; they immediately went to New Jersey, she assuming the man's name; they afterwards went to Maryland and then returned to New Jersey permanently, where they lived and cohabitated as husband and wife and were so regarded for many years until his death, she joining in a mortgage with him, and also being described in his wills as his wife; she meanwhile and, prior to the later residence in New Jersey, had ascertained that the person performing the ceremony was not a minister and that there was no license, but the cohabitation continued and there was testimony that the man assured her that they were married, and afterwards in his last will he appointed his wife executrix and she qualified *as such*; *Held*, that: Marriage in fact, as distinguished from a ceremonial marriage, may be proved by habit and repute, and, except in cases of adultery and bigamy when actual proof is required, may be inferred from continued cohabita-

tion and reputation; and even though in view of the statutory requirements in those States the marriage might have been invalid in Virginia for want of license, and in Maryland for want of religious ceremony, the cohabitation in good faith and reputation during their residence in New Jersey, and their conduct towards each other from the time of the ceremony until the man's death, established an agreement between the parties *per verba de presenti* to become husband and wife which was as effective to establish that status in New Jersey as if made in words of the present tense after the parties had become domiciled in that State. 25 App. D. C. 567, affirmed.

THE facts are stated in the opinion.

Mr. Bernard Carter and Mr. Arthur A. Birney, with whom Mr. Charles H. Stanley, Mr. Edward A. Newman and Mr. Fillmore Beall were on the brief, for appellants:

The testator devised all his real estate, except a small portion thereof, to his four sons. By a codicil he revoked the devise to his daughter Elizabeth and gave that parcel to one of his sons.

In making the devises to his son Elias and a portion to his son Joseph, he made them to such son, "his heirs and assigns forever in fee simple." The other devises are to his several sons, "their heirs and assigns forever," without the addition of the words "in fee simple." No devises are in terms of a less estate. That the testator deliberately made the distinction in the terms of these two classes of devises is shown by the "general provision," of the will, to the effect of which he subjects each of the devises of the second class.

The language of the devises was, without more, ample to create a fee simple. Qualified by the general provision, each of the devises affected thereby became a determinable fee in the first taker, with an executory devise over to the surviving sons and the child or children of such as might be dead. *Abbott v. Essex Company*, 18 How. 202; *Richardson v. Noyes*, 2 Massachusetts, 56; Underhill on Wills, 1272, 1274.

It is a rule in construing wills that where a general intent is apparent upon the face of the will, and a particular intent is also expressed which conflicts with such general intent, the

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latter will prevail. 2 Williams on Executors (7th Am. ed.), 333; *Chase v. Lockerman*, 11 G. & J. 286; *Thompson v. Young*, 25 Maryland, 459; *Taylor v. Watson*, 35 Maryland, 524; *Smith v. Bell*, 6 Pet. 68; *In re Banks' Will*, 87 Maryland, 425.

The construction of the will is to be made from the entire instrument, including the codicil, and the intent of the testator thus ascertained be permitted to govern. *Jones v. Wright*, 2 Bligh, 49; *White v. Crenshaw*, 5 Mackey, 115.

Where two clauses in a will operate on the same property, devising it differently, giving it to different devisees, or showing a different technical intention, the latter clause will prevail. *Dugan v. Hollins*, 13 Maryland, 149; *Manning v. Thurston*, 59 Maryland, 226.

The general intent of the testator being to keep his real estate within the male line of descent, to the exclusion of the female, is it to be supposed that he was willing that this intent should be defeated by the mere marriage of a son? He might be willing to measurably provide for a widow, through an allowance equal to dower, but the existence of the widow affords no reason for letting in the daughters to heir.

Courts will change or mold language so as to give effect to the intention. Schouler on Wills, 3d ed., § 477; Jarman on Wills, 505, 507; *Doe v. Watson*, 8 How. 263, 272; *Hance v. Noble*, 172 U. S. 383, 389; *Hardenbergh v. Ray*, 151 U. S. 126; *Shugloff v. Johns*, 87 Maryland, 273; *Scarlett v. Montell*, 95 Maryland, 157.

The words "wife or child or children" should be read wife and child or children. The cases cited and many others justify such change.

If the will be construed as we contend, the proceeds of the devise to James, affected by the general provision, must be awarded to the appellants, for it will not be claimed that he left a child surviving him; if, however, this point be ruled against the appellants, they must yet succeed, unless it has been shown, either, first, that James Travers married and his wife survived him; or, second, that he and his brother Elias

(the last survivor of the brothers) entered into a binding agreement with their sisters that they should share as heirs in the property thus devised to James. No such marriage was proved, and the alleged agreement or estoppel was not established.

The testimony of the woman, Sophia V. O'Brien, should have been rejected as wholly unworthy of belief, and with this out of the case there would not have been the slightest evidence that James Travers was ever married, except the recitals of his mutilated will of 1881, of his will of 1883, and of the mortgage deed of September 27, 1867.

The mortgage, and the will of 1881, were both made in Maryland, where the "common law marriage," so called, is unknown, and a ceremony *in facie ecclesiæ* is necessary to a valid union. *Denison v. Denison*, 35 Maryland, 297.

The will of 1883 seems to have been made in New Jersey, where a looser rule prevails, but where a contract to marry is as important as it is in Maryland.

The Court of Appeals had no basis in the evidence for the assertion in its opinion that during the whole time he called her and introduced her as his wife, and she was so recognized in the community generally.

The only witness sworn was the woman. She certainly could not establish her own repute as married. She said nothing whatever of her life at Point Pleasant, before the death of Travers, and, of her life elsewhere, said only that Travers introduced her as his wife, and that she was called "Mrs. Travers." This falls far short of proving that "public recognition," which this court has declared "necessary as evidence of its existence," in the case of the marriage without ceremony or record. *Maryland v. Baldwin*, 112 U. S. 490, 495; *Commonwealth v. Stump*, 53 Pa. St. 132 (cited 112 U. S. 495); *Jones v. Hunter*, 2 La. Ann. 224; *Taylor v. Swett*, 22 Am. Dec. 159, note.

This case, then, must turn upon the question whether there was a valid marriage between James Travers and Sophia Grayson at Alexandria, Virginia, on August 15, 1865.

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The Virginia statute required that in all cases a license should issue and without it there could be no valid marriage. The emphatic decision of the Court of Appeals of Virginia, delivered in 1901, would foreclose discussion on this subject were it not for the ground taken by Mr. Justice Gould, in sustaining as a marriage the union under discussion. *Offield v. Davis*, 100 Virginia, 250; *Beverlin v. Beverlin*, 29 W. Va. 732.

The Virginia decision is conclusive that without a license there could be no marriage in that State. *Leffingwell v. Warren*, 2 Black, 599, 603; *Green v. Lessee of Neal*, 6 Pet. 291; *Bauserman v. Blunt*, 147 U. S. 652; *Meister v. Moore*, 96 U. S. 82; *Fairfield v. County of Gallatin*, 100 U. S. 47, 52.

Mr. William A. Gordon, Mr. George E. Hamilton and Mr. M. J. Colbert, with whom Mr. J. Holdsworth Gordon was on the brief, for appellees:

While the marriage in Virginia in 1865 did not comply with the statute of that State, under *Offield v. Davis*, 100 Virginia, 250, and would have been void as to the status of the parties in that State and as to property there located, as the parties immediately left that State and never returned there, but subsequently resided in New Jersey and Maryland, and as the property in controversy is located in the District of Columbia, the status of Sophia as the wife of James Travers at the time of his decease does not depend upon the law in Virginia.

It has never been held that the law in the District of Columbia denied validity to marriages good at common law, and in fact the only *dicta* on the subject lean toward the validity of such marriages, even when contracted in said District. *Thomas v. Holtzman*, 18 App. D. C. 66.

The fact that letters testamentary were granted to her by the New Jersey court as the widow of James Travers, although her name was not given in the will, is conclusive proof of the reputation of marriage in that community; and the fact that his next of kin and heirs-at-law permitted her as "wife"

to qualify as executrix and take under the devise to his "wife" shows conclusively that she was recognized by them as the wife of their brother.

The bequest in the will of his sister Elizabeth, a nun in the convent at Georgetown, to Annie E. Travers, the reputed child of James, as her "niece" should be received as evidence of reputation, so far as that sister is concerned, as to the marriage, and that James and Sophia V. Travers were man and wife.

These acts certainly constituted a marriage under the laws of New Jersey, and if a lawful marriage in that State it will be recognized as such in the District of Columbia.

Atlantic City R. R. Co. v. Gooding, 62 N. J. 394, it was held that a contract of marriage made *per verba de præsenti* constitutes an actual marriage and is valid, and in *Stevens v. Stevens*, 56 N. J. Eq. 490, that a common law marriage is good. Even though the marriage in Virginia did not constitute a lawful marriage in that State, it did constitute an agreement between the parties to accept each other as man and wife, thus constituting a marriage good at common law, and their stay in New Jersey immediately after said common law marriage, and especially the residence in that State in 1883, prior to the death of James Travers, and their living there in compliance with the terms of the contract entered into in Virginia, made their status that of man and wife. *Meister v. Moore*, 96 U. S. 76; *Meyer v. Pope*, 110 Massachusetts, 314; *Smith v. Smith*, 52 N. J. 207.

The decision in *Offield v. Davis*, rendered in 1902, is not conclusive on this court, as in 1877 it decided, in *Meister v. Moore*, *supra*, in construing a statute in many respects identical with the Virginia statute, that a marriage similar to that now under consideration was valid.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was originally brought for the partition or sale of

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certain real estate in the city of Washington devised by the will (and codicils thereto) of Nicholas Travers who died in the year 1849, leaving four sons and three daughters.

The only parts of that estate remaining in dispute are certain lots in square 291 in Washington, and the questions to be determined depend upon the construction of that will and upon the evidence touching the alleged marriage of James Travers, a son of the testator, with Sophia V. Grayson.

By the first item of the will certain lots are devised to the testator's son Elias "and his heirs and assigns forever in fee simple." By the same item other lots are devised to the same son, "which last two devises shall be subject to the general provision hereinafter made in case of any sons dying without leaving a wife or child or children."

By the second item the testator devised lot 5, in square 291, to his son "Joseph Travers and his heirs forever," and two other specified lots "to him and his heirs forever, in fee simple;" lot 5 "being subject to the general provision aforesaid hereafter made."

By the third item he devised to his son Nicholas and his heirs forever certain lots in square 291 "subject to the general provision hereinafter made;" also "to him and his heirs forever, in fee simple," other real estate in square 36, and a designated parcel of ground in square 291, "said piece or parcel of ground to be subject to the general provision hereafter made."

By the fourth item certain devises are made to the son "James Travers and his heirs forever," "all of which devises are to be subject to the general provision hereinafter made."

Here follows, at the close of the fourth item, the "general provision" referred to: "With regard to the several estates hereinbefore devised to my several sons, it is hereby declared to be my will, and I do order and direct, as a general provision, that if any of my sons should die *without leaving a wife, or a child or children living at his death*, then his estate herein devised to him, saving and excepting those portions thereof expressly granted and so named to be 'in fee simple,' and which they

can sell and dispose of as they think fit, shall go, and be invested in fee, to my surviving sons and the child or children of such as may be dead, such child or children representing the share of the father—but if either of my sons shall, at his death, leave a wife either with or without a child or children, such wife shall be entitled to her dower rights and privileges.”

This was followed in the will by certain devises for the benefit of the daughters, as well as by several codicils to the will, but it is not necessary to give their provisions in detail.

By a codicil, dated June 26th, 1848, the testator revoked certain parts of his will, providing: “And in lieu thereof I do hereby give and devise all of said lots or part of lots, so as aforesaid described, with the house and other improvements and appurtenances, to my son James and his heirs, subject to the express stipulations and restrictions contained in the will to which this is a codicil, wherein I declare that all and every portion of my real estate not devised by the use of the words ‘in fee simple,’ shall be held by such devisees for life, and then according to stipulations and restrictions as therein contained and declared by said will.”

It is contended here, as it was in the courts below, that the words in the above general provision, that “if any of my sons should die without leaving a wife or child or children living at his death,” should be interpreted as if it read “if any of my sons should die without leaving a wife *and* child or children living at his death.” The court is thus asked, by interpretation, to substitute the word “and” in place of “or” in the above sentence.

Looking at all the provisions of the will, and ascertaining, as best we may, the intention of the testator, we perceive no reason for interpreting the words used by him otherwise than according to their ordinary, natural meaning.

It is insisted by appellants that the general, dominant purpose of the testator was that his real estate should descend only through his sons, and that his daughters and their descendants should have no share therein. And the doctrine is in-

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voked that "the predominant idea of a testator's mind, when discovered, is to be heeded as against all doubtful and conflicting provisions which might of themselves defeat it; and the general intent and particular intent being inconsistent, the latter (the particular) must be sacrificed to the former—the general intent." Schouler on Wills, § 476. This general doctrine is not controverted, but there are other cardinal rules in the interpretation of wills which must be regarded. Mr. Justice Story, speaking for this court, said that effect must be given "to all the words of a will, if, by the rules of law, it can be done. And where words occur in a will their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense." *Wright v. Denn*, 10 Wheat. 204, 239. "The first and great rule in the exposition of wills," said Chief Justice Marshall, "to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." *Smith v. Bell*, 6 Pet. 68, 75; *Finlay v. King*, 3 Pet. 346, 377. The same thought, in substance, was expressed by Lord Chancellor Eldon in *Crooke v. De Vendes*, 9 Ves. 197, 205. He said that "where words have once got a clear, settled, legal meaning, it is very dangerous to conjecture against that, upon no better foundation than simply that it is improbable, the testator could have meant to do one thing by one set of words, having done another thing, using other words, as to persons in the same degree of relation to him." It would seem clear that the words "without leaving a wife or child or children," where they first appear in the above general provision, were purposely chosen. They appear three times in the will, and their usual meaning is not doubtful. We think the testator meant "or," not "and." The court would not be justified in making the proposed substitution unless the whole context of the will plainly and beyond question requires that to be done in order to give effect to the will of the testator. That the words, in the general provision, "without leaving a wife or a child or children," were deliberately selected is to

some extent shown by the last sentence in the first item of the will, "which two devises shall be subject to the general provision hereinafter made in case of any sons dying without leaving a wife *or* child or children." We do not think that the testator used the word "*or*," intending thereby to convey the same thought as would be expressed by "*and*." We concur with the Court of Appeals, speaking by Chief Justice Shepard, in holding that the words in question are unambiguous, and their obvious, ordinary meaning must not be defeated by conjecture. 25 App. D. C. 567, 576.

The important question remains whether James Travers, the son of the testator, died leaving a wife or a child or children. If he did, then the decree below must be affirmed.

The original bill averred that James Travers died in 1883 "without widow or lawful child or children or descendants of a child or children surviving him." This averment was not specifically denied in the answers, but in the progress of the cause the defendants, children of the sisters of James Travers, amended their answer and alleged that he left surviving him "his widow, Sophia V. Travers, now Sophia V. O'Brien, who was his lawful wife at the time of his death and who had been his lawful wife for many years prior thereto, and he left one child, Annie E. Travers, one of the defendants herein, who was his lawful child." The issue thus made constituted the principal matter to which the proof was directed. Both of the courts below held that under the evidence Sophia V. was to be deemed the lawful wife of James Travers at the time of his death. Children were born to them, but they died very young. It is conceded that they left no child surviving them, Annie E. Travers being only an adopted child.

The appellants insisted throughout the case and now insist that the relation between James Travers and Sophia V. was not at any time one of a matrimonial cohabitation, but an illicit or meretricious cohabitation, which did not create the relation of husband and wife.

Upon a careful scrutiny of all the evidence as to the alleged

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marriage we think that the following facts may be regarded as established:

1. James Travers, whose domicil was in the District of Columbia, and Sophia V. Grayson, whose domicil was in West Virginia, were in Alexandria together on the fifteenth of August, 1865, when some sort of marriage ceremony (exactly what does not appear) was performed by a friend of Travers, whom the woman, then only about seventeen years of age, and without living parents, supposed at the time was a minister, entitled to officiate in that capacity at a marriage. She thought it was a real marriage by a minister, although he did not produce or have any license to solemnize the marriage of these parties. It must be taken upon the evidence that he was not a minister. By the statutes of Virginia then in force it was provided: "Every marriage in this State shall be under a license and solemnized in the manner herein provided, but no marriage solemnized by any persons professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such persons if the marriage be in all other respects lawful and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

2. Immediately after the affair at Alexandria the parties—the woman, from and after that occasion, assuming the name of Mrs. Travers—left Virginia and went to Shrewsbury, New Jersey, where, as husband and wife, they remained for a short time, after which they went to Belair, Harford County, Maryland, living there, as husband and wife, at a rented place.

3. In 1867 Travers purchased a farm in Talbot County, Maryland, on which he lived with said Sophia until some time in 1883, when that farm was sold, and, on account of Travers' health, they removed to Point Pleasant, New Jersey, and purchased property there, having lived on the Talbot County farm, as husband and wife, for more than fifteen years. Travers died at Point Pleasant in the latter part of the year 1883, and

five years after his death the woman, claiming to be and recognized in the community as the widow of James Travers, married a lawyer of Philadelphia, the ceremony being performed at the Catholic Church in Point Pleasant.

4. From the fifteenth of August, 1865, up to his death, on the first day of November, 1883—a period of more than eighteen years—Travers and Mrs. Travers continuously cohabited *as husband and wife*. During all that period they acted as if they were lawfully husband and wife, and uniformly held themselves out as sustaining that relation; and beyond all question they were regarded as husband and wife in the several communities in which they lived after leaving Alexandria in 1865. There is no proof that any one coming in contact with them regarded them otherwise.

5. About five or six years after the latter date Mrs. Travers learned, for the first time, that Travers' "friend" who had officiated at the ceremony in Alexandria was not a minister. She was asked, when giving her deposition, this question: "Q. After you discovered, some four or five years after you went to live with Mr. Travers, that you had not been married to him according to any ceremony, did he ever make any promise to you in that regard? A. Always. Poor fellow, he would have it all right—— Mr. Birney: We object to that. Q. And what did he say? A. Well, he would always say that it was all right, and we were just as much married as if we had been married before a priest or a minister." Upon the basis of their being husband and wife the parties continuously rested their relations to each other up to the death of Travers.

6. That Travers recognized Mrs. Travers as his wife, and held her out as such, appears from many facts: (a) In a mortgage executed September 27th, 1867, to secure the balance of the purchase money due on the Talbot County farm, the mortgagors are described, both in the body of the mortgage as "James Travers and Sophia V. Travers, his wife, of Harford County, in the State of Maryland," and in the certificate of acknowledgment as "James Travers and Sophia V. Travers,

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his wife," and she signed and acknowledged the mortgage as Sophia V. Travers. (b) By a mutilated, holographic will dated February 8th, 1881, and signed by James Travers, he gave, devised and bequeathed "to my wife Sophy Virginia Travers," all his household furniture, books, pictures, etc., to have and to hold the same to her, and her executors, administrators and assigns forever; also, to her the use, improvement and income of his dwelling house and farm, "to have and to hold the same to her for and during her natural life; and from and after the decease of my said wife, I give and bequeath," etc.; and by which, further, he gave, devised and bequeathed "to my wife Sophy Virginia Travers, for her sole use," all the rest and residue of the testator's estate, real, personal or mixed, of which he died seized and possessed, or to which he should be entitled at the time of his decease. That will concluded: "Lastly, I do nominate and appoint my said wife sole executrix of this my last will and testament." (c) By a will dated at Point Pleasant, New Jersey, October 5th, 1883, witnessed by three persons, James Travers devised to his brothers and sisters all his interest and property in the District of Columbia, and "to my wife, while she remains *my widow*, all my property of every description and character not hereinbefore disposed of with full power of disposition and alienation, provided, however, that in case our daughter survives her, that all the property not disposed of prior to *my wife's* decease shall be and become the property of our said daughter, and in the event of *my wife's* contracting *another* marriage, then, it is my will that she shall possess and enjoy as of her own right, only one-third of the property then remaining, and that the other two-thirds shall be invested and held in trust for my daughter Annie, and paid to her upon attaining her majority. . . . I hereby appoint *my wife* Sole Executrix of this my last will and testament." That will was duly proven before the Surrogate of Ocean County, New Jersey, partly by Mrs. Travers, and that officer certified that "Sophia Virginia Travers of the county of Ocean, the executrix therein named, proved the

same before me and she is duly authorized to take upon herself the administration of the estate of the testator agreeably to said will." That will was duly filed and recorded in the proper office in the District of Columbia.

In view of these facts, the question is whether the woman Sophia was to be deemed the lawful wife of James Travers at the time of his death in 1883. Marriage in fact, as distinguished from a ceremonial marriage, may be proven in various ways. Of course the best evidence of the exchange of marriage consent between the parties would come from those who were personally present when they mutually agreed to take each other as husband and wife, and to assume all the responsibilities of that relation. But a legal marriage may be established in other ways. It may be shown by what is called habit or repute. Referring to marriage at common law, Kent says: "The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of the marriage is required." 2 Kent, 12th ed., 88.

Naturally, the first inquiry must have reference to what occurred at Alexandria, Virginia, in 1865, when, as the woman supposed—in good faith, we think—that there was a real, valid marriage between her and James Travers. But we will assume for the purposes of this case only that that marriage was not a valid one under the laws of Virginia. We do this in deference to the decision of the Supreme Court of Appeals of Virginia in *Offield v. Davis*, 100 Virginia, 250, 263, in which that court, construing the above statute of that Commonwealth, held it to be mandatory, not directory, and had abrogated the common law in force in Virginia, and that no marriage or attempted marriage, if it took place there, would be held valid there, unless it be shown to have been under a license, and solemnized according to the statute of that Commonwealth. We will also

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assume, but only for the purposes of the present decision, and because of the earnest contentions of the plaintiffs in error, that cohabitation in Maryland, as husband and wife, for more than fifteen years, and the recognition of that relation in the communities where they resided in that State, did not entitle James Travers and the woman Sophia to be regarded in that State as lawfully husband and wife. We make this assumption also because it appears here that James Travers and Sophia V. Grayson did not become husband and wife in virtue of any religious ceremony, and because it has been decided by the Court of Appeals of Maryland that in that State "there cannot be a valid marriage without a religious ceremony," although "a marriage may be competently proved without the testimony of witnesses who were present at the ceremony." *Richardson v. Smith*, 80 Maryland, 89, 93. That court also said in the same case: "The law has wisely provided that marriage may be proved by general reputation, cohabitation and acknowledgment; when these exist, it will be inferred that a religious ceremony has taken place; and this proof will not be invalidated because evidence cannot be obtained of the time, place and manner of the celebration of the marriage. On this point we think it unnecessary to do more than quote from *Redgrave v. Redgrave*, 38 Maryland, 93, 97: 'Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. 1 Taylor, Evidence, §§ 140, 517; *Hervey v. Hervey*, 2 W. Bl. 877; *Goodman v. Goodman*, 28 L. J. Ch. 1; *Jewell v. Jewell*, 1 How. 219, 232. Indeed, the most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation and acknowledgment. *Sellman v. Bowen*, 8 Gill & John. 50; *Boone v. Purnell*, 28 Maryland, 607.' " We may refer, in this connection, to what the Supreme Court of the District of Columbia,

speaking by Judge Merrick, who was learned in the law of Maryland, said in *Thomas v. Holtzman*, 18 D. C. 62, 66: "In the first place, it is not at all apparent that it ever was the law that a marriage *in facie de ecclesiæ* was necessary for the purpose of legitimating the issue. It is true that the Court of Appeals of Maryland in the last four or five years has decided that such was the law, but that decision is not binding upon us. It is laid down by Blackstone that a marriage *per verba de præsentî* without the intervention of a clergyman is a legitimate marriage. And both Story and Kent say that according to the universal understanding in this country a marriage *per verba de præsentî*, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage."

In *Voorhees v. Voorhees*, 1 Dick. Ch. 411, 413, 414, the Court of Chancery of New Jersey said: "Two essentials of a valid marriage are capacity and consent. . . . Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made *per verba de præsentî* amounts to an actual marriage and is valid," quoting *O'Gara v. Eisenlohr*, 38 N. Y. 296. In *Atlantic City v. Gordin*, 62 N. J. 394, 400, the New Jersey Court of Errors and Appeals said: "In the *Voorhees case* Vice Chancellor Van Fleet concedes that a contract of marriage made *per verba de præsentî* amounts to an actual marriage and is valid, and in the case of *Stevens v. Stevens*, 11 Dick. Ch. Rep. 488, Vice Chancellor Pitney declares the law on the subject to the same effect, citing abundant authority."

This brings us to consider what were the relations of these parties after selling the Maryland farm and after taking up their residence in New Jersey in 1883. That their cohabitation, as husband and wife, after 1865 and while they lived in Maryland, continued without change after they became domiciled in New Jersey and up to the death of James Travers; and that they held themselves out in New Jersey as lawfully husband and wife, and recognized themselves and were recognized in the community as sustaining that relation, is manifest from

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all the evidence and circumstances. It is impossible to explain their conduct towards each other while living in New Jersey upon any other theory than that they regarded each other as legally holding the matrimonial relation of husband and wife. It is true that no witness proves express words signifying an actual agreement or contract between the parties to live together as husband and wife. No witness heard them say, in words, in the presence of each other, "We have agreed to take each other as husband and wife, and live together as such." But their conduct towards each other, from the time they left Alexandria in 1865 up to the death of James Travers in 1883, admits of no other interpretation than that they had agreed, from the outset, to be husband and wife. And that agreement, so far as this record shows, was faithfully kept up to the death of James Travers. When it is remembered that James Travers assured the woman Sophia that they were as much married as if they had been married by a priest or minister; that in his mortgage of 1867 she is described as his wife; that in the holographic will of 1881 he recognized her as his wife; that in his last will, made at his domicile in New Jersey, he referred to her as his wife, and devised by that will property to her while she remained his widow and did not contract another marriage; and that he made her the sole executrix of his will, describing her as his wife; when these facts are supplemented by the fact that they lived together, without intermission, in good faith, and openly, for more than eighteen years as husband and wife, nothing more is needed to show that he and the woman had mutually agreed to sustain the relation of husband and wife. Under the evidence in the cause they are to be held as having, prior to the death of James Travers, agreed *per verba de præsenti* to become husband and wife.

Did the law of New Jersey recognize them as husband and wife after they took up their residence in that State and lived together, in good faith, as husband and wife and were there recognized as such? Upon the authorities cited this question must be answered in the affirmative.

We are of opinion that even if the alleged marriage would have been regarded as invalid in Virginia for want of license, had the parties remained there, and invalid in Maryland for want of a religious ceremony, had they remained in that State, it was to be deemed a valid marriage in New Jersey after James Travers and the woman Sophia, as husband and wife, took up their permanent residence there and lived together in that relation, continuously, in good faith, and openly, up to the death of Travers—being regarded by themselves and in the community as husband and wife. Their conduct towards each other in the eye of the public, while in New Jersey, taken in connection with their previous association, was equivalent, in law, to a declaration by each that they did and during their joint lives were to occupy the relation of husband and wife. Such a declaration was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that State.

The views we have expressed find support in the authorities. In *Meister v. Moore*, 96 U. S. 76, 79, it was said that an informal marriage by contract *per verba de presenti* constituted a marriage at common law, and that a statute simply requiring "all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses," may be construed "as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent."

In *Maryland v. Baldwin*, 112 U. S. 490, 494, 495, the court said: "It is proper to say that, by the law of Pennsylvania, where, if at all, the parties were married, a marriage is a civil contract, and may be made *per verba de presenti*, that is, by words in the present tense, without attending ceremonies, religious or civil. Such is also the law of many other States in the absence of statutory regulation. It is the doctrine of the common law. But where no such ceremonies are required, and no record is made to attest the marriage, some public recogni-

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tion of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills, and other formal instruments."

So in *Hoggan v. Craigie*, Macl. & Rob. 942, 965, in which Lord Chancellor Cranworth, referring to contracts of marriage *per verba de presenti*, said: "It is not necessary to prove the contract itself; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; upon this principle the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage. . . . Everything, therefore, is pertinent and relevant in an inquiry like the present, which indicates the present or previous consent of the parties." Again, in *Campbell v. Campbell*, known as the *Breadalbane Case*, L. R. 1 Sc. App. 182, 192, 196, 211, Lord Chancellor Chelmsford said: "Habit and repute arise from parties cohabiting together openly and constantly, as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighborhood of which they are members as to produce a general belief that they are really married." In the same case Lord Westbury, after observing that it might not be strictly correct to speak of cohabitation with habit and repute as a mode of contracting marriage, said: "It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged. If I were to express what I collect from the different opinions on the subject I should rather be inclined to express the rule in the following language: that cohabitation as husband and wife is a manifestation of the parties having consented to contract the relationship *inter se*.

It is a holding forth to the world by the manner of daily life by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged." In his *Treatise on Domestic Relations*, Eversley says: "Marriage may also be proved between the parties by their conduct towards each other, and the first consent need not be proved; 'it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; the acknowledgment of the parties, their conduct toward each other, and the repute consequent upon it, may be sufficient to prove a marriage' " p. 41. See also 2 Greenleaf on Evidence (Harriman's ed.), §§ 461, 462, and notes; 3 Wigmore on Evidence, §§ 2082, 2083, and authorities cited.

Without further discussion or citation of authorities, we adjudge that the courts below did not err in holding that, under the evidence, James Travers and the Mrs. Travers who lived with him constantly and openly as his wife for more than eighteen years, were, in law, to be deemed husband and wife at the time of his death, in New Jersey, in 1883. It results from this view that the decree of the Court of Appeals, affirming the decree of the Supreme Court of the District, must itself be affirmed.

It is so ordered.

MR. JUSTICE McKENNA and MR. JUSTICE MOODY did not participate in the decision of this case.

MR. JUSTICE HOLMES, dissenting.

I feel some doubts in this case which I think that I ought

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to state. I understand it to be assumed, as it must be admitted, that James Travers and Sophia V. Grayson lived together for many years, calling themselves man and wife, when they were not man and wife and probably knew that they were not man and wife. This condition of things lasted from 1865, the time of the pretended marriage in Virginia to which their cohabitation referred for its justification, until 1883, the year of James Travers' death. So long as they lived in Maryland, that is until some time in 1883, if they had attempted to make their union more legitimate by simply mutual agreement they could not have done it. Therefore the instances of James Travers calling Sophia his wife during that period may be laid on one side.

Just before he died Travers moved to New Jersey and there made his will. As in Maryland, he spoke of his wife in that instrument, and as I understand it, the decision that he was married must rest wholly on this recognition and the fact that in New Jersey a marriage may be made without the intervention of a magistrate. I do not see how these facts can be enough. Habit and repute might be evidence of a marriage when unexplained. But they must be evidence of a contract, however informal, to have any effect. When an appellation shown to have been used for nearly eighteen years with conscious want of justification continues to be used for the last month of lifetime, I do not see how the fact that the parties have crossed a state line can make that last month's use evidence that in that last moment the parties made a contract which then for the first time they could have made in this way.

It is imperative that a contract should have been made in New Jersey. Therefore even if both parties had supposed that they were married instead of knowing the contrary it would not have mattered. To live in New Jersey and think you are married does not constitute a marriage by the law of that State. If there were nothing else in the case it might be evidence of marriage, but on these facts the belief, if it was entertained, referred to the original inadequate ground.

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Collins v. Voorhees, 47 N. J. Eq. 555. A void contract is not made over again or validated by being acted upon at a time when a valid contract could be made. When a void contract is acted upon, the remedy, when there is one, is not on the contract, but upon a quasi-contract, for a *quantum meruit*. There is no such alternative when a marriage fails.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY *v.* WILLIAMS.

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

No. 243. Argued March 14, 15, 1907.—Decided April 15, 1907.

Under § 6 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826, the certificate of the Circuit Court of Appeals as to questions or propositions of law concerning which it desires instruction must present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of the advice on which the question arises, and if not so presented this court is without jurisdiction; and where the question certified practically brings up the entire case, and this court is asked to pass upon the validity of a contract and indicate what the final judgment should be, the certificate will be dismissed and the questions not answered.

THIS case is before the court upon a question certified by the Circuit Court of Appeals under the sixth section of the Judiciary Act of March 3, 1891, providing that in every case within its appellate jurisdiction a Circuit Court of Appeals may certify to this court any questions or propositions of law concerning which it desires instruction for the proper decision of such case. 26 Stat. 826, c. 517.

Accompanying the certificate is a detailed statement of the case as disclosed by the evidence. It is well to give that statement in full. It is as follows:

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"The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for \$5,000 damages caused to the defendant in error, who will hereafter be called the plaintiff, by the negligence of the servants of the railway company, the defendant below, in the operation of a cattle train, in the caboose of which the plaintiff was riding under this contract:

"Burlington Route.

"*Live Stock Contract.*

"Issued by Chicago, Burlington & Quincy Railway Company.

"Agents of this company are not authorized to agree to forward Live Stock to be delivered at any specified time or for any particular market.

"Agents will permit only the names of the owners or *bona fide* employés, who accompany the stock, to be entered on the back of the contract without regard to passes allowed by number of cars.

"The contract when endorsed by the person or persons in charge and signed in ink by agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of contract to ride on any other train, nor will contract be accepted for passage on any passenger train.

"Conductor of freight train must punch contract, or in absence of punch will endorse his name on back of contract when presented for passage.

"Live Stock contracts are not good for return passage. Parties entitled to return passage will be provided with return ticket on application to proper office. Conductors will be held strictly responsible for permitting persons to ride on stock contracts, except when in charge of live stock.

No. of waybill.	No. and initial of car.	No. of animals in each car.
42	50043Q	17
43	16168Q	17

"Read the Contract.

"ROBERTSON, MO., STATION.

"This Contract, made and entered into this 26 day of Sep., 1903, by and between Ed Williams of Robertson, of the first part, and the Chicago, Burlington & Quincy Railway Company of the second part.

"Witnesseth, That for and in consideration of $23\frac{1}{2}$ per cwt., subject to minimum weights as shown in published tariffs, the said Railway Company agrees to transport 2 cars loaded with cattle (number of cars, number of waybill, and number of animals as noted above), from Robertson to U. S. yds. consigned to Drumm Com. Co.; and the said first party in consideration thereof, agrees to deliver the said animals, to the said Railway Company, for transportation between the points aforesaid upon the following terms, viz.:

"That whereas, the said first party, before delivering the said animals to said Railway Company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said Railway Company alternative rates proportionate to the value of the said animals, such value to be fixed and declared by the first party or his agent, and

"Whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said Railway Company, and fully set forth as follows, to-wit:

"Live Stock.—Ratings given above are based upon declared valuations by shippers, not exceeding the following:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack.....	\$100 00
Each Ox, Bull or Steer.....	50 00
Each Cow.....	30 00
Each Calf.....	10 00
Each Hog.....	10 00
Each Sheep or Goat.....	3 00

"When the declared value exceeds the above, an addition of 25 per cent. will be made to the rate for each 100 per cent.

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or fraction thereof, of 'additional declared valuation per head;' which said alternative rates are fully shown in and upon the regular tariffs and classifications printed, published and posted by the said Company as required by law, and

"Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefit thereof, has declared, and does hereby declare said animals to be of the value as follows, to wit: Each Steer, Value, \$50 00."

"To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid.

"Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof, shall in no case exceed the said valuation.

"It is further agreed in consideration of the alternative rate so made by the said Railway Company and accepted by the first party, that in case of loss or of damage to said animals, whether resulting from accident or negligence of said Railway Company, or its servants, the said Railway Company shall not be liable in excess of the actual loss or damage; and in no case shall the said Railway Company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said Railway Company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line, but nevertheless in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the 'Burlington System' then it is expressly understood and agreed that this contract shall be for and shall inure to the benefit of, the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

"It is further agreed that the said Railway Company shall

in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing by the owner or owners thereof, or his or their agents, and delivered to a General Freight Agent of the said Railway Company, or to the agent of said Railway Company at the station from which the animals are shipped, or to the agent at the point of destination, within ten (10) days from the time the said animals are removed from the cars. And in case of loss or damage upon any connecting line, such connecting line shall not be in any manner liable unless claim shall be made in like manner in writing to such general officer or agent of such connecting line.

“And in consideration of free transportation for one person, designated by the first party, hereby given by said Railway Company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said Railway Company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

“It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agent in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which result from the nature or propensities of such animals, and that the Railway Company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

“Witness the name of the Railway Company by its Agent,

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and the hand of the first party, the day and year first above written.

"CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,

"By C. M. HOLT, *Agent*.

"ED. WILLIAMS, *Shipper*.

"If this contract is for two or more cars, and is presented to the Company's Agents at the below named addresses within 3 days from date, it may be exchanged for a return pass for the above named party in charge, it being distinctly understood that said pass must be used the same day as issued.

"Atchison, Kans., General Agent's Office.

"Beardstown, Ill., Local Freight Agent's Office.

"Burlington, Iowa, Division Freight Agent's Office.

"Chicago, Ill., General Freight Office, Union Stock Yards.

"The defendant pleaded that it was exempt from liability for damages to the plaintiff by virtue of the italicized paragraph of the foregoing agreement. At the close of the trial there was substantial evidence that the injury to the plaintiff was caused by the negligence of the defendant's servants in the operation of the cattle train, the evidence relative to the contract between the parties for the free transportation of the plaintiff was uncontradicted and it established these facts: The plaintiff resided at Robertson in the State of Missouri. He had been engaged in dealing in and shipping cattle in that State for eighteen years, had frequently made contracts of the character of that here in evidence and was familiar with this agreement, and with the rates and terms upon which the Railway Company transported cattle from Robertson to the city of Chicago. The defendant operated regular passenger trains and carried passengers thereon between these stations for a regular fare of about \$12. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach of a passenger train. The defendant offered to carry and did transport cattle from Robertson to Chicago and between other places on its railroad

and assumed the entire responsibility and care of them during the transportation, without furnishing free transportation to the shipper or any of his agents and without any agreement that he or any of his agents should water, feed or give care or attention to the cattle during the transportation, for the same price and rate as it charged and received in cases in which the owner or his agent received free transportation upon the cattle train and agreed to assume the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train, as he did in the contract in evidence. The railway company preferred to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and when desired did provide free transportation on the cattle train for one person for every two cars shipped upon the terms specified in the italicized paragraph of the agreement. Cattle were shipped each way. The railway company charged and received the same rate whichever method was adopted and left the shippers free to make their choice. The majority of the shippers accepted the free transportation on the train with their cattle and agreed to care for them and to hold the company exempt from liability for any injury to themselves while they were riding on the freight train. The plaintiff and other shippers had the option to ship their cattle without free transportation for any one and to throw the entire care of the cattle on the company, or to accept the free transportation and to make the agreement to care for their cattle during the transportation and to exempt the defendant from liability for their injuries while riding on the cattle train. The plaintiff was not requested, required or constrained to accept the free transportation upon the cattle train upon which he rode, to assume the care of the cattle during their carriage or to ride on the cattle train and to agree that the defendant should not be liable for his injuries while he was so carried, but he did so voluntarily because he wished to accompany his cattle to Chicago and to sell them there. In this state of the case the trial court denied the request of counsel

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for the defendant to instruct the jury to return a verdict in its favor; an exception was taken to this ruling and it was assigned as error.

"And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following question of law is presented by the assignment of errors in this case, that its decision is indispensable to a determination of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following question:

"Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or constraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage valid?"

Mr. O. H. Dean, with whom *Mr. W. D. McLeod*, *Mr. Hale Holden*, *Mr. H. C. Timmonds* and *Mr. O. M. Spencer* were on the brief, for Chicago, Burlington and Quincy Railway Company.

Mr. Timothy J. Butler, *Mr. D. C. Allen*, *Mr. John H. Denison*, *Mr. John Hipp* and *Mr. Ralph Talbott* for Edgar C. Williams.

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

In *Jewell v. McKnight*, 123 U. S. 426, 432, 434, 435, the court

had occasion to determine the scope of those provisions of the Revised Statutes which authorized the judges of the Circuit Court in any civil suit or proceeding before it where they were divided in opinion, to certify to this court the point upon which they so disagreed. Rev. Stat., §§ 650, 652, 693. Speaking by Mr. Justice GRAY, this court held that each question certified must be a distinct point or proposition of law clearly stated, so that it could be definitely answered, without regard to other issues of law or of fact in the case. It said: "The points certified must be questions of law only, and not questions of fact, or of mixed law and fact—'not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony of facts adduced in the cause.' . . . The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division." In that case the general creditors of one of the parties sought to set aside, as fraudulent, a warrant of attorney to confess judgment. The court further said: "The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call 'the facts found' is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found. The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact. . . . Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a con-

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sideration of all the circumstances of the case. . . . 'They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone;' and 'It is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so.' *Waterville v. Van Slyke*, 116 U. S. 699, 704." See also *Fire Asso. v. Wickham*, 128 U. S. 426, 434.

In *United States v. Rider*, 163 U. S. 132, the Chief Justice, speaking for the court, said that "it has always been held that the whole case could not be certified," and that "under the Revised Statutes, as to civil cases, the danger of the wheels of justice being blocked by difference of opinion was entirely obviated." In that case it was also held that certificates of questions of law by the Circuit Courts of Appeals under the Judiciary Act of March 3, 1891, are governed by the same general rules as were formerly applied to certificates of division of opinion in the Circuit Court—citing *Columbus Watch Co. v. Robbins*, 148 U. S. 266; *Maynard v. Hecht*, 151 U. S. 324.

In *United States v. Union Pacific Railway*, 168 U. S. 505, 512 (which was the case of certified questions from a Circuit Court of Appeals), the rule as announced in the *Rider* case was affirmed. To the same effect are *Graver v. Faurot*, 162 U. S. 435, 436; *Cross v. Evans*, 167 U. S. 60, 64; *McHenry v. Alford*, 168 U. S. 651, 658.

The present certificate brings to us a question of mixed law and fact and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rather a condensed, argumentative narrative of the facts upon which, in the opinion of the judges of the Circuit Court of Appeals, depends the validity of the live-stock contract in suit. Thus, practically, the whole case is brought here by the certified question, and we are, in effect, asked to indicate what, under all

the facts stated, should be the final judgment. It is, obviously, as if the court had been asked, generally, upon a statement of all the facts, to determine what, upon those facts, is the law of the case. We thus state the matter, because it is apparent that the case turns altogether upon the question propounded as to the validity, in view of all the facts stated, of the contract under which the plaintiff's cattle were transported. This court is without jurisdiction to answer the question certified in its present imperfect form and the certificate must be dismissed. *Sadler v. Hoover*, 7 How. 646.

It is so ordered.

MR. JUSTICE BREWER dissented.

PATTERSON *v.* COLORADO *Ex rel.* THE ATTORNEY
GENERAL OF THE STATE OF COLORADO.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 223. Argued March 5, 6, 1907.—Decided April 15, 1907.

The requirement in the Fourteenth Amendment of due process of law does not take up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purpose of the case, and in that way subject a state decision that they have been complied with to revision by this court.

Whether an information for contempt is properly supported, and what constitutes contempt, as well as the time during which it may be committed, are all matters of local law.

As a general rule the decision of a state court upon a question of law is not an infraction of the due process clause of the Fourteenth Amendment and reviewable by this court on writ of error merely because it is wrong or because earlier decisions are reversed.

While courts, when a case is finished, are subject to the same criticisms as other people, they have power to prevent interference with the course of justice by premature statements, arguments, or intimidation, and the truth is not a defense in a contempt proceeding to an improper publication made during the pending suit.

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Argument for Plaintiff in Error.

In punishing a person for contempt of court the judges act impersonally and are not considered as sitting in their own case. *United States v Shipp*, 203 U. S. 563, 674.

THE facts are stated in the opinion.

Mr. Thomas M. Patterson, *pro se*, with whom Mr. Henry M. Teller, Mr. Charles S. Thomas, Mr. Sterling B. Toney, Mr. James H. Blood, Mr. Harvey Riddell, Mr. S. W. Belford and Mr. John A. Rush were on the brief, for plaintiff in error:

The articles and cartoon were legitimate and privileged criticisms. They did not relate to "pending" cases within the meaning of the law; and whatever reference they made to cases were in no wise calculated to interfere with the due administration of justice. These matters are jurisdictional, and by reason of them the court was without jurisdiction to proceed against respondent for contempt and to adjudge a fine against him, and in so doing it was the rendering of a judgment that deprived him of his property without due process of law. *Titus v. The People*, 7 Colorado, 451; *New Orleans v. Steamship Co.*, 20 Wall. 387.

It follows that in cases of criminal contempt not committed in the presence of the court, there must be a charge, in writing, and stating the facts constituting the contempts, and unless the facts set out constitute a contempt the court is without jurisdiction to either issue a citation or proceed further with the cause. *Cooper v. The People*, 13 Colorado, 337; *Mullin v. The People*, 15 Colorado, 440; *Wyatt v. The People*, 17 Colorado, 252.

Once a suit is decided newspapers may make whatever comments they will about it, and though the honor and integrity of the court may be assailed, judges, like other persons, are relegated to the courts for redress.

To issue a citation in contempt proceedings upon an unverified information confers no jurisdiction, and all proceedings thereafter in such proceedings are void for want of jurisdiction.

⁴ Blackstone's Commentaries, 286; *Thomas v. The People*,

14 Colorado, 254; *Cooper v. The People*, 13 Colorado, 355, and cases cited.

The legislature having defined contempts, fixed a practice and declared a punishment, the court was without authority to ignore the statutes and proceed in defiance of their provisions.

The legislature did exercise its authority over contempt and changed the rule of the common law by positive statute. It, like Congress, declared what should constitute contempt, and in doing so it included what has been divided by the courts into civil and criminal contempts in its enumeration. Sec. 321, Colorado Civil Code.

Every one of these enumerated contempts are declared by Rapalje to be criminal contempts, and Rapalje's definition is approved by the Colorado Supreme Court. Rapalje on Contempts, § 21; *Wyatt v. The People*, 17 Colorado, 258.

To fine or imprison an accused person in contempt proceedings for publishing the truth about a judge or court when the truth of the charge is pleaded in justification and an offer to prove the same is made, is to deprive him of liberty or property without due process of law. 4 Blackstone's Commentaries, . 285; *Cooper v. People*, 13 Colorado, 337, 365; *Matter of Sturock*, 97 Am. Dec. 626; *State v. Circuit Court*, 38 L. R. A. 559, 560; *In re Shortridge*, 99 California, 526; *Postal Co. v. Adams*, 155 U. S. 698; *Windsor v. McVeagh*, 93 U. S. 277; *Galpin v. Page*, 18 Wall. 350; *Hovey v. Elliot*, 167 U. S. 414, 419.

This court has a right to review the decisions of the state courts in contempt cases. *Walker v. Sauvinet*, 92 U. S. 90; *Eilenbecher v. Plymouth County District Court*, 134 U. S. 31; *Tinsley v. Anderson*, 171 U. S. 101; *Manley v. Park*, 187 U. S. 547; *Detroit Co. v. Osborne*, 189 U. S. 383; *Abbott v. National Bank of Commerce*, 175 U. S. 409.

Mr. I. B. Melville and *Mr. Horace G. Phelps*, with whom *Mr. William H. Dickson*, Attorney General of the State of

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Argument for Defendant in Error.

Colorado, *Mr. Samuel H. Thompson, Jr.*, and *Mr. N. C. Miller* were on the brief, for defendant in error:

This court has no jurisdiction to review the judgment of the Supreme Court of Colorado in this case. No treaty or Federal statute of, or any authority exercised under, the United States is involved. No statute of, or authority exercised under, the State of Colorado is involved on the ground of their being repugnant to the Constitution, treaties or laws of the United States.

The legislature of the Territory of Colorado in 1861 adopted the common law of England, so far as applicable and of a general nature, as well as all the acts and statutes of a general nature passed by the British parliament in aid of the common law prior to the fourth year of James I. *Laws of Colorado*, 1861, p. 35.

A following legislature, in 1868, repealed this statute, but afterwards, at the same session, reënacted it, and it has ever since remained in force in this commonwealth. 2 *Mills' Ann. Stat.* § 4184; *Herr v. Johnson*, 11 *Colorado*, 393, 396; *Chilcott et al. v. Hart*, 23 *Colorado*, 40, 51; *Teller v. Hill*, 18 *Colo. App.* 509, 512.

The constitution of the State of Colorado was adopted July 1, 1876, and the Supreme Court of such State was created and its duties defined by article VI thereof. 1 *Mills' Ann. Stat.* 252.

The original thirteen States inherited the common law, and so held it at the time of the adoption of their respective constitutions. Colorado adopted the common law by legislative enactment, and so held it at the time of the adoption of its constitution.

When the courts of those States came into existence by constitutional creation, they became possessed of common law powers by reason of the existence of the common law in their respective jurisdictions; and for the same reason, when the Supreme Court of Colorado came into existence, by virtue of the constitution of such State, it became possessed of common law powers, except as otherwise provided in said instrument.

The Supreme Court of Colorado is a constitutional court, with common law powers, and right of self-preservation is an inherent right in such courts. Rapalje on Contempts, § 1; Abbott's Trial Brief (Crim. 2d ed.), 13; 7 Am. & Eng. Enc. of Law (2d ed.), 30; 9 Cyc. of Law & Proc. 26; 2 Bish. New Crim. Law, § 243; *Ex parte Bollman*, 4 Cr. 75, 94; *United States v. Hudson*, 7 Cr. 32, 34; *Anderson v. Dunn*, 6 Wheat. 204, 227; *Ex parte Kearney*, 7 Wheat. 39, 42; *Randall v. Brigham*, 7 Wall. 523, 540; *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 303 *et seq.*; *Ex parte Savin*, 131 U. S. 267, 275; *In re Debs*, 158 U. S. 564, 596.

It follows that the legislature is without power to limit or restrict the exercise of such inherent power, whenever the latter is necessary for the protection and preservation of the efficiency and usefulness of such court. Rapalje on Contempts, § 1; Abbott's Trial Brief (Crim. 2d ed.), note, p. 13; 9 Cyc. Law. & Proc. 27, and cases cited under note 40; 7 Am. & Eng. Enc. of Law (2d ed.), 33, and cases cited under note 1; *Ex parte Robinson*, 19 Wall. 505, 510.

While freedom of the press, like that of freedom of speech, is necessary to the perpetuation of a republican form of government, this does not mean that either can be carried to such an extreme as to impede, embarrass, or unjustly influence the due and orderly administration of justice, or prejudice the rights of litigants in pending cases, for the latter would more surely impair the existence of our government than the former. Cooley's Const. Lim. (7th ed.), 604, 605; 7 Am. & Eng. Enc. of Law (2d ed.), 59; 9 Cyc. Law and Proc. 20; 2 Bish. New Crim. Law, § 259; Abbott's New Trial Brief (Crim. 2d ed.), 15; Oger's Libel & Slander (3d ed.), 519, 524.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to review a judgment upon an information for contempt. The contempt alleged was the publication of certain articles and a cartoon, which, it was

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charged, reflected upon the motives and conduct of the Supreme Court of Colorado in cases still pending and were intended to embarrass the court in the impartial administration of justice. There was a motion to quash on grounds of local law and the state constitution and also of the Fourteenth Amendment to the Constitution of the United States. This was overruled and thereupon an answer was filed, admitting the publication, denying the contempt, also denying that the cases referred to were still pending, except that the time for motions for rehearing had not elapsed, and averring that the motions for rehearing subsequently were overruled, except that in certain cases the orders were amended so that the democratic officeholders concerned could be sooner turned out of their offices. The answer went on to narrate the transactions commented on, at length, intimating that the conduct of the court was unconstitutional and usurping, and alleging that it was in aid of a scheme, fully explained, to seat various republican candidates, including the governor of the State, in place of democrats who had been elected, and that two of the judges of the court got their seats as a part of the scheme. Finally, the answer alleged that the respondent published the articles in pursuance of what he regarded as a public duty, repeated the previous objections to the information, averred the truth of the articles, and set up and claimed the right to prove the truth under the Constitution of the United States. Upon this answer the court, on motion, ordered judgment fining the plaintiff in error for contempt.

The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they raise questions of local law, which are not open to reëxamination here. The requirement in the Fourteenth Amendment of due process of law does not take up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, and in that way subject a state decision that they have been complied with to revision by this court. *French v.*

Taylor, 199 U. S. 274, 278; *Rawlins v. Georgia*, 201 U. S. 638, 639; *Burt v. Smith*, 203 U. S. 129, 135. For this reason, if for no other, the objection that the information was not supported by an affidavit until after it was filed cannot be considered. See further *Ex parte Wall*, 107 U. S. 265. The same is true of the contention that the suits referred to in the article complained of were not pending. Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States. It is admitted that this may be true in some other sense, but it is not true, it is said, for the purpose of fixing the limits of possible contempts. But here again the plaintiff in error confounds the argument as to the common law, or as to what it might be wise and humane to hold, with that concerning the State's constitutional power. If a State should see fit to provide in its constitution that conduct otherwise amounting to a contempt should be punishable as such if occurring at any time while the court affected retained authority to modify its judgment, the Fourteenth Amendment would not forbid. The only question for this court is the power of the State. *Virginia v. Rives*, 100 U. S. 313, 318; *Missouri v. Dockery*, 191 U. S. 165, 171.

It is argued that the decisions criticised, and in some degree that in the present case, were contrary to well-settled previous adjudications of the same court, and this allegation is regarded as giving some sort of constitutional right to the plaintiff in error. But while it is true that the United States courts do not always hold themselves bound by state decisions in cases arising before them, that principle has but a limited application to cases brought from the state courts here on writs of error. Except in exceptional cases, the grounds on which the Circuit Courts are held authorized to follow an earlier state decision rather than a later one, or to apply the rules of commercial law as understood by this court, rather than those

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laid down by the local tribunals, are not grounds of constitutional right, but considerations of justice or expediency. There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed.

It is argued that the articles did not constitute a contempt. In view of the answer, which sets out more plainly and in fuller detail what the articles insinuate and suggest, and in view of the position of the plaintiff in error that he was performing a public duty, the argument for a favorable interpretation of the printed words loses some of its force. However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. Supposing that such a case would give the plaintiff in error a standing here, anything short of that is for the state court to decide. What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.

The defense upon which the plaintiff in error most relies is raised by the allegation that the articles complained of are true and the claim of the right to prove the truth. He claimed this right under the constitutions both of the State and of the United States, but the latter ground alone comes into consideration here, for reasons already stated. *Ex parte Kemmler*, 136 U. S. 436. We do not pause to consider whether the claim was sufficient in point of form, although it is easier to refer to

the Constitution generally for the supposed right than to point to the clause from which it springs. We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respubica v. Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *ubi sup.*; 4 Bl. Com. 150.

In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury and the publication may affect their judgment. Judges generally, perhaps, are less apprehensive that publications impugning their own

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reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied. *Ex parte Terry*, 128 U. S. 289; *Telegram Newspaper Co. v. Commonwealth*, 172 Massachusetts, 294; *State v. Hart*, 24 W. Va. 416; *Myers v. State*, 46 Ohio St. 473, 491; *Hunt v. Clarke*, 58 L. J. Q. B. 490, 492; *Rex v. Parke* [1903], 2 K. B. 432. It is objected that the judges were sitting in their own case. But the grounds upon which contempts are punished are impersonal. *United States v. Shipp*, 203 U. S. 563, 574. No doubt judges naturally would be slower to punish when the contempt carried with it a personally dishonoring charge, but a man cannot expect to secure immunity from punishment by the proper tribunal, by adding to illegal conduct a personal attack. It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court.

Writ of error dismissed.

MR. JUSTICE HARLAN, dissenting.

I cannot agree that this writ of error should be dismissed.

By the First Amendment of the Constitution of the United States, it is provided that "Congress shall make no law respecting an establishment of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition the Government for redress." In the *Civil Rights cases*, 109 U. S. 1, 20, it was adjudged that

the Thirteenth Amendment, although in form prohibitory, had a reflex character in that it established and decreed universal civil and political freedom throughout the United States. In *United States v. Cruikshank*, 92 U. S. 542, 552, we held that the right of the people peaceably to assemble and to petition the Government for a redress of grievances—one of the rights recognized in and protected by the First Amendment against hostile legislation by Congress—was an attribute of “national citizenship.” So the First Amendment, although in form prohibitory, is to be regarded as having a reflex character and as affirmatively recognizing freedom of speech and freedom of the press as rights belonging to citizens of the United States; that is, those rights are to be deemed attributes of national citizenship or citizenship of the United States. No one, I take it, will hesitate to say that a judgment of a Federal court, prior to the adoption of the Fourteenth Amendment, impairing or abridging freedom of speech or of the press, would have been in violation of the rights of “citizens of the United States” as guaranteed by the First Amendment; this, for the reason that the rights of free speech and a free press were, as already said, attributes of national citizenship before the Fourteenth Amendment was made a part of the Constitution.

Now, the Fourteenth Amendment declares, in express words, that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” As the First Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that when the Fourteenth Amendment prohibited the States from impairing or abridging the privileges of citizens of the United States it necessarily prohibited the States from impairing or abridging the constitutional rights of such citizens to free speech and a free press. But the court announces that it leaves undecided the specific question whether there is to be found in the Fourteenth Amendment a prohibition as to the rights of free

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speech and a free press similar to that in the First. It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such "*previous restraints*" upon publications as had been practiced by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them. In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.

I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press.

MR. JUSTICE BREWER, separately dissenting.

While not concurring in the views expressed by Mr. Justice Harlan, I also dissent from the opinion and judgment of the court. The plaintiff in error made a distinct claim that he was denied that which he asserted to be a right guaranteed by the Federal Constitution. His claim cannot be regarded as a frivolous one, nor can the proceedings for contempt be

entirely disassociated from the general proceedings of the case in which the contempt is charged to have been committed. I think, therefore, that this court has jurisdiction and ought to inquire and determine the alleged rights of the plaintiff in error. As, however, the court decides that it does not have jurisdiction, and has dismissed the writ of error, it would not be fit for me to express any opinion on the merits of the case.

CHANLER *v.* KELSEY, COMPTROLLER OF THE STATE
OF NEW YORK.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW
YORK AND STATE OF NEW YORK.

No. 240. Argued March 14, 1907.—Decided April 15, 1907.

Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title.

This court must follow the decision of the state court in determining that the essential thing to transfer an estate is the exercise of a power of appointment.

The imposition of a transfer or inheritance tax under ch. 284, Laws of New York, 1897, on the exercise of a power of appointment in the same manner as though the estate passing thereby belonged absolutely to the person exercising the power, does not, although the power was created prior to the act, deprive the person taking by appointment, and who would not otherwise have taken the estate, of his property without due process of law in violation of the Fourteenth Amendment; nor does it violate the obligation of any contract within the protection of the impairment clause of the Federal Constitution.

176 N. Y. 486, sustained.

THIS is a writ of error to the Surrogate's Court of the county of New York, State of New York, but its real purpose is to

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Statement of the Case.

review a decision of the Court of Appeals of the State sustaining an order of the Surrogate's Court, which imposed a transfer-tax upon certain estates arising under appointment by Laura Astor Delano, deceased. 176 N. Y. 486.

Laura Astor Delano was the daughter of William B. Astor. Upon the occasion of her marriage in 1844 to Frank H. Delano, Mr. Astor executed a deed in the nature of a marriage settlement, conveying certain real and personal property to trustees in trust to pay the income to said Laura Delano for life, with remainder to her issue in fee, or in default of issue, to her heirs in fee; and giving her power in her discretion to appoint the remainder "amongst her said issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will."

In the years 1848, 1849 and 1865 William B. Astor made other deeds, by way of addition to the original marriage settlement, substantially similar in their terms. That of 1848 conveyed certain real estate to Mrs. Delano for life, with power of appointment as to said premises, or any part thereof, "to and among her said issue, brothers, sister Alida, or their issue, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed in the presence of two witnesses or acknowledged by her as a will." The deed of 1849 conveyed to trustee certificates for \$50,000 of the public debt of Ohio; "to hold the same in trust for the benefit of Laura Astor Delano during her life, and at her death to transfer and convey the capital of the said stock to her issue, but in case she left no issue, then to her surviving brothers and sister Alida and to the issue of any of them who died leaving issue; and said instrument contained a power of appointment to Laura Astor Delano as follows: 'Provided, however, that it shall be lawful for the said Laura, by any instrument executed duly as a will of personal estate, to dispose of the said capital unto and amongst her

issue, brothers, sister and their issue, in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may be lawfully devised.' " These deeds were absolutely irrevocable, took effect upon delivery, and were not made in contemplation of the death of the grantor.

Laura A. Delano died June 15, 1902, in Geneva, Switzerland, leaving no descendants. By her last will and testament, duly admitted to probate in the county of New York on October 14, 1902, she exercised the power of appointment conferred in the deeds from her father in favor of the plaintiffs in error.

One of the plaintiffs in error, Arthur Astor Carey, a grandson of William B. Astor, and an appointee to whom Mrs. Delano had appointed the property originally conveyed by the deeds of 1848 and 1849, took an appeal from the order of the Surrogate's Court refusing to dismiss the petition to the Appellate Division of the Supreme Court, where it was held that the act under which the tax was imposed, as applied to this case, was unconstitutional. *Matter of Delano*, 82 App. Div. 147. The state comptroller appealed to the Court of Appeals from the decision of the Appellate Division.

That court sustained the right to impose the transfer tax upon the interests appointed by Mrs. Delano under the powers created by the deeds above referred to. Subsequent decisions were made *pro forma* and a final order on the last remittitur of the Court of Appeals was made in the Surrogate's Court, and the case brought here by all the plaintiffs in error.

Mr. Lucius H. Beers for plaintiff in error:

The power of the State to take property by means of a succession tax arises only when the succession is caused by the death of the former owner of the property taken.

Death is the generating source from which the particular taxing power takes its being. *Knowlton v. Moore*, 178 U. S. 41, 56; *Cahen v. Brewster*, 203 U. S. 543, 550; *Mager v. Grima*, 8 How. 490, 493; *United States v. Perkins*, 163 U. S. 625;

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Argument for Plaintiff in Error.

Plummer v. Coler, 178 U. S. 115, 124; *Matter of Swift*, 137 N. Y. 77, 83; *Matter of Sherman*, 153 N. Y. 1, 3-5; *Matter of Lansing*, 182 N. Y. 238, 248; *Minot v. Winthrop*, 162 Massachusetts, 113; *Re Wilmerding*, 117 California, 281; *State v. Dalrymple*, 70 Maryland, 294; *State v. Henderson*, 160 Missouri, 190; *State v. Alston*, 94 Tennessee, 674; *Kochersperger v. Drake*, 167 Illinois, 122; *Strode v. Commonwealth*, 52 Pa. St. 181.

The validity of a succession tax depends, not on the general taxing power of the State, but on the existence of a power in the State to regulate the particular succession sought to be "taxed."

In a series of decisions this court and the New York Court of Appeals have held that this is not a tax on property or a tax on persons. *United States v. Perkins*, 163 U. S. 625, 629.

The powers under which this property was appointed to the plaintiffs in error were created by deed *inter vivos* and that fact distinguishes this case from the case of *Orr v. Gilman*, 183 U. S. 278, where the power was created by will. See also *Cahen v. Brewster*, 203 U. S. 543, 551, where the precise distinction here contended for is pointed out.

The amendment of 1897 was not an exercise of the State's general power to tax, but was intended to impose a succession tax.

It is not necessary for the court to consider here, whether the statute would be constitutional if it were regarded as an exercise of the general taxing power of the State, for the New York Court of Appeals has in this case held that the statute in question "does not attempt to impose a tax upon property, but upon the exercise of the power of appointment." See *Matter of Pell*, 171 N. Y. 48.

There has been no succession to the remainders originally transferred by the deeds of 1844, 1848 and 1849 which would permit the imposition of a succession tax.

There can be powers which make the property involved practically the property of the donee, but those must give the donee the unlimited power of appointment. Such powers the

law treats as tantamount to ownership, at least so far as the rights of creditors are concerned. Here the powers are in trust and were limited to be exercised only in favor of certain descendants of the creator of the power. For these distinctions see *Matter of Lansing*, 182 N. Y. 238.

The instrument by which Mrs. Delano exercised these powers of appointment created by deed was not a "will" in so far as it exercised those powers.

The imposition of a tax under the amendment of 1897 will deprive the plaintiffs in error of property without due process of law.

The legislature has based this exaction on an hypothesis as to the facts, which it deliberately recognizes to be a false hypothesis.

In this case there has been no succession, and there can be no succession tax here unless it is within the power of the legislature to avoid constitutional limitations by "deeming" the facts to be what they are not.

States have repeatedly attempted to treat an appointment as a succession for the purpose of collecting a succession tax, but such attempts have uniformly failed for the reason that an appointment is not legally a succession because the appointed property does not belong to the donee of the power. *Emmons v. Shaw*, 171 Massachusetts, 410; *Commonwealth v. Duffield*, 12 Pa. St. 277; *Commonwealth v. Williams*, 13 Pa. St. 29; *Matter of Stewart*, 131 N. Y. 274, 281; *Matter of Harbeck*, 161 N. Y. 211.

The amendment of 1897 in imposing a succession tax on the property of the plaintiffs in error impaired the obligation of a contract.

Each of the remaindermen named in the original deeds took a vested remainder subject to being divested only by the exercise of the power in favor of some other member of the class. *Root v. Stuyvesant*, 18 Wend. 257, 267.

A transfer tax cannot constitutionally be imposed on a remainder which vested before the tax was created. *Matter*

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Argument for Defendant in Error.

of *Pell*, 171 N. Y. 48, 55; *Matter of Lansing*, 182 N. Y. 238, 247, 248.

The clause of the United States Constitution providing that no State shall pass a law impairing the obligation of contracts applies to grants and other executed contracts, as well as to executory contracts. *Fletcher v. Peck*, 6 Cranch, 87, 136.

Mr. David B. Hill for defendant in error:

The instrument by which Mrs. Delano exercised the powers of appointment was a "will." Rev. Stat., Part 2, chap. I, title II, Art. III, § 110, or 1 Rev. Stats. 735, § 110.

At the time of the making of the deeds herein, Laura Astor Delano had the right given by § 110 above, to make a will for the purpose of exercising the power given by said deeds.

William B. Astor is presumed to have made these deeds with knowledge of this provision of law.

The decision of the Court of Appeals of the State of New York that the statute, chapter 284 of the laws of 1897, subdivision 5 of § 220 of the Tax Law, does not violate any provision of the constitution of the State of New York will be regarded as conclusive upon this court upon that question. *Orr v. Gilman*, 183 N. Y. 278; *People ex rel. Met. St. Ry. Co. v. N. Y. State Board of Tax Com'rs*, 199 U. S. 1; *Seneca Nation v. Christie*, 162 U. S. 283; *Missouri R. R. Co. v. Haber*, 169 U. S. 613; *Smiley v. Kansas*, 196 U. S. 447; *Hibben v. Smith*, 191 U. S. 310.

The legislature of the State of New York had the right to enact chapter 284 of the laws of 1897 (now subdivision 5 of § 220 of the Tax Law), and the same is not a violation of any of the provisions of the Constitution of the United States.

The legislature by this act does not impose a tax upon property, but it does impose a tax upon the exercise of a power of appointment.

It can make no difference when the right was given to the exercise of the power, or how it was created. No tax is made upon the giving of the power, but only upon the exercise by

the donee of the power of appointment. It does not impair the obligation of any contract between William B. Astor and the plaintiffs in error, made prior to the passage and enactment of the statute, nor does it deprive the plaintiffs in error of their property without due process of law, or deny to them the equal protection of the laws. *People ex rel. Eisman v. Ronner*, 185 N. Y. 293; *United States v. Perkins*, 163 U. S. 625; *McMillan v. Anderson*, 95 U. S. 37.

The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, 288; *United States v. Perkins*, 163 U. S. 625; *In re Cullom*, 145 N. Y. 593; *Wallace v. Myers*, 38 Fed. Rep. 184; *Matter of Hoffman*, 143 N. Y. 327.

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

The tax in controversy was imposed under an amendment of the general transfer-tax law of the State of New York, chapter 284, Laws of 1897, which provides as follows:

“Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled

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to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The validity of this tax was attacked in the courts of New York upon objections pertaining to both the Federal and state constitutions. The latter are not open here, and we shall consider the case only so far as it relates to the objections made to the validity of this statute by reason of alleged violations of the Federal Constitution. These are: First, that by the imposition of the tax the property of the beneficiaries is taken without due process of law, in violation of the Fourteenth Amendment; and, second, that such taxation violates the obligation of a contract within the protection of section 10 of Article I of the Federal Constitution.

The objection that the property is taken without due process of law is based upon the argument that the estate in remainder was derived from the deeds of William B. Astor and not under the power of appointment received from those deeds by Mrs. Laura A. Delano. In support of this contention, common law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument. 4 Kent's Com. 327; 2 Washburn, Real Property, 320. The argument is that the estate which arose by the exercise of the power came from William B. Astor and not from Laura A. Delano, and was vested long before the passage of the amendment of 1897, under the authority of which the tax was imposed, and to tax the exercise of the power therefore takes property without due process of law.

However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is

self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others.

Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title. It is so within the purpose of the registration acts. A person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for quiet enjoyment. 2 Sugden on Powers, 3d ed., 19.

"So on an issue to try whether the plaintiff was entitled by two writings, or any other, purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will, in which case it was contended that the devisees were in by the feoffment and not by the will, the court held that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough and pursuant to the issue, and a verdict was accordingly given for the plaintiff." 2 Sugden on Powers, 19, citing *Bartlett v. Ramsden*, 1 Keb. 570.

So, in the present case, the plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano.

By statute in England, for the purposes of taxation, it has been provided that the donee of the power shall be regarded, in case of a general power, as the one from whom the estate came. In *Attorney General v. Upton et al.*, L. R. 1 Ex. 224, the Court of Exchequer had under consideration the Succession Duty Act (16, 17 Vict. c. 51), and it was held that the

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appointee under a general power of appointment, taking effect on the death happening since the commencement of the act, takes succession from the donee of the power. The testator, Admiral Fanshawe, by will devised certain lands to the use of his wife, Caroline Fanshawe, for life, remainder to such use as she should by deed or will appoint, and, in default of appointment, for the use and benefit of testator's nephews, C. F. and J. F. Fanshawe, and their issue. She by deed appointed to the use that trustees should after her death receive an annuity during the lives of the wife of the testator's nephew, and of the children of the nephew by her, in trust for the separate use of the wife, Elizabeth Fanshawe. Section 4 of the act, which is there construed, provides that any person having a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of the act, shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power. All the judges agreed that under section 4 of the act the nephew's wife took the annuity as a succession from the testator's widow and not from the testator himself; that, therefore, a duty of ten per cent was payable. Bramwell, B., was of opinion that the duty was also payable under section 2, which provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition . . . a succession." In speaking of this section the Baron said:

"Now, will these annuitants take by reason of the will of Admiral Fanshawe? We must look, not at the *causa remota*, but at the *causa proxima*, and that is the disposition of Caroline Fanshawe. Again, the act says, that the term predecessor 'shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or

shall be derived.' From whom, then, is the interest derived? As I said in *Barker's case* (1), these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fanshawe or from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law that an appointee takes his estate from the donor of the power, but I say that it is a rule not applicable to the construction of this statute, and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary."

The learned Baron seems to have gone farther, as to section 2, than his brethren were willing to. *Attorney General v. Mitchell*, L. R. 6 Q. B. D. 548. His observations are nevertheless suggestive.

While the entire bench recognized the common law rule that the estate is taken to come from the donor of the power, it enforced the statutory change as to a subsequent exercise of the power, treating the estate as coming from the donee, by whose act it was appointed to the beneficiary.

The statute of New York in question acts equally upon all persons similarly situated. It affects an estate which only became complete by the exercise of a power subsequent to its enactment.

The exercise of the power bestowing property in the present case was made by will. And we need not consider the case, expressly reserved by the Court of Appeals in its opinion, as to the result if it had been exercised by deed.

That the will was effectual to transfer the estate was ruled by the Court of Appeals, and its decision on this question is binding here, as was held in *Orr v. Gilman*, 183 U. S. 278, which came here for a review of a decision of the Circuit Court of Appeals of New York, rendered in *Matter of Dows*, 167 N. Y. 227, a case which arose under the same statute of 1897. In that case the testator devised real estate in trust to pay the income to his son for life, and, upon his death, to vest abso-

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lutely and at once in his children and the issue of his deceased children, as his son should appoint by will. If, however, the son should die intestate the estate was to vest absolutely and at once in his children then living, and the issue of the deceased children. The son exercised the power of appointment by his last will, probated in 1899. The Court of Appeals held that the property was subject to the taxation imposed by the act of 1897; that such tax was on the right of succession and not on the property. It became important in that case to determine whether the property passed by virtue of the will of the donor, David Dows, Senior, and then became vested in the grandchildren, or only became vested in them when the power of appointment was exercised by the will of David Dows, Junior.

This court held that the answer to this question must, of course, be furnished by the Court of Appeals in that case. 183 U. S. 282. In other words, the Court of Appeals of New York had the exclusive right to construe instruments of title in that State, and determine for itself the creation and vesting of estates through wills under the laws of the State. "The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statutes." 183 U. S. 288. In the present case the New York Court of Appeals has spoken in no uncertain language upon the subject:

"As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee by her will to divest certain defeasible estates

and to vest them absolutely in one person. If this authority had been conferred by will, instead of by deed, the right to act would have been precisely the same, and the power would have neither gained nor lost in force. . . . 176 N. Y. 493.

"As we said through Judge Cullen in the *Dows case*: 'Whatever be the technical source of title of the grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.' This accords with the statutory definition of a power as applied to real estate, for it includes an authority to create or revoke an estate therein. (Real Property Law, § 111.) Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and the interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act." 176 N. Y. 494.

As in *Orr v. Gilman*, 183 U. S. *supra*, we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will. *United States v. Perkins*, 163 U. S. 625, 628; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288.

We cannot say that property has been taken without due process of law, within the protection of the Fourteenth Amendment, by the manner in which the Court of Appeals has construed and enforced this statute. *Orr v. Gilman*, 183 U. S. *supra*.

Nor do we perceive that the effect has been to violate any contract right of the parties. It is said that this is so, because

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instead of disposing of the entire estate, ninety-five per cent of the property included in the power has been transferred and five per cent taken by the State; but as there was a valid exercise of the taxing power of the State, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate.

Certainly the remaindermen had no contract with the donor or with the State. For whether the remaindermen received aliquot parts of the entire estate or the same was divested in whole or in part for the benefit of others in the class, depended upon the exercise of the power by the donee. The State was not deprived of its sovereign right to exercise the taxing power upon the making of a will in the future by which the estate was given to the appointees.

We find no error in the judgment of the Surrogate's Court entered on the remittitur from the Court of Appeals, and the same is

Affirmed.

MR. JUSTICE HOLMES, with whom was MR. JUSTICE MOODY, dissenting.

I have the misfortune to differ from the majority of my brethren in this case, and although the argument which seemed and still seems to me unanswerable was presented and has not prevailed, I think that the principles involved are of sufficient importance to justify a statement of the reasons for my dissent. A state succession tax stands on different grounds from a similar tax by the United States or a general state tax upon transfers. It is more unlimited in its possible extent, if not altogether unlimited, and therefore it is necessary that the boundaries of the power to levy such taxes should be accurately understood and defined.

I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,—a power

which belongs to the States; and I have been fortified in my belief by the utterances of this court from the time of Chief Justice Taney to the present day. *Mager v. Grima*, 8 How. 490, 493; *United States v. Perkins*, 163 U. S. 625, 627, 628; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288; *Plummer v. Coler*, 178 U. S. 115, 124, 126, 137; *Billings v. Illinois*, 188 U. S. 97, 104; *Campbell v. California*, 200 U. S. 87, 94; *Cahen v. Brewster*, 203 U. S. 543, 550. See also *Matter of Sherman*, 153 N. Y. 1, 4. For that reason the power is more unlimited than the power of a State to tax transfers generally, or the power of the United States to levy an inheritance tax. The distinction between state and United States inheritance taxes was recognized in *Knowlton v. Moore*, 178 U. S. 41, 58, and whatever may be thought of the decision in *Snyder v. Bettman*, 190 U. S. 249, I do not understand it to import a denial of the distinction, reaffirmed by the dissenting members of the court. 190 U. S. 256.

If then a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69.

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It is not denied that the tax under consideration is a succession tax. The Court of Appeals treated it as such in the present case. It said: "If the power had been exercised by deed a different question would have arisen, but it was exercised by will and owing to the full and complete control by the legislature of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will." *Matter of Delano*, 176 N. Y. 486, 494, reversing S. C., 82 App. Div. 147. That it was such a tax and valid for that reason was decided in *Matter of Dows*, 167 N. Y. 227, affirmed by this court. *Orr v. Gilman*, 183 U. S. 278, adopting the New York view, 183 U. S. 289. And these decisions and some of the other decisions of this court cited above were relied upon by the Court of Appeals. 176 N. Y. 492. See further *Matter of Vanderbilt*, 50 App. Div. 246; aff'd 163 N. Y. 597; *Matter of Lansing*, 182 N. Y. 238, 248. Probably the tax would be invalid for other local reasons besides those mentioned in *Matter of Dows*, but for the construction which it has received. *Matter of Pell*, 171 N. Y. 48, 60.

This being then a succession tax, I should have thought it plain that there was no succession for it to operate upon. More precisely, even if otherwise any element of succession could have been found, a matter that I think would need explanation, the execution of the power did not depend in any way upon the continued coöperation of the laws of New York by way of permission or grant. I am not concerned to criticise the statement of the Court of Appeals that in substance it is the execution of the power that gives to the grantee the property passing under it. It is enough if it is remembered that the instrument executing the power derives none of its efficiency in that respect from the present laws of New York. It is true that the instrument happens to be a will, and that it could not have operated as a will except by the grant of the privilege from the State at the time when Mrs. Delano died. But what would execute the power depended, in the first place, upon the deed creating it, and if that deed did not

require a will but only an instrument otherwise sufficiently characterized, it did not matter whether the instrument was also good as a will or not. *Ela v. Edwards*, 16 Gray, 91, 100.

What the deeds which I am considering required was "an instrument in its nature testamentary to be acknowledged by her (Mrs. Delano) as a deed in the presence of two witnesses or published by her as a will." The language was chosen carefully, I presume, in view of the incapacities of married women at that time. By the terms used a will was unnecessary. It was enough if Mrs. Delano sealed and acknowledged an instrument in its nature testamentary in the presence of two witnesses, whether it was good as a will or not. *Strong v. Wilkins*, 1 Barb. Ch. 9, 13; *Heath v. Withington*, 6 Cush. 497. This she did. In *Orr v. Gilman*, 183 U. S. 278, the power was created by will, and, what is more obviously material, it required a will for its execution, and so might be held to invoke and submit itself to the law in force when the execution should take place. Therefore that case has no bearing upon this. The ground upon which this tax is imposed is, I repeat, the right of the State to regulate or, if it sees fit, to destroy inheritances. If it might not have appropriated the whole it cannot appropriate any part by the law before us. And I also repeat that it has no bearing upon the matter that by a different law the State might have derived an equal revenue from these donees in the form of a tax. I do not understand it to be suggested that the State without compensation could have appropriated the remainder after Mrs. Delano's life, which Mr. Astor parted with in 1844 and shortly following years. If it could not have done so I am unable to see on what ground this tax is not void. The English decisions throw no light upon the question before us because they are concerned only with the construction of statutes which, however construed, are law.

MR. JUSTICE MOODY concurs in this dissent.

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BARRINGTON v. MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 493. Submitted April 8, 1907.—Decided April 22, 1907.

Although the brief alleges that certain Federal questions were duly raised in the state court and so disposed of as to sustain the jurisdiction of this court, if those questions are wholly without merit, or foreclosed by previous decisions of this court, the writ of error will be dismissed; and *held* that rulings of the state court in a criminal case in regard to change of venue, admission of evidence, and form of indictment were not subject to review in this court and afforded no basis for holding that plaintiff in error was not awarded due process of law.

Article V of Amendments to the Constitution does not operate as a restriction on the powers of the State, but solely upon the Federal Government. *Brown v. New Jersey*, 175 U. S. 172.

Under the laws of Missouri the right of accused to the endorsement of names of witnesses on the indictment does not rest on the common law but on state statute, and whether the provisions have been complied with is not a Federal question and the decision of the state court is not open to revision here.

The question of citizenship is immaterial as affecting the jurisdiction of this court under § 709, Rev. Stat. As a general rule aliens are subject to the law of the territory where the crime is committed.

No treaty gives to subjects of Great Britain any different measure of justice than that secured to citizens of this country.

Writ of error to review, 95 S. W. Rep. 235, dismissed.

THE facts are stated in the opinion.

Mr. William G. Johnson, for plaintiff in error.

Mr. Herbert S. Hadley, Attorney General of the State of Missouri, and *Mr. John Kennish*, Assistant Attorney General, for defendant in error.

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

Plaintiff in error was found guilty of murder in the first degree in the Circuit Court of St. Louis County, Missouri, and, after

motions for new trial and in arrest of judgment were made and overruled, judgment was rendered on the verdict and sentence passed accordingly. The case was carried to the Supreme Court of the State and the judgment was affirmed by Division No. 2 of that court, having appellate jurisdiction of criminal cases. No Federal question was referred to in the opinion of the court. A motion for rehearing was filed, wherein Federal questions were sought to be raised. The court denied the motion without opinion.

Plaintiff in error then moved for the transfer of the cause to the court in banc, setting forth certain Federal questions, and the cause was transferred. The court in banc adopted the opinion of Division No. 2 as its opinion and the judgment was again affirmed. 95 S. W. Rep. 235. A motion for rehearing assuming to raise Federal questions was filed and denied without opinion. This writ of error was thereupon brought and comes before us on motions to dismiss or affirm.

No assignment of errors was returned with the writ as required by § 997 of the Revised Statutes, nor is there in the brief of counsel for plaintiff in error on these motions any specification of errors under Rule 21, but the brief does allege that certain Federal questions were duly raised and so disposed of as to sustain the jurisdiction of this court.

But if these questions are wholly without merit or are no longer open by reason of our previous decisions, it has long been settled that the writ of error should be dismissed.

1. Before the trial of the cause was commenced plaintiff in error applied for a change of venue on the ground of local prejudice.

The application was heard at length, and forty-one witnesses testified in its support and thirty-seven witnesses in opposition thereto; and the trial court decided that prejudice justifying a change of venue had not been made out, and denied the application. It is now contended that the refusal to grant the change of venue deprived plaintiff in error of a fair and impartial trial, to which, under the Federal Constitution, he

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was entitled. The state Supreme Court held it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and that "where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there are circumstances of such a nature as indicates an abuse of the discretion lodged in such court." And the Supreme Court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the State of Missouri, although the Supreme Court of that State had held to the contrary.

2. It is also contended that plaintiff in error "set up and claimed that, under the Federal Constitution, as well as under the constitution of Missouri, he could not be compelled to give testimony against himself, and that this exemption and protection were denied to him by the court in permitting to be given in evidence against him alleged extra-judicial admissions extorted from him while under arrest by the police officers of the State." Certain statements made by plaintiff in error, defendant below, were admitted in evidence on the trial, but it does not appear that counsel objected to the introduction of this testimony on the ground that any rights, privileges or immunities of defendant under the Constitution of the United States were thereby violated. Counsel for the State offered in evidence certain articles taken from defendant's trunk, and this was objected to on the ground that they were taken in violation of the state constitution and without defendant's consent. The objection was not passed upon, and the articles were withdrawn. The trunk and its contents were again offered in evidence and objected to, but the objection was based entirely upon the ground of irrelevancy and immateriality

and the fact that a proper foundation had not been laid in the identification of the trunk.

When the State offered in evidence the statements made by defendant following his arrest, the trial court excluded the jury and heard the testimony of the persons present at the time for the purpose of determining the competency thereof. After the examination of a number of witnesses, who detailed fully the circumstances under which the statements were made, counsel objected "because there is no foundation laid for it and because it was [not] voluntary." This objection was overruled and the evidence admitted.

The state Supreme Court held that the trial court in admitting the testimony did not commit error. This notwithstanding the constitution of Missouri provided "That no person shall be compelled to testify against himself in a criminal case." Its ruling upon that proposition is not subject to review in this court.

After the decision of the Supreme Court in banc affirming the judgment, plaintiff in error filed a petition for rehearing which was denied without opinion. The third ground of that motion was as follows: "Because counsel for appellant, through neglect and inadvertence, failed to call the attention of the court to the proposition that the cross-examination of appellant complained of as 'improper,' and the admission as evidence of statements or 'confessions' made by appellant while in the 'sweat box' of the St. Louis police department, was in direct violation of the Constitution of the United States, Article V, amendments to the Constitution of the United States, in that it compelled the appellant to become a witness against himself." The suggestion came too late, and, moreover, Article V of the amendments, alone relied on, does not operate as a "restriction of the powers of the State, but was intended to operate solely upon the Federal Government." *Brown v. New Jersey*, 175 U. S. 172. And if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the constitution and laws of the State of Missouri, the record

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affords no basis for holding that he was not awarded due process of law. *Howard v. Fleming*, 191 U. S. 126.

3. Plaintiff in error filed a demurrer to the indictment, one of the grounds of which was: "Because of the inconsistency, multiplicity and repugnancy of said counts, the defendant is being proceeded against in violation of the state and Federal guarantee of due process of law and in violation of his constitutional right to be specifically informed of the nature and cause of the accusation against him." The demurrer was overruled. And also a motion to quash, assigning similar grounds, which was likewise overruled.

These rulings in respect of the sufficiency of the indictment present no Federal question. *Howard v. Fleming*, 191 U. S. 126, 135, and cases cited.

4. After the demurrer and motion to quash had been disposed of, a plea in abatement was filed, averring that the prosecuting attorney intentionally refrained from endorsing the names of certain witnesses on the indictment; that defendant was a native of Great Britain and a subject of the King, and that by virtue of treaties, the law of nations, the laws and Constitution of the United States, and the laws of Missouri, defendant was entitled to know who were the witnesses against him.

A similar point, with like allegations, was made in the motion to quash. The court heard the evidence on the plea in abatement and found the issues against defendant, except that it found that he was a native citizen and subject of Great Britain.

The question of citizenship is immaterial as affecting the jurisdiction of this court under § 709, Rev. Stat. *French v. Hopkins*, 124 U. S. 524. Nor are we aware, as Chief Justice Waite said in *Spies v. Illinois*, 123 U. S. 131, 182, of any treaty giving to subjects of Great Britain any different measure of justice than secured to citizens of this country. And the general rule of law is that aliens are subject to the law of the territory where the crime is committed. *Wildenhus's Case*, 120 U. S. 1; *Carlisle v. United States*, 16 Wall. 147; *People v. McLeod*, 1 Hill (N. Y.), 377; Wharton, Conflict of Laws, § 819.

As to the allegation that the prosecuting attorney intentionally refrained from endorsing the names of certain witnesses on the indictment in the motion to quash, as well as in the plea in abatement, the state courts held that the charge was not sustained by the evidence.

The right of the accused to the endorsement of names of witnesses does not rest on the common law, but is statutory and provided for in Missouri by § 2517 of the Revised Statutes of 1899, whereby the right of the State to use other witnesses not so endorsed is recognized. The state Supreme Court discussed the matter at length, held there was no error, and added: "Aside from all this it is manifest that the defendant has no right to complain of any prejudicial error upon the action of the court upon this motion. This motion was filed October 6, 1903, and the record discloses upon the showing made upon such motion and plea in abatement that appellant had notice of these additional witnesses which were introduced by the State at the trial. The trial did not occur until the 23d of February, 1904, some three or four months subsequent to the time of which the record discloses that he had notice of these witnesses."

The decision of the Supreme Court that defendant had been tried in accordance with the procedure provided by the statutes of Missouri is not open to revision here in the circumstances.

We have not been astute to apply to these motions the rigor of our rules, and have explored the record with care, but have not found therein any denial of fundamental rights, of due process of law or of the equal protection of the laws. The Federal questions asserted in the brief or suggested by the record are wholly inadequate to justify our interference.

Writ of error dismissed.

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Statement of the Case.

WHITFIELD v. ÆTNA LIFE INSURANCE COMPANY
OF HARTFORD.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.

No. 258. Argued April 12, 1907.—Decided April 22, 1907.

If an insurance company does business in a State it must do so subject to such valid regulations as the State adopts.

A State may adopt such public policy as it deems best, provided it does not in so doing come into conflict with the Federal Constitution; and if constitutional the legislative will must be respected, even though the courts be of opinion that the statute is unwise.

The statute of Missouri, that suicide, unless contemplated when the policy was applied for, shall be no defense to actions on policies of life insurance, is a legitimate exercise of the power of the State; and a stipulation in a policy that the company shall only be liable for a portion of the amount in case of suicide, not contemplated when the policy was applied for, is void, and cannot be set up as a defense.

Whatever tends to diminish a plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense.

144 Fed. Rep. 356, reversed.

THIS is a suit upon an accident policy of insurance issued November 3, 1900, by the Ætna Life Insurance Company of Hartford, Connecticut, upon the life of James Whitfield, a resident of Missouri. The policy specifies various kinds of injuries; also, the amount that will be paid by the company on account of such injuries respectively. It provides: "If death results solely from such injuries within ninety days, the said Company will pay the principal sum of five thousand dollars to Amanda M. S. Whitfield, his wife, if living; and in event of the death of the said beneficiary before the death of the insured, to the executors, administrators, or assigns of the insured." The policy recites that it was issued and accepted by the assured, James Whitfield, subject to certain conditions, among which are these: ". . . 5. In event of death, loss of limb or sight, or disability due to injuries inten-

tionally inflicted upon the insured by any other person (except assaults committed for the sole purpose of burglary or robbery), whether such other person be sane or insane, or under the influence of intoxicants or not; or due to injuries received while fighting or in a riot; or due to injuries *intentionally inflicted upon the insured by himself; or due to suicide, sane or insane;* or due to the taking of poison, voluntarily or involuntarily, or the inhaling of any gas or vapor; or due to injuries received while under the influence of intoxicants or narcotics, then in all such cases referred to in this paragraph, the limit of this Company's liability shall be *one-tenth* the amount otherwise payable under this policy, anything to the contrary in this policy notwithstanding. . . . 8. The maximum liability of the Company hereunder in any policy year shall not exceed the principal sum hereby insured, and in no event will claim for weekly indemnity be valid if claim is also made for any of the stated amounts herein provided for specified injuries based upon the same accident and resulting injuries."

The insured died April 7th, 1902, the plaintiff, his widow and the beneficiary of the policy, alleging in her petition that he died "from bodily injuries, effected through external, violent, and accidental means, and by a pistol shot." The petition also states that the company after receiving proofs as to the death of the insured offered to pay \$500 as the full amount due by § 5 of the policy, but refused to pay more. The plaintiff asked a judgment for \$5,000 with interest from the date of the death of the insured.

The company, in its answer, denied liability for the whole principal sum and averred, among other things, that by the terms of the policy "in the event death is caused by intentional injuries inflicted by the insured or any other person, whether such person be sane or insane, or while fighting or in a riot, or by suicide, sane or insane, or by poison or by inhaling gas or vapor, or while under the influence of intoxicants or narcotics then the amount to be paid shall be *one-tenth* of the principal sum or \$500; . . . that said James Whitfield died from

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bodily injuries caused by a pistol shot intentionally fired by himself for the purpose thereby of taking his own life; that the cause of the death of said Whitfield was suicide." It was not averred in the answer that the insured contemplated suicide when applying for a policy.

The plaintiff demurred to the answer. The demurrer was overruled, and the plaintiff filed a reply, admitting that the insured "died from bodily injuries caused by a pistol shot fired by himself and the cause of his death was suicide," but averring that the shot was fired and the suicide committed at a time when the insured was "incapable of realizing or knowing, and when he did not realize or know, what he was doing or the consequences of his act."

The case—a jury having been waived in writing—was tried by the court upon an agreed statement of facts, one of which was that the insured died "from bodily injuries caused by a pistol shot intentionally fired by himself, for the purpose of thereby taking his own life; that the cause of the death of said Whitfield was suicide."

The Circuit Court held that the plaintiff was not entitled to recover \$5,000, but only \$500, and judgment for the latter amount was entered. 125 Fed. Rep. 269. That judgment was affirmed by the Circuit Court of Appeals, 144 Fed. Rep. 356, and the case is here upon writ of certiorari.

Mr. Frank Hagerman, with whom *Mr. Herbert S. Hadley*, Attorney General of the State of Missouri, was on the brief, for petitioner:

There can, in case of suicide, be no limitation in the amount of the recovery.

The amount of the liability cannot, in the case of suicide, be lessened. *Kellar v. Travelers' Ins. Co.*, 58 Mo. App. 557, 561.

Prior to the decision in this case, it was the generally understood doctrine of the Supreme Court of the State and of the Federal courts that there could be no limitation in the amount of recovery in case of suicide, because, in *Logan v. Fidelity &*

Casualty Co., 146 Missouri, 114; *Berry v. Knights Templars &c. Co.*, 46 Fed. Rep. 440; *S. C.*, upon appeal, 50 Fed. Rep. 511; and *Jarman v. Knights Templars Assn.*, 95 Fed. Rep. 70; *S. C.*, 104 Fed. Rep. 638, 187 U. S. 199, the policies provided (and the provision was held invalid) that in case of suicide the company should, in lieu of paying the full amount of the insurance, pay a sum equaling the premiums that had been paid to the company, which was no more of a limitation than was here attempted, where the explicit provision is that where death occurs by suicide only one-tenth of the insurance shall be paid.

Any other construction is an evasion of the statute which under familiar rules should be avoided; and if the company can contract to pay only a part of the insurance in case of suicide, the whole virtue of the statute can be destroyed.

In this way, by indirection and in a circuitous manner, the object and purpose of the statute might be defeated, which ought not to be permitted if settled rules of interpretation are to be followed. 26 Am. & Eng. Enc. of Law (2d ed.), 657; *Magdalen College Case*, 11 Coke, 66, 76; Endlich on Interpretation of Statutes, § 138; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338, 349.

When the *Jarman case* reached this court, 187 U. S. 197, 204, it was here said that the statute created "an independent and binding obligation overriding and nullifying any stipulation of the parties." See also in *Ætna Life Insurance Co. v. Florida*, 69 Fed. Rep. 932; *Berry v. Knights Templars &c. Co.*, 46 Fed. Rep. 439, 441; *S. C.*, 50 Fed. Rep. 511, 513.

The Circuit Court of Appeals erred in saying that the statute should receive a restrictive construction. Such a view is directly opposed to the cases hereinbefore cited, wherein the doctrine has been repeatedly affirmed that the statute, being remedial, was to have the most liberal construction, and if this court were not bound by the decisions already rendered in the state courts, it should at least lean toward agreeing therewith. *Burgess v. Seligman*, 107 U. S. 20.

The construction of this statute by the highest court of the

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Argument for Respondent.

State is controlling here. *Knights Templars' Ass'n v. Jarman*, 187 U. S. 197, 204. It is contended that the Supreme Court of the State has not decided the question. But *Logan v. Fidelity Ins. Co.*, 146 Missouri, 114, 118, was from that court, and as already seen necessarily decided that a clause was invalid which in case of suicide limited the recovery to the premiums paid. There is no difference in principle between limiting the recovery to the amount of premiums paid and limiting it to a specific sum of money. *Berry v. Knights Templars Ass'n*, 46 Fed. Rep. 439, 441; S. C., 50 Fed. Rep. 511; *Knight Templars Ass'n v. Jarman*, 104 Fed. Rep. 638; S. C., 187 U. S. 199.

Mr. James C. Jones, with whom Mr. J. J. Darlington was on the brief, for respondent:

The statute does not abrogate the right to contract in respect to suicide when construed by the rules of construction applicable to such statutes.

At common law, suicide was a defense to an action on a policy of insurance. Sec. 7896 declares it shall be no defense. In the absence of any controlling statute public policy condemns a contract to insure against death by intentional self-killing and precludes a recovery on a life insurance policy where death is so caused even though the policy contains no exception covering suicide. *Ritter v. Mutual Life*, 169 U. S. 139. Hence, the statute is in derogation of common law and being so must be strictly construed. *Shaw v. Railroad Co.*, 101 U. S. 565; Sutherland on Construction of Statutes, § 400; Endlich on Interpretation of Statutes, § 113. The statute, as plaintiffs would have construed it, encourages self-murder and gives legislative sanction and approval to the very contract which this court has held so subversive of morality as to be within the condemnation of the law (in the absence of an enabling statute); and for the rule of construction which should be applied here, see *United States v. Fisher*, 2 Cranch, 390.

There is nothing in the statute which indicates that it is the

public policy of Missouri to limit or restrict the power to contract with respect to the amount of indemnity that shall be granted under an accident or life policy, where death ensues from suicide. It is the public policy of the State of Missouri, apparently, that the parties shall not contract so as to absolve the insurer absolutely from liability in the event of suicide, but it is nowhere stated in the law that policies against suicide shall not be written for a smaller amount in case of suicide. The insurer is at perfect liberty to contract for the payment of a fixed or a variable amount.

Nor would such a contract be an evasion of the statute.

The statute does not undertake to abolish suicide as a legitimate subject of contract. It merely prevents the enforcement of a contract provision for forfeiture in case of suicide. Unlike, under an ordinary life policy, the insured under this policy was not insured for a certain, definite and fixed sum, payable upon death, but was guaranteed the payment of a weekly indemnity in case of disability and a gross but variable sum in case of death from accident, the amount depending upon the character of the accident or the manner and circumstances under which it occurred.

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

When the policy in suit was issued and also when the insured committed suicide it was provided by the statutes of Missouri that "in all suits upon policies of insurance on life hereafter issued by any company doing business in this State, to a citizen of this State, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Rev. Stat. Missouri, 1879, § 5982; *Ib.* 1889, § 5855; *Ib.* 1899, § 7896.

Assuming—as upon the record we must do—that within the true meaning of both the statute and the policy, the insured

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committed suicide, without having contemplated self-destruction at the time he made application for insurance, the question arises whether the contract of insurance limiting the recovery to *one-tenth* of the principal sum specified was valid and enforceable.

1. That the statute is a legitimate exertion of power by the State cannot be successfully disputed. Indeed, the contrary is not asserted in this case, although it is suggested that the statute "seemingly encourages suicide and offers a bounty therefor, payable, not out of the public funds of the State, but out of the funds of insurance companies." There is some foundation for this suggestion in a former decision of this court, in which it was held that public policy, even in the absence of a prohibitory statute, forbade a recovery upon a life policy, silent as to suicide, where the insured, when in sound mind, willfully and deliberately took his own life. *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139, 154. But the determination of the present case depends upon other considerations than those involved in the *Ritter case*. An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot for that reason alone be disregarded; for, it is the province of the State, by its legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the constitution of the State or the Constitution of the United States. There is no such conflict here. The legislative will, within the limits stated, must be respected, if all that can be said is that, in the opinion of the court, the statute expressing that will is unwise from the standpoint of the public interests. See *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243.

2. Did the courts below err in adjudging that the policy in suit was not forbidden by the statute? Can an insurance

company and the insured lawfully stipulate that in the event of suicide, not contemplated by the insured when applying for a policy, the company shall not be bound to pay the principal sum insured but only a given part thereof? Will the statute in a case of suicide allow the company, when sued on its policy, to make a defense that will exempt it, simply *because of such suicide*, from liability for the principal sum?

We cannot agree with the learned courts below in their interpretation of the statute. The contract between the parties, evidenced by the policy, is, we think, an evasion of the statute and tends to defeat the objects for which it was enacted. In clear, emphatic words the statute declares that in *all* suits on policies of insurance on life it shall be *no* defense that the insured committed suicide, unless it be shown that he contemplated suicide when applying for the policy. Whatever tends to diminish the plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense. When the company denied its liability for the whole of the principal sum, it certainly made a defense as to all of that sum except one-tenth. If, notwithstanding the statute, an insurance company, may by contract, bind itself, in case of the suicide of the insured, to pay only one-tenth of the principal sum, may it not lawfully contract for exemption as to the whole sum or only a nominal part thereof, and if sued, defeat any action in which a recovery is sought for the entire amount insured? In this way the statute could be annulled or made useless for any practical purpose. Looking at the object of the statute, and giving effect to its words, according to their ordinary, natural meaning, the legislative intent was to cut up by the roots any defense, as to the whole and every part of the sum insured, which was grounded upon the fact of suicide. The manifest purpose of the statute was to make all inquiry as to suicide wholly immaterial, except where the insured contemplated suicide at the time he applied for his policy. Any contract inconsistent with the statute must be held void.

In *Berry v. Knights Templars' &c. Co.*, 46 Fed. Rep. 441, which was an action upon a policy of life insurance, it appears that the policy, among other things, provided that in the case of the self-destruction of the insured, whether voluntary or involuntary, sane or insane, the policy should be void. Judgment was given for the plaintiff. The Circuit Court said: "It is contended that the provision in the policy, declaring that it shall be void if the assured commits suicide, is a waiver or nullification of the statute which declares such a stipulation in a policy 'shall be void.' The statute is mandatory and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies, and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute, and cannot be varied or waived by the private conventions of the parties." Upon writ of error to the Circuit Court of Appeals the judgment was affirmed, that court saying: "The company refused to pay the full amount named in the policy, claiming that by the express provisions of the policy self-destruction by the insured, whether sane or insane, rendered the contract for the payment of \$5,000 void, and the company was only bound to pay the amount which had been paid in assessments by the insured. This action was brought in the Circuit Court for the Western District of Missouri, to recover the full sum of \$5,000. The case was tried to the court, a jury being waived. The parties stipulated that the company was liable for the full amount claimed by the plaintiffs, unless excused by the clause in the policy providing that the same should be void in case of suicide; . . . Judgment in favor of the plaintiffs having been entered for the full amount of the policy, the case was brought to this court upon writ of error. . . . In our judgment, the court below ruled correctly in holding that the policy sued on was a contract made in Missouri, and, as such, that the provisions of § 5982 [the same as the statute now in question] are applicable

thereto; and therefore the judgment is affirmed, at costs of plaintiff in error." 50 Fed. Rep. 511, 512, 515.

In *Knights Templars' Indemnity Co. v. Jarmon*, 187 U. S. 197, this court had occasion to consider the scope and effect of the statute here in question. That was an action upon a policy of life insurance for \$5,000. A recovery for the whole sum was sought, but the company defended the action upon the ground that the provision in the statute that it should be no defense that the insured committed suicide, related only to cases where he took his own life voluntarily, while sane, and in full possession of his mental faculties; that the provision in the policy that " 'in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or *insane*, . . . this policy shall become null and void,' applied and exonerated the company from all liability beyond that provided in the policy, 'that in the case of the suicide of the holder of this policy, then this company will pay to his widow and heirs or devisees such an amount of his policy as the member shall have paid to this company on the policy in assessments on the same without interest.' " This view of the statute was not accepted in the Circuit Court, and there was judgment against the company for the whole sum insured. That judgment was affirmed here upon certiorari to the Circuit Court of Appeals.

A leading case on the general subject is *Logan v. Fidelity & Casualty Company*, 146 Missouri, 114, 119, 122, 123, which was a suit upon a policy which, according to the answer in the case, contained stipulations and covenants to the effect that in the event of fatal injuries to the assured wantonly inflicted upon himself, or inflicted upon himself while insane, the company's liability under its policy should be a sum equal to the premiums paid, and that sum the policy provided should be in full liquidation of all claims under it. The question before the court was whether or not the statute here in question applied to such a policy as the one there in suit. The trial court instructed the jury to return a verdict for the full amount of

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the policy with interest. The court said: "The error into which respondent has fallen is in assuming that § 5855 [the statute now in question] was intended to affect a particular line, class or department of insurance, as the same has been classified for legislation. The real object of the section, as the clear terms of its language express, is to affect *all policies of insurance on life* from whatever class, department or line of insurance the policy may be issued or by whatever name or designation the company may be known. It is policies of a given kind, and not companies of a class, that are to be affected by the provisions of § 5855. The section was enacted clearly to protect all policy holders of *insurance on life* against the defense that the insured committed suicide, all provisions in the policies to the contrary notwithstanding, unless as provided in the section, it can be shown that the insured contemplated suicide at the time he made application for the policy. . . . When a policy covers loss of life from external, violent and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life insurance policy admittedly would be insurance on life, then why less insurance on life because not coupled with provisions covering loss of life from usual or natural causes as well? If one holds a general life policy and an accident policy, and is killed by lightning or commits suicide, so that he may be said to have died by accidental means, both the companies should pay, and the stipulation against liability in the event of suicide in the policies should be no more a defense against the suit upon the accident policy, providing against death from accidental cause, than against the policy which goes further and covers death from other causes as well. No such exception or exemption is found in the plain and comprehensive language of § 5855. . . . No rule of construction, short of one applied for distortion and destruction, can relieve accident insurance companies, issuing policies of insurance on life in this State, from the operation and influences of § 5855, which in plain and unambiguous terms declares that in all suits upon policies of

insurance on life thereafter issued, it shall be no defense that the assured committed suicide, unless it shall have been shown to the satisfaction of the court or judge trying the cause that the insured contemplated suicide at the time of making his application for the policies, all stipulations in the policy to the contrary being void."

In *Keller v. Travelers' Insurance Company*, decided by the St. Louis Court of Appeals, 58 Mo. App. 557, 560, 561, we have a decision very much in point. That was an action on an insurance policy for \$2,500. The company defended upon the ground that by the terms of the policy if the insured died of suicide, whether the act be voluntary or involuntary, it should be liable for the then full net value of said policy per the American Experience Table of Mortality and four and one-half per cent interest and no more, and that the same should be paid in manner and form as provided in the policy for the payment thereof in the event of death. The defense was that the insured committed suicide and that the full net value of the policy, according to the contract, was only \$814.50, and no more. The defense was overruled and judgment given for the principal sum. That judgment was affirmed in the Court of Appeals, the court saying: "The plain purpose of the statute *supra* was to prevent the insertion in policies of life insurance of exceptions to liability on the ground of the suicide of the insured, unless it could be proven 'that the insured contemplated suicide at the time he made the application for the policy.' This was in effect a legislative declaration of the public policy of this State. That it was intended to limit the power to contract for a lesser liability in cases of death by suicide, not within the limitation expressed in the statute, is also apparent from its terms, to wit: 'and any stipulation to the contrary shall be void.' . . . The fact that the premium warranted and the policy guaranteed full insurance in case of the death of the insured for any cause not specified in the clause set up in the defendant's answer demonstrates that said clause was designed to modify the liability of the

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Counsel for Parties.

insurance company if the insured committed suicide. It necessarily follows, if this stipulation as to a decreased liability in the event of death by suicide is enforced, that it is *some* defense to the otherwise full liability agreed upon in the policy. As the statute in question declares that suicide, not committed as therein set forth, is '*no defense*,' we cannot hold that the present stipulation can be enforced without violating the plain terms of a mandatory statute which the parties have no power to alter or abrogate."

Without further discussion, we adjudge that, under the statute in question—anything to the contrary in the policy notwithstanding—where liability upon a life policy is denied simply because of the suicide of the insured, the beneficiary of the policy can recover the whole of the principal sum, unless it be shown that the insured, at the time of his application for the policy, contemplated suicide. The judgment must, therefore, be reversed and the case remanded for further proceedings in conformity with this opinion and consistent with law.

It is so ordered.

HARRISON v. MAGOON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 107. Submitted March 18, 1907.—Decided April 22, 1907.

Where no right of appeal existed when the final judgment was entered in the Supreme Court of a Territory, an appeal or writ of error will not lie under the act of March 3, 1905, 33 Stat. 1035, granting appeals in certain cases, because after final judgment a petition for rehearing was entertained and not finally denied until after the passage of the act.

Writ of error to review, 16 Hawaii, 332, dismissed.

THE facts are stated in the opinion.

Mr. D. L. Withington, Mr. A. G. M. Robertson and Mr. W. R. Castle for plaintiff in error.

Mr. E. B. McClanahan, Mr. J. A. Magoon, Mr. F. B. McStocker and Miss Dorothea Emerson for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to review a judgment for the defendants in a suit upon a contract. 16 Hawaii, 332. At the trial a nonsuit was ordered, subject to exceptions taken by the plaintiff. A motion for a new trial was made but was dismissed, and this dismissal also was excepted to. The Supreme Court held that the former exceptions were presented too late, but that the latter was open and raised the question whether the judgment of nonsuit was right as matter of law. It discussed this question and sustained the judgment. This was on December 14, 1904. In January, 1905, a petition for rehearing was filed; it was entertained by the court, and, after argument, was denied on March 6, 1905. The defendants in error now move to dismiss, the main ground being that the Act of March 3, 1905, c. 1465, § 3, 33 Stat. 1035, amending the Act of April 30, 1900, c. 339, § 86, 31 Stat. 141, 158, granting writs of error, &c., does not apply.¹

It is answered for the plaintiff in error that, as the petition for rehearing was entertained and acted upon by the Supreme Court of the Territory, the time to be considered is the date when the petition was denied, and that that was after the statute went into effect. *Voorhees v. John T. Noye Manufacturing Co.*, 151 U. S. 135; *Northern Pacific Railroad Co. v.*

¹ Act of April 30, 1900, c. 339, § 86 " . . . The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. . . ."

Amended by Act of March 3, 1905, c. 1465, § 3, by adding at the end of the section: "*Provided*, That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

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Holmes, 155 U. S. 137. No doubt the decisions cited and others show that where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error on appeal does not begin to run until the petition for rehearing is disposed of. But there are limits to even that rule. When an appeal in bankruptcy, required by General Orders in Bankruptcy, xxxvi, 2, to be brought within thirty days after the judgment or decree, was not brought within that time, the fact that a petition for rehearing was filed within the time required by the court below, but after the thirty days, was held not to prolong the time for appeal. "The appellant could not reinvest himself with that right by filing a petition for rehearing." *Conboy v. First National Bank of Jersey City*, 203 U. S. 141, 145. If at the time of final judgment there is no right of appeal whatever, it is perhaps even plainer that a party cannot evoke a new one by filing a petition for rehearing, even if, by accident, it is kept along until an act giving an appeal is passed. Whether in any event a writ of error would lie in this case it is unnecessary to decide.

Writ of error dismissed.

HOME SAVINGS BANK v. CITY OF DES MOINES.

PEOPLE'S SAVINGS BANK v. SAME.

DES MOINES SAVINGS BANK v. SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Nos. 82, 83, 92. Argued November 2, 5, 1906.—Restored to the docket for reargument December 3, 1906.—Reargued March 5, 1907.—Decided April 22, 1907.

The Constitution has conferred upon the Government power to borrow money on the credit of the United States and that power cannot be

burdened, impeded, or in any way affected, by the action of any State. *Weston v. Charleston*, 2 Pet. 449.

The tax upon the property of a bank in which United States securities are included is beyond the power of the State, and is also within the prohibition of § 3701, Rev. Stat., and other acts of Congress.

While the tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation.

If a State has not the power to levy a tax it will not be sustained merely because another tax which it might lawfully impose would have the same ultimate incidence.

The substantial effect of section 1332 of the Code of Iowa providing that shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and companies and not to the individual stockholders, and that in fixing the value of the shares capital, surplus and undivided earnings shall be taken into account, as the law has been construed by the highest court of the State, is to tax the property of the bank and not the shares of stock, and an assessment which includes government bonds owned by the bank in fixing the valuation of its shares is illegal and beyond the power of the State.

THE facts are stated in the opinion.

Mr. N. T. Guernsey, Mr. William J. Harvison and Mr. George F. Henry, with whom *Mr. Horatio F. Dale* was on the brief, for plaintiffs in error:

In so far as § 1322 of the Iowa code authorizes the taxation of United States bonds, it is void because in contravention of the Constitution and statutes of the United States. Rev. Stat. § 3701; *Weston v. Charleston*, 2 Pet. 448; *Bank v. New York*, 2 Bl. 620; *Bank Tax Cases*, 2 Wall. 200; Act of June 13, 1898.

The section provides that shares of stock of state and savings banks shall be assessed to such banks and not to the individual stockholders. It distinguishes between shares of stock in national banks and in savings banks, the former being assessed to the shareholders, the bank being merely the collecting agent and the shareholders being permitted to deduct

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their debts, while the latter are assessed to the bank, which is required to pay the tax, without any right to reimbursement from the shareholder, the shareholder having no right to deduct debts. *Bank v. Rerick*, 96 Iowa, 238, 242; Code, § 1325.

Section 1322 of the Code of Iowa in fact imposes a tax upon the capital of the plaintiff in error, and therefore its government bonds should have been deducted.

The construction of this section by the Supreme Court of Iowa must be accepted. *Railroad Co. v. Kentucky*, 183 U. S. 503, 507.

The tax imposed by this statute, as it is construed by the Supreme Court of Iowa, is nothing more than a tax on capital, void in so far as the capital is invested in government bonds. Code, § 1321.

The tax is against the owner of the bonds, upon an assessment which includes the value of the bonds, without provision for reimbursement by the shareholder. It therefore does not come within the rule of *Van Allen v. Assessors*, 3 Wall. 573, because the tax is neither assessed against nor paid by the owner of the bonds.

The court will look to the substance and effect of the statute. *Home Ins. Co. v. New York*, 134 U. S. 594, 598.

Applying this test, the statute is a tax on the capital of the corporation, *New Orleans v. Houston*, 119 U. S. 278; *St. Johns National Bank v. Bingham Township*, 113 Michigan, 203, and this is held in the *German-American Savings Bank* case.

The doctrine of equivalency invoked by the Supreme Court of Iowa makes the tax in fact a tax on the bonds. *Owensboro Nat'l Bank v. Owensboro*, 173 U. S. 664.

A tax on the value of the capital is a tax on the property in which the capital is invested. *Railroad Co. v. Pennsylvania*, 198 U. S. 341, 353; *Stapylton v. Thaggard*, 91 Fed. Rep. 93; *National Bank of Virginia v. Richmond*, 42 Fed. Rep. 877; *Brown v. French*, 80 Fed. Rep. 166.

To the same effect in principle are the cases holding that the shares of a national bank cannot be taxed to it *in solido*.

First National Bank v. Fisher, 45 Kansas, 726; *National Bank of Chemung v. Elmira*, 53 N. Y. 49; *Sumpter County v. National Bank of Gainesville*, 62 Alabama, 464; *City of Springfield v. First National Bank*, 87 Missouri, 441; *First National Bank v. Meredith*, 44 Missouri, 500; *National Com. Bank v. Mobile*, 62 Alabama, 284. See also *National Bank v. Hoffman*, 93 Iowa, 119; *People ex rel. v. Coleman*, 126 N. Y. 433.

The statute cannot be sustained upon the theory that it makes the bank a mere collecting agent for the State.

In such cases the tax is not upon the property of the bank, and provision is always made for its reimbursement. *Stapleton v. Thaggard*, 91 Fed. Rep. 93; *Bank v. Commonwealth*, 9 Wall. 353, 362; *Hershire v. First Nat'l Bank*, 35 Iowa, 272, 277.

There is no conflict between these cases and *Cleveland Trust Co. v. Lander*, 184 U. S. 111.

There the law provided for taxing the shares to the shareholder and for reimbursement by him.

If § 1322 requires the taxation of the shares of the shareholders to the bank, it is void because within the inhibition of the Fourteenth Amendment. A tax exacted without jurisdiction is the taking of property without due process of law. *Railroad Co. v. Pennsylvania*, 198 U. S. 341; *Corry v. Baltimore*, 196 U. S. 466.

If what this statute requires is a tax upon the property of the shareholders assessed against and to be paid by the bank, without provision for its reimbursement, the bank is deprived of its property without due process of law, and the law itself is void. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Cooley on Taxation* (3d ed.), 1, 3, 12 and 27; *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. Rep. 385, 392; *United States v. Railroad Company*, 17 Wall. 322; *Henkle v. Town of Keota*, 68 Iowa, 334.

Mr. William H. Bremner, with whom *Mr. M. H. Cohen* was on the brief, for defendants in error:

The assessment is not void merely because it was assessed

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in the wrong name. *Weston & Co. v. Cass Co.*, 69 Iowa, 147; *First National Bank v. Concord*, 59 N. H. 75.

The decision of the Supreme Court of Iowa as to the form of the assessment and failure to comply with the state statute in relation to the method of procedure is binding on the Supreme Court of the United States. *Stanley v. Supervisors of Albany*, 121 U. S. 535; *Palmer v. McMahon*, 133 U. S. 662.

Questions not raised in the lower court will not be considered on appeal. *Sunley v. Metropolitan Life Ins. Co.* 105 N. W. Rep. 408 (Iowa); *McCormick Harvester Co. v. McCormick*, 103 N. W. Rep. 204 (Iowa); *Stelpflug v. Wolfe*, 102 N. W. Rep. 1130 (Iowa); *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632.

Section 1322 is not void as in contravention of the Constitution and statutes of the United States.

The construction and meaning given to a statute of a State by the Supreme Court of such State is binding on the Supreme Court of the United States. *Cleveland Trust Co. v. Lander*, 184 U. S. 111; *L. & N. R. R. v. Kentucky*, 183 U. S. 503-507.

For construction of § 1322 of the Code of Iowa, as determined by the Supreme Court of Iowa, see *German Am. Sav. Bank v. Burlington*, 118 Iowa, 84; *National State Bank v. Burlington*, 119 Iowa, 696; *First National Bank v. Independence*, 123 Iowa, 482.

The State has the power to assess for taxation corporate shares of stock without deducting, in determining their value, the value of United States government bonds held by the corporation. *Van Allen v. Assessors*, 3 Wall. 584; *First National Bank v. Farwell*, 10 Biss. 270; *People v. Commissioners*, 4 Wall. 244; *National Bank v. Miller*, 19 Fed. Rep. 378; *National Bank v. Commonwealth*, 9 Wall. 353; *Cleveland Trust Co. v. Lander*, 184 U. S. 111.

A tax on the shares of stock of a bank is not a tax on its capital stock. *Van Allen v. Assessors*, 3 Wall. 573; *Palmer v. McMahon*, 135 U. S. 662; *Cleveland Trust Co. v. Lander*, 184 U. S. 111; *German Am. Savings Bank v. Burlington*, 118 Iowa, 84; *First National Bank v. Independence*, 123 Iowa, 482.

A bank may be required to pay the taxes on the shares of stock of its stockholders. *Primghar State Bank v. Rerick*, 96 Iowa, 238; *German Am. Savings Bank v. Burlington*, *supra*; *National Bank v. Commonwealth*, 9 Wall. 353; *First National Bank v. Douglas Co.*, 3 Dill. 330; *Lionberger v. Rouse*, 9 Wall. 470.

The statute is not void because it does not provide for personal notice to the shareholders. *National Bank v. Dodge, Assessor*, 119 Fed. Rep. 57; *Palmer v. McMahon*, 133 U. S. 662; *Merchants' and Mfg. Natl. Bank v. Commonwealth*, 167 U. S. 461; *St. Clara Co. v. Southern Pac. R. Co.*, 8 C. C. A. 401.

MR. JUSTICE MOODY delivered the opinion of the court.

These cases raise the same Federal question. The plaintiffs in error were banking institutions incorporated under the laws of the State of Iowa. Upon each of them a tax was levied under a law of that State, which provided that "*Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to individual stockholders.*" The material sections of the code are printed in the margin.¹

¹ SEC. 1322. Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. *Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders.* At the time the assessment is made, the officers of *national banks* shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the Auditor of State, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares

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Each bank owned at the time to which the assessment related United States bonds, the value of which they insisted should be deducted from the valuation of the property assessed to them. The taxing authorities refused to make that deduction, and their action was sustained by the Supreme Court of the State, whose judgments have been brought here by writs of error for review.

These banks were corporations created by the State of Iowa. In imposing burdens upon them, their property, or their shares, the State does not, as in the case of national banks, require any authority from the United States. Its own governmental power is sufficient for the imposition of such taxes, assessed by such methods, and under such standards of valuation as it may choose, unless something is done which violates some provision of the Federal Constitution, or of a Federal law which by that Constitution is made supreme. The only claim of violation of Federal right which need be considered here is that bonds of the United States have been taxed. It is conceded and cannot be disputed that these securities are beyond the taxing power of the State, and the only question, therefore, is whether in point of fact the State

of stock of such corporations, the amount of their capital actually invested in real estate, owned by them, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed.

Sec. 1325. The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this State, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his post office address, as the same appears upon the books of the company, or is known by its secretary.

has taxed them. The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon "shares of stock of state and savings banks and loan and trust companies." But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in *New Orleans v. Houston*, 119 U. S. 265, 278, and *Home Insurance Co. v. New York*, 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself. The result of this inquiry is of vital importance, because there may be a tax upon the shares of a corporation, which are property distinct from that owned by the corporation and with a different owner, without an allowance of the exemption due to the property of the corporation itself, while, if the tax is upon the corporation's property, all exemptions due it must be allowed. Looking then further into the law, it appears that the shares are to be "assessed to such banks . . . and not to the individual stockholders." When this is read the doubt instantly arises whether the law intended to tax the corporation for property which it does not own, but which on the contrary is owned by the stockholders. Certainly such a purpose, against common justice and of doubtful constitutionality, ought not to be attributed to the law if any other fair construction is possible. With respect to taxation usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon

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the property which they own, not upon property which others own. We should be reluctant to suppose that there has been any departure from this principle in this law. It, however, is not an uncommon and is an entirely legitimate method of collecting taxes to require a corporation, as the agent of its shareholders, to pay in the first instance the taxes upon shares, as the property of their owners, and look to the shareholders for reimbursement. In this very law we have an example of this method. By § 1322, national bank shares are assessed to the stockholders, and by § 1325, the corporations are made liable to pay the tax and are secured by a lien on the stock and dividends, which may be enforced by sale. The state banking corporations are excluded *ex industria* from this statutory right of reimbursement by confining it to the cases of "taxes assessed to the stockholders of such corporation." This cannot include the case of state bank shares which are not so assessed. Nor can the corporations in the case at bar have by any possibility a common law right to recover the tax paid from the shareholders. The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks. The fair interpretation of the law is that the taxes are upon the property of the banks. In the valuation for taxation the assessor is required to "take into account the capital, surplus and undivided earnings," must be furnished with "a verified statement of all matters provided by the preceding section," which by reference is seen to be a detailed statement showing the assets of the bank (§ 1321).¹ It is true that the assessor

¹ SEC. 1321. Private bankers. Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the

may resort to "other information he can obtain," but, although capital, surplus and undivided earnings are expressly named, nothing is said of the franchise and good will, essential factors of the value of the shares, though not of the value of the assets of the bank. See *People v. Coleman*, 126 N. Y. 433. Moreover, the section closes with the words, "and the property of such corporation shall not be otherwise assessed," which plainly implies that the assessment already provided for is in substance an assessment upon the property of the corporation. That the law was administered upon the theory that the tax was upon the property of the corporation is signally illustrated by the proceedings in these cases. The valuation was first made on the exact figures of the capital, surplus, and undivided earnings, deducting the holdings of United States securities. Then, upon being advised that the deduction was erroneous, the assessor corrected the val-

receiving of deposits subject to check, on certificate, receipts or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement showing the assets, aside from real estate, and liabilities of such bank or banker on January 1st of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them and other credits due or to become due;

3. The amount of all deposits made with them by others, and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing the assets, and the specific kinds and descriptions thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such banks, as provided in this chapter, and the aggregate actual value of bonds and stocks after deducting the portion thereof, exempt or otherwise, taxed in this State, and also the other property pertaining to the business shall be assessed at twenty-five per cent of the actual value of the same, not including real estate, which shall be listed and assessed as other real estate.

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uation by adding the value of the securities deducted. We therefore conclude that the substantial effect of the law is to require taxation upon the property, not including the franchise, of the banks, and that the value of the shares, ascertained in a manner appropriate to determine the value of the assets, is only the standard or measure by which the taxable valuation of that property is determined. This we think is consistent with the interpretation of the law by the Supreme Court of Iowa, which sustained the taxation upon grounds which will be presently considered.

The next question is whether such taxation violates any provision of the Federal Constitution or of any paramount Federal law. The State cannot by any form of taxation impose any burden upon any part of the national public debt. The Constitution has conferred upon the Government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded or in any way affected by the action of any State. This principle was announced in *Weston v. Charleston*, 2 Pet. 449, where it was held that taxes upon the stock of the United States levied by one of the municipal corporations of South Carolina were invalid. From that time no one has questioned the immunity of national securities from state taxation. It may well be doubted whether Congress has the power to confer upon the States the right to tax obligations of the United States. However this may be, Congress has never yet attempted to confer such a right. Until the time of the Civil War it was not thought to be necessary to express the constitutional prohibition in an act of Congress. But on the occasion of authorizing the issue of Treasury notes it was enacted that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States shall be exempt from taxation by or under state authority." Act of February 25, 1862, 12 Stat. at Large, 346. The substance of this enactment is embodied in § 3701 of the Revised Statutes, and has usually, if not

invariably, since 1862 been inserted in acts authorizing the issue of bonds.

That the tax upon the property of a bank in which United States securities are included is beyond the power of the State, and, what perhaps is of lesser moment, within the prohibition of the statutory law, hardly needs to be proved by authority. But the authority is clear and conclusive. With the beginning of the Civil War large amounts of the national securities began to be issued. So important it was to sustain the national credit that, as we have seen, Congress for the first time began the practice of accompanying the authority for their sale with an express prohibition of their taxation by the States. The state banks often invested a large part or the whole of their resources in these securities, and the question of their liability to state taxation on their capital and surplus thus invested at once arose. The Bank of Commerce, incorporated under the laws of New York, invested all its capital, except its investment in real estate, in United States bonds. Under the authority of a law requiring that the capital stock should be assessed at its actual value a tax was levied. The Court of Appeals of New York sustained the tax so far as it applied to securities issued before the act of 1862, expressly declaring their exemption, and annulled it so far as it applied to securities thereafter issued. The case came here on a writ of error. *Bank of Commerce v. New York City*, 2 Black, 620. This court held the tax invalid on all securities, without even alluding to the act of 1862, but basing the decision entirely upon the constitutional inability of a State to affect by taxation the exercise of the sovereign power of the Nation in borrowing money on its credit. This was the rule specifically declared in *Weston v. Charleston*, as an application of the general rule of the immunity from state control of the operations of the Federal Government in the region of its supremacy. To the argument, which was strenuously urged, that the tax was not upon the securities but upon the capital of the bank, and that thereby the case was

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distinguished from *Weston v. Charleston*, the court, by Mr. Justice Nelson, replied: "We cannot yield our assent to the soundness of the distinction."

The State of New York then amended its law, and enacted that banks should be "liable to taxation on a valuation equal to the amount of capital stock paid in, or secured to be paid in, and their surplus earnings." The validity of taxation under the amended law was considered in the *Bank Tax Case*, 2 Wall. 200. There it was insisted that the tax was imposed upon the corporation and not its property, and that the statute only prescribed a measure of the amount annually to be paid for the franchises. But the court held that the amendment simply changed the method of fixing the amount of capital, and that the tax was upon the capital, which, so far as invested in national securities, was beyond the power of the State.

The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings, and in the case at bar on the shares of the stock, taking into account the capital, surplus and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end—the taxation of the property of the bank. The slight concealment afforded by the omission of the property *eo nomine* is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected.

It is, however, contended that although these cases have not been overruled, distinctions have been drawn in later cases which are applicable here, and withdraw the cases before the court from their authority. These later cases must therefore be considered and their exact effect determined. We

may quickly put out of view those not relied upon here, in which it has been held that the State may levy a tax upon the value of the franchise of corporations created by it, or upon the right of succession to property on the death of its owner, without first deducting the amount of United States securities owned by the corporation whose franchise is taxed, or by the estate transmitted under the inheritance laws of the State. *Society for Savings v. Coite*, 6 Wall. 594; *Provident Institution v. Massachusetts*, 6 Wall. 611; *Hamilton Company v. Massachusetts*, 6 Wall. 632; *Home Insurance Company v. New York*, 134 U. S. 594; *Plummer v. Coler*, 178 U. S. 115. The theory of all these cases is that the taxes are not imposed upon the assets of the corporation or the property of the decedent, but in the one case upon the franchise granted by the State and in the other case upon the right of succession to property on the death of the owner which is conferred by the State.

But another line of cases cannot so easily be dismissed. They were relied upon by the Supreme Court of Iowa, and the respect due to the opinion of that court demands that the reasons why we think those cases do not apply to the case at bar should be fully stated. These cases relate to the right of the State to tax at their full value shares of stock as the property of the shareholders. Although the States may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purposes of taxation it is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. The right to tax the shares of national banks arises by Congressional authority, but the right to tax shares of state banks exists independently of any such authority, for the State requires no leave to tax the holdings in its own corporations. The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation.

The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in *McCulloch v. Maryland*, 4 Wheat. 316, where, in the opinion of Chief Justice Marshall, declaring a tax upon the circulation of a branch bank of the United States beyond the power of the State of Maryland, it was said that the opinion did not extend "to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other properties of the same description throughout the State." The distinction appears, however, to have been first made the basis of a decision in *Van Allen v. The Assessors*, 3 Wall. 573. The National Bank Act, as amended in 1864, Rev. Stat. § 5219, permitted the States to include in the valuation of personal property for taxation, the shares of national banks "held by any person or body corporate" under certain conditions not necessary here to be stated. Acting under the authority of this law, the State of New York assessed the shares of Van Allen in the First National Bank of Albany. At that time all the capital of the bank was invested in United States securities, and it was asserted that a tax upon the individual in respect of the shares he held in the bank was, unless the holdings in United States securities were deducted, a tax upon the securities themselves. But a majority of the court held otherwise, saying by Mr. Justice Nelson: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination to his proportion of the property that may remain of the corporation

after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed."

In an opinion, in which Justices Wayne and Swayne joined, Chief Justice Chase dissented from the judgment upon the ground that taxation of the shareholders of a corporation in respect of their shares was an actual though an indirect tax on the property of the corporation itself. But the distinction between a tax upon shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems and cannot be disregarded without bringing them into confusion, which would be little short of chaos.

The *Van Allen* case has settled the law that a tax upon the owners of shares of stock in corporations in respect of that stock is not a tax upon United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the Congressional permission or upon shares of state corporations by virtue of the power inherent in the State to tax the shares of such corporation. The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him. *National Bank v. Commonwealth*, 9 Wall. 353; *Lionberger v. Rouse*, 9 Wall. 468; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440; *Merchants Bank v. Pennsylvania*, 167 U. S. 461; *Cleveland Trust Company v. Lander*, 184 U. S. 111. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on

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the shareholders' holdings of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders and not upon the property of the corporation.¹ There is nothing in them which justifies the tax under consideration here, levied, as has been shown, on the corporate property. Without further review of the authorities it is safe to say that the distinction established in the *Van Allen* case has always been observed by this court, and that, although taxes by States have been permitted which might indirectly affect United States securities, they have never been permitted in any case except where the taxation has been levied upon property which is entirely distinct and independent from these securities. On the other hand, whenever, as in these cases, the tax has been upon the property of the corporation, so far as that property has consisted of such securities, it has been held void.

One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro National Bank v. Owensboro*, 173 U. S. 664. There it appeared that a tax upon the intangible property of a national bank had been levied under the name of a franchise tax. Such a tax upon one of the agencies of the

¹ This fact assumed but not stated in *Cleveland Trust Co. v. Lander* is shown by the record to exist.

National Government is beyond the power of the State. But it was contended that although the tax was not in form upon shares in the hands of shareholders (a tax lawful by the permission Congress has given), it was the equivalent of such a tax. To this contention the court, by Mr. Justice White, replied: "To be equivalent in law involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the State to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decision of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the name of the stockholders. . . . If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. . . . The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration." These words apply with equal force to the case at bar. Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the *Bank of Commerce case* and the *Bank Tax case*, and indeed all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed.

We regret that we are constrained to differ with the Su-

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preme Court of the State on a question relating to its law. But holding the opinion that the law directly taxes national securities, our duty is clear. If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound.

Judgments reversed, and cases remanded for further proceedings not inconsistent with this opinion.

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

FRANK v. VOLLKOMMER.

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

No. 184. Argued January 26, 28, 1907.—Decided April 29, 1907.

The possession of a temporary receiver in bankruptcy of the proceeds of property, upon which the bankrupt had fraudulently imposed a lien, deposited as a special fund to await the further order of the court, did not affect the rule that under the bankruptcy act of 1898, prior to the amendment of February 5, 1903, 33 Stat. 797, the state court in which an action could have been brought prior to the bankruptcy to set aside the lien had exclusive jurisdiction of a similar action brought by the trustee. The amendment of February 5, 1903, gave the bankruptcy court in such a case concurrent, not exclusive, jurisdiction.

Where it was necessary that a trustee in bankruptcy should represent judgment creditors in order to attack the validity of a chattel mortgage given by the bankrupt, if the state court has set the mortgage aside and the record shows that all the proceedings in the bankruptcy court were in evidence in the state court, it will be presumed that the trustee represented the necessary claims of creditors, although the evidence is not returned to this court.

109 App. Div. 914, affirmed.

THIS was a suit commenced in December, 1902, in the Supreme Court of New York for the County of Kings by Joseph Vollkommer, Jr., as trustee in bankruptcy of the estate of Jacob Vogt, bankrupt, against Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, and Jacob Vogt, to set aside an alleged chattel mortgage on certain horses, harness, wagons, etc., given by Vogt to defendants Frank, April 16, 1902, as fraudulent, and intended to hinder, delay and defraud creditors.

The mortgagees had taken possession, and creditors immediately thereafter filed petitions in bankruptcy against Vogt in the District Court of the United States for the Eastern District of New York, whereupon and on June 30, 1902, one Stoutenburgh was appointed temporary receiver and duly qualified as such.

As alleged in the complaint, by agreement between the Franks and the petitioning creditors, which was approved by the District Court and entered of record therein July 2, A. D. 1902, it was provided that the property in question should be sold at public auction on July 3 by the temporary receiver; "that the expenses of the sale be paid out of the proceeds thereof; that the said temporary receiver deposit the net proceeds of said sale at the People's Trust Company of Brooklyn as a special fund, there to await the further order of the court upon due notice to all creditors who have or may hereafter appear; that the lien, if any, of the alleged chattel mortgage of the said defendants Frank be transferred to and attached to said special fund, or deposit, in lieu of and to the same extent as if attached to the said property thereinbefore directed to be sold; that in pursuance thereof, said sale was had on the third of July, A. D. 1902, and the net proceeds thereof, amounting to about \$5,482.47, were on or about the 10th day of July, 1902, duly deposited in the People's Trust Company of Brooklyn, as provided by said agreement."

July 10, A. D. 1902, Vogt was duly adjudicated an involuntary bankrupt, and on November 12, A. D. 1902, Voll-

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kommer, Jr., was appointed trustee in bankruptcy of Vogt, duly qualified November 21, and entered upon the duties of his office as trustee. He thereafter filed this complaint against the Franks and Vogt, setting up the proceedings and averring that defendants Frank claimed a lien upon the special fund to the whole extent thereof, which constituted a cloud on plaintiff's title to the fund, and he demanded judgment that the chattel mortgage be declared null and void and cancelled and discharged of record, and that the special fund be declared free of the incumbrance of the alleged chattel mortgage, and from any lien or claim by the Franks under the mortgage or otherwise. The trial court held that the mortgage was made "with the intent and purpose of said Vogt and said defendants Frank to hinder, defeat, defraud and delay said Vogt's creditors"; and decreed the annulment of the mortgage, and that it was "no lien upon the moneys, viz., \$5,481.47, deposited on July 9th, 1902, by Arthur T. Stoutenburgh, temporary receiver, in the People's Trust Company of Brooklyn, New York, under an order of the District Court of the United States for the Eastern District of New York made July 2d, 1902." The case was carried to the Appellate Division of the Supreme Court and the decree was affirmed. Leave to appeal to the Court of Appeals was denied by the Appellate Division, and subsequently by an Associate Judge of the Court of Appeals. This writ of error was then allowed.

Mr. Roger Foster for plaintiffs in error:

Plaintiffs in error had a contractual right to have all questions concerning the title to the proceeds of the receiver's sale determined by the bankruptcy court which appointed the receiver under whose direction the sale took place, and in whose custody the proceeds were deposited. *Havens Co. v. Pierek*, 120 Fed. Rep. 244, 245; *Guaranty Co. v. North Chicago Ry. Co.*, 130 Fed. Rep. 801, 813.

Irrespective of the order on which plaintiffs in error had a right to rely, the state court had no power to make any order

affecting the title to a fund in the possession of a United States court.

Every court with equitable powers, in whose possession property is placed, whether tangible property or a fund, has exclusive jurisdiction to determine the validity of all claims to a lien upon the same, and to distribute that fund amongst the rightful owners. No other court has any power to interfere with such property.

This rule of general as well as of Federal jurisprudence applies to proceedings in bankruptcy. The prosecution of this suit in the state court might have been enjoined by the court of bankruptcy. The judgment is, consequently, subject to reversal by this court. *Covell v. Heymen*, 111 U. S. 176, 182.

There is no difference in principle, nor in practical importance, so far as this rule is concerned, between a suit where the state court directs its officer to exercise physical interference with property in the custody of the Federal tribunal, and one in which the decree of the state court affects the title only to the same, without taking manual possession thereof.

In each case, the judgment of the court which acquired prior jurisdiction is impeded, clogged and interfered with. It is, moreover, for the interests of justice that conflicts between decrees of coördinate tribunals should be avoided; and that the parties should not be tempted by the hope of thus gaining some apparent and at least temporary advantage, to indulge in "an unseemly scramble of litigants to speed cases in the respective courts of their preference." *Sharon v. Terry*, 36 Fed. Rep. 337, 359, *infra*.

Where a sheriff sells land, he merely delivers a deed, which purports to confer title thereto, and he exercises no physical control over the same. Yet, such a sale will be enjoined by the court of the United States with prior jurisdiction. *Julian v. Central Trust Co.*, 93 U. S. 193.

This rule has been applied to bankruptcy proceedings.

It is imperatively necessary that the state courts should be obliged to respect this rule in cases affecting funds in the pos-

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session of the courts of bankruptcy, in order that the supremacy of the United States, when exercising that power expressly granted by the Federal Constitution, may be recognized.

In such cases the courts of the United States can even interfere with property in the possession of the state courts. *Tefft v. Sternberg*, 40 Fed. Rep. 2, 6; *Moran v. Sturges*, 154 U. S. 256; *The Willamette Valley*, 66 Fed. Rep. 565; *Re Watts and Sachs*, 190 U. S. 1, 32.

Mr. Francis B. Mullin for defendants in error:

The text-writers and the cases declare in unequivocal terms for the jurisdiction of the state courts in cases similar to the one at bar. *Bardes v. Hawarden Bank*, 178 U. S. 524, and two cases following; *Collier on Bankruptcy*, 5th ed., 272, *infra*; *Wall v. Cox*, 181 U. S. 244; *Brandenburg on Bankruptcy*, 3d ed., § 581; *Jones v. Schermerhorn*, 53 N. Y. App. Div. 494; *Silberstein v. Stahl*, 32 N. Y. Misc. 353, *aff'd* 63 N. Y. App. Div. 614; *aff'd* 171 N. Y. 649; *Small v. Muller*, 67 N. Y. App. Div. 143; *Bryan v. Madden*, 109 N. Y. App. Div. 876.

Notwithstanding the possession of the fund by the bankruptcy court, it is perfectly proper, and consistent with comity, as has been said already, to permit the trustee to sue in the state court, to avoid the mortgage. Such a suit does not interfere with the possession of the fund. Where the suit in the state court asks for relief which might be an interference with the possession of the Federal court, this does not warrant enjoining the suit, where the principal relief sought would not be a direct interference. *Guaranty Trust Co. v. North Chicago St. R. Co.*, 130 Fed. Rep. 801.

The imperfect and partial possession of the funds in this case is not sufficient to change the ordinary rule giving the state courts jurisdiction. In every bankruptcy case, as soon as an adjudication is made, the bankruptcy court is constructively in possession of all the property of the bankrupt. *State Bank v. Cox*, 16 Am. Bk. Rep. 32; *York Mfg. Co. v. Cassell*, 15 Am. Bk. Rep. 638; *S. C.*, 201 U. S. 344; *Mueller v.*

Nugent, 184 U. S. 1; *Re Granite City Bank*, 137 Fed. Rep. 818. But notwithstanding this possession the state courts have universally entertained actions by the trustee.

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

Counsel for plaintiffs in error contended below that the state courts had no jurisdiction because the suit was brought to determine title to property or a fund in the possession of the District Court of the United States. The bankruptcy act of July 1, 1898, provided that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." 30 Stat. 544, c. 541, § 23b.

In *Bardes v. Hawarden Bank*, 178 U. S. 524, we held that the bankruptcy court, except by the consent of the defendant, had no jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the state courts or in the Circuit Courts of the United States where diversity of citizenship existed. The act of 1898 was amended by the act of February 5, 1903, 32 Stat. 797, c. 487, section 19 of which provided that the act should "not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight."

The present case was commenced in 1902, and besides the amendment gave the bankruptcy court concurrent and not exclusive jurisdiction.

We give in the margin ¹ quotations from the acts of July 1,

¹ SEC. 23b: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such

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1898, and February 5, 1903, the amendments made by the latter act being italicized.

Undoubtedly the state court, in which the trustee brought

trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*"

SEC. 60b: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

SEC. 67e: "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void, as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

SEC. 70e: "The trustee may avoid any transfer by the bankrupt of his

this suit, was the court "where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them [suits], if proceedings in bankruptcy had not been instituted," and its jurisdiction under the applicable general rule must be conceded.

But plaintiffs in error contend that the possession by the bankruptcy court of the proceeds of the sale of the mortgaged chattels deprives the state court of its conceded jurisdiction to set aside the mortgage as fraudulent.

The contention is wholly inadmissible. The mortgaged property consisted of horses, vehicles, harness, etc., and the order of sale of the temporary receiver, agreed to by plaintiffs in error, was evidently in the interest of all parties, and provided for the deposit of the proceeds, not in the general funds of the estate, but as a special fund, to which the lien, if any, of the chattel mortgage was transferred, and clearly contemplated a plenary suit to determine the validity thereof, which, at that time, there being no diversity of citizenship, and no such possession as might lead to a different result, could only be commenced in the state court. The trustee himself commenced it there and obtained the decree, which was in its nature self-executing, and merely set aside the mortgage, and, as incident thereto, declared that the special fund was free from its lien, and, without seeking to interfere with the possession, left it to the bankruptcy court to carry the decree into effect by placing the money in the custody of its officer, the trustee.

property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

SEC. 19 of act of February 5, 1903: "*That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*"

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No principle of comity was violated and there was no interference with the bankruptcy court. *First National Bank v. Title & Trust Company*, 198 U. S. 280; *Davis v. Friedlander*, 104 U. S. 570; *Eyster v. Gaff*, 91 U. S. 521; *Claflin v. Houseman*, 93 U. S. 130; *Re Platteville Foundry & Machine Company*, 147 Fed. Rep. 828; *Guaranty Trust Company v. North Chicago Street Railroad Company*, 130 Fed. Rep. 801; *Re Spitzer*, 130 Fed. Rep. 879; *Bindseil v. Smith*, 61 N. J. Eq. 645; *Skilton v. Codington*, 185 N. Y. 80. In the latter case the Court of Appeals by Cullen, C. J., in sustaining the jurisdiction of the state court, admirably expounds the applicable principles, with a full citation of authorities. That was a suit against the trustee, while the present case was brought by the trustee.

The possession of the temporary receiver of the special fund was not in the circumstances in any sense sufficient to change the ordinary rule giving the state courts jurisdiction any more than the constructive possession in every case created by adjudication. *Mueller v. Nugent*, 184 U. S. 1; *York Mfg. Company v. Cassell*, 201 U. S. 344.

It is objected that the trustee had no right to attack the validity of the chattel mortgage because it did not appear that he represented any but simple contract creditors. But the record before us shows that the entire record of the proceedings in the bankruptcy court was in evidence before the trial court, though it was not returned here, so that if it were necessary that the trustee should represent judgment creditors, which we do not decide that it was, it must be presumed that the trial court in passing upon all the evidence found that he did. This may explain why the point was not made in the trial court, and it comes too late here.

Judgment affirmed.

GREEN v. CHICAGO, BURLINGTON AND QUINCY
RAILWAY COMPANY.ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

No. 435. Submitted April 8, 1907.—Decided April 29, 1907.

While in case of diverse citizenship the suit may be brought in the Circuit Court for the district of the residence of either party, there must be service within the district; and if the defendant is a non-resident corporation service can only be made upon it if it is doing business in that district in such a manner, and to such an extent, as to warrant the inference that it is present there through its agent.

A railroad company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic.

147 Fed. Rep. 767, affirmed.

THE facts are stated in the opinion.

Mr. Frank P. Prichard and *Mr. John G. Johnson* for plaintiff in error:

When a corporation, through its properly constituted agents, engages in business in a foreign jurisdiction, it may, irrespective of any consent, be found there for purposes of suit, and service upon its agents is service upon it, provided always that the agent is of such a representative character that service upon him may properly be considered service upon the corporation. *Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369; *St. Clair v. Cox*, 106 U. S. 350; *Barrow Steamship Co. v. Kane*, 170 U. S. 100.

The courts of England have reached the same conclusion and the doctrine thus established will probably be ultimately recognized as the true doctrine in all the courts, state as well as Federal.

As to what constitutes the doing of business by a foreign corporation, it is manifestly impossible for the courts to lay down any hard and fast rule. A single isolated transaction would not usually be sufficient, although the transaction might be of such magnitude, and involve so many acts as to be an exception to such a rule. A series of transactions in the State long continued usually amounts to the carrying on of business, but here again the acts might be of such a character, as, for example, the mere solicitation by traveling salesmen as not to come within the rule. Each case must be judged by its own circumstances. There are, however, certain elements which, if one or more of them exist, are usually considered to indicate the carrying on of a business, as *e. g.*:

The establishment of a permanent office to which all persons having business with the corporation may come.

The employment of an agent located within the State who is advertised as a general agent of the corporation for such business as it transacts in the State.

The continuous making within the State of contracts binding on the corporation.

Examining the facts of the present case as disclosed by the evidence and in the light of the principles above referred to, it is submitted that the defendant was subject to the jurisdiction of the United States Circuit Court in which it was sued.

Mr. Francis Rawle for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

The plaintiff in error, a citizen of Pennsylvania, brought an action in the Circuit Court for the Eastern District of Pennsylvania to recover damages for personal injuries alleged to have been incurred in Colorado through the negligence of the defendant, against the defendant in error, a corporation

created by the laws of the State of Iowa, and, therefore, for jurisdictional purposes, a citizen of that State. The return upon the writ shows a service "on Chicago, Burlington and Quincy Railway Company, a corporation which is doing business in the Eastern District of Pennsylvania . . . by giving a true and attested copy to Harry E. Heller, agent of said corporation." The defendant appeared specially for the purpose of disputing jurisdiction. The Circuit Court held that the service was insufficient, because the defendant was not doing business within the district, and that decision is brought here by writ of error for review.

The jurisdiction of the Circuit Court in this case was founded solely upon the fact that the parties were citizens of different States. In such a case the suit may be brought in the district of the residence of either. Act of March 3, 1875, chap. 137, § 1, as corrected by act of August 13, 1888, chap. 866, § 1 (25 Stat. 434). But to obtain jurisdiction there must be service, and the service was upon the corporation in the Eastern District of Pennsylvania. Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there.

The eastern point of the defendant's line of railroad was at Chicago, whence its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers, and the construction, maintenance and operation of a railroad for that purpose. As incidental and collateral to that business it was proper, and, according to the business methods generally pursued, probably essential, that freight and passenger traffic should be solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers

and freight to be transported over the defendant's line. For conducting this business several clerks and various travelling passenger and freight agents were employed, who reported to the agent and acted under his direction. He sold no tickets and received no payments for transportation of freight. When a prospective passenger desired a ticket, and applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington and Quincy Railroad a ticket over that road. Occasionally he sold to railroad employes, who already had tickets over intermediate lines, orders for reduced rates over the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's line. In these bills of lading it was recited that they should not be in force until the freight had been actually received by the defendant.

The question here is whether service upon the agent was sufficient, and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites *Denver &c. Railroad Co. v. Roller*, 100 Fed. Rep. 738, and *Tuchband v. Chicago &c. Railroad*, 115 N. Y. 437. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts.

The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to

formulate any general rule defining what transactions will constitute "doing business" in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower Federal courts. *Maxwell v. Atchison &c. Railroad*, 34 Fed. Rep. 286; *Fairbank & Co. v. Cincinnati &c. Railroad*, 54 Fed. Rep. 420; *Union Associated Press v. Times Star Co.*, 84 Fed. Rep. 419; *Earle v. Chesapeake &c. Railroad*, 127 Fed. Rep. 235.

The judgment of the Circuit Court is

Affirmed.

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OPINIONS PER CURIAM, ETC., FROM FEBRUARY 27
TO APRIL 29, 1907.

No. —, Original. *Ex parte*: IN THE MATTER OF JOHN ARMSTRONG CHANLER, PETITIONER. Submitted February 25, 1907. Decided March 4, 1907. Motion for leave to file petition for a writ of prohibition denied. *Mr. George W. Watt and Mr. James M. Dohan* for petitioner. *Mr. Joseph H. Choate, Jr.*, opposing.

Nos. 210 and 211. ISAAC W. FOWLER, RECEIVER, ETC., APPELLANT, *v.* JOHN C. OSGOOD. Appeals from the Circuit Court of the United States for the District of Colorado. Argued February 27, 1907. Decided March 4, 1907. *Per Curiam*. Dismissed for the want of jurisdiction on the authority of *Louisville Trust Company v. Knott*, 195 U. S. 225, and cases therein cited; *Bache v. Hunt*, 193 U. S. 523, 525. *Mr. Joseph C. Helm and Mr. N. T. Guernsey* for appellant. *Mr. Cass E. Herrington and Mr. David C. Beaman* for appellee.

No. 461. JOHN ROMIG ET AL., APPELLANTS, *v.* MYRTLE GILLET. Appeal from the Supreme Court of the Territory of Oklahoma. Motion to dismiss submitted February 25, 1907. Decided March 4, 1907. *Per Curiam*. Dismissed for the want of jurisdiction. *Schlosser v. Hemphill*, 198 U. S. 173, and cases cited in *California Consolidated Mining Co. v. Manley*, 203 U. S. 579. *Mr. A. A. Hoehling, Jr.*, for appellants. *Mr. Henry F. Woodard and Mr. A. A. Birney* for appellee.

No. 478. CHOD THOMAS, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS. In error to the Supreme Court of the

State of Kansas. Motions to dismiss or affirm submitted February 26, 1907. Decided March 4, 1907. *Per Curiam*. Dismissed for the want of jurisdiction. *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31; *Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, 137 U. S. 86; *Giozza v. Tiernan*, 148 U. S. 662; *Otis v. Parker*, 187 U. S. 606, 608, 609; *Castillo v. McConnico*, 168 U. S. 674; *Smiley v. Kansas*, 196 U. S. 447. Case below, 86 Pac. Rep. 499. Mr. Alfred M. Jackson for plaintiff in error. Mr. C. C. Coleman for defendant in error.

No. 221. O. V. LAWSON, PLAINTIFF IN ERROR, *v.* THE STATE OF WASHINGTON. In error to the Supreme Court of the State of Washington. Argued for defendant in error March 1, 1907. Decided March 11, 1907. *Per Curiam*. Dismissed for the want of jurisdiction. *Dent v. West Virginia*, 129 U. S. 114; *California Powder Works v. Davis*, 151 U. S. 393; *Sayward v. Denny*, 158 U. S. 180; *Ansbro v. United States*, 159 U. S. 695. Mr. F. B. Crosthwaite for plaintiff in error. Mr. Frederic D. McKenney, Mr. J. S. Flannery, Mr. George H. Walker and Mr. Kenneth MacKintosh for defendant in error.

No. 224. PROCOPIA GARZA DE VILLEREAL ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF TEXAS. In error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. Submitted March 6, 1907. Decided March 11, 1907. *Per Curiam*. Dismissed for the want of jurisdiction. *O'Connor v. Texas*, 202 U. S. 501; *Bacon v. Texas*, 163 U. S. 219; *California Powder Works v. Davis*, 151 U. S. 389; *Devine v. Los Angeles*, 202 U. S. 313, 337. Mr. H. G. Dickinson for plaintiffs in error. Mr. Robert V. Davidson for defendant in error.

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NO. 234. CHARLES T. CHERRY, RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* THE FIDELITY AND DEPOSIT COMPANY. In error to the Supreme Court of the Territory of Oklahoma. Argued March 13 and 14, 1907. Decided March 18, 1907. *Per Curiam*. Judgment affirmed with costs. *Fidelity and Deposit Company v. Courtney*, 186 U. S. 342; *Guarantee Company v. Mechanics Company*, 183 U. S. 402; case below, 85 Pac. Rep. 713, *sub nom.* *Willoughby v. Fidelity and Deposit Company*; *Sweeney v. Lomme*, 22 Wall. 208. Mr. R. M. Campbell, Mr. D. T. Flynn and Mr. C. B. Ames for plaintiff in error. Mr. Edgar H. Gans for defendant in error.

NO. 242. STEVENSON IRON MINING COMPANY, PLAINTIFF IN ERROR, *v.* ELMER A. KIBBE. In error to the Circuit Court of the United States for the District of Minnesota. Argued March 14, 1907. Decided March 18, 1907. *Per Curiam*. Judgment affirmed with costs and interest. *Minnesota Iron Company v. Kline*, 199 U. S. 593; *Holden v. Hardy*, 169 U. S. 366, 392; *Kibbe v. Stevenson Iron Company*, 136 Fed. Rep. 147; *Kline v. Minnesota Iron Company*, 93 Minnesota, 63; *Schus v. Powers-Simpson Company*, 85 Minnesota, 447. Mr. John G. Williams and Mr. Moses E. Clapp for plaintiff in error. Mr. Samuel A. Anderson for defendant in error.

NO. 235. JOHN EDWARD MCCARTY, APPELLANT, *v.* THE UNITED STATES. Appeal from the Circuit Court of the United States for the Northern District of California. Submitted March 6, 1907. Decided April 8, 1907. *Per Curiam*. Dismissed for the want of jurisdiction on the authority of *Chase v. United States*, 155 U. S. 489. Mr. H. V. Morehouse for appellant. The Attorney General and Mr. Assistant-Attorney General Van Orsdel for appellee.

NO. 247. MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, v. J. W. ECKMAN, GUARDIAN, ETC. On a certificate from the United States Circuit Court of Appeals for the Fifth Circuit. Argued March 15 and 18, 1907. Decided April 8, 1907. *Per Curiam*. Question¹ answered in the negative on the authority of *Slater v. Mexican Central National Railroad Company*, 194 U. S. 120. Mr. Ezra Ripley Thayer and Mr. Moorfield Storey for the railway company. Mr. George E. Wallace for Eckman.

NO. 401. WILL D. GOULD ET AL., APPELLANTS, v. LEO V. YOUNGORTH, UNITED STATES MARSHAL; NO. 415. WARREN GILLELEN ET AL., APPELLANTS, v. LEO V. YOUNGORTH, UNITED STATES MARSHAL; and NO. 432. LEE R. MYERS, APPELLANT, v. H. Z. OSBORNE, UNITED STATES MARSHAL. Appeals from the Circuit Court of the United States for the Southern District of California. Argued March 19 and 20, 1907. Decided April 8, 1907. *Per Curiam*. Final orders reversed with costs, and causes remanded with directions to discharge petitioners, respectively, without prejudice to renewal of applications to remove, on the authority of *Tinsley v. Treat &c.*, 205 U. S. 20. Mr. Will D. Gould for appellants in No.

¹ The question answered was:

"In an action brought in the United States Circuit Court in and for the Western District of Texas by a citizen of that district against the Mexican Central Railway Company, a corporation duly created under the laws of the State of Massachusetts and doing business in and operating a steam railroad under continuous line in the State of Texas and the Republic of Mexico, to recover for injuries to the plaintiff, received while he was engaged in defendant's service, and whereby, through defective appliances furnished by said railroad company and the negligent operation of the said railroad in the Republic of Mexico, the said plaintiff, at Ebano, Mexico, was injured and lost a leg, can the said court proceed to judgment and award such damages as upon proof may be assessed by a jury, notwithstanding the provisions of the laws of the Republic of Mexico, proved on this trial and recited in the statement of this case, and which, it is agreed, were the laws of Mexico applicable herein in force and effect at the time of the injuries complained of?"

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401 and *Mr. Herbert J. Goudge* for appellants in No. 415. *The Attorney General* and *Mr. Assistant-Attorney General Sanford* for appellee.

No. 18, Original. *Ex parte*: IN THE MATTER OF FERNANDO VAZQUEZ MORALES ET AL.; PETITIONERS. Motion for leave to file submitted April 8, 1907. Decided April 15, 1907. Motion for leave to file petition for appeal granted, and appeal allowed on appellants filing bond in the penal sum of \$1,000, conditioned according to law, to be approved by the Supreme Court of Porto Rico. *Mr. Charles C. Lancaster* and *Mr. Herbert E. Smith* for petitioners.

Nos. 502 and 503. WILLIAM McCOACH, COLLECTOR, ETC., PETITIONER, *v.* THE PHILADELPHIA TRUST, SAFE DEPOSIT AND INSURANCE COMPANY ET AL., EXECUTORS, ETC.; and No. 504. WILLIAM McCOACH, COLLECTOR, ETC., PETITIONER, *v.* GEORGE W. NORRIS ET AL., EXECUTORS, ETC. On writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit. Argued April 15 and 16, 1907. Decided April 22, 1907. Judgments affirmed with costs by a divided court, and causes remanded to the Circuit Court of the United States for the Eastern District of Pennsylvania. No. 505. THE UNITED STATES, PETITIONER, *v.* THE MARION TRUST COMPANY, TRUSTEE, ETC. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. Argued April 15 and 16, 1907. Decided April 22, 1907. Judgment affirmed by a divided court, and cause remanded to the District Court of the United States for the District of Indiana. *The Attorney General*, *The Solicitor General* and *Mr. J. C. McReynolds* for the petitioners. *Mr. H. Gordon McCouch* for respondents in Nos. 502, 503 and 504. *Mr. Morris M. Townley* and *Mr. E. W. Bradford* for respondent in No. 505.

No. 642. WILLIAM SPAUGH, JR., APPELLANT, *v.* H. L. FITTS, SHERIFF, ETC. Appeal from the District Court of the United States for the Eastern District of Missouri. Argued for appellee and submitted for appellant April 23, 1907. Decided April 29, 1907. *Per Curiam*. Final order affirmed with costs. *Valentina v. Mercer*, 201 U. S. 131; *Felts v. Murphy*, 201 U. S. 123; *Urquhart v. Brown*, 205 U. S. 179; *In re Eckart*, 166 U. S. 481, 483; *Tinsley v. Anderson*, 171 U. S. 101, 105; *Craemer v. Washington*, 168 U. S. 124; *Ex parte Harding*, 120 U. S. 782. Mr. Charles F. Wilson for appellant. Mr. Herbert S. Hadley and Mr. North T. Gentry for appellee.

No. 412. WHITE STAR MINING COMPANY, PLAINTIFF IN ERROR, *v.* NELS O. HULTBERG ET AL.; No. 647. CLAES W. JOHNSON, PLAINTIFF IN ERROR, *v.* WHITE STAR MINING COMPANY OF ILLINOIS ET AL.; and No. 648. PETER H. ANDERSON, PLAINTIFF IN ERROR, *v.* WHITE STAR MINING COMPANY OF ILLINOIS ET AL. In error to the Supreme Court of the State of Illinois. Motion to dismiss submitted April 22, 1907. Decided April 29, 1907. *Per Curiam*. Dismissed for the want of jurisdiction. *Sayward v. Denny*, 158 U. S. 180; *San Francisco v. Scott*, 111 U. S. 769; *Delmas v. Insurance Company*, 14 Wall. 661; *Erie Railroad Company v. Purdy*, 185 U. S. 148; *Oxley Stave Company v. Butler County*, 166 U. S. 648. Case below, 220 Illinois, 578. Mr. Harris F. Williams, Mr. Frederick S. Winston, Mr. John Barton Payne and Mr. Silas H. Strawn in support of motion to dismiss. Mr. Charles H. Hamill and Mr. Carl R. Chindblom in opposition thereto.

*Decisions on Petitions for Writs of Certiorari from
February 27 to April 29, 1907.*

No. 616. WILLIAM F. D. TAYLOR, PETITIONER, *v.* THE UNITED STATES. March 4, 1907. Petition for a writ of cer-

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tiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Lucius H. Beers* and *Mr. William G. Choate* for petitioner.

No. 574. ROBERT S. BRIGHT, TRUSTEE, PETITIONER, *v.* THE FIFTH CONGREGATIONAL CHURCH OF WASHINGTON, D. C. March 4, 1907. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Heber J. May* and *Mr. S. Herbert Giesy* for petitioner. *Mr. W. C. Sullivan* for respondent.

No. 595. ALFRED KESSLER ET AL., PETITIONERS, *v.* THE ENSLEY LAND COMPANY ET AL. March 4, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William A. Gunter* and *Mr. J. W. Baker* for petitioners. *Mr. John B. Knox* for respondents.

No. 596. JOHN STEPHENS ET AL., PETITIONERS, *v.* A. E. BRAST ET AL. March 4, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. V. B. Archer* for petitioners. *Mr. R. E. Hornor* for respondents.

No. 600. ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, PETITIONER, *v.* JOHN R. MCSWEAN. March 4, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* and *Mr. Thomas F. West* for petitioners. No appearance for respondent.

No. 621. WILLIAM H. WILDER, PETITIONER, *v.* ATWELL J. BLACKFORD. March 4, 1907. Petition for a writ of certiorari

to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Duell* and *Mr. C. E. Littlefield* for petitioner. *Mr. Philip Mauro* for respondent.

No. 568. CONTINENTAL PAPER BAG COMPANY, PETITIONER, *v.* EASTERN PAPER BAG COMPANY. March 11, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Albert H. Walker* for petitioner. *Mr. Samuel R. Betts* and *Mr. Francis T. Chambers* for respondent.

No. 602. T. M. ANGLE, PETITIONER, *v.* THE UNITED STATES. March 11, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George E. Hamilton* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 624. FREDERICK W. WARD, PETITIONER, *v.* JOHN B. HART, TRUSTEE, ET AL. March 11, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. V. B. Archer* for petitioner. No appearance for respondents.

No. 632. LUIGI GANDOLFI ET AL., PETITIONERS, *v.* ALFREDO C. SIEGERT, as surviving partner, etc. March 11, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edmund Wetmore* and *Mr. John Brooks Leavitt* for petitioners. *Mr. Edward B. Whitney* for respondent.

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No. 620. THOMAS J. SHEA, PETITIONER, *v.* CITY OF MOBILE. March 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry T. Smith* and *Mr. Gregory L. Smith* for petitioner. *Mr. Burwell B. Boone* for respondent.

No. 627. CONVENT OF ST. ROSE, PETITIONER, *v.* THE UNITED STATES SAVINGS AND LOAN COMPANY. March 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles W. Needham* for petitioner. *Mr. Corwin S. Shank* for respondent.

No. 629. LOUIS W. DOWNES, PETITIONER, *v.* THE TETER-HEANY DEVELOPMENT COMPANY. March 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Philip Mauro* and *Mr. Reeve Lewis* for petitioner. *Mr. Henry E. Everding* for respondent.

No. 640. KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, PETITIONER, *v.* J. I. BLANTON, ASSIGNEE, ETC. March 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Marshall Bullitt*, *Mr. Alfred S. Austrian* and *Mr. Levy Mayer* for petitioner. *Mr. Helm Bruce* for respondent.

No. 630. MORRIS EDELSTEIN, PETITIONER, *v.* THE UNITED STATES. March 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth

Circuit denied. *Mr. William B. Matthews* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 635. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* HUBBARD BROTHERS & Co. March 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. A. Henderson*, *Mr. Caruthers Ewing* and *Mr. Alfred P. Thom* for petitioner. No appearance for respondent.

No. 636. W. KELSEY KURTZ, PETITIONER, *v.* ARTHUR K. BROWN, SURVIVING RECEIVER, ETC. April 8, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Rudolph M. Schick* for petitioner. *Mr. Reynolds D. Brown*, *Mr. Malcolm Lloyd, Jr.*, and *Mr. Charles H. Burr* for respondent.

No. 646. ELIZABETH J. WARD, PETITIONER, *v.* DAMPSKIBS-SELSKABET KJOEBENHAVN. April 8, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank R. Savidge* for petitioner. *Mr. J. Parker Kirlin* and *Mr. C. R. Hickox* for respondent.

No. 663. SMOKELESS FUEL COMPANY, PETITIONER, *v.* SAMUEL H. COTTRELL & SON. April 8, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alexander H. Sands* for petitioner. *Mr. Henry R. Pollard* for respondents.

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No. 651. COUNTY OF PRESIDIO, TEX., PETITIONER, *v.* THE NOEL-YOUNG BOND AND STOCK COMPANY. April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. T. J. Beall* for petitioner. *Mr. Millard Patterson* for respondent.

No. 691. STANDARD OIL COMPANY, PETITIONER, *v.* EDWARD ANDERSON. April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles W. Fuller* for petitioner. No appearance for respondent.

No. 603. THE CLEVELAND-CLIFFS IRON COMPANY, PETITIONER, *v.* THE EAST ITASCA MINING COMPANY. April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William P. Belden* and *Mr. Horace Andrews* for petitioner. *Mr. J. L. Washburn* for respondent.

No. 658. SCHOOL DISTRICT No. 11, DAKOTA COUNTY, NEB., PETITIONER, *v.* EDWARD H. CHAPMAN ET AL., ADMINISTRATORS, ETC. April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elbert H. Hubbard* for petitioner. No appearance for respondents.

No. 659. BAY PRAIRIE IRRIGATION COMPANY, PETITIONER, *v.* RICHARD WOOD ET AL. April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the Fifth Circuit denied. *Mr. Hannis Taylor, Mr. A. L. Jackson and Mr. H. M. Garwood* for petitioner. *Mr. Richard Wood pro se.*

No. 673. THE DEUTSCHE LEVANTE LINIE, ETC., PETITIONER, *v. J. SAMUEL STEPHENSON ET AL.*; No. 674. THE DEUTSCHE LEVANTE LINIE, ETC., PETITIONER, *v. CONSTANTINE S. GALANOPULO*; No. 675. THE DEUTSCHE LEVANTE LINIE, ETC., PETITIONER, *v. THE HILLS BROTHERS COMPANY*; No. 676. THE DEUTSCHE LEVANTE LINIE, ETC., PETITIONER, *v. THE NATIONAL BOARD OF MARINE UNDERWRITERS*; and No. 677. THE DEUTSCHE LEVANTE LINIE, ETC., PETITIONER, *v. WILLIAM H. HARRIS*. April 15, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harrington Putnam* for petitioner. *Mr. Lawrence Kneeland* for respondents.

No. 689. CATHARINE J. WHITE, EXECUTRIX, ETC., PETITIONER, *v. THE PENNSYLVANIA RAILROAD COMPANY*; and No. 690. CATHARINE J. WHITE, EXECUTRIX, ETC., PETITIONER, *v. THE STEAM FERRY BOAT PHILADELPHIA, ETC.* April 15, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin and Mr. LaRoy S. Gove* for petitioner. *Mr. Henry Galbraith Ward* for respondents.

No. 693. ROBERT T. NEILL, TRUSTEE, ETC., PETITIONER, *v. THE UNION NATIONAL BANK OF KANSAS CITY, MO.* April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr.*

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Edwin C. Brandenburg for petitioner. *Mr. Meriwether L. Crawford* for respondent.

No. 694. EUCLID PARK NATIONAL BANK OF CLEVELAND, OHIO, ET AL., PETITIONERS, *v.* UNION TRUST AND DEPOSIT COMPANY, TRUSTEE. April 15, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles D. Merrick* for petitioners. *Mr. B. M. Ambler* for respondent.

No. 679. WILLIAM BEATTIE & SON, PETITIONER, *v.* UNITED SHIRT AND COLLAR COMPANY ET AL. April 29, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George A. Mosher* and *Mr. Frank S. Black* for petitioner. *Mr. Livingston Gifford* and *Mr. Hillary C. Messimer* for respondents.

No. 705. WEBSTER COAL AND COKE COMPANY, PETITIONER, *v.* A. J. CASSATT ET AL; and No. 706. PENNSYLVANIA COAL AND COKE COMPANY, PETITIONER, *v.* A. J. CASSATT ET AL. April 29, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. John W. Griggs* and *Mr. George S. Graham* for petitioners. *Mr. John G. Johnson* for respondents.

No. 708. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PETITIONER, *v.* CATHERINE McGRATH. April 29, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. J. H. McGowan* for petitioner. *Mr. Holmes Conrad* for respondent.

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CASES DISPOSED OF WITHOUT CONSIDERATION BY
THE COURT FROM FEBRUARY 27 TO APRIL 29,
1907.

No. 628. ED. SMITH, PLAINTIFF IN ERROR, *v.* THE STATE OF TENNESSEE. In error to the Supreme Court of the State of Tennessee. February 27, 1907. Docketed and dismissed with costs, on motion of *Mr. Charles T. Cates, Jr.*, for the defendant in error. No one opposing.

No. 254. NORTH SHORE BOOM AND DRIVING COMPANY, PLAINTIFF IN ERROR, *v.* NICOMEN BOOM COMPANY. In error to the Supreme Court of the State of Washington. March 11, 1907. Dismissed with costs, on motion of *Mr. S. H. Piles* for the plaintiff in error. *Mr. S. H. Piles* for plaintiff in error. *Mr. W. W. Cotton* for defendant in error.

No. 248. ANDREW PATTERSON, PLAINTIFF IN ERROR, *v.* ISHAM TAYLOR, JAILER, ETC. In error to the Supreme Court of the State of Florida. March 13, 1907. Dismissed with costs, pursuant to the tenth rule. *Mr. J. Douglas Wetmore* and *Mr. Isaac L. Purcell* for plaintiff in error. No appearance for defendant in error.

No. 354. MARGARET SAYLOR, APPELLANT, *v.* JOHN C. FRANTZ. Appeal from the Supreme Court of the Territory of Oklahoma. March 18, 1907. Dismissed with costs, on authority of counsel for appellant. *Mr. S. H. Harris* for appellant. *Mr. Frank Dale* and *Mr. A. G. C. Bierer* for appellee.

No. 268. ROBERT MANFORD, PLAINTIFF IN ERROR, *v.* THE STATE OF MINNESOTA. In error to the Supreme Court of the

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State of Minnesota. March 22, 1907. Dismissed with costs, pursuant to the tenth rule. *Mr. Louis Marshall* and *Mr. Moritz Rosenthal* for plaintiff in error. No appearance for defendant in error.

No. 661. ABRAHAM RUEF, PLAINTIFF IN ERROR, *v.* THOMAS F. O'NEIL, SHERIFF, ETC. In error to the Superior Court of the City and County of San Francisco, State of California. March 25, 1907. Dismissed with costs, on motion of *Mr. A. B. Browne* for the plaintiff in error. *Mr. A. B. Browne* for plaintiff in error. *Mr. Frederic D. McKenney* and *Mr. Francis J. Heney* for defendant in error.

No. 166. CITY OF CHICAGO, APPELLANT, *v.* CHICAGO CITY RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 8, 1907. Decree reversed with costs, on confession of error and consent of counsel, and cause remanded for further proceedings according to law, on motion of *Mr. John P. Wilson* for the appellee. *Mr. James Hamilton Lewis* and *Mr. Edgar Bronson Tolman* for appellant. *Mr. John P. Wilson* and *Mr. John J. Herrick* for appellee.

No. 421. LUIS BRAVO ET AL., ETC., APPELLANTS, *v.* EMILIO GOMEZ ET AL. Appeal from the District Court of the United States for the District of Porto Rico. April 8, 1907. Dismissed, per stipulation, on motion of *Mr. Frederic D. McKenney* for the appellees. *Mr. N. B. K. Pettingill* for appellants. *Mr. Frederic D. McKenney* for appellees.

No. 73. WILLIAM S. DEXTER ET AL., TRUSTEES, ETC., PLAINTIFFS IN ERROR, *v.* SALEM D. CHARLES ET AL., AS BOARD

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OF STREET COMMISSIONERS, ETC. In error to the Supreme Judicial Court of the State of Massachusetts. April 8, 1907. Dismissed with costs, per stipulation. *Mr. A. R. Serven* for plaintiffs in error. *Mr. Thomas M. Babson* for defendants in error.

No. 237. BAINBRIDGE W. BURDICK, APPELLANT, *v.* WILLIAM DILLON ET AL. Appeal from the United States Circuit Court of Appeals for the First Circuit. April 8, 1907. Dismissed, per stipulation. *Mr. Selden Bacon* for appellant. *Mr. H. V. Cunningham* for appellees.

No. 678. THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* BEN SMALL. In error to the United States Circuit Court of Appeals for the Fifth Circuit. April 8, 1907. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. D. D. Duncan* for plaintiff in error. No appearance for defendant in error.

No. 100. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* THE TORREY CEDAR COMPANY. In error to the Circuit Court of the United States for the Eastern District of Wisconsin. April 15, 1907. Dismissed, on motion of *Mr. Solicitor-General Hoyt* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Charles Barber* for defendant in error.

No. 1, Original. THE STATE OF NEW JERSEY, COMPLAINANT, *v.* THE STATE OF DELAWARE. April 15, 1907. Bill of complaint dismissed without costs and without prejudice, on motion of *Mr. Robert H. McCarter* for the complainant. *Mr. Robert H. McCarter* for complainant. *Mr. Robert H. Richards* and *Mr. George H. Bates* for defendant.

205 U. S. Cases Disposed of Without Consideration by the Court.

No. 701. *Ex parte*: IN THE MATTER OF JOHN JOHNSON, APPELLANT. Appeal from the Circuit Court of the United States for the Southern District of New York. April 17, 1907. Docketed and dismissed on motion of *Mr. Alford W. Cooley* in behalf of counsel. No one opposing.

No. 515. NEW ORLEANS GREAT NORTHERN RAILROAD COMPANY, APPELLANT, *v.* THE MISSISSIPPI RAILROAD COMMISSION ET AL. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. April 22, 1907. Decree reversed at the cost of appellant on confession of error, and cause remanded to be proceeded in according to law, on motion of *Mr. Marcellus Green* for the appellant. *Mr. Marcellus Green* for appellant. *Mr. R. V. Fletcher* and *Mr. C. H. Alexander* for appellees.

No. 638. MAGGIE MYERS, APPELLANT, *v.* ANDREW P. WYMORE, LATE SHERIFF, ETC., ET AL. Appeal from the District Court of the United States for the Western District of Missouri. April 22, 1907. Dismissed with costs, pursuant to the tenth rule. *Mr. James S. Easby-Smith*, *Mr. W. E. Fowler* and *Mr. R. B. Ruff* for appellant. *Mr. Herbert S. Hadley* for appellees.

No. 290. ISAAC BERKSON ET AL., APPELLANTS, *v.* SAMUEL H. MARCUSE, TESTAMENTARY EXECUTOR, ETC. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. April 24, 1907. Dismissed with costs, pursuant to the tenth rule. *Mr. Henry L. Lazarus* for appellants. No appearance for appellees.

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL 29, 1907.

PRESENTATION OF RESOLUTIONS IN COMMEMORATION OF
J. HUBLEY ASHTON.

Hon. Henry M. Hoyt, Solicitor General: May it please the court, on behalf of the Bar Association of this District, and in the name of the Attorney General, I have the honor to present to the Court the resolutions adopted by the Bar Association in commemoration of the late Mr. J. Hubley Ashton, whose distinguished official and personal career at this bar is well known to the Court; and I beg to ask that the court will direct that an appropriate minute be made of those proceedings upon its record.

The Chief Justice: The Court recognizes that the long and eminent labors of Mr. Ashton, and particularly while connected with the Department of Justice, justify the Court in making this an exception to the general rule, and render it eminently proper that the request of the Bar Association be granted.

The resolutions, therefore, will be placed on the files of this Court.

The resolutions are as follows:

WASHINGTON, D. C.

We hereby certify the following to be a true copy of the minute and resolutions adopted at a meeting of the Bar of the District of Columbia held on the twenty-ninth day of March, in the year 1907, in memory of the late J. Hubley Ashton.

A. B. HAGNER,
Chairman.

Attest:

PERCIVAL M. BROWN,
Secretary.

MINUTE AND RESOLUTIONS.

The Bar of the District of Columbia have met to give expression to their sorrow and to their sensibility of the loss occasioned to them and to the profession by the death of J. Hubley Ashton, and to pay a tribute to his eminent abilities and virtues.

Mr. Ashton was admitted to the Bar of the Supreme Court of the United States in December, 1864, and to this Bar in the month of October, 1869.

He was Assistant Attorney General of the United States from May, 1864, continuously, with the exception of a few months, until his resignation in April, 1869.

During that period he argued on behalf of the Government a great number of important causes, more than seventy in all, which originated in the events of the Civil War and in the execution of the laws and policy relating to reconstruction and which involved grave questions of constitutional and international law. Many of these cases as they are reported in volumes 2 to 8 of Wallace related to the law of prize, and his arguments therein greatly contributed to the establishment of the doctrines enunciated by the Court. He served under and was associated with Attorneys General Bates, Speed, Stanbery, Evarts and Hoar, and was several times appointed Acting Attorney General.

From the time he was admitted to this Bar to the day of his death his home was in Washington, and until recently he was actively engaged in the practice of his profession.

After he severed his connection with the Law Department, he was frequently employed by the Government in litigation involving great responsibility and in matters relating to international intercourse and obligation.

He seldom appeared in the local courts. His practice continued to be in the Supreme Court of the United States, and he was also the adviser of many corporations and had professional charge of important business interests.

Mr. Ashton's long career made conspicuous his varied learning and professional knowledge of the fundamental principles

of jurisprudence, his intellectual vigor, alertness and acumen, his power in legal controversy, and his capacity for persuasive and convincing argument and exposition. His briefs were made of exceptional value and usefulness by his habit of exhaustive research and preparation and his faculty for lucid statement and logical reasoning.

The conduct of his professional life, as was his conduct in all the relations of life, was in conformity with the highest and most ennobling standards of duty, of rectitude and of honor.

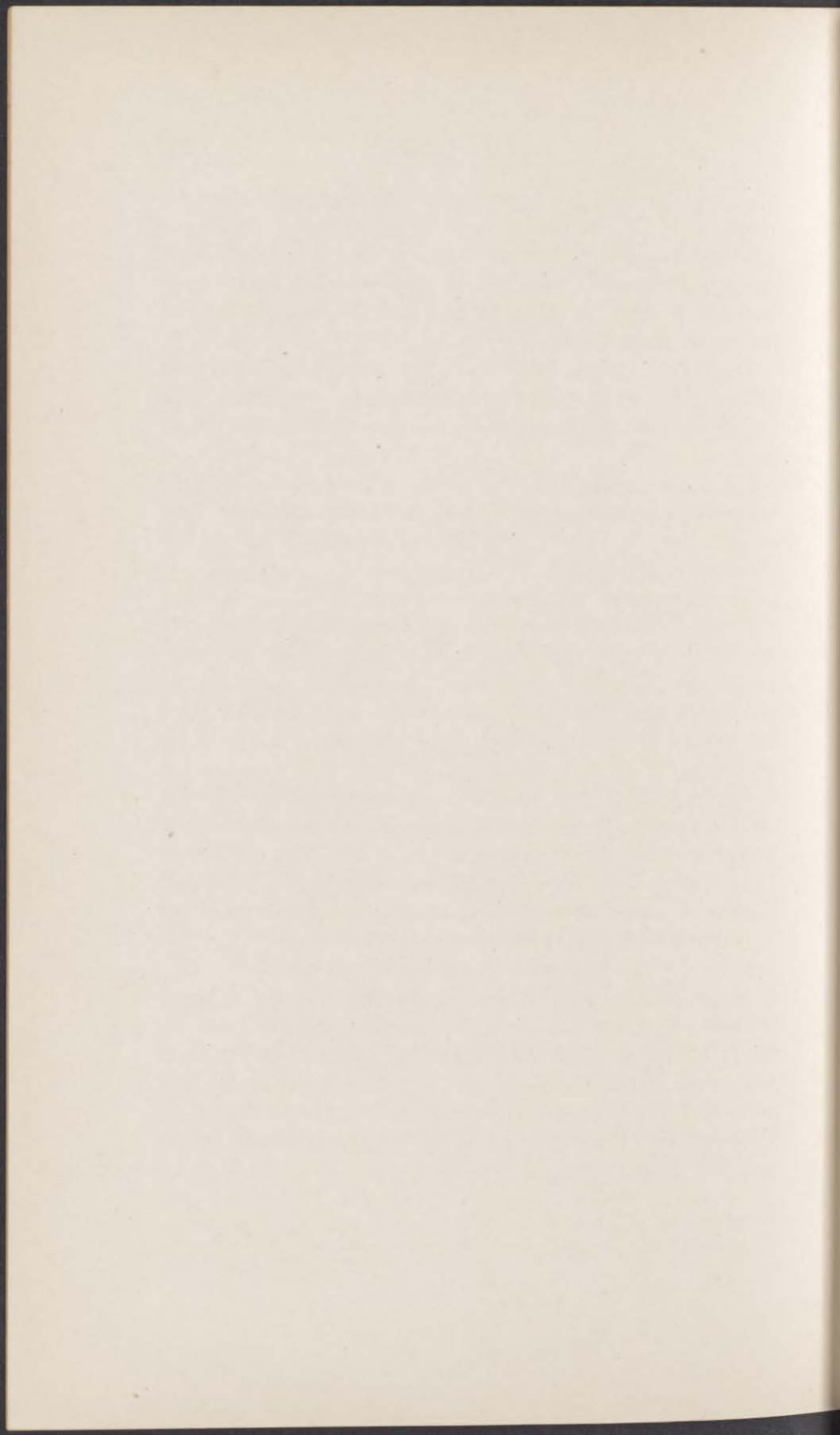
His character and the simplicity, refinement and kindliness of his nature secured and firmly held the confidence, the respect and the sincere friendship of the Bench and of the members of the Bar.

Therefore, be it—

Resolved, That we bear testimony to and hold in honor the rare attainments of our deceased brother, his fidelity to justice and to law, his great services to the profession and to the community, and the nobility and purity of the spirit in which he devoted his great abilities to the duties and labors of his profession.

Resolved, That the unalterable purpose evinced by Mr. Ashton from the beginning to the end of his laborious life to accept and fully meet the moral responsibilities and obligations that devolve upon the Bar, as well as upon the Bench, deserves our special recognition and a permanent record of our remembrance, in the desire that the influence of his example may be thereby preserved, strengthened and extended.

Resolved, That the president of the Bar Association be requested to present this memorial and these resolutions to the Court of Appeals and the Supreme Court of the District of Columbia, with the request that they be entered on its minutes, and that a copy be communicated to the family of the deceased with the expression of the sincere sympathy of the members of the Bar.



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A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends, and as this doctrine is not confined to full sovereign powers it extends to those, such as the Territories of the United States which in actual administration originate and change the law of contract and property. *Kawananakoa v. Polyblank*, 349.

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APPEAL AND ERROR.

1. *Review of judgment of state court necessarily involving Federal question duly raised but not referred to in opinion.*

Where a Federal question is duly raised at the proper time and in a proper manner in the state court and the judgment of the state court necessarily involves the decision of such question this court on writ of error will review such judgment although the state court in its opinion made no reference to the question. And if it is evident that the ruling of the state court purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 1.

2. *Review of judgment of Supreme Court of Philippine Islands—Errors of law disregarded if not stated in assignment of error.*

In reviewing judgments of the Supreme Court of the Philippine Islands the same rule applies as does in reviewing judgments of the Circuit Courts of the United States that alleged errors of law not stated in the assignment of errors filed with the petition for the writ of error will be disregarded unless they are so plain that under the provision in the thirty-fifth rule to that effect the court may at its option notice them, but this court will not subject the opinion of the court below to minute scrutiny to discover error of law when on the whole it is clear, as in this case, that the facts found by that court justify the judgment under review. *Behn v. Campbell*, 403.

3. *Mode of review of errors in action at law—Scope of review on appeal and writ of error.*

In the absence of modification by statute the rule in respect to all courts whose records are brought for review to this court is that errors alleged to have been committed in an action at law can be reviewed here only by writ of error; but this court has always observed the rule recognized by legislation that while an appeal brings up questions of fact as well as of law, on writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. *Ib.*

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ARMY AND NAVY.

1. *Right to increased pay under § 7 of act of April 26, 1898.*

Section 7 of the act of April 26, 1898, 30 Stat. 364, was not enacted to give increased pay for the discharge of the ordinary duties of the service, but to give compensation for the greater risk and responsibility of active military command; and the assignment under orders of competent authority must be necessary and non-gratuitous. *United States v. Mitchell*, 161.

2. *When officer of army is exercising command under assignment in orders by competent authority within meaning of § 7 of act of 1898.*

A second lieutenant of the United States army who, in the absence of the captain and first lieutenant assumes command of the company in regular course under § 253 of the Army Regulations of 1895, is not exercising under assignment in orders issued by competent authority, a command above that appertaining to his grade within the meaning of § 7 so as to obtain the benefit of the statute, even though a regimental special order may issue directing him to assume the command, and this action may be attempted to be ratified by special order of the commanding general where it is not apparent that any necessity for special direction existed. *Ib.*

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1. *Discharge; claims barred by—To what words in § 17, subd. 4 of bankruptcy act extend.*

Where a claim is founded upon an open account or upon a contract, express or implied, and can be proved under § 63a of the bankruptcy act, if the claimant chooses to waive the tort and take his place with the other creditors, the claim is one provable under the act and barred by the

discharge. The words in the fourth subdivision of § 17, "while acting as an officer, or in any fiduciary capacity," extend to "fraud, embezzlement, misappropriation," as well as "defalcation." (*Crawford v. Burke*, 195 U. S. 176.) *Tindle v. Birkett*, 183.

2. *Life insurance policies within meaning of § 70a of bankruptcy act of 1898.*

The provisions in § 70a of the bankruptcy act of 1898, that a bankrupt having policies of life insurance payable to himself and which have a cash-surrender value, may pay the trustee such value and thereafter hold the policies free from the claims of creditors, are not confined to policies in which the cash-surrender value is expressly stated, but permit the redemption by the bankrupt of policies having a cash-surrender value by the concession or practice of the company issuing the same. *Hiscock v. Mertens*, 202.

3. *When jurisdiction of bankruptcy court concurrent with that of state court—Effect of amendment of February 5, 1903, to bankruptcy act of 1898.*

The possession of a temporary receiver in bankruptcy of the proceeds of property, upon which the bankrupt had fraudulently imposed a lien, deposited as a special fund to await the further order of the court, did not affect the rule that under the bankruptcy act of 1898, prior to the amendment of February 5, 1903, 33 Stat. 797, the state court in which an action could have been brought prior to the bankruptcy to set aside the lien had exclusive jurisdiction of a similar action brought by the trustee. The amendment of February 5, 1903, gave the bankruptcy court in such a case concurrent, not exclusive, jurisdiction. *Frank v. Vollkommer*, 521.

4. *When presumed that trustee represented claims of creditors in proceeding in state court to set aside chattel mortgage.*

Where it was necessary that a trustee in bankruptcy should represent judgment creditors in order to attack the validity of a chattel mortgage given by the bankrupt, if the state court has set the mortgage aside and the record shows that all the proceedings in the bankruptcy court were in evidence in the state court, it will be presumed that the trustee represented the necessary claims of creditors, although the evidence is not returned to this court. *Ib.*

BANKS.

See TAXES AND TAXATION, 2, 3.

BENEFITS.

See CONSTITUTIONAL LAW, 8.

BILLS AND NOTES.

See SALES, 1;

TAXES AND TAXATION, 5, 6.

BONDS.

See CONTRACTS, 7;

TAXES AND TAXATION, 3.

BOUNDARIES.

Boundary between the States of Mississippi and Arkansas defined.

Under the acts of Congress of March 1, 1817, 3 Stat. 348, admitting Mississippi, and of June 15, 1836, 5 Stat. 50, admitting Arkansas to the Union, the boundary line between the two States is the middle of the main channel of the Mississippi River as it was in 1817, and at the point where Island No. 76 is situated it was at that time on the Mississippi side of that island which has never been within the State of Mississippi, notwithstanding attempts on the part of that State to exercise jurisdiction thereover. *Moore v. McGuire*, 214.

See JURISDICTION, D 4;

PRACTICE AND PROCEDURE, 4.

BUILDING CONTRACTS.

See CONTRACTS, 6.

BURDEN OF PROOF.

See JURISDICTION, B 1;

SAFETY APPLIANCE ACT, 3.

CARRIERS.

See SAFETY APPLIANCE ACT.

CASES DISTINGUISHED.

Joy v. St. Louis, 201 U. S. 332, distinguished from *Moore v. McGuire*, 214.
Vance v. W. A. Vandercook Co., 170 U. S. 438, distinguished from *Delamater v. South Dakota*, 93.

CASES FOLLOWED.

Brown v. New Jersey, 175 U. S. 172, followed in *Barrington v. Missouri*, 483.
Board of Trade v. Christie Grain and Stock Co., 198 U. S. 236, followed in *Hunt v. New York Cotton Exchange*, 322.
Crawford v. Burke, 195 U. S. 176, followed in *Tindle v. Birkett*, 183.
De Lima v. Bidwell, 182 U. S. 1, followed in *Pearcy v. Stranahan*, 257.
Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 10, followed in *Citizens' Sav. & Trust Co. v. Illinois Central R. R.*, 46.
Johnson v. Southern Pacific Co., 196 U. S. 1, followed in *Schlemmer v. Bufalo, R. & P. Ry. Co.*, 1.
Jones v. United States, 137 U. S. 202, followed in *Pearcy v. Stranahan*, 257.
Northern Pacific Railway v. Slaght, 205 U. S. 122, followed in *Same v. Same*, 134.
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, followed in *Delamater v. South Dakota*, 93.

Slater v. Mexican Central Nat. R. R. Co., 194 U. S. 120, followed in *Mexican Central Ry. Co. v. Eckman*, 538.
Tinsley v. Treat, 205 U. S. 20, followed in *Kessler v. Treat*, 33; *Gould v. Youngworth*, 538.
United States v. Rice, 4 Wheat. 246, followed in *Pearcy v. Stranahan*, 257.
United States v. Rauscher, 119 U. S. 407, followed in *Johnson v. Browne*, 309.
United States v. Shipp, 203 U. S. 563, followed in *Patterson v. Colorado*, 454.
Weston v. Charleston, 2 Pet. 449, followed in *Home Savings Bank v. Des Moines*, 503.

CERTIFICATE.

See JURISDICTION, B 7;
 PRACTICE AND PROCEDURE, 9, 10.

CERTIORARI.

To Court of Appeals of District of Columbia; when writ will lie.

While under § 6 of the Court of Appeals Act of 1891, 26 Stat. 828, a certiorari can only be issued when a writ of error cannot be, it will not be issued merely because the writ of error will not lie; but only where the case is one of gravity, where there is conflict between decisions of state and Federal courts, or between those of Federal courts of different circuits, or something affecting the relations of this Nation to foreign nations, or of general interest to the public. *Fields v. United States*, 292.

CHANCERY SALES.

See SALES, 3.

CHANGE OF VENUE.

See JURISDICTION, A 6.

CIRCUMSTANTIAL EVIDENCE.

See CRIMINAL LAW, 1, 2.

CITIZENSHIP.

See JURISDICTION, A 4;
 PERSONAL RIGHTS.

CLAIMS AGAINST THE UNITED STATES.

Effect of overpayment to officer of army on claim for extra pay.

Where the United States filed no set-off or counterclaim the court will not overhaul the allowance made to an officer of the Army by the auditor of the War Department. An overpayment erroneously made does not determine the legality of the claim. *United States v. Mitchell*, 161.

CLASSIFICATION.

See STATES, 4.

COLLISION.

See NEGLIGENCE, 3.

COMMERCE.

See CONSTITUTIONAL LAW, 1;
STATES, 8, 9.

COMMISSIONS.

See JURISDICTION, A 1.

COMMON LAW.

See STATES, 5.

CONDITIONAL SALES.

See SALES, 1.

CONFLICT OF LAWS.

See JURISDICTION, B 7.

CONGRESS.

Acts of. *See* ACTS OF CONGRESS.

Powers of. *See* TERRITORIES.

CONSTITUTIONAL LAW.

1. *Commerce clause—Validity of South Dakota law imposing license tax on salesmen of intoxicating liquors.*

The law of South Dakota imposing an annual license charged on travelling salesmen selling, offering for sale, or soliciting orders for intoxicating liquors in quantities of less than five gallons is not unconstitutional because repugnant to the commerce clause of the Constitution of the United States. *Delamater v. South Dakota*, 93.

See STATES, 9.

Contract impairment. *See* CONTRACTS, 3;
Infra, 5.

2. *Due process of law; deprivation of property; effect of decision of state court involving nothing more than the ownership of property.*

The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property, without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amendment did not impair the authority of the States to determine finally, according to its settled usages and established modes of procedure, such questions, when they do not involve any right secured by the Federal Constitution or by any valid act of Congress, or by any treaty. *Tracy v. Ginzberg*, 170.

3. *Due process of law; effect of provisions of state constitution and laws.*

The requirement in the Fourteenth Amendment of due process of law does not take up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purpose of the case, and in that way subject a state decision that they have been complied with to revision by this court. *Patterson v. Colorado*, 454.

4. *Due process of law; decision of state court as infraction of.*

As a general rule the decision of a state court upon a question of law is not an infraction of the due process clause of the Fourteenth Amendment and reviewable by this court on writ of error merely because it is wrong or because earlier decisions are reversed. *Ib.*

5. *Due process of law; violation of contract obligation—Validity of New York law imposing tax on exercise of power of appointment.*

The imposition of a transfer or inheritance tax under ch. 284, Laws of New York, 1897, on the exercise of a power of appointment in the same manner as though the estate passing thereby belonged absolutely to the person exercising the power, does not, although the power was created prior to the act, deprive the person taking by appointment, and who would not otherwise have taken the estate, of his property without due process of law in violation of the Fourteenth Amendment; nor does it violate the obligation of any contract within the protection of the impairment clause of the Federal Constitution. *Chanler v. Kelsey*, 466.

6. *Due process of law and equal protection; deprivation of property—Validity of Nebraska flag law.*

The statute of Nebraska preventing and punishing the desecration of the flag of the United States and prohibiting the sale of articles upon which there is a representation of the flag for advertising purposes is not unconstitutional either as depriving the owner of such articles of his property without due process of law, or as denying him the equal protection of the laws because of the exception from the operation of the statute of newspapers, periodicals or books upon which the flag may be represented if disconnected from any advertisement. *Halter v. Nebraska*, 34.

7. *Due process and equal protection of laws—Police power of State to regulate mines and mining.*

It is an appropriate exercise of the police power of the State to regulate the use and enjoyment of mining properties, and mine owners are not deprived of their property, privileges, or immunities without due process of law or denied the equal protection of the laws by the Illinois mining statute of 1899, which requires the employment of only licensed mine managers and mine examiners, and imposes upon the mine owners liability for the willful failure of the manager and examiner to furnish a reasonably safe place for the workmen. *Wilmington Mining Co. v. Fulton*, 60.

See JURISDICTION, A 6.

8. *Eminent domain; validity of taking where amount assessed for benefits exceeds value of property.*

Constitutional rights like others are matters of degree, and a street opening statute which has stood for a long time will not be declared unconstitutional as taking property without compensation because in a particular instance the amount assessed under the strict letter of the statute exceeded the value of the property, but the statute should be so interpreted, as is possible in this case, so that the apportionment of damages be limited to the benefit. *Martin v. District of Columbia*, 135.

Equal protection of laws. See Supra, 6, 7;

PRACTICE AND PROCEDURE, 3.

9. *Federal power to borrow money; state burdens on.*

The Constitution has conferred upon the Government power to borrow money on the credit of the United States and that power cannot be burdened, impeded, or in any way affected by the action of any State. (*Weston v. Charleston*, 2 Pet. 449.) *Home Savings Bank v. Des Moines*, 503.

10. *Fifth Amendment; effect upon powers of States.*

Article V of Amendments to the Constitution does not operate as a restriction on the powers of the State, but solely upon the Federal Government. (*Brown v. New Jersey*, 175 U. S. 172.) *Barrington v. Missouri*, 483.

11. *Full faith and credit; when judgment not entitled to.*

Where an action is brought to recover upon a judgment the jurisdiction of the court rendering the judgment is open to inquiry; and the Constitutional requirement as to full faith and credit in each State to be given to the public acts, records and judicial proceedings of every other State does not require the enforcement of a judgment rendered without jurisdiction or otherwise wanting in due process of law. *Wetmore v. Karrick*, 141.

12. *Full faith and credit; judgment in personam without jurisdiction of person, not entitled to.*

A judgment rendered *in personam* against a defendant without jurisdiction of his person is not only erroneous but void, and is not required to be enforced in other States under the full faith and credit clause of the Constitution or the act of Congress passed in aid thereof, § 905, Rev. Stat. *Ib.*

See JUDGMENTS AND DECREES, 5.

States. See Ante, 2, 9.

Trial by jury. See CRIMINAL LAW, 5.

CONSTRUCTION.

OF GRANTS OF GOVERNMENTAL POWER. *See* Contracts, 4.

OF STATUTES. *See* Courts, 5;

Safety Appliance Act, 2;
Statutes.

OF TREATIES. *See* Extradition, 5.

OF WILLS. *See* Wills.

CONTEMPT OF COURT.

See COURTS, 1, 2;

LOCAL LAW (GENERALLY).

CONTRACTS.

1. *Application of rule that prior negotiations are merged in contract.*

The rule that prior negotiations are merged in the contract is general in its nature and does not preclude reference to letters between the parties prior to the execution of a contract in order to determine whether from the language used in the contract the parties intended stipulated deductions for delay as a penalty or as liquidated damages. *United States v. Bethlehem Steel Co.*, 105.

2. *Time as of essence—Deductions for delay in performance.*

Where in response to Government advertisements the same party submits different bids, the largest price being for the shortest time of delivery, the acceptance of the bid for the shorter time is evidence that the element of time is of essence, and a stipulated deduction of an amount per day equivalent to the difference between the short and long time for delivery is to be construed as liquidated damages for whatever delay occurs in the delivery, and not as a penalty, although the word penalty may have been used in some portions of the contract. *Ib.*

3. *Grant of immunity from exercise of governmental power not transferable.*

Although the obligations of a legislative contract granting immunity from the exercise of governmental authority are protected by the Federal Constitution from impairment by the State, the contract itself is not property which as such can be transferred by the owner to another, but is personal to him with whom it is made and incapable of assignment, unless by the same or a subsequent law the State authorizes or directs such transfer; and so held as to a contract of exemption with a street railway company from assessments for paving between its tracks. *Rochester Ry. Co. v. Rochester*, 236.

4. *Legislative immunity from taxation; construction of grant of.*

The rule that every doubt is resolved in favor of the continuance of governmental power, and that clear and unmistakable evidence of the intent to part therewith is required, which applies to determining whether a legislative contract of exemption from such power was granted also applies to determining whether its transfer to another was authorized or directed. *Ib.*

5. *Legislative contract of immunity from taxation not transferable.*

A legislative authority to transfer the estate, property, rights, privileges and franchises of a corporation to another corporation does not authorize the transfer of a legislative contract of immunity from assessment. *Ib.*

6. *Building contracts—Conclusiveness of architect's certificate.*

Although under a building contract the builder, to be entitled to payment, must first obtain the certificate of the architect, in the absence of a provision in plain language to that effect, the certificate is not conclusive as to the amount due nor a bar to the owner showing a violation of the contract, in material parts, by which he has sustained damage. *Mercantile Trust Co. v. Hensey*, 298.

7. *Bonds—Right of bona fide purchaser before maturity of county bonds to assume that conditions of issue were complied with.*

Where the qualified voters of the county vote for an issue of bonds for subscription to stock of a railroad on condition that the county be exonerated from a prior subscription authorized for another railroad, and thereafter the judge of the county court authorized by statute to make the subscription enters an order to that effect, receives the stock subscribed for, and issues the bonds, and nothing further is ever done in regard to the prior subscription, although no formal exoneration thereof was ever made or attempted, a *bona fide* purchaser before maturity of the bonds and coupons for value is entitled to assume in his purchase that the county had been fully exonerated from the prior subscription. *Quinlan v. Green County*, 410.

See CONSTITUTIONAL LAW, 5; JURISDICTION, E;
CORPORATIONS, 1; STATES, 10.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1;
SAFETY APPLIANCE ACT.

CORPORATIONS.

1. *Merger of corporations operating as dissolution of constituent—Effect of legislative contract of exemption from taxation.*

Although two corporations may be so united by one of them holding the stock and franchises of the other, that the latter may continue to exist and also to hold an exemption under legislative contract, that is not the case where its stock is exchanged for that of the former and by operation of law it is left without stock, officers, property or franchises, but under such circumstances it is dissolved by operation of the law which brings this condition into existence. *Rochester Ry. Co. v. Rochester*, 236.

2. *Power to receive from another corporation an exemption inconsistent with its charter or laws of State.*

Where a corporation incorporates under a general act which creates certain

obligations and regulations, it cannot receive by transfer from another corporation an exemption which is inconsistent with its own charter or with the constitution or laws of the State then applicable, even though under legislative authority the exemption is transferred by words which clearly include it. *Ib.*

See CONTRACTS, 5; PROCESS;
INSURANCE, 1; STATES, 6;
JURISDICTION, A 8; B 2; TAXES AND TAXATION, 4.

CORPUS DELICTI.

See CRIMINAL LAW, 1, 2.

COURTS.

1. *Contempts; status of judge in punishing for contempt.*

In punishing a person for contempt of court the judges act impersonally and are not considered as sitting in their own case. (*United States v. Shipp*, 203 U. S. 563, 674.) *Patterson v. Colorado*, 454.

2. *Contempts; truth of improper publication as defense to.*

While courts, when a case is finished, are subject to the same criticisms as other people, they have power to prevent interference with the course of justice by premature statements, arguments, or intimidation, and the truth is not a defense in a contempt proceeding to an improper publication made during the pending suit. *Ib.*

3. *Federal interference by habeas corpus with regular course of procedure under state authority.*

Although the power exists and will be exercised in cases of great importance and urgency, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under state authority, but will leave the petitioner to exhaust the remedies afforded by the State for determining whether he is legally restrained of his liberty, and then to bring his case to this court by writ of error under § 709, Rev. Stat.; this rule applies to a case where petitioner contends that his commitment under a state statute, providing for the commitment of one acquitted by reason of insanity, is a deprivation of liberty without due process of law, in violation of the Fourteenth Amendment. *Urquhart v. Brown*, 179.

4. *Judicial notice as to location of territory.*

The court takes judicial cognizance whether or not a given territory is within the boundaries of the United States, and is bound to take the fact as it really exists however it may be averred to be. *Pearcy v. Stranahan*, 257.

5. *Power to overrule long established constitutional construction.*

A long established and steadily adhered to principle of constitutional construction precludes a judicial tribunal from holding a legislative

enactment, Federal or state, unconstitutional and void unless it is manifestly so. *Halter v. Nebraska*, 34.

<i>See</i> BANKRUPTCY, 3;	JURISDICTION;
CRIMINAL LAW, 4;	MORTGAGES AND DEEDS OF
EXTRADITION, 1;	TRUST;
INDIANS, 2;	STATES, 3;
JUDGMENTS AND DECREES, 5;	TERRITORY, 1.

COURT AND JURY.

See NEGLIGENCE, 3, 4.

CRIMINAL LAW.

1. *Corpus delicti; sufficiency of circumstantial evidence to establish.*

While in this case there was no witness to the homicide and the identification of the body found was not perfect, owing to its condition caused by its having been partially burned, yet as the circumstantial evidence was clearly enough to warrant the jury in finding that the body was that of the person alleged to have been murdered and that he had been killed by defendant, the trial court would not have been justified in withdrawing the case from the jury, but properly overruled a motion to instruct a verdict of not guilty for lack of proof of the *corpus delicti*. *Perovich v. United States*, 86.

2. *Corpus delicti; submission to jury of question of guilt on circumstantial evidence.*

In the absence of positive proof, but where there is circumstantial evidence of the *corpus delicti*, it is not error to submit to the jury the question of defendant's guilt with the instruction that the circumstantial evidence must be such as to satisfy the jury beyond a reasonable doubt that the *corpus delicti* has been established. *Ib.*

3. *Evidence of conversations between officer and accused; admissibility.*

The testimony of a marshal as to conversations between him and the defendant charged with murder which were voluntary, and not induced by duress, intimidation or other improper influences, are admissible. *Ib.*

4. *Interpreters; appointment discretionary with trial court.*

Whether in a criminal trial the court interpreter should be appointed is a matter largely resting in the discretion of the court, and its refusal so to do is not an error where it does not appear that the discretion was in any way abused. *Ib.*

5. *Removal for trial under § 1014, Rev. Stat.; admissibility of evidence to disprove prima facie case made by indictment.*

While in a removal proceeding under § 1014, Rev. Stat., an indictment constitutes *prima facie* evidence of probable cause it is not conclusive, and evidence offered by the defendant tending to show that no offense triable in the district to which removal is sought had been committed

is admissible; and its exclusion is not mere error but the denial of a right secured under the Federal Constitution. *Tinsley v. Treat*, 20.

6. *Removal for trial under § 1014, Rev. Stat.; procedure for.*

A district judge of the United States on application to remove from the district where defendant is arrested to that where the offense is triable acts judicially and the provision of § 1014, Rev. Stat., that the proceedings are to be conducted agreeably to the usual mode of process in the State against offenders has no application to the inquiry on application for removal. *Ib.*

See EXTRADITION;

JURISDICTION, A 1, 4, 5, 6.

CUBA.

See TERRITORY, 2.

CUSTOMS DUTIES.

See TERRITORY, 2.

DAMAGES.

See CONSTITUTIONAL LAW, 8;

JURISDICTION, B 7;

PRACTICE AND PROCEDURE, 2.

DECLARATIONS.

See CRIMINAL LAW, 3.

DEFENSES,

What amounts to a defense.

Whatever tends to diminish a plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense. *Whitfield v. Aetna Life Ins. Co.*, 489.

See COURTS, 2;

INSURANCE, 2;

PRACTICE AND PROCEDURE, 8.

DEPARTMENT OF THE INTERIOR.

See INDIANS, 2.

DESCENT.

See WILLS.

DINGLEY ACT.

See TERRITORY, 2.

DISTRICT OF COLUMBIA.

See CERTIORARI;

JURISDICTION, A 1;

TERRITORIES.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW;

COURTS, 3;

JURISDICTION, A 6.

ELECTION.

1. *Election defined and differentiated from transfer.*

Election is simply what its name imports; a choice shown by an overt act between two inconsistent rights either of which may be asserted at the will of the chooser alone. Transfer is different from election and requires acts of a different import on the part of the owner and corresponding acts on the part of the transferee. *Bierce v. Hutchins*, 340.

2. *Effect of attempting to exercise right to which party not entitled.*

The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. *Ib.*

See RES JUDICATA, 2.

EMBEZZLEMENT.

See JURISDICTION, A 1.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 8.

EQUAL PROTECTION OF LAWS.

See CONSTITUTIONAL LAW, 6, 7.

EQUITY.

See MORTGAGES AND DEEDS OF TRUST.

ESTATES.

See CONSTITUTIONAL LAW, 5;

PRACTICE AND PROCEDURE, 5;

TITLE.

EVIDENCE.

Hearsay as evidence.

Statements of a witness, although based on hearsay, constitute evidence in the cause unless seasonably objected to as hearsay. *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 1.

See CONTRACTS, 1;

JURISDICTION, A 6;

CRIMINAL LAW, 2, 3, 5; MARRIAGE;

SAFETY APPLIANCE ACT.

EXEMPTIONS.

See ACTIONS;

CONTRACTS, 3, 4;

CORPORATIONS, 1, 2.

EXTRADITION.

1. *Duty of courts after surrender has been made.*

Although the surrender of a person demanded under an extradition treaty has been made, it is the duty of the courts here to determine the legality of the subsequent imprisonment which depends upon the treaties in force between this and the surrendering governments. *Johnson v. Browne*, 309.

2. *Right of demanding country to try person for other than crime for which extradited—Effect of treaty of 1842 with Great Britain.*

While the treaty of 1842, with Great Britain, had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, such a limitation is found in the manifest scope and object of the treaty itself and it has been so construed by this court. (*United States v. Rauscher*, 119 U. S. 407.) *Ib.*

3. *Right of demanding country to punish person for offense other than that for which extradited—Treaty of 1899 with Great Britain.*

A person extradited under the treaty of 1899 with Great Britain cannot be punished for an offense other than that for which his extradition has been demanded even though prior to his extradition he had been convicted and sentenced therefor. Sections 5272, 5275, Rev. Stat., clearly manifest the will of the political department of the government, that a person extradited shall be tried only for the crime charged in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested and detained for any other offense. *Ib.*

4. *Effect of treaty of 1899 with Great Britain to repeal §§ 5272, 5275, Rev. Stat.*

Repeals by implication are never favored, and a later treaty will not be regarded as repealing, by implication, an earlier statute unless the two are so absolutely incompatible that the statute cannot be enforced without antagonizing the treaty, and so held that the treaty with Great Britain of 1899 did not repeal §§ 5272, 5275, Rev. Stat. *Ib.*

5. *Construction of treaties; good faith to be observed in.*

While the escape of criminals is to be deprecated, treaties of extradition should be construed in accordance with the highest good faith, and a treaty should not be so construed as to obtain the extradition of a person for one offense and punish him for another, especially when the latter offense is one for which the surrendering government has refused to surrender him on the ground that it was not covered by the treaty. *Ib.*

FACTS.

See PRACTICE AND PROCEDURE, 7.

FEDERAL POWERS.

See CONSTITUTIONAL LAW, 9.

FEDERAL QUESTION.

See APPEAL AND ERROR;
CONSTITUTIONAL LAW, 3;
JURISDICTION.

FIFTH AMENDMENT.

See CONSTITUTIONAL LAW, 10.

FINDINGS OF FACT.

See PRACTICE AND PROCEDURE, 7.

FLAG.

See CONSTITUTIONAL LAW, 6;
PERSONAL RIGHTS;
STATES, 2.

FORECLOSURE.

See MORTGAGES AND DEEDS OF TRUST;
SALES, 2.

FOREIGN CORPORATIONS.

See JURISDICTION, A 8; B 2;
PROCESS;
STATES, 6.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW;
COURTS, 3.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 11, 12;
JUDGMENTS AND DECREES, 5.

GOVERNMENTAL POWER.

See CONSTITUTIONAL LAW, 9;
CONTRACTS, 4;
STATES, 1, 2.

GOVERNMENT INSTRUMENTALITIES.

See TAXES AND TAXATION, 2, 3, 4.

GRANTS.

See CONTRACTS, 4.

GREAT BRITAIN.

See EXTRADITION, 2, 3;
TREATIES.

HABEAS CORPUS.

See COURTS, 3.

HEARSAY EVIDENCE.

See EVIDENCE.

HOMESTEADS.

See PUBLIC LANDS, 1, 2.

HOMICIDE.

See CRIMINAL LAW, 1.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 5;
CONTRACTS, 3.

INDIANS.

1. *Allotments—Secretary of Interior to determine who are members of tribe—Mandamus will not lie to control his decision.*

While the promise of the United States to allot 160 acres to each member of the Wichita band of Indians under the act of March 2, 1895, 28 Stat. 876, 895, may confer a right on every actual member of the band, the primary decision as to who the members are must come from the Secretary of the Interior; and, in the absence of any indication in the act to allow an appeal to the courts for applicants who are dissatisfied, mandamus will not issue to require the Secretary to approve the selection of one claiming to be an adopted member of the tribe but whose application the Secretary has denied. *West v. Hitchcock*, 80.

2. *Control by Department of Interior over adoption of whites into tribes.*

In view of long established practice of the Department of the Interior, and the undoubted power of Congress over the Indians, this court will hesitate to construe the language of §§ 441, 463, Rev. Stat., as not giving the Department of the Interior control over the adoption of whites into the Indian tribes. *Ib.*

3. *Jurisdiction of Secretary of Interior to determine right to select land.*

Where the Secretary of the Interior has authority to pass on the right of one claiming to be a member of a band of Indians to select land under an agreement ratified by an act of Congress, his jurisdiction does not depend upon his decision being right. *Ib.*

INDICTMENT.

See CRIMINAL LAW, 5;
JURISDICTION, A 5, 6.

INHERITANCE TAX.

See CONSTITUTIONAL LAW, 5.

INJUNCTION.

See JURISDICTION, B 3.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 2;

VERDICT.

INSURANCE.

1. *State regulation.*

If an insurance company does business in a State it must do so subject to such valid regulations as the State adopts. *Whitfield v. Aetna Life Ins. Co.*, 489.

2. *Defenses to actions on policies of life insurance; limitation by States.*

The statute of Missouri, that suicide, unless contemplated when the policy was applied for, shall be no defense to actions on policies of life insurance, is a legitimate exercise of the power of the State; and a stipulation in a policy that the company shall only be liable for a portion of the amount in case of suicide, not contemplated when the policy was applied for, is void, and cannot be set up as a defense. *Ib.*

See BANKRUPTCY, 2;

JURISDICTION, A 8;

STATES, 6.

INTERIOR DEPARTMENT.

See INDIANS.

INTERPRETERS.

See CRIMINAL LAW, 4.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, 1; STATES, 8, 9.

SAFETY APPLIANCE ACT; STATUTES, A 2.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 1;

STATES, 7, 8, 9, 10.

ISLE OF PINES.

See TERRITORY, 2.

JUDGMENTS AND DECREES.

1. *Right to attack validity of judgment sued on.*

Whatever remedies may exist as to the judgment in the State where ren-

dered, want of jurisdiction may be pleaded by the judgment debtor wherever the judgment is set up against him in another forum. *Wetmore v. Karrick*, 141.

2. *Correction of clerical mistake cannot be made after term without notice.*

Although a mistake in regard to a judgment may be a clerical one it cannot be corrected after the term without notice, especially where the condition of the parties has changed in view of new rights acquired which render it prejudicial to enter a new judgment. *Ib.*

3. *Judgment rendered after loss of jurisdiction and without notice to party, invalid.*

Jurisdiction once lost can only be regained by some proper notice to the other party and where, as in this case, had notice been given of the motion to render a new judgment defendant could have pleaded a discharge in bankruptcy, substantial rights are impaired, and the judgment so rendered without notice is void. *Ib.*

4. *When judgment final under Massachusetts law.*

In Massachusetts the rule day when a judgment becomes final is equivalent to the end of a term, and in that State the rule is that judgment is final unless set aside within the exceptions for mistake. *Ib.*

5. *Validity of new judgment rendered after term at which original judgment entered.*

A court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, cannot, after the term or at a subsequent term, without notice to the defendant, set that judgment aside and render a new judgment against the defendant; a judgment so entered is void and not required to be enforced in another State under the full faith and credit clause of the Constitution. *Ib.*

6. *On demurrer.*

A judgment on demurrer is as conclusive as one rendered on proof. *North-ern Pacific Railway v. Slaughter*, 122.

See CONSTITUTIONAL LAW, 11, 12;
JURISDICTION, A 7; B 6;
RES JUDICATA, 1, 2.

JUDICIAL DISCRETION.

See CRIMINAL LAW, 4.

JUDICIAL NOTICE.

See COURTS, 4.

JUDICIAL SALES.

See SALES, 2, 3.

JURISDICTION.

A. OF THIS COURT.

1. *Amount in controversy—Commissions of fiduciary convicted of embezzlement—Review of judgment of Court of Appeals of District of Columbia.*
 One who embezzles money from an estate forfeits his right to commissions, irrespective of whether he is or is not convicted of any crime in respect thereto, and his conviction does not involve the pecuniary amount of the commissions which he forfeits by reason of the embezzlement; nor does the fact that such commissions amount to over \$5,000 give this court jurisdiction under § 233 of the Code to review the judgment of the Court of Appeals of the District of Columbia affirming the conviction. The rule that a writ of error does not lie from this court to the Court of Appeals of the District of Columbia in a criminal case applies in such a case. *Fields v. United States*, 292.

2. *Conclusiveness of judgment of state court.*

Whether a state lien statute, otherwise constitutional, applies to vessels not to be used in the waters of the State; on whose credit the supplies were furnished; whether the lien was properly filed as to time and place; and what the effect thereof is as to *bona fide* purchasers without notice, are not Federal questions, but the judgment of the state court is final and conclusive in this court. *The Winnebago*, 354.

3. *Of appeal or writ of error from territorial court under act of March 3, 1905.*
 Where no right of appeal existed when the final judgment was entered in the Supreme Court of a Territory, an appeal or writ of error will not lie under the act of March 3, 1905, 33 Stat. 1035, granting appeals in certain cases, because after final judgment a petition for rehearing was entertained and not finally denied until after the passage of the act. *Harrison v. Magoon*, 501.

4. *Under § 709, Rev. Stat.; materiality of question of citizenship.*

The question of citizenship is immaterial as affecting the jurisdiction of this court under § 709, Rev. Stat. As a general rule aliens are subject to the law of the territory where the crime is committed. *Barrington v. Missouri*, 483.

5. *To review decision of state court as to compliance with state statute.*

Under the laws of Missouri the right of accused to the endorsement of names of witnesses on the indictment does not rest on the common law but on state statute, and whether the provisions have been complied with is not a Federal question and the decision of the state court is not open to revision here. *Ib.*

6. *Of writ of error where Federal questions alleged to have been raised are without merit—Review of rulings of state court in criminal case.*

Although the brief alleges that certain Federal questions were duly raised in the state court and so disposed of as to sustain the jurisdiction of this court, if those questions are wholly without merit, or foreclosed

by previous decisions of this court, the writ of error will be dismissed; and *held* that rulings of the state court in a criminal case in regard to change of venue, admission of evidence, and form of indictment were not subject to review in this court and afforded no basis for holding that plaintiff in error was not awarded due process of law. *Ib.*

7. *Of direct appeal from Circuit Court—Involution of construction and application of Constitution and laws of United States.*

In a suit in the Circuit Court of the United States where diverse citizenship exists, if the real question is the controlling effect of *res judicata* of a decree rendered between the parties in another suit, and whether the court rendering it had jurisdiction so to do and those questions are decided upon principles of general law, the case is not one involving the construction and application of the Constitution and laws of the United States, and a direct appeal does not lie to this court under § 5 of the Court of Appeals Act of 1891, 29 Stat. 492; nor can the decision appealed from be converted into one involving the construction and application of the Constitution by averring argumentatively that to give such effect to the former adjudication amounts to depriving a party of due process of law. *Empire State-Idaho Mining Co. v. Hanley*, 225.

8. *On writ of error to state court; involution of Federal question to confer—Power of State relative to foreign insurance companies.*

Where the state court decides that a foreign insurance company cannot recover assessments on a policy issued within the State because it has not complied with the statutory conditions imposed by the State, no Federal question is involved, and a request to find that the state statute could not prevent the insured from going outside the State and obtaining insurance on property within the State does not raise a Federal question, where the fact was otherwise, and the writ of error will be dismissed. *Swing v. Weston Lumber Co.*, 275.

See APPEAL AND ERROR;
CONSTITUTIONAL LAW, 4;
PRACTICE AND PROCEDURE, 9.

B. OF CIRCUIT COURTS.

1. *Amount in controversy; value of right of an exchange to control quotations.*

In a suit brought by an exchange to enjoin defendant from receiving quotations from the telegraph company to which it has given the right to distribute them, and from using the same, the value involved is not merely the amount which defendant pays the telegraph company, but the right of the exchange to keep the control of the quotations and protect itself from competition which is the object of the suit; and if the testimony shows, as it does in this case, that such right is worth more than \$2,000, the Circuit Court has jurisdiction, so far as amount is concerned; and when the plea presents such an issue the burden is on appellant to show that the amount involved is less than the jurisdictional amount. *Hunt v. New York Cotton Exchange*, 322.

2. *When service on non-resident corporation sufficient to give court jurisdiction in case of diverse citizenship.*

While in case of diverse citizenship the suit may be brought in the Circuit Court for the district of the residence of either party, there must be service within the district; and if the defendant is a non-resident corporation service can only be made upon it if it is doing business in that district in such a manner, and to such an extent, as to warrant the inference that it is present there through its agent. *Green v. Chicago, B. & Q. Ry. Co.*, 530.

3. *Under § 720, Rev. Stat.—Effect of pendency of prior suit in state court.*

The fact that defendant has, in another action in the state court, and to which the exchange was not a party, obtained an injunction against the telegraph company, enjoining it from ceasing to deliver the quotations, does not deprive the Circuit Court of jurisdiction of the suit by the exchange under § 720, Rev. Stat., the parties and the purpose not being the same. *Hunt v. New York Cotton Exchange*, 322.

4. *Of suit to remove cloud on title to land where construction of act of Congress admitting a State to the Union and defining its boundaries is involved.*

Where the bill is brought in the Circuit Court to quiet, and remove a cloud upon, the title to land alleged to be within the State and District where the suit is brought, and the cloud is based upon tax sales made under the authority of an adjoining State in which defendants claim the land is situated, although the chief difference may be upon the question of fact as to the location of the boundary line between the two States, if the construction of the act of Congress admitting one of the States to the Union and defining its boundaries is also in dispute the Circuit Court has jurisdiction of the case as one arising under the Constitution or laws of the United States. (*Joy v. St. Louis*, 201 U. S. 332, distinguished.) *Moore v. McGuire*, 214.

5. *Under § 8 of act of March 3, 1875—What constitutes a suit within meaning of that act.*

A suit brought by owners of stock of a railroad company for the cancellation of deeds and leases under and by authority of which the properties of the company are held and managed is a suit within the meaning of § 8 of the act of March 3, 1875, 18 Stat. 470, as one to remove incumbrances or clouds upon real or personal property and local to the district and within the jurisdiction of the Circuit Court for the district in which the property is situated, without regard to the citizenship of defendants so long as diverse to that of the plaintiff, and foreign defendants not found can be brought in by order of the court subject to the condition prescribed by that section, that any adjudication affecting absent non-appearing defendants shall affect only such property within the districts as may be the subject of the suit and under the jurisdiction of the court. *Citizens' Sav. & Trust Co. v. Illinois Central R. R.*, 46.

6. *Under act of March 3, 1875; effect of appearance of non-resident defendant for sole purpose of denying jurisdiction.*

Non-resident defendants appearing in the Circuit Court under protest for the sole purpose of denying jurisdiction do not waive the condition in § 8 of the act of March 3, 1875, 18 Stat. 470, that any judgment of the court shall affect only property within the district. *Ib.*

7. *Court cannot proceed to judgment and award damages for injuries occurring in Mexico, contrary to the laws of that Republic.*

The certified question: "In an action brought in the United States Circuit Court in and for the Western District of Texas by a citizen of that district against the Mexican Central Railway Company, a corporation duly created under the laws of the State of Massachusetts and doing business in and operating a steam railroad under continuous line in the State of Texas and the Republic of Mexico, to recover for injuries to the plaintiff, received while he was engaged in defendant's service, and whereby, through defective appliances furnished by said railroad company and the negligent operation of the said railroad in the Republic of Mexico, the said plaintiff, at Ebano, Mexico, was injured and lost a leg, can the said court proceed to judgment and award such damages as upon proof may be assessed by a jury, notwithstanding the provisions of the laws of the Republic of Mexico, proved on this trial and recited in the statement of this case, and which, it is agreed, were the laws of Mexico applicable herein in force and effect at the time of the injuries complained of?" answered in the negative. *Mexican Central Ry. Co. v. Eckman*, 538.

See PROCESS, 4.

C. OF ADMIRALTY COURTS.

See JURISDICTION, E.

D. OF BANKRUPTCY COURTS.

See BANKRUPTCY, 3.

E. OF STATE COURTS.

To enforce contract to build vessel.

A contract to build a vessel is not a maritime contract enforceable only in admiralty, but the remedy is within the jurisdiction of the state court, and this rule applies to items furnished the vessel after she has been launched, but which are really part of her original construction. *The Winnebago*, 354.

See BANKRUPTCY, 3.

F. OF SECRETARY OF INTERIOR.

See INDIANS, 3.

G. GENERALLY.

See CONSTITUTIONAL LAW, 12;

JUDGMENTS AND DECREES, 1, 3;

PRACTICE AND PROCEDURE, 8.

JURY.

See NEGLIGENCE, 3, 4.

JURY TRIAL.

See CRIMINAL LAW, 5.

LAND DEPARTMENT.

See PUBLIC LANDS, 1.

LIBERTY.

See COURTS, 3;
PERSONAL RIGHTS.

LICENSES.

See CONSTITUTIONAL LAW, 1.

LIENS.

See BANKRUPTCY, 3;
JURISDICTION, A 2.

LIFE INSURANCE.

See BANKRUPTCY, 2.

LIMITATION OF ACTIONS.

As to government patentee.

A statute of limitations does not commence to run against a government patentee until after the patent has been issued to him. *Northern Pacific Railway v. Slaght*, 122.

LIQUIDATED DAMAGES.

See CONTRACTS, 2.

LOCAL LAW.

Generally. Questions that are local. Whether an information for contempt is properly supported, and what constitutes contempt, as well as the time during which it may be committed, are all matters of local law. *Patterson v. Colorado*, 454.

See CRIMINAL LAW, 6.

Illinois. Practice Act, § 57 (see Verdict). Wilmington Mining Co. v. Fulton, 60.

Mining act of 1899—Relation of mine manager and examiner as vice-principals. As construed by the highest court of that State, under the mining act of Illinois of 1899, a mine manager and mine examiner are vice-principals of the owner and engaged in the performance of duties which the owner cannot so delegate to others as to relieve himself from responsibility. *Ib.*

See CONSTITUTIONAL LAW, 7.

- Iowa.* Taxation of savings banks, etc., § 1332 of Code (see Taxes and Taxation, 3). *Home Savings Bank v. Des Moines*, 503.
- Massachusetts.* Judgments. Terms of court (see Judgments and Decrees, 4). *Wetmore v. Karrick*, 141.
- Missouri.* Suicide as defense to action on life insurance policy (see Insurance, 2). *Whitfield v. Aetna Life Ins. Co.*, 489. Criminal law; right of accused to indorsement on indictment of names of witnesses (see Jurisdiction, A 5). *Barrington v. Missouri*, 483.
- Nebraska.* Flag law (see Constitutional Law, 6). *Halter v. Nebraska*, 34.
- New York.* Inheritance and transfer tax law. Laws of 1897, ch. 284 (see Constitutional Law, 5). *Chanler v. Kelsey*, 466.
- South Dakota.* Liquor license law (see Constitutional Law, 1). *Delamater v. South Dakota*, 93 (see Statutes, A 2); *Ib.*

MANDAMUS.

See INDIANS, 1.

MARITIME CONTRACTS.

See JURISDICTION, E.

MARITIME LIENS.

See JURISDICTION, E;
PRACTICE AND PROCEDURE, 6.

MARKET QUOTATIONS.

See PROPERTY.

MARRIAGE.

Proof of marriage in fact by habit and repute.

A man and woman, neither of whom was a resident of Virginia, and who had not obtained any marriage license, went through a ceremony in Virginia which the woman thought was a marriage by a clergyman; they immediately went to New Jersey, she assuming the man's name; they afterwards went to Maryland and then returned to New Jersey permanently, where they lived and cohabitated as husband and wife and were so regarded for many years until his death, she joining in a mortgage with him, and also being described in his wills as his wife; she meanwhile and, prior to the later residence in New Jersey, had ascertained that the person performing the ceremony was not a minister and that there was no license, but the cohabitation continued and there was testimony that the man assured her that they were married, and afterwards in his last will he appointed his wife executrix and she qualified as such. *Held*, that marriage in fact, as distinguished from a ceremonial marriage, may be proved by habit and repute, and, except in cases of adultery and bigamy when actual proof is required, may be inferred from continued cohabitation. *Travers v. Reinhardt*, 423.

MASTER AND SERVANT.

Liability of master for injuries to servant.

Where two concurring causes contribute to an accident to an employé, the fact that the master is not responsible for one of them does not absolve him from liability for the other cause for which he is responsible. *Wilmington Mining Co. v. Fulton*, 60.

See LOCAL LAW (ILL.); SAFETY APPLIANCE ACT;
NEGLIGENCE, 1; STATES, 5.

MERGER.

See CORPORATIONS, 1.

MINES AND MINING.

See CONSTITUTIONAL LAW, 7;
LOCAL LAW (ILL.).

MISSISSIPPI.

See BOUNDARIES.

MISSISSIPPI RIVER.

See BOUNDARIES.

MISTAKE.

See ELECTION, 2;
JUDGMENTS AND DECREES, 2.

MORTGAGES AND DEEDS OF TRUST.

Foreclosure; effect of sale of part of mortgaged premises to sovereign who refuses to waive exemption from suit.

Under Equity Rule 92, where a part of the mortgaged premises has been sold to the sovereign power which refuses to waive its exemption from suit, the court can, all other parties being joined, except the land so conveyed and decree sale of the balance and enter deficiency judgment for sum remaining due if proceeds of sale are insufficient to pay the debt. *Kawananakoa v. Polyblank*, 349.

MURDER.

See CRIMINAL LAW, 1.

NATIONAL EMBLEM.

See CONSTITUTIONAL LAW, 6;
PERSONAL RIGHTS;
STATES.

NEGLIGENCE.

1. *Distinction between assumption of risk and negligence.*

Assumption of risk as extended to dangerous conditions of machinery.

premises and the like, obviously shades into negligence as commonly understood. The difference between the two is one of degree rather than of kind. *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 1.

2. *Want of care constituting negligence.*

There is an obligation on all persons to take the care which, under the special circumstances of the case, a reasonable and prudent man would take, and the omission of that care constitutes negligence. *Davidson Steamship Co. v. United States*, 187.

3. *Province of jury—Negligence of captain and pilot of ship in colliding with Government breakwater—Practice of following findings concurred in by two lower courts.*

It is within the province of the jury to determine whether a captain of a steamship, also acting as pilot thereof, who fails to keep himself informed of changes made from time to time in the different harbors which he is likely to visit, is guilty of negligence in colliding with a Government breakwater, in course of erection, and on which the lights have been changed, and even though there may have been evidence warranting the finding of contributory negligence on the part of the Government in the way it left the lights, this court will not set aside the verdict after it has been approved by the trial court and the Circuit Court of Appeals. *Ib.*

4. *When question for jury and its determination conclusive.*

Where negligence is a mere question of fact and nothing appears which is negligence *per se*, the determination of the question is peculiarly the province of the jury and its conclusions will not be disturbed unless it is entirely clear that they were erroneous. *Ib.*

NOTICE.

See JUDGMENTS AND DECREES, 2, 3.

NON-RESIDENTS.

See JURISDICTION, B 6.

ORIGINAL PACKAGE.

See STATES, 8.

PARTIES.

See MORTGAGES AND DEEDS OF TRUST;
PRACTICE AND PROCEDURE, 3, 6.

PARTNERSHIP.

See PROCESS, 2.

PATENT FOR LAND.

See LIMITATION OF ACTIONS;
PUBLIC LANDS, 2.

PENALTIES AND FORFEITURES.

See CONTRACTS, 2.

PERSONAL PROPERTY.

See TAXES AND TAXATION, 5.

PERSONAL RIGHTS.

Limitation of privilege of citizenship and rights inhering in personal liberty.
The privileges of citizenship and the rights inhering in personal liberty are subject in their enjoyment to such reasonable restraints as may be required for the public good; and no one has a right of property to use the Nation's emblem for individual purposes. *Halter v. Nebraska*, 34.

PILOTS.

See NEGLIGENCE, 3.

PLATT AMENDMENT.

See TERRITORY, 2.

PLEADING.

Demurrer; admissions by.

The averment that territory named in the complaint is a part of the United States is a conclusion of law and not admitted by a demurrer. *Pearcy v. Stranahan*, 257.

See COURTS, 4;

RES JUDICATA, 2;

JUDGMENTS AND DECREES, 1;

SAFETY APPLIANCE ACT, 3.

POLICE POWER.

See CONSTITUTIONAL LAW, 7;

STATES, 5, 7.

POWERS.

See CONSTITUTIONAL LAW, 5;

PRACTICE AND PROCEDURE, 5;

TITLE.

POWERS OF CONGRESS.

See TERRITORIES.

PRACTICE AND PROCEDURE.

1. *As to showing of error.*

It is for the plaintiff in error to show affirmatively that error was committed; it is not to be presumed and will not be inferred from a doubtful statement in the record. *Mercantile Trust Co. v. Hensey*, 298.

2. *As to duty of counsel to call trial court's attention to error; and effect on appeal of failure to do so.*

Where there is no evidence of the amount of damage caused by each par-

ticular breach but only of the total amount sustained, the attention of the trial court should have been called to the plaintiff's objection to a recovery of particular damage permitted, and a request made for direction of verdict, and in the absence thereof the objection cannot be argued here. *Ib.*

3. *As to declaring state law unconstitutional at suit of one whose constitutional rights are not invaded.*

A state law will not be held unconstitutional in a suit coming from a state court at the instance of one whose constitutional rights are not invaded, because as against a class making no complaint it might be held unconstitutional. *The Winnebago*, 354.

4. *As to determination of boundary between States at suit of private parties.*

In this case the court determined a controversy between private parties involving the location of the boundary line between two States favorably to the party in possession of the land involved under the authority of the State actually exercising jurisdiction thereover, but expressed doubt as to whether courts should in such a case go further than the actual conditions rather than leave it to the other State, if dissatisfied, to bring a suit in its own name. *Moore v. McGutre*, 214.

5. *Following decision of state court.*

This court must follow the decision of the state court in determining that the essential thing to transfer an estate is the exercise of a power of appointment. *Chanler v. Kelsey*, 466.

6. *When constitutionality of state statute will not be determined—Necessary parties.*

Whether a state lien statute is unconstitutional as permitting the seizure and sale of a vessel and the distribution of the proceeds in conflict with the exclusive jurisdiction in admiralty of the Federal courts will not be determined in a suit from the state courts where no holder of a maritime lien is present contesting the unconstitutionality of the statute. *The Winnebago*, 354.

7. *Statement of facts found by court appealed from; necessity for.*

In an appeal from the Supreme Court of the Territory of Hawaii, tried by the court of first instance without a jury, where the Supreme Court of the Territory reversed the conclusions of law, but took the findings of fact as true, and those findings are not open to dispute, but the question for decision is definite and plain, there is no need to send the case back for a statement of facts by the Supreme Court of the Territory, although one should have been made. *Bierce v. Hutchins*, 340.

8. *Effect of failure to make defense—Power to raise in this court question not presented below.*

The failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled; and

where the question of the jurisdiction of a court in a particular case over property in its actual possession was not presented in that court, the appellant cannot, in this court, question the power of that court to order a sale of the property or the title conveyed to the purchaser. *Gila Reservoir Co. v. Gila Water Co.*, 279.

9. *Certificate of Circuit Court of Appeals must present distinct point of law—When question certified will not be answered.*

Under § 6 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826, the certificate of the Circuit Court of Appeals as to questions or propositions of law concerning which it desires instruction must present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of the advice on which the question arises, and if not so presented this court is without jurisdiction; and where the question certified practically brings up the entire case, and this court is asked to pass upon the validity of a contract and indicate what the final judgment should be, the certificate will be dismissed and the questions not answered. *Chicago, B. & Q. Ry. v. Williams*, 444.

10. *Question certified by Circuit Court of Appeals must be single.*

Where a question certified by the Circuit Court of Appeals contains more than a single question or proposition of law it will not be answered by this court. *Quinlan v. Green County*, 410.

See APPEAL AND ERROR;	CRIMINAL LAW, 6;
BANKRUPTCY, 4;	JURISDICTION, A 2, 6;
CONSTITUTIONAL LAW, 2;	NEGLIGENCE, 3;
COURTS, 3;	VERDICT.

PRESUMPTIONS.

See BANKRUPTCY, 4.

PRIVILEGES AND IMMUNITIES.

See CONSTITUTIONAL LAW, 7.

PROCESS.

1. *Service on foreign corporation.*

Foreign corporations can be served with process in a State only when doing business therein, and such service must be upon an agent who represents the corporation in such business. *Peterson v. Chicago, R. I. & P. Ry. Co.*, 364.

2. *Sufficiency of service on corporation—What constitutes partnership of railroads.*

There is no partnership liability under such circumstances by which the company owning or controlling the capital stock of the other can be brought into court to respond for a tort by serving the latter company with process. *Ib.*

3. *What constitutes doing business in State for purpose of service of process on corporation.*

Under the circumstances of this case a railroad company is not doing business in a State simply because another railroad company, of which it owns practically the entire capital stock, does do business therein, nor is the latter company or its officers and employes agents of the former company for the purpose of service of process even though such agents may at times also represent that company as to business done in other States. *Ib.*

4. *What constitutes doing business within district by non-resident railroad to render it liable to service of process.*

A railroad company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic. *Green v. Chicago, B. & Q. Ry. Co.*, 530.

See CRIMINAL LAW, 6;
JURISDICTION, B 2.

PROPERTY.

Quotations of prices collected by an exchange are property.

Quotations of prices on an exchange, collected by the exchange, are property and entitled to the protection of the law, and the exchange has the right to keep them to itself or have them distributed under conditions established by it. (*Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236.) *Hunt v. New York Cotton Exchange*, 322.

See JURISDICTION, B 1;
CONSTITUTIONAL LAW, 2.

PUBLICATIONS

See COURTS, 2.

PUBLIC LANDS.

1. *Homesteads—Conclusiveness of findings of Land Department.*

In a contest over a homestead entry, whether there was a sale and whether the thing sold was or was not the tract in question, are matters of fact to be determined by the testimony, and the findings of the Land Department in those respects are conclusive in the courts. *Love v. Flahive*, 195.

2. *Homesteads—Right of homesteader to abandon or relinquish rights in land—Effect of attempt to sell.*

While a homesteader cannot make a valid and enforceable contract to sell the land he is seeking to enter, he is not bound to perfect his application but may abandon or relinquish his rights in the land, and if he in fact makes a sale he is no longer interested in the land and the

Government can treat the sale as a relinquishment and patent the land to other applicants. *Ib.*

See LIMITATION OF ACTIONS.

PUBLIC POLICY.

See STATES, 3.

QUOTATIONS.

See PROPERTY;

JURISDICTION, B 1.

RAILROADS.

See JURISDICTION, B 7;

PROCESS;

SAFETY APPLIANCE ACT.

RECEIVERS.

See BANKRUPTCY, 3.

REHEARING.

Petition for rehearing in *Gila Reservoir Co. v. Gila Water Co.*, 202 U. S. 270, denied, 279.

REMOVAL FOR TRIAL.

See CRIMINAL LAW.

REPEALS.

See EXTRADITION, 4.

REPLEVIN.

See SALES, 1.

RES JUDICATA.

1. *When judgment bar to second action; and extent of bar.*

The question as to the effect of a judgment as *res judicata* when pleaded in bar of another action is its legal identity with the judgment sought in the second action, and, as a general rule, its extent as a bar is not only what was pleaded or litigated, but what could have been pleaded or litigated. *Northern Pacific Railway v. Slaght*, 122.

2. *Extension of bar to what might have been pleaded.*

Where a plaintiff could have pleaded rights to property in addition to those pleaded, he and his grantees are bound by that election, and after an adverse judgment cannot again assert title to the same property against the same parties under a different source of title. *Ib.*

See JURISDICTION, A 7; B 3.

REVISED STATUTES.

See ACTS OF CONGRESS.

SAFETY APPLIANCE ACT.

1. *Rolling stock included within provisions of—Application to locomotives and steam-shovel cars.*

The provisions of § 2 of the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, declaring it to be unlawful for any common carrier engaged in interstate commerce to haul or permit to be hauled or used on its line any car used in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, relate to all kinds of cars running on the rails, including locomotives and steam-shovel cars. (*Johnson v. Southern Pacific Co.*, 196 U. S. 1.) *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 1.

2. *Object of act and significance of words "used in moving interstate traffic."*

The object of that statute was to protect the lives and limbs of railroad employes by rendering it unnecessary for men operating the couplers to go between the ends of the cars, and the words "used in moving interstate traffic" occurring therein are not to be taken in a narrow sense. *Ib.*

3. *Effect of proviso of § 6; duty of parties to suit in respect of.*

In a suit based upon the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, the plaintiff is not called upon to negative the proviso of § 6 of said act, either in his pleadings or proofs. Such proviso merely creates an exception and if the defendant wishes to rely thereon the burden is upon it to bring itself within the terms of the exception; those who set up such an exception must establish it. *Ib.*

4. *Assumption of risk by employé—So-called contributory negligence held within exoneration of employé.*

Section 8 of the Automatic Coupler Act having exonerated the employé from assumption of risk under specified conditions, the employé's rights in that regard should not be sacrificed by charging him with assumption of risk under another name, for example, with contributory negligence. In this case the so-called contributory negligence of the deceased employé was so involved with and dependent upon erroneous views of the statute, that the judgment complained of must be reversed. *Ib.*

SALES.

1. *Conditional—Validity of stipulation that title to goods is to remain in vendor until payment of note given for purchase-price.*

The absolute liability for the price and putting that liability in the form of a note are consistent with the retention of title until the note is paid; and, in the absence of statute, a stipulation that the sale is conditional and the goods remain the property of the seller, until payment of a note

given for the price, is lawful and enforceable in replevin even where, as in this case, possession was given and additional security of mortgage bonds was required. *Bierce v. Hutchins*, 340.

2. *Confirmation; when denied.*

While the confidence in the stability of judicial sales should not be disturbed, a sale under foreclosure of valuable property, worth at least seven times the amount of the bid, should not be confirmed in the face of an adverse report by the master and the trial court. *Ballentyne v. Smith*, 285.

3. *Setting aside for inadequacy of price.*

The old English rule that in chancery sales, until confirmation of the master's report the bidding would be opened upon a mere offer to advance the price ten per cent has been rejected, and a sale will not be set aside for inadequacy of price unless so great as to shock the conscience or where there are additional circumstances against its fairness; and each case stands upon its own facts. *Ib.*

See MORTGAGES AND DEEDS OF TRUST;
PUBLIC LANDS, 1, 2.

SECRETARY OF THE INTERIOR.

See INDIANS, 1, 3.

SERVICE OF PROCESS.

See PROCESS, 1.

SITUS FOR TAXATION.

See TAXES AND TAXATION, 5, 6.

SIXTH AMENDMENT.

See CONSTITUTIONAL LAW, 5.

SOVEREIGNTY.

See ACTIONS;
TERRITORIES.

STATES.

1. *Legislative powers of.*

Except as restrained by its own fundamental law, or by the supreme law of the land, a State possesses all legislative power consistent with a republican form of government; and it may by legislation provide not only for the health, morals and safety of its people, but for the common good as involved in their well-being, peace, happiness and prosperity. *Halter v. Nebraska*, 34.

2. *Powers of Federal and state governments as to legislation in respect of National flag.*

There are matters which, by congressional legislation, may be brought

within the exclusive control of the National Government but over which in the absence of such legislation the State may exert some control in the interest of its own people; and although the National flag of the United States is the emblem of National sovereignty and a congressional enactment in regard to its use might supersede state legislation in regard thereto, until Congress does act, a State has power to prohibit the use of the National flag for advertising purposes within its jurisdiction. *Ib.*

3. *Power as to adoption of public policy—Respect by courts of legislative will.*

A State may adopt such public policy as it deems best, provided it does not in so doing come into conflict with the Federal Constitution; and if constitutional the legislative will must be respected, even though the courts be of opinion that the statute is unwise. *Whitfield v. Aetna Life Ins. Co.*, 489.

4. *Power to classify for purposes of taxation.*

A State may consistently make a classification among its people based on some reasonable ground which bears a just and proper relation to the classification and is not arbitrary. *Halter v. Nebraska*, 34.

5. *Power to derogate common law in respect of relation of master and servant.*

It is within the power of the State to change or modify, in accord with its conceptions of public policy, the principles of the common law in regard to the relation of master and servant; and, in cases within the proper scope of the police power, to impose upon the master liability for the willful act of his employé. *Wilmington Mining Co. v. Fulton*, 60.

6. *Power to prohibit and regulate foreign insurance companies.*

The State has undoubted power to prohibit foreign insurance companies from doing business within its limits, or, in allowing them to do so, to impose such conditions as it pleases. *Swing v. Weston Lumber Co.*, 275.

7. *Intoxicating liquors; power to control dealing in.*

The general power of the States to control and regulate, within their borders, the business of dealing in, or soliciting orders for, the purchase of intoxicating liquors is beyond question. *Delamater v. South Dakota*, 93.

8. *Intoxicating liquors—Purpose of Wilson Act—Power of State over intoxicating liquors when subject of interstate commerce.*

The purpose of the Wilson Act, 26 Stat. 713, as a regulation of interstate commerce was to allow the States to exert ampler power as to intoxicating liquors when the subject of such commerce than could have been exercised before the enactment of that statute, which enabled the States to extend their authority as to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package. *Ib.*

9. *Intoxicating liquors—Effect of Wilson Act on power of State over interstate commerce in.*

Since the enactment of the Wilson law, which expressly provides that intoxicating liquors coming into a State should be as completely under control of the State as though manufactured therein, the owner of intoxicating liquor in one State cannot, under the commerce clause of the Constitution, go himself or send his agent into another State and, in defiance of its laws, carry on the business of soliciting proposals for the purchase of such liquors. *Ib.*

10. *Intoxicating liquors—Power of State when order for same contemplated a contract resulting from final acceptance in another State.*

Although a State may not forbid a resident therein from ordering for his own use intoxicating liquor from another State it may forbid the carrying on within its borders of the business of soliciting orders for such liquor although such orders may only contemplate a contract resulting from final acceptance in another State. (*Vance v. W. A. Vandercook Co.*, 170 U. S. 438, distinguished.) *Ib.*

See CONSTITUTIONAL LAW, 2, 7, INSURANCE, 1, 2;
9, 10; JURISDICTION, A 8;
CONTRACTS, 3; PRACTICE AND PROCEDURE, 4;
TAXES AND TAXATION, 1, 2, 3, 6.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

A. CONSTRUCTION OF.

1. *Repealing effect of judiciary act of 1887–1888.*

The repealing section of the judiciary act of 1887–1888 did not reach § 8 of the act of March 3, 1875, 18 Stat. 470, and that section is still in force. (*Jellinik v. Huron Copper Mining Co.*, 177 U. S. 1, 10.) *Citizens' Sav. & Trust Co. v. Illinois Central R. R.*, 46.

2. *South Dakota liquor license law not in conflict with Wilson Act.*

The highest court of South Dakota having held that the act imposing a license on travelling salesmen soliciting orders for intoxicating liquors is a police regulation and not a taxing act, it is within the purview of, and not in conflict with, the Wilson Act. (*Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, followed.) *Delamater v. South Dakota*, 93.

See ACTS OF CONGRESS; COURTS, 5;
CONSTITUTIONAL LAW, 8; EXTRADITION, 4;
SAFETY APPLIANCE ACT.

B. OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STOCKHOLDERS.

See TAXES AND TAXATION, 4.

STREETS AND HIGHWAYS.

See CONSTITUTIONAL LAW, 8.

TARIFF.

See TERRITORY, 2.

TAXES AND TAXATION.

1. *State; effect on legality of tax of right to levy tax having same ultimate incidence.*

If a State has not the power to levy a tax it will not be sustained merely because another tax which it might lawfully impose would have the same ultimate incidence. *Home Savings Bank v. Des Moines*, 503.

2. *States; power to tax United States securities.*

The tax upon the property of a bank in which United States securities are included is beyond the power of the State, and is also within the prohibition of § 3701, Rev. Stat., and other acts of Congress. *Ib.*

3. *States; taxation of government instrumentalities—Effect and validity of Iowa law taxing savings banks and trust companies.*

The substantial effect of section 1332 of the Code of Iowa providing that shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and companies and not to the individual stockholders, and that in fixing the value of the shares, capital, surplus and undivided earnings shall be taken into account, as the law has been construed by the highest court of the State, is to tax the property of the bank and not the shares of stock, and an assessment which includes government bonds owned by the bank in fixing the valuation of its shares is illegal and beyond the power of the State. *Ib.*

4. *Tax on shareholders as tax on corporation—Taxation of government securities.*

While the tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation. *Ib.*

5. *Situs for taxation of personal property.*

Neither the fiction that personal property follows the domicile of the owner, nor the doctrine that credits evidenced by notes have the situs of the latter, can be allowed to obscure the truth; and personal property may be taxed at its permanent abiding place although the domicile of the owner is elsewhere. *Metropolitan Life Ins. Co. v. New Orleans*, 395.

6. *State taxation of capital employed by non-resident in business of loaning money within State—Effect of removal from State of evidences of credit.*

Where a non-resident enters into the business of loaning money within a State and employs a local agent to conduct the business, the State may tax the capital employed precisely as it taxes the capital of its own citizens, in like situation, and may assess the credits arising out of the business, and the foreigner cannot escape taxation upon his capital by temporarily removing from the State the evidences of credits which, under such circumstances, have a taxable situs in the State of their origin. Loans made by a New York life insurance company on its own policies in Louisiana are taxable in that State although the notes may be temporarily sent to the home office. *Ib.*

See CONSTITUTIONAL LAW, 1, 5;
CONTRACTS, 3.

TERMS OF COURT.

See JUDGMENTS AND DECREES, 2, 4, 5.

TERRITORY.

1. *Question of sovereignty political—Binding effect of determination.*
Who is the sovereign *de jure* or *de facto* of territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. (*Jones v. United States*, 137 U. S. 202.) *Pearcy v. Stranahan*, 257.

2. *Isle of Pines foreign country within meaning of Tariff Act of 1897.*
The Isle of Pines under the provisions of the Platt Amendment and the Constitution of the Republic of Cuba is *de facto* under the jurisdiction of the Republic of Cuba, and, as the United States has never yet taken possession thereof, it has remained and is foreign country within the meaning of the Dingley Tariff Act of 1897. (*De Lima v. Bidwell*, 182 U. S. 1; *United States v. Rice*, 4 Wheat. 246.) *Ib.*

TERRITORIES.

Territories differentiated from District of Columbia.

- A Territory of the United States differs from the District of Columbia in that the former is itself the fountain from which rights ordinarily flow, although Congress may intervene, while in the latter the body of private rights is created and controlled by Congress and not by a legislature of the District. *Kawananakoa v. Polyblank*, 349.

See ACTIONS;
COURTS, 4;
PLEADING.

TERRITORIAL COURTS.

See JURISDICTION, A 3.

TESTAMENTARY INTENT.

See WILLS.

TITLE.

When execution of power considered source of title.

Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title. *Chanler v. Kelsey*, 466.

See RES JUDICATA, 2;

SALES, 1.

TORTS.

See PROCESS, 2.

TRANSFER.

See ELECTION, 1;

PRACTICE AND PROCEDURE, 5.

TRANSFER TAX.

See CONSTITUTIONAL LAW, 5.

TREATIES.

Treaty with Great Britain; rights of aliens under.

No treaty gives to subjects of Great Britain any different measure of justice than that secured to citizens of this country. *Barrington v. Missouri*, 483.

See EXTRADITION, 2, 3, 4, 5.

TRIAL BY JURY.

See CRIMINAL LAW, 5.

UNITED STATES.

See CONSTITUTIONAL LAW, 9;

STATES, 2.

VENDOR AND VENDEE.

See SALES, 1.

VENUE.

See JURISDICTION, A 6.

VERDICT.

Instructed; defendant entitled to, as to counts of declaration not supported by evidence.

Where there is no evidence sustaining certain counts in the declaration as to defendant's negligence, he is entitled to an instruction that no

recovery can be had under those counts, and where, as it was in this case, the refusal to so instruct is prejudicial error the verdict cannot be maintained, either at law or under § 57 of the Illinois Practice Act. *Wilmington Mining Co. v. Fulton*, 60.

VESSELS.

See JURISDICTION, A 2; E;
NEGLIGENCE, 3.

WAIVER.

See JURISDICTION, B 6.

WICHITA INDIANS.

See INDIANS, 1.

WILLS.

Construction; effect to be given words; force of testamentary intent.

While the predominant idea of the testator's mind when discovered is to be heeded as against all doubtful and conflicting provisions which might defeat it, effect must be given to all the words of a will if by the rules of law it can be done; and the words "without leaving a wife or child or children" will not be construed as "without leaving a wife and child or children," notwithstanding a general dominant interest on the part of the testator that his real estate should descend only through his sons. *Travers v. Reinhardt*, 423.

WILSON ACT.

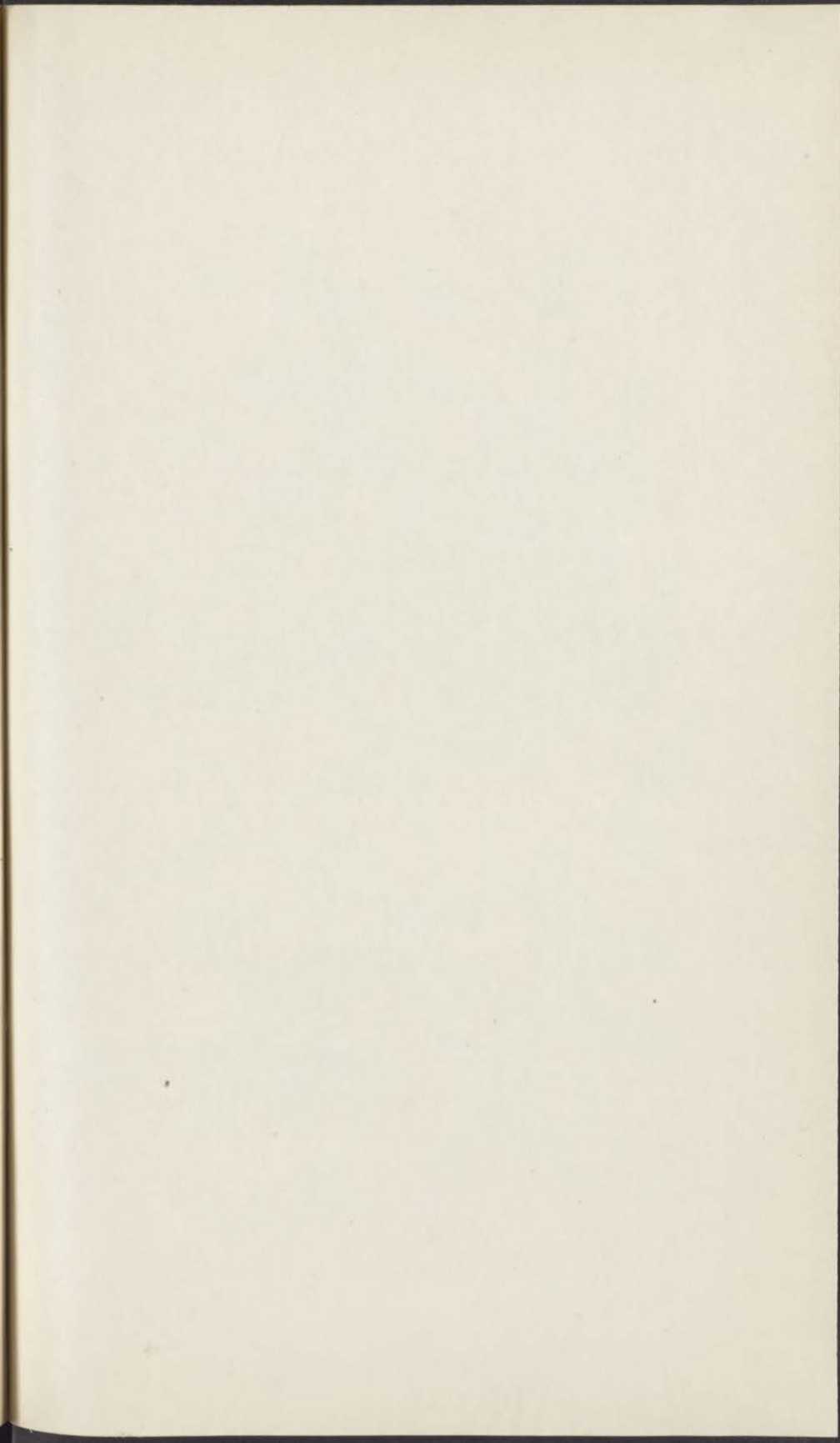
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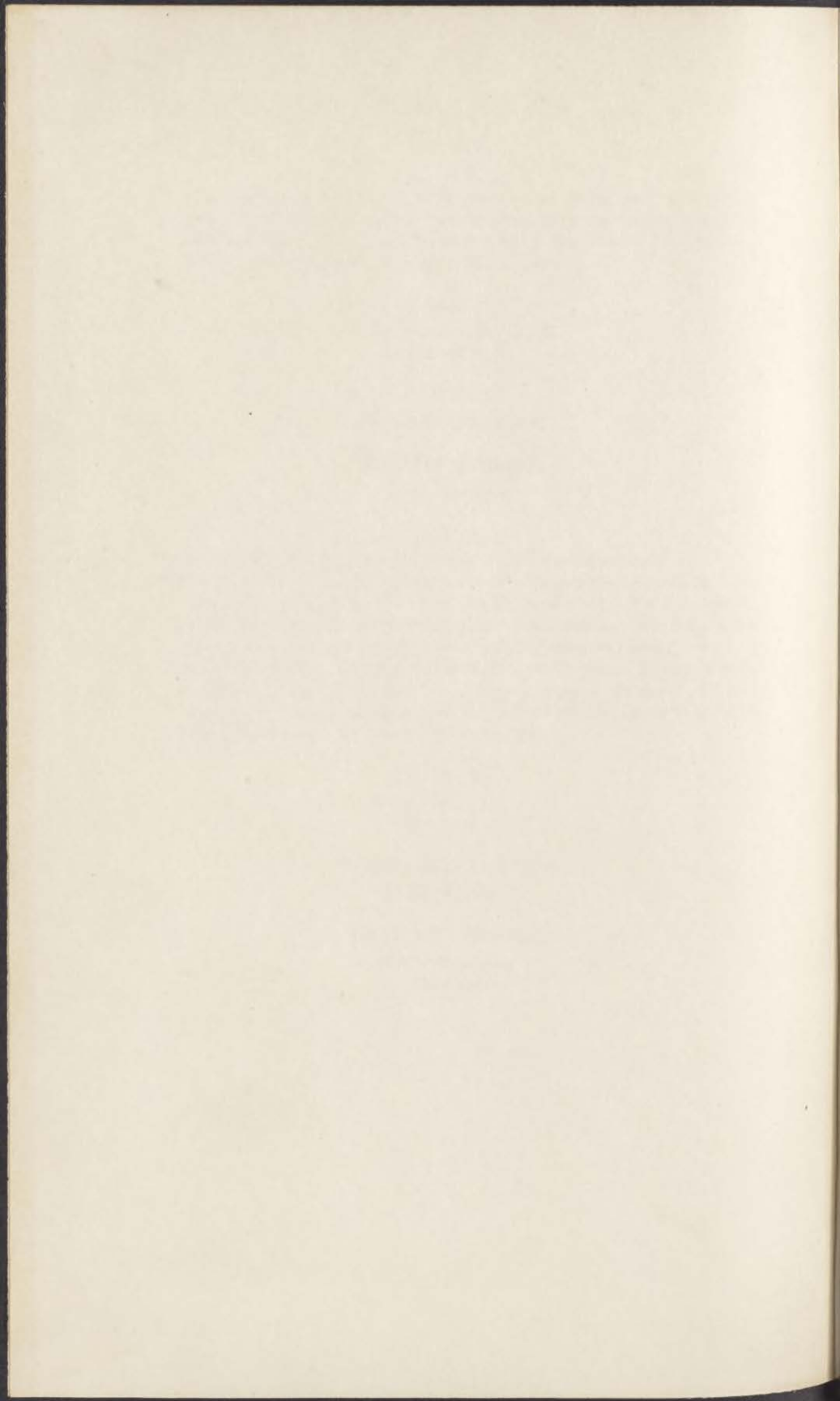
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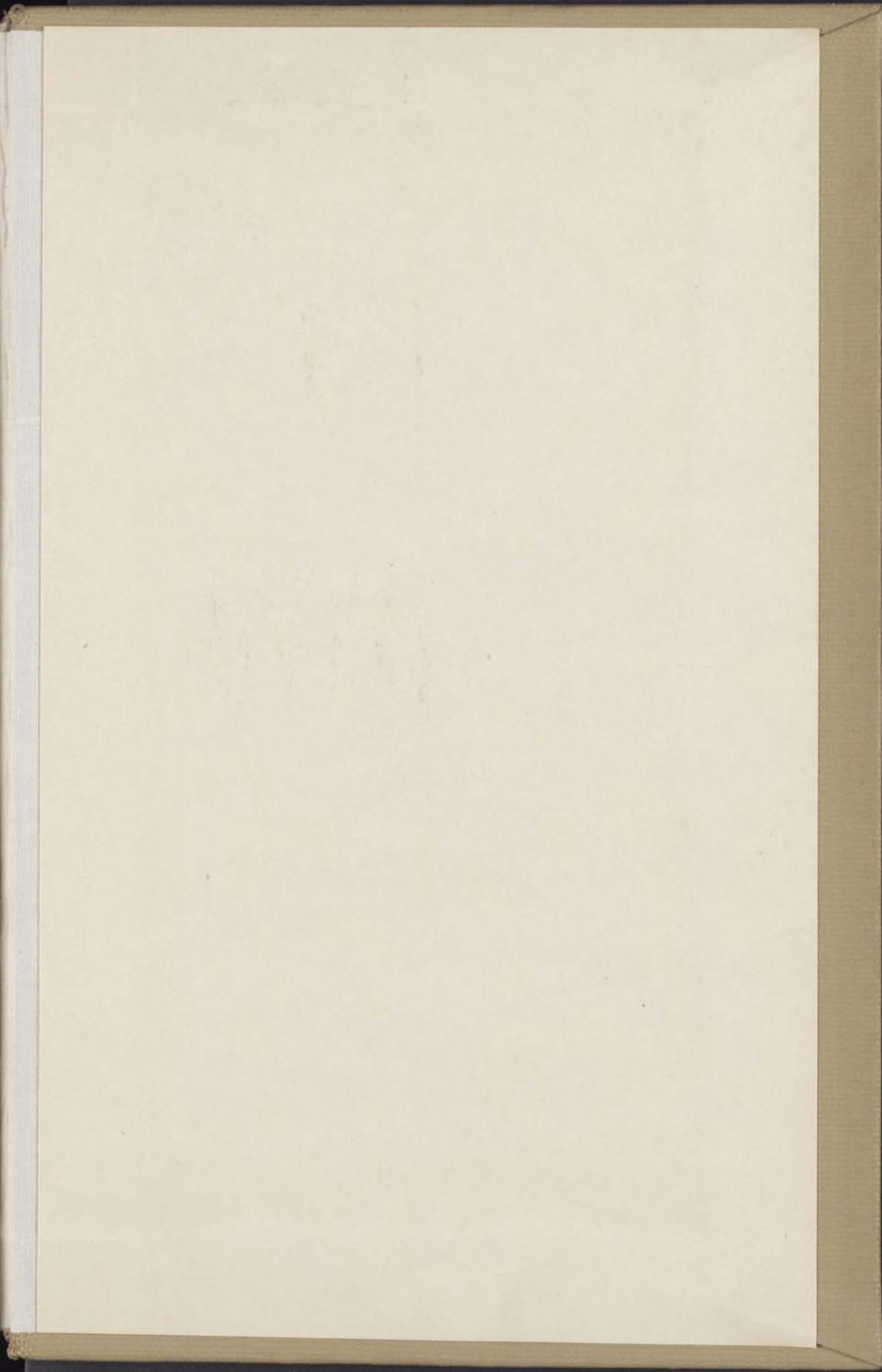
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WRIT AND PROCESS.

See CERTIORARI;
PROCESS.







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